

Lawyers Mutual

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THE

RISK MANAGER

A quarterly newsletter by Lawyers Mutual Insurance Company of Kentucky

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A LETTER TO THE MEMBERS OF THE KENTUCKY BAR ASSOCIATION



From John G. Prather, Jr.,
Chairman of the Board of Directors,
Lawyers Mutual Insurance Company of Kentucky

SPECIAL

ANNIVERSARY

EDITION



1987-2012

In this special issue of *The Risk Manager Newsletter* celebrating Lawyers Mutual's 25th Anniversary, I want to take a moment of your time to reflect on why Lawyers Mutual was established by the KBA back in 1987, its continuing mission, and where we are after 25 years of service to the KBA.

It is a sweet irony for us at Lawyers Mutual to realize that most members of the KBA have little knowledge of our history. This is true because in 1987 there were only 9,123 members of the KBA. As of November 7, 2012 there were 17,477 members of our Bar – nearly a 100% increase in the last 25 years. Figuring in the number of retirements from the Bar in that period, I estimate that more than 70% of the Bar now has little or no knowledge of the liability insurance crisis lawyers experienced in the mid-1980s with ever-increasing premiums and many commercial carriers ceasing to offer malpractice insurance. That led to the bar-related insurance company movement in which state bar associations decided to protect their lawyers by starting captive lawyer liability insurance companies thereby assuring that their bars always would have readily available malpractice insurance at reasonable rates. We have never expanded beyond the original mission except we now provide a ready market for court bonds.

The KBA joined this movement in 1985 and over the next two years raised the \$3,000,000 required to begin underwriting lawyers liability insurance. We opened for business in November 1987 with the mission of insuring only KBA members, providing outstanding claims service, offering risk management guidance, and assuring that the members of the KBA always would have lawyers liability insurance available. The reason I wrote that it was a sweet irony that so few current members of the KBA know this background is because we have achieved exactly what we set out to do – currently in Kentucky there is a dynamic lawyers liability insurance market offering competitive rates with the sure knowledge that Lawyers Mutual will always be here to backstop any future problems. Lawyers liability insurance is simply not a problem in Kentucky. Thus, to some extent, we are the victims of our own success.

I hope you will review the *Timeline* of our progress included in this newsletter. It shows our efforts over the years to develop Lawyers Mutual by improving policy coverage, hiring competent staff, providing unique claims service, and offering a variety of risk management tools through *The Risk Manager Newsletter*, our Website (www.lmick.com), and continuing legal education programs. I think you will find the article *What We Learned About Legal Malpractice in Kentucky in 25 Years* in this newsletter a good example of how we strive to assist Kentucky lawyers in avoiding malpractice.

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In conclusion, I want to make it clear that we are here for all Kentucky lawyers and not just the 2,564 lawyers in the 1,290 firms we insure. Of course, we hope you will join us soon, but we are committed to the KBA as a whole and will continue to send *The Risk Manager Newsletter* to all KBA members and welcome all Kentucky lawyers to our CLE offerings, as well as fulfilling our primary role of providing reasonably priced and available malpractice insurance.

Lawyers Mutual sends to the members of the KBA its best wishes for a successful and claims-free 2013.

Warm Regards,

John G. Prather, Jr.,
Chairman of the Board of Directors,
Lawyers Mutual Insurance Company of Kentucky

What We Learned About Legal Malpractice in Kentucky in 25 Years

Introduction

Lawyers Mutual opened for business in November 1987. Included in our mission was the commitment to track malpractice claims reported to us and share with the Kentucky Bar the lessons learned from the actual malpractice experience of Kentucky lawyers. No longer would the Bar depend on the limited information about Kentucky malpractice that commercial insurers were willing to release. Our purpose is twofold:

- First, to underwrite fair insurance premiums based exclusively on Kentucky’s experience– not based on the merged experience of several states as many commercial insurers do.
- Second, to provide feedback on the Area of Practice, Type of Activity, and Type of Alleged Error that generate malpractice claims so that Kentucky lawyers can develop risk management programs tailored to the needs of their practice.

Coincidentally, shortly before Lawyers Mutual went into business, the ABA Standing Committee on Lawyers’ Professional Liability conducted the first of six national malpractice studies in 1985. It just issued its most recent study report – *Profile of Legal Malpractice Claims: 2008* –

2011. This enables us at the time of our 25th year of service to the Kentucky Bar to compare recent national malpractice trends with Kentucky trends and allows Kentucky lawyers to see where the major malpractice risks are both nationally and locally.

