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# The Risk Manager

*A quarterly newsletter by Lawyers Mutual Insurance Company of Kentucky*

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## 2008 ANNUAL POLICYHOLDERS' MEETING

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 7:00 am, Wednesday, June 18, 2008 in Patterson A Room, Hyatt Regency, Lexington, Kentucky. Included in the items of business are the election of a class of the Board of Directors and a report on company operations. Proxy materials will be mailed to policyholders prior to the meeting. We urge all policyholders to return their proxy and to attend the meeting.

## Unusual Lawyer Liability Issues Reviewed at the Kentucky Justice Association's Seminar: Legal Malpractice – *The Evil of Which We Do Not Speak*

***By Del O'Roark***

Lawyers Mutual was pleased to sponsor the Kentucky Justice Association's March seminar on legal malpractice. The program covered liability theories, defending the accused lawyer, damages, the role of experts, and insurance coverage issues. Presented by an experienced and enthusiastic faculty, the seminar was one of the best I have attended. We hope it is made an annual offering by the KJA.

*"Presented by an experienced and enthusiastic faculty, the seminar was one of the best I have attended."*

Two lawyer liability subjects covered at the seminar are of particular interest:

### *Wrongful Use of Civil Proceedings (A.K.A. Malicious Prosecution)*

Lee Sitlinger gave an outstanding presentation on wrongful use of civil proceedings. After going over the elements of the cause of action, damages, and Kentucky case law, Lee offered this risk management advice for avoiding a wrongful use of civil proceedings suit when considering whether to bring a medical malpractice suit. This advice in principle is equally applicable to avoiding such suits in other situations.

- ***Send as a professional courtesy a letter of intent to assert a claim:*** This is done as an act of courtesy and should include a request for an opportunity to meet with the physician's lawyer or a representative. This should be done even if there is no expectation of a response for two reasons. First, it documents and supports your good faith and honest belief that a medical malpractice cause of action is warranted from the inception of the process. Second, if there is a meeting, it could lead to a decision not to proceed thereby avoiding an action lacking in merit and the risk of defending a wrongful use of civil proceedings suit.

- ***Request a meeting with the physician and his representative:*** Make this request even if there is no expectation of a response for the same reasons as above – it documents and shows a good faith attempt to get the facts and could lead to a decision not to proceed.

**continued**

Since 1987

*"Anything that is worth doing has been done frequently. Things hitherto undone should be given, I suspect, a wide berth."*

*Max Beerbohm*

- ***Request a tolling agreement:*** Often the time available to investigate a medical malpractice action prior to filing suit is short. In these situations it is good practice to request a tolling agreement to allow enough time to be sure an action is warranted. Some lawyers believe that this approach does not work, but Lee reported success with this approach. It avoids hasty actions and is fair to both parties.

- ***Conduct a thorough pre-litigation investigation:*** It is essential to make a comprehensive medical review of the case before filing suit using these recommended procedures:
  1. Obtain the client's medical records for evaluation prior to filing suit. A showing in a wrongful use of civil proceedings action that medical records were never requested is devastating evidence supporting a finding of lawyer liability.

*Note: In our Fall 2007 newsletter we offered this risk management guidance for obtaining medical records:*

- *Before you obtain medical records, get from your client a thorough history of his treatment including the medical conditions for which treatment was sought, the procedures performed, and the dates of treatment. Emphasize that the purpose of this review is to see if there are any gaps, missed procedures, missed blood or lab reports, etc. Have the client show you billing statements received from Medicare and others that show services received. Provide this information to the physician in your discovery request.*
- *After you get the medical records, go over them with your client by comparing them with his knowledge of his medical history with emphasis on identifying missing records.*
- *Pay close attention to dates in looking for gaps in the records.*
- *If the record pages are numbered, look for missing pages.*
- *If your client reports a medical condition that the records do not show, find out why.*

  2. Have the medical record evaluated by a professional with the appropriate experience for the nature of the medical procedures involved. This may require a specialist, a non-specialist practitioner, or nurse consultant. A few rare cases can be filed without a medical consult, but this is risky and should be avoided if at all possible.

  3. Document the file in detail showing due diligence in researching the medical issues. This documentation will be of the utmost value in defending a wrongful use of civil proceedings suit.