Considerations in Evaluating the ABA and Kentucky Statistics

In reviewing the malpractice statistics below consider the following factors that require a certain amount of Kentucky windage be applied before drawing conclusions:

- The ABA studies and Lawyers Mutual’s methodology in gathering malpractice data evolved over the years so that making comparisons among the studies and Lawyers Mutual’s data is valid only on a broad gauge basis.
- The insurers participating in the ABA studies are primarily bar-related insurers that typically insure small firms (2-5) and solo practitioners. While trends indicated in the statistics are useful to larger firms, this information is not representative of large law firm experience. It is quite applicable to the great majority of Kentucky lawyers.
- Statistical results are based on claims reported to insurance companies by insured lawyers. Malpractice not reported and that of uninsured lawyers (perhaps as high as 30% of all lawyers) are not included.
- It is not the intent of this article to identify good and bad lawyers or areas of practice. The statistics show only where the claims are occurring. They do not include the number of lawyers practicing in an area of law or the overall lawyer time spent in an area of law or practice activity. For this reason, an active practice area with a high percentage of malpractice claims may appear more risky than it actually is.

Even with these limitations, the ABA studies are useful tools for developing a national profile of malpractice trends that is a valid benchmark from which to compare Kentucky’s claims experience. From this comparison it is feasible to identify where the risks are and focus your risk management program on those risks most applicable to your practice.

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2 *Remember that risk management is always about striking an appropriate balance between too much risk taking and too little:*

“Risk comes from not knowing what you’re doing.”
Warren Buffett

“A ship is safe in harbor, but that’s not what ships are for.”
William Shedd

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Organization of Malpractice Statistics for Comparison and Evaluation

The following categories are used in this article to organize our review of malpractice risks for Kentucky lawyers:

- Area of Law
- Type of Activity
- Type of Alleged Error
 - Administrative Errors
 - Substantive Errors
 - Client Relations
 - Intentional Wrongs

The tables for each category use data from three ABA studies (covering years 1990-95, 2000-03, and 2008-11; hereinafter cited as ABA Study '95, '03, and '11) for comparison with Lawyers Mutual's data – referred to as Kentucky claims. Significant trends and observations are noted in the accompanying commentary for each table.

Area of Law

Table 1, Percentage of Claims by Area of Law, compares the ABA's top Area of Law malpractice percentages with what we know about malpractice in those areas in Kentucky. The key considerations from Table 1 include:

- The ABA '11 Study and Lawyers Mutual's data for the period 2008-12 shows for the first time that *Real*

Estate is the top Area of Law for malpractice claims. *Personal Injury – Plaintiff* is now in second place. While the recent real estate collapse accounts for some of the increase in *Real Estate* claims, the ABA '11 Study shows a substantial reduction in the percentage of *Personal Injury – Plaintiff* claims from earlier studies. This improvement accounts in large part for the change in the position of these two areas of practice.

- Kentucky's over 10% increase in *Real Estate* claims from the 1990-95 period to the 2008-12 period does not compare well with the just under 6% increase in the ABA studies over the same time. Unfortunately, Kentucky's *Personal Injury – Plaintiff* claims remained almost as high in the period 2008-12 as they were in the period 2000-06 (24% versus 25.81%) and over 8% higher than in the ABA '11 Study. It appears from recent claims reporting that *Real Estate* claims are leveling off in Kentucky and should decline as the real estate crisis is finally worked out. Nonetheless the lesson to be taken from these statistics is that there is work to be done in developing more effective risk management programs in both *Real Estate* and *Personal Injury – Plaintiff* practice by Kentucky lawyers.
- *Family Law* is in third place in the Area of Practice hit list in the ABA '11 Study at 12.14%. The 2008-12 Kentucky percentage compares well with the ABA data at only 7%. The primary risks in

Table 1: Percentage of Claims by Area of Law

	1990-95 ABA %	1990-95 KY %	2000-03 ABA %	2000-06 KY %	2008-11 ABA %	2008-12 KY%
Real estate	14.35	14.38	16.46	24	20.33	26
Personal Injury-Plaintiff	21.65	18.42	19.96	25.81	15.59	24
Family Law	9.13	8.59	9.58	6.06	12.14	7
Estate, Trust & Probate	7.59	6.49	8.63	8.42	10.67	6
Collection & Bankruptcy	7.91	7.89	7.92	11.5	9.2	13
Corp./Business Org.& Transactions	19.53	5.78	9.55	3.35	10.9	2
Criminal Law	3.82	4.56	4.19	2.26	5.65	3
Personal Injury-Defense	3.27	2.28	9.96	1.99	3.26	2
Labor Law	1.41	1.22	1.55	2.53	2.19	5
Workers' Compensation	3.3	7.54	2.27	5.34	1.9	5

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"Mistakes are a fact of life. It is the response to error that counts."

Nikki Giovanni

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family law practice are in elder law and divorce. The proliferation of double income families, retirement plans, and investment options often leads to claims in divorce property settlements.

- *Collection and Bankruptcy* claims are up in both the ABA '11 Study and in the Kentucky 2008-12 period. Unfortunately, they are nearly 4% higher in Kentucky than in the ABA Study. Much of this increase is attributed to collections and the Fair Debt Collection Practices Act. Also this is, at least in part, the result of lawyers without the requisite competence accepting bankruptcy matters over the last several years of severe economic conditions. With more clients and potential clients facing insolvency there is a temptation to dabble in bankruptcy. Do not give into this temptation unless you are prepared to make the intense effort required to competently represent a client in bankruptcy.
- *Labor Law and Workers' Compensation* claims in Kentucky's 2008-12 data are right at 3% higher than the comparable percentages in the ABA '11 Study. This is troublesome and may reflect that lawyers

without the requisite competence are accepting *Labor Law* and *Workers' Compensation* matters that should be declined. Additionally, missed deadlines are often the cause of Workers' Compensation claims.

Type of Activity

Table 2, Percentage Claims by Type of Activity, focuses on the legal process in which a lawyer was engaged when the error occurred. It compares the ABA's Type of Activity malpractice percentages with what we know about malpractice in those areas in Kentucky. The key considerations from Table 2 include:

- *Preparation, Filing, Transmittal of Documents* is a broad category that applies to documents that are not part of a pleading or related to a contested matter. It includes contracts, leases, deeds, formal applications, wills, and trust. It does not include tax returns or title opinions. This category accounts for 13% of Kentucky Type of Activity claims in the 2008-12 period. While this is substantially better than the ABA '11 Study percentage of 28.46%, it remains a significant indicator of where improvement is needed in risk

Table 2: Percentage Claims by Type of Activity

	1990-95 ABA%	1991-95 KY%	2000-03 ABA%	2000-06 KY%	2008-11 ABA %	2008-12 KY%
Preparation, Filing, Transmittal of Documents	16.21	12.27	23.08	13.13	28.46	13
Advice	12.41	12.27	15.07	7.69	20.19	3
Commencement Action/ Proceeding	28.62	29.1	15.59	24.54	17.31	27
Pre-Trial/Pre-Hearing	12.62	10.69	19.47	14.67	8.55	13
Settlement/Negotiation	11.44	18.21	8.2	7.15	6.79	9
Trial or Hearing	7.1	6.73	5.07	3.8	5.33	4
Title Opinion	0.95	13.06	4.03	10.5	4.46	15
Investigation Other Than Litigation	1.86	1.38	2.19	0.63	3.25	1
Post Trial or Hearing	2.62	3.96	1.72	5.52	1.73	5
Appeal Activities	2.75	8.11	2.15	4.71	1.6	2
Ex Parte Proceeding	1.43	1.38	1.72	2.08	0.64	4
Other Written Opinion	0.65	1.18	0.77	0.72	0.62	0
Tax Reporting	0.77	1.78	0.58	1.35	0.56	1
Referral/Recommendation	0.57	0.39	0.36	0.09	0.51	0

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management. Risk management that includes tight control over document flow, detailed mail procedures, and docketing of all time sensitive and important documents is essential to avoid claims

- Litigation activities of *Commencement Action/ Proceeding, Pre-Trial/Pre-Hearing, Settlement/ Negotiation*, and *Trial or Hearing* account for 53% of claims related to Type of Activity in the 2008-12 Kentucky data. This does not compare favorably with 38% for these same activities in the ABA '11 Study. This is not a surprising result, however, given the substantial difference between Kentucky and the ABA percentages for *Personal Injury – Plaintiff* in the Area of Law analysis in this time period – Kentucky 24% versus ABA 15.59%. A combination of failing to know or ascertain a deadline, to calendar a deadline, to calendar a deadline accurately, and to react to a calendar alert accounts for many of these claims. Every practice should have an automated docketing system that alerts the responsible lawyer, the legal secretary, and a central control person in the firm to deadlines — solo practitioners use your computer as the central calendar control. (See the risk management test for reviewing your calendar system in the *Failure to Calendar Properly* discussion in the Administrative Errors section below.)
- Given the dramatic increase in real estate matters resulting from the 2008 crash of the real estate market, it is not surprising that claims for erroneous *Title Opinions* in Kentucky in the 2008-12 period



increased to 15%. What is discouraging is that this increase is over an already high percentage of claims from the 2000-06 period and more than 10% higher than the ABA '11 Study percentage. Our risk management advice is:

1. Document the Scope of the Engagement:

Always use a letter of engagement to document the work to be done. The majority of real estate malpractice claims concern title searches. Is the lawyer to prepare an abstract of title indicating only what land records contain or a title opinion on validity of ownership? Is the search for liens only? Is the lawyer responsible for accuracy through the date and time of the completion of the title search or required to bring the search current to the time of closing? Be precise, detailed, and exclusive in the scope description.

2. Use Real Property Transaction Checklists:

A good checklist for sale of real estate should cover in detail at a minimum: 1) the parties; 2) description of property; 3) condition of title; 4) construction status; 5) purchase and loan terms; 6) warranties of seller; 7) conditions of buyer's obligation; 8) escrow; and 9) closing.