- ***Continue due diligence once suit is filed:***
  1. It is critical that the medical malpractice suit be diligently pursued once filed. Remember that an element of a wrongful use of civil proceedings action is the filing and "maintaining" of suit without probable cause. If it becomes apparent as a case progresses that the original good faith basis for filing suit will not hold up, the diligent lawyer will promptly withdraw the suit. By not maintaining a suit that is now known to be without merit, the lawyer should avoid a wrongful use of civil proceedings claim.

  2. What often happens is when the medical malpractice case weakens – becomes a dog case – lawyers begin to ignore the case and it lingers for years before it is lost. When the wrongful use of civil proceedings suit is brought against the lawyer the fact that the doctor had an unwarranted malpractice claim pending for a number of years may be argued to support an award of punitive damages.

*Note: One seasoned Kentucky lawyer advises: "The best approach most often with a dog case is to take your medicine. Quit procrastinating, do the discovery, set the case for trial, try the case, lose the case; i.e., clean up your own mess. After all, you took the case." Also keep in mind that if a lawyer believes the dog case lacks a good faith basis for proceeding, SCR 3.130 (1.16) Declining or Terminating Representation, mandates withdrawal because pursuing the case is a violation of SCR 3.130 (Rule 3.1) Meritorious Claims and Contentions, and procedural rules forbidding baseless and frivolous actions.*

***"Difficult questions should be answered before they are asked."***

***Wieslaw Brudzinski***

## *Does the Kentucky Consumer Protection Act Apply to Lawyers?*

**continued from pg. 2**

The Kentucky Consumer Protection Act (KCPA) provides in pertinent part:

*KRS.367.170 Unlawful Acts:* (1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

*KRS 367.220 Action for recovery of money or property – When action may be brought:* Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or a personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by KRS 367.170, may bring an action under the Rules of Civil Procedure … to recover actual damages …. equitable relief …. punitive damages.

> ***Our consumers are well protected. It is hard to see the need for an overlay of generic consumer protection law to protect them.***

At the seminar the opinion was expressed several times that the KCPA applies to lawyers which, if correct, opens the door to yet another liability exposure for Kentucky lawyers. The plain meaning of the statutory words certainly supports that conclusion.

My opinion, however, is that the KCPA does not apply to the practice of law – at least not until the Kentucky Supreme Court rules that it does. The Kentucky Constitution vests the Supreme Court with the exclusive authority to regulate the Bar. Just as Kentucky lawyers were not permitted to practice in limited liability entities until the Supreme Court issued rules authorizing them (*see* SCR 3.022 and 3.024), the KCPA should not apply to the practice of law without Supreme Court approval. The recent Pennsylvania case of *Beyers v. Richmond et al.*, 937 A.2d 1082 (Pa.2007), illustrates this position.

In *Beyers* a lawyer was sued for conversion of settlement funds under a Pennsylvania consumer protection law similar to KRS 367.220. The Pennsylvania Supreme Court held that applying consumer protection law to lawyers encroaches upon the Court's exclusive constitutional power to regulate lawyer conduct in the practice of law in Pennsylvania. The Court pointed out that the state's Rules of Professional Conduct cover misappropriation of client funds and provide an exclusive remedy for such conduct. Accordingly, the consumer protection law does not create a separate action for the same conduct. It was acknowledged, however, that lawyers acting in other capacities than the practice of law would be subject to consumer protection laws (*e.g.*, "attorney's who regularly engage in debt collection practices apart [*from*] their legal representation ….").

Currently Kentucky lawyers are subject to claims for malpractice, abuse of process, and breach of fiduciary duty. The Kentucky Rules of Professional Conduct are replete with client protection rules. Examples are rules on diligence, fees, confidentiality, conflicts of interest, business relations with clients, safekeeping client property, truthfulness, respect for the rights of represented parties and third parties, and misconduct involving dishonesty, fraud, deceit, or misrepresentation. Our consumers are well protected. It is hard to see the need for an overlay of generic consumer protection law to protect them.