3. Manage Title Search Abstracts and Opinions Carefully:

- Specify in the abstract or opinion the scope of the search, its purpose, authorized uses, and restrictions.
- If others are preparing evaluations on some parts of the transaction, clearly exclude those parts. If there is reliance on an expert opinion as part of the analysis (e.g., an environmental assessment), show that in detail.
- Be complete. Advise of any doubts or potential title defects no matter how remote. Taking risks on defects is the client's decision – not the lawyer's.
- Establish office procedures for quality control of title search documents. Procedures should indicate who is authorized to sign and release them for the firm and provide for a formal and cold review before release.

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Type of Alleged Error

Table 3, Administrative Errors, concerns routine practice management functions such as faulty calendaring and clerical error – the easiest aspects of practice to do well and too frequently given a low priority by firm leadership. Unfortunately, these simple mistakes can result in large malpractice payments. The key considerations from Table 3 include:

- Administrative Errors now account for 30.12% of total errors in the ABA ‘11 Study. Kentucky total Administrative Errors in the 2008-12 period compare favorably at 19%.
- Unfortunately, where Kentucky compared least favorably with the ABA ‘11 Study was in the all-important category *Failure to Calendar Properly*. At 8% Kentucky’s percentage was almost twice that of the ABA’s percentage of 4.34%. Accurate calendaring must be a top priority of every firm’s risk management program. Test your calendaring system by answering the following self-evaluation questions from the ALI/ABA publication “*A Practical Guide To Achieving Excellence in the Practice of Law*” for work control systems:

1. Items to be calendared
 - a. Do I have a docket control or tickler system for litigation matters to control time deadlines?
 - b. Does it include calendaring of
 1. statutes of limitations?
 2. due dates for pleadings?

3. due dates for motions?
 4. due dates for briefs and other documents?
 5. due dates for responses to interrogatories?
 6. scheduling of depositions?
 7. scheduling of trial and hearing dates?
 8. notices of appeal?
 9. other important deadlines?
- c. Do I have a docket control or tickler system for non-litigation matters to control time deadlines?
 - d. Does it include calendaring of
 1. filing and hearing dates for matters before administrative agencies, commissions, or boards?
 2. corporate tax dates, stockholders’ and directors’ meetings, and filing dates required by the SEC?
 3. renewal dates for copyrights, patents, or trademarks?
 4. real estate closing dates?
 5. individual tax return due dates?
 6. review dates for estate planning and wills?
 7. other important deadlines?
 - e. Do I also calendar such items as
 1. periodic review of a matter?
 2. preparation of status reports to clients?
 3. professional meetings, conferences, and other commitments?

Table 3: Percentage of Claims by Type of Error — Administrative Errors

	1990-95 ABA%	1991-95 KY%	2000-03 ABA%	2000-06 KY%	2008-11 ABA %	2008-12 KY%
Procrastination in Performance/ Followup	8.68	5.94	9.43	6.79	9.68	5
Lost File, Document Evidence	0.57	0.59	0.37	0.54	7.05	0
Failure to Calendar Properly	6.75	8.71	5.19	9.69	4.34	8
Clerical Error	2.14	4.35	4.74	2.08	3.54	3
Failure to File Document - No Deadline	2.69	0.39	4.28	1.08	3.17	2
Failure to React to Calendar	6.35	2.77	4.35	4.8	2.34	1

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- 4. intra-firm meetings and other commitments?
 - 5. personal commitments?
2. Immediate and automatic calendaring of items
 - a. Do I always note and enter important deadlines
 1. when a new matter file is created?
 2. as I become aware of new deadlines?
 - b. Have I considered having someone else make entries automatically as pleadings or mail comes into the office, even before the material is passed on to me?
 3. Double-checking of entries and notification
 - a. When an entry is made, is a second person so informed?
 - b. Are both persons responsible for anticipating upcoming deadlines?
 - c. Is there a third person responsible for checking the system if either or both primary responsible persons are unavailable?
 4. Sufficient time for preparation and performance
 - a. Does the system generate periodic and timely reminders of upcoming deadlines?
 - b. Are the reminders timed to allow adequate preparation and performance?

5. Adequate follow-up
 - a. When a deadline is met, is that information entered into the system?
 - b. Is there a second person responsible for checking whether deadlines have been met?

Table 4, Substantive Errors, categories are self-explanatory covering everything from math errors in tax computations to situations when a lawyer was unaware of the legal principles applicable to a matter or when research failed to ascertain the applicable principles. The key considerations from Table 4 include:

- Substantive Errors now account for 45.07% of all errors in the ABA ‘11 Study. Kentucky Substantive Errors in the 2008-12 period compare unfavorably at 61%.
- Most of the difference between Kentucky and ABA percentages is attributable to the category of *Error in Public Record Search* in which Kentucky at 13% is nearly 10% higher than the ABA ‘11 Study percentage of 3.03%. This category covers when a title search fails to disclose a relevant item on public record or when no public record search is made when it should have been made. See our *Real Estate* risk management advice above in the Type of Activity analysis.

Table 4: Percentage of Claims by Type of Error — Substantive Errors

	1990-95 ABA%	1991-95 KY%	2000-03 ABA%	2000-06 KY%	2008-11 ABA %	2008-12 KY%
Failure to Know/Apply Law	11.05	29.3	10.98	17.84	13.57	17
Inadequate Discovery/Investigation	10.24	9.5	10.37	7.33	7.82	8
Planning Error Procedure Choice	10.87	4.75	7.72	11.14	7.39	12
Failure to Know/Ascertain Deadline	6.97	7.32	7.09	6.25	6.91	6
Conflict of Interest	3.79	4.55	6.28	2.8	4.28	3
Error in Public Record Search	1.24	10.69	2.54	8.96	3.03	13
Failure to Understand/Anticipate Tax	1.96	0.99	1.26	1.27	1.37	1
Error Math Calculation	0.44	0.59	1.04	0.18	0.69	1

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“Only those who get into scrapes with their eyes open can find the safe way out.”

Logan Pearsall Smith



Lawyers Mutual Insurance Company of Kentucky (LMICK) Timeline

Pre-1987



- Opening of CA & NC Bar-related insurance companies in the late '70s
- **Rates increase 50%-100% for firms without claims and denial or difficulty to get coverage based on areas of practice**
- Denial or difficulty for KY attorneys to get coverage due to areas of practice
- Charles E. English, Joe B. Campbell & William T. Robinson, III spearheaded efforts of LMICK across KY
- KBA developed the concept of LMICK and began with the surplus certificate capital campaign/drive while investing \$229,785 for administrative expenses and purchased \$250,000 in surplus certificates
- Marsh McLennan named managing general agent of LMICK

- Hired Lois A. Smith, now VP Underwriter.
- Published **The Risk Manager** quarterly to members of KY Bar



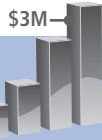
1990



1992



- Installed LMICK software system for easier renewals for policyholders
- **Introduced New Attorney Program** for graduated rates for new attorneys
- Filed first financial audit by the KY Department of Insurance
Result: in full compliance required by Kentucky insurance companies



1987

- Raised \$3M in surplus funds
- Sold **1st policy** 11/1/87 to Campbell Kerrick Grise Stivers & Coyle.
- Named LMICK Board with attention to geographical diversity, and included current KBA president, past president and President-elect



- Named Robert (Bob) G. Breetz COO, Claims Counsel
- Del O'Roark continues as Loss Prevention Consultant writing *The Risk Manager* and other articles on Professional Responsibility and providing CLEs.



1993

1989

- Competition cut their rates 30%
- Named Brigadier General (USA Ret) Dulaney (Del) O'Roark, Jr. Executive VP & COO
- Hired first staff: Kitty Baumgart, Patricia A. Burnett, & Deborah J. Dorman
- Became charter member of NABRICO (National Association of Bar-Related Insurance Companies)



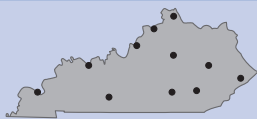
1995

- Hired Sarah B. Kessinger, Accounting Assistant



1996

- **Sold 1,000 policies**
- Repaid the KBA in full for start-up capital (\$229,785)
- Provided assistance in the revised layout of the New Lawyer Program



1998

- Repaid the KBA in full for start-up surplus capital (\$250,000)

- Named Asa P. (Pete) Gullett, III, Marketing Director



1999

2000

- Hired Jennifer S. Bicknell, Claims Administrator



- Named Asa P. (Pete) Gullett, III, Chief Operating Officer
- Retained Robert G. Breetz as Chief Claims Counsel

2001

2002

- Hired Jane Broadwater Long, VP, Claims Counsel



- Moved to 323 West Main Street, Suite 600, Louisville, KY 40202
- Published eight page newsletter, *The Risk Manager*, for more proactive claims and risk management information

2003

- Hired Connie Harper, Underwriting Assistant



2006

- Hired John F. Reesor, CPA, Esq., Chief Financial Officer



2007

Twenty Year Anniversary of Lawyers Mutual

- Exceeded \$20 million in assets for first time
- Have surplus in excess of \$6 million



2008

- Charles E. English retired from the Board of Directors as President and Ruth H. Baxter becomes President of Lawyers Mutual

2009

- Partnered with the Missouri Bar Plan to offer full spectrum of court bonds
- Increased policy coverage for insureds with no additional premium
- Hired Nancy L. Meyers, Marketing Director