*"Character builds slowly, but it can be torn down with incredible swiftness."*

*Faith Baldwin*

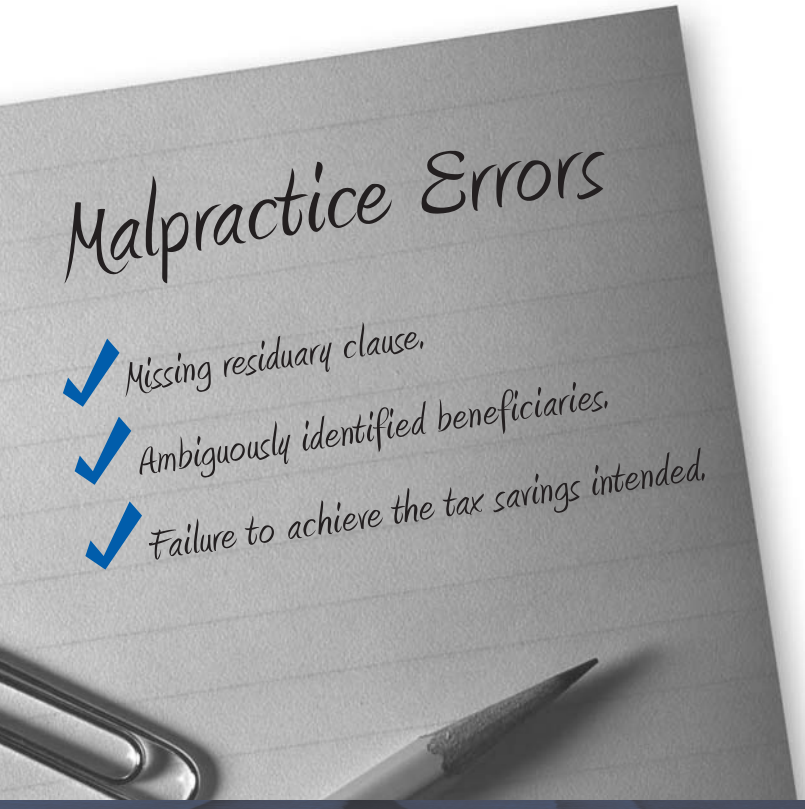
# Risk Managing Estate Planning More Complex Than Ever

The Legal Malpractice Risk Management Conference held in March in Chicago included a panel* presentation on the subject: *Estate Planning – Being Sued By Persons You Never Met for Things Your Client Did Not Ask You to Do.* The presentation began with interesting observations on the anomalies of representing wealthy clients in estate planning matters. People with a lot of money can act irrationally, e.g., giving millions to a cat. When something bizarre crops up in an estate plan the tendency of frustrated beneficiaries is to say that there had to be malpractice because nobody would have done that. Not so say the panelists – but the estate planning lawyer better be extra careful in documenting the advice given and the client's instructions on unusual arrangements.

The panelists then covered three estate planning risk management considerations:

- Who is your client – fiduciary, beneficiaries, or both?
- Common estate planning malpractice errors.
- Responsibility for investment losses in an estate or trust.

What follows is a gloss of the issues reviewed by the panelists. They are offered here as an alert for current risk management issues in estate planning. Your own independent research is required to apply them to your practice.




***Who is your client – fiduciary, beneficiaries, or both?***
Standing to sue a lawyer for malpractice typically involves a showing that an attorney-client relationship existed. In risk managing estate planning and follow-on legal services an estate planner must be sure to avoid an attorney-client relationship when none is intended. The primary risk centers on interaction with beneficiaries of estates and trusts when the lawyer is representing the fiduciary. The estate planner must be clear on:

- Who are your clients for estate planning?
- Who are your clients when somebody dies?
- Have you assumed a duty to beneficiaries to advise them of tax planning, tax effects, tax results of estate and trust distributions?
- Do you have a duty when representing the executor or trustee to notify beneficiaries they have rights that may or may not be detrimental to the estate?

*When something bizarre crops up in an estate plan the tendency of frustrated beneficiaries is to say that there had to be malpractice because nobody would have done that.*

The panelists suggested that lawyers take these actions to reduce risk exposure:

- Express in a letter of engagement to the fiduciary that you represent only the fiduciary in his fiduciary capacity …. The letter should cover what you are doing – your scope of engagement – and who you are doing it for. Then stick to it and don't digress. Finally, document the file.
- Advise beneficiaries to retain third party advice on tax results in estate matters.
- Act as if the fiduciary obligation extends to the executor and beneficiaries – provide as much tax notice to beneficiaries as possible.
- Research case law in the applicable jurisdiction to determine how far fiduciary obligations extend.

***Garden Variety Estate Planning Malpractice Errors:***
The panelists offered the following examples of common estate planning malpractice:

- Missing residuary clause.
- Ambiguously identified beneficiaries.
- Failure to achieve the tax savings intended.
- Conflicting documents – two living trusts.
- Failure to fund a credit shelter trust.
- Failure to change beneficiaries.