2010

- Formed partnership with the Young Lawyers Division of the KBA
- Enhanced Website to add new sections vital to attorneys
- Joined LinkedIn/Twitter

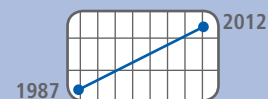


- Created new CLE program, "Lawyers as Leaders - Becoming a Superstar" for recent law school graduates



2012

25 Year Anniversary of Lawyers Mutual



- Produced 92 issues of *The Risk Manager*
- Written over 300 articles on Risk Management & Professional Responsibility
- Held seminars for over 1,000 CLE hours over 20 years



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Table 5, Client Relations, categories are for the most part self-explanatory. *Improper Withdrawal of Representation* covers whenever a question of representation is raised.

It covers claims based on improperly communicated withdrawal of representation by a lawyer and when a client alleges that a lawyer-client relationship was established and the lawyer denies it. The key considerations from Table 5 are:

- Overall the Kentucky percentages in the 2008-12 period compare favorably with the ABA '11 Study. Unfortunately, Kentucky errors attributed to *Failure to Follow Client's Instructions* increased to 8% in the 2008-12 period. This reflects an increasing deterioration in managing this risk over the prior two Kentucky Study periods
- The ABA'11 Study analysis observed, "Client Relation and Intentional Wrongs account for a quarter of all claims though these errors seem entirely within lawyers' power to control and avoid." We second that pungent thought.

Table 6, Intentional Wrongs, categories are self-explanatory. The key considerations from Table 6 include:

- Kentucky has made outstanding progress in reducing claims based on *Malicious Prosecution, Abuse of Process* coming down from a high of 11.48% in the 1991-95 period to only 3% in the 2008-12 period. These are expensive claims that liability insurance often only covers for defense.
- Not so good is that Kentucky's 7% in the *Fraud* category is 2.47% higher in the 2008-12 period than that of the ABA'11 Study.

Table 5: Percentage of Claims Reports by Type of Error — Client Relations

	1990-95 ABA%	1991-95 KY%	2000-03 ABA%	2000-06 KY%	2008-11 ABA %	2008-12 KY%
Failure to Obtain Consent/ Inform Client	9.77	8.11	5.75	3.07	7.02	0
Failure to Follow Client's Instructions	5.06	3.36	6.72	7.15	5.71	8
Improper Withdraw of Representation	2.14	4.55	2.1	1.9	1.87	1

Table 6: Percentage of Claims by Type of Error — Intentional Wrongs

	1990-95 ABA%	1991-95 KY%	2000-03 ABA%	2000-06 KY%	2008-11 ABA %	2008-12 KY%
Fraud	3.19	3.16	3.35	3.8	4.53	7
Malicious Prosecution, Abuse of Process	3.7	11.48	3.59	2.62	3.43	3
Violation of Civil Rights	1.29	0.39	1.26	0.09	1.27	0
Libel or Slander	1.11	2.17	1.59	1.08	0.96	1

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1 Risk Management Lesson Learned in 25 Years: Real Estate, Real Estate, and Real Estate!

It is clear that in Kentucky real estate matters trigger a high percentage of all malpractice claims and at a significantly higher percentage than shown nationally in the ABA '11 Study. This is demonstrated in the Kentucky 2008-12 statistics showing:

- *Real Estate* as the # 1 Area of Practice malpractice claims leader at 26% – 5.67% higher than the ABA '11 Study.
- *Title Opinion* errors at 15% of Type of Activity claims – 10.54% higher than the ABA '11 Study; and
- *Error in Public Record Search* at 13% of all Substantive Errors claims – 9.97% higher than the ABA '11 Study.

Real estate practice in Kentucky is a major practice area. It is, therefore, not surprising that we experience a high percentage of claims in that Area of Practice. Nonetheless, the statistics show that Kentucky is out of line with the national trend in real estate claims. We urge all lawyers doing real estate work to do a comprehensive review of your risk management program even if you have never had a claim. Real estate claims are usually expensive and for the most part indefensible. Even the best lawyers make mistakes and most real estate errors are easily avoidable with good risk management. Use the Risk Management

Analysis appended to this article for this review along with the real estate risk management advice in the Type of Activity section above.

Risk Management Analysis

Appended to this article is a *Risk Management Analysis* checklist that was developed by Anthony Davis of the law firm Hinshaw & Culbertson as a bar service. It is recommended for use in identifying the causes of errors in your practice and the corrective actions required to prevent recurrence. It should be used to analyze all questions of malpractice that arise – not just when there is an allegation of malpractice by a client. This should permit immediate correction of a malpractice risk. Retain each evaluation of a question of malpractice in a permanent file. Systemic weaknesses in firm operations can then be identified over time, recurring errors come to light, and risk management programs can be developed responsive to a firm's unique situation. Risk management is not a "one size fits all" process. Every firm is different and requires a tailored risk management plan. The *Risk Management Analysis* checklist is the instrument that gives a firm the means to identify its special risk management needs.

Editors Note: Portions of this article are adaptations and updates from the January 2007 Bench & Bar article "Legal Malpractice in Kentucky: What do we know about it?" by Pete Gullet and Del O'Roark.



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"Observe due measure, for right timing is in all things the most important factor."

Hesiod, c. 700 B.C.

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APPENDIX

RISK MANAGEMENT ANALYSIS

I. CLIENT INTAKE

- 1. Incomplete information on firm’s client intake form
- 2. No independent review of client intake decisions
- 3. Inadequate independent review of client intake decisions
- 4. No engagement letter sent
- 5. Inadequate engagement letter sent
 - a. Failure to use form engagement letter
 - b. Inadequate definition of clients/non-clients
 - c. Inadequate description of scope of service
 - d. Inadequate limitation of scope of service
 - e. Failure to include conflicts disclosure language
 - f. Inadequate conflict disclosure language
 - g. Failure to obtain any/adequate waiver or consent
 - h. Failure to obtain client’s timely countersignature
- 6. Failure to send any/adequate non-engagement letter
- 7. Failure to identify after-arising conflict of interest
- 8. Failure to send closing letter

II. TIME RECORDING, FEES, BILLING AND COLLECTIONS

- 1. Fee dispute with client
 - a. Firm threatened suit for fees
 - b. Firm initiated suit for fees
 - c. Firm counterclaimed for fees

- 2. Improper timekeeping/time recording
 - a. Timekeepers entered time seven or more days after date work performed
 - b. Substantive (more than editorial) changes in description of work made subsequent to original time entry
 - c. Substantive (other than to conform matching entries of multiple timekeepers) changes made in amount of time spent on task after date of original entry
 - d. Impossible (e.g., 25 hour day) time entries recorded
 - e. Identity of person performing task changed after original time entry
 - f. Inadequate or inaccurate description of work performed
- 3. Improper withdrawal of representation for failure to pay

III. SUBSTANTIVE ERRORS – INADEQUATE OVERSIGHT OF PARTNERS, PROFESSIONALS AND MATTERS IN PROGRESS

A. Substantive Errors

1. Categories of Substantive Error

- a. Failure to know/properly apply law
- b. Improper Advice
- c. Inadequate discovery/investigation/ due diligence
- d. Improper strategic/procedural choice
- e. Unethical Conduct
- f. Failure to Advise
- g. Improper Drafting
- h. Defective Research
- i. Misrepresentation
- j. Inadequate Preparation

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- k. Ineffective Negotiation
- l. Failure to understand/anticipate tax
- m. Error in formal opinion (including audit response) letter
- n. Error in public record search
- o. Error in mathematical calculation

2. Causes of Substantive Error

- a. Attorney suffering from impairment (alcohol, drugs, other addiction or psychiatric problem)
- b. Attorney practicing out of normal area of expertise
- c. Attorney handling file/matter alone
 - (i) No other attorney in firm with knowledge of practice area
 - (ii) Inadequate or no review or oversight of file by second attorney
- d. Paralegal handling matter alone – inadequate or no review or oversight of file by an attorney
- e. Inadequate or no practice group management



B. Client Relations

1. Categories of Failure

- a. Failure to follow client’s instruction
- b. Failure to obtain client consent
- c. Failure to inform client
- d. Improper withdrawal other than for failure to pay

2. Causes of Failure

- a. Attorney practicing out of normal area of expertise
- b. Attorney handling file/matter alone
 - (i) No other attorney in firm with knowledge of practice area
 - (ii) No review or oversight of file by second attorney
- c. Inadequate practice group management

C. Intentional Wrongs

1. Categories of Failure

- a. Malicious prosecution/abuse of process
- b. Fraud
- c. Defamation
- d. Violation of civil rights

2. Causes of Failure

- a. Attorney handling file/matter alone
 - (i) Failed to make adequate investigation
 - (ii) Ignored information making client’s claims suspect
- b. No review or oversight of file by second attorney prior to commencement of litigation

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- c. Inadequate review or oversight of file by second attorney prior to commencement of litigation
- (i) Failed to make adequate investigation
- (ii) Ignored information making client's claims suspect
- d. Inadequate practice group management

IV. CASE MANAGEMENT AND THE PROTECTION OF CLIENT CONFIDENCES

A. Failure to Protect Client Confidences

1. Client confidences inadequately protected

- (i) Disclosure during discovery process
- (ii) Disclosure resulting from inadequate protection of electronic communication (e.g., instant messaging, e-mail, fax, telephone or voicemail)

2. Nonexistent or inadequate firm policies and procedures for protection of client confidences

3. Nonexistent or inadequate training of law firm personnel regarding protection of client confidences

B. Missed Deadlines

1. Categories of Failure

- a. Failure to know/ascertain correct deadline
- b. Failure to calendar properly
- c. Failure to react to calendar

2. Causes of Failure

- a. Attorney maintaining personal calendar (no central or practice group software available for deadline calculation and/or entry)

- b. Paralegal/staff maintaining attorney's personal calendar (no central or practice group software available for deadline calculation and/or entry)
- c. Deadline missed by attorney maintaining personal calendar (attorney not using available central or practice group software for deadline calculation and/or entry)
- d. Deadline missed by paralegal/staff maintaining attorney's personal calendar (attorney not using available central or practice group software for deadline calculation and/or entry)
- e. No independent checking of deadline calculation and/or entry and/or timely completion of task by an attorney responsible for calendar/docket control

C. Other Administrative Errors

1. Categories of Failure

- a. Failure to file document (no deadline)
- b. Lost file, document or other item of evidence or client asset
- c. Loss or Destruction of Valuable Client Property (e.g., Wills, Bonds Original Documents, Necessary Evidence)

2. Causes of Failure

- a. Attorney suffering from impairment (alcohol, drugs, other addiction or psychiatric problem)
- b. Attorney practicing out of normal area of expertise
- c. Attorney handling file/matter alone
 - (i) No other attorney in firm with knowledge of practice area
 - (ii) Inadequate or no review or oversight of file by second attorney

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- d. Paralegal handling matter alone – inadequate or no review or oversight of file by an attorney
- e. Inadequate or no practice group management
- f. Inadequate or inappropriate document or file retention/destruction policy
- g. Failure to follow document retention/destruction policy

V. HANDLING PROBLEMS, POTENTIAL AND ACTUAL CLAIMS

- 1. Failure to give notice to insurer
 - a. Inadequate or no defined internal reporting policy
- 2. No designated general counsel, risk management or claims partner
- 3. Failure to manage impaired lawyer
 - a. Inadequate or no human resource or employment manual or policies
- 4. Failure to manage dealings with the media
 - a. Inadequate or no policy for responding to media inquiries

VI. DISASTER RESPONSE/BUSINESS RECOVERY PLANNING

- 1. Inadequate or no disaster recovery plan
 - a. Failure to secure adequate data backup
 - b. Failure to secure adequate backup premises
 - c. Failure to secure adequate backup equipment
 - d. Inadequate or no off-site data backup
 - e. Inadequate training of personnel
- 2. Failure to follow disaster recovery plan
- 3. Loss of key personnel

VII. FINANCIAL CONTROLS AND MANAGING ESCROW ACCOUNTS/CLIENT FUNDS

1. Categories of Failure

- a. Theft, embezzlement or diversion of firm funds
- b. Theft of client funds

2. Causes of Failure

- a. Inadequate human resource management procedures
- b. Inadequate audit or review of finances
- c. Inadequate review of purchasing procedures
- d. Inadequate oversight of client accounts

VIII. LAW FIRM MANAGEMENT

- 1. Inadequate or no partnership/shareholder agreement
 - a. Compensation structure encourages solo practice mentality – discourages centralized management
- 2. Inadequate resources allocated to firm management
- 3. Inadequate time spent on firm management
- 4. Inadequate supervision of satellite office
- 5. Inadequate oversight of firm finances





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Malpractice Avoidance Update

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Real Estate – Title Examinations: Does Reliance on an Affidavit Of Descent Properly Filed in the County Court Clerk's Office Meet the Malpractice Standard of Care when Performing a Title Examination?

The latest in the never-ending effort to enlarge a lawyer's standard of care is that some plaintiffs' attorneys are claiming that a title examiner is not entitled to rely upon an affidavit of descent properly indexed in the county court clerk's office. Rather it is asserted that the title examiner has a duty to go behind the affidavit and ascertain its accuracy.

Avoid this risk by including in the exceptions to your title opinions the following language currently used by one of our experienced insured lawyers:

- No certification is made as to the interest of any person inheriting an interest in property whose name was omitted from any affidavit of descent appearing in the chain of title for this property.

In anticipation of further efforts during this era of real estate foreclosures to create lawyer liability, we suggest you also consider adding these exceptions to your title opinions if you are not already doing so:

- No certification is made or opinion rendered as to the propriety, including jurisdiction of the court or service on the parties, of any court proceeding that resulted in a deed that is in the chain of title for this property.
- It is assumed that all persons who executed deeds or other documents in the chain of title were competent to do so at the time they executed said document.
- No certification is made as to the judgment of any court affecting the chain of title for this property that is not properly recorded in the County Court Clerk's Office referenced above.
- No certification is made as to any liens, out-conveyances or other documents recorded against or by persons using names other than those contained in the chain of title supplied by the request for title opinion.
- This examination is limited to the properly indexed records of the County Court Clerk's office at the time this search was conducted.