**continued**

They then made these malpractice prevention recommendations:

- An estate planning lawyer must be well versed in estate tax laws.
- Clients should not be accepted who want basic wills, quick wills, or "wills because we are going on vacation and will update them later." Just say 'no' to many engagements.
- Don't use estate planning as a loss leader.
- You must do due diligence on all assets -- have clients sign off on a client asset list as 'genuine and correct.'

***Responsibility for investment losses in an estate or trust:*** The panelists discussed the general rule that during a client's lifetime the estate planner has minimal responsibility, if any, to be concerned about investment issues in the client's portfolio – that is the client's domain. The problem for lawyers arises post mortem when investments decline in value. What role does the lawyer have in advising fiduciaries and beneficiaries of investment risks?

> ***The problem for lawyers arises post mortem when investments decline in value. What role does the lawyer have in advising fiduciaries and beneficiaries of investment risks?***

Citing the Michigan unpublished case of *Brian M. Kelly Trust v Adkison, Need, Green & Allen, PLLC* ( #134101, 10/17/07), the panelists discussed the situation when a law firm advised a fiduciary and beneficiaries on the transfer of an IRA post mortem. The firm took seven months to make the transfer in which time the IRA decreased from $700,000 to $400,000. The firm was sued for malpractice for their delay resulting in a claimed loss of $470,000. The court held that:

> In the absence of specific evidence that the trustees delegated their investment and management duties … [*the*] respondents owed no duty to prudently invest or manage the assets of the IRA. Respondents' sole duty was to exercise due care in the rendering of legal services, by acting "as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances." …. The duty to prudently invest and manage the trust assets was separate from the duty to provide legal services, and it belonged to the trustees alone rather than to respondents.

To risk manage this exposure the panelists recommended:

- Always advise fiduciaries in writing about investment standards post mortem.
- As soon as possible vest control to make investment decisions in fiduciaries or others.
- If a choice exists between risk free investments (that generate lower returns) and risky investments (that could generate higher returns or erode principal), err on the side of caution.
- Always leave investment decisions to fiduciaries or beneficiaries.

KBA Ethics Opinion E-401 is the place to start researching your responsibilities when representing a fiduciary of an estate or trust in Kentucky. It includes this helpful guidance:

1. In representing a fiduciary the lawyer's client is the fiduciary and not with the trust or estate, or with the beneficiaries of a trust or estate.

2. The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary under the Rules of Professional Conduct, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties.

3. The lawyer's obligation to preserve client's confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary.

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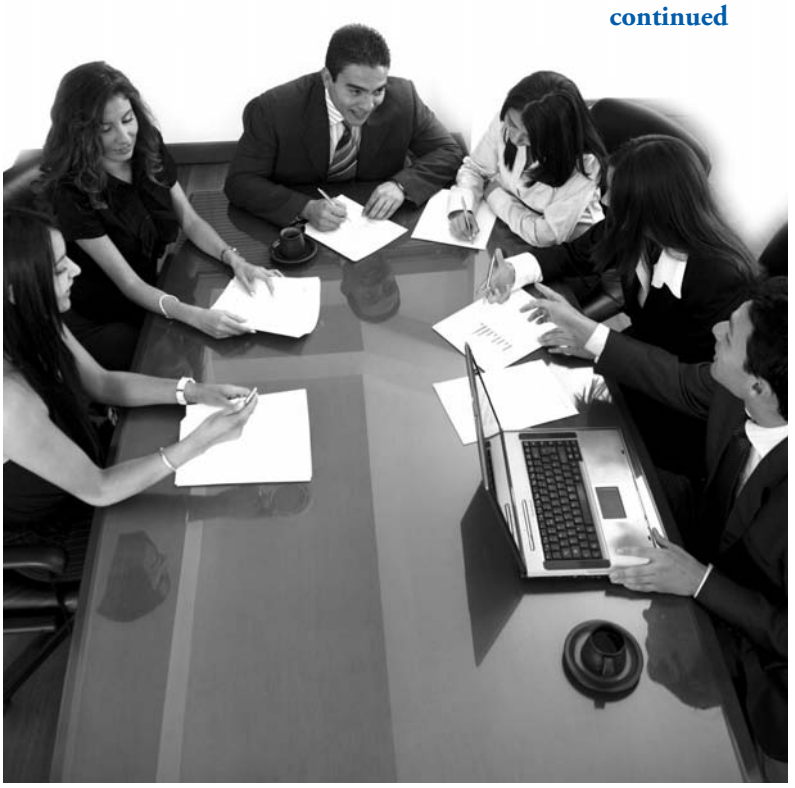

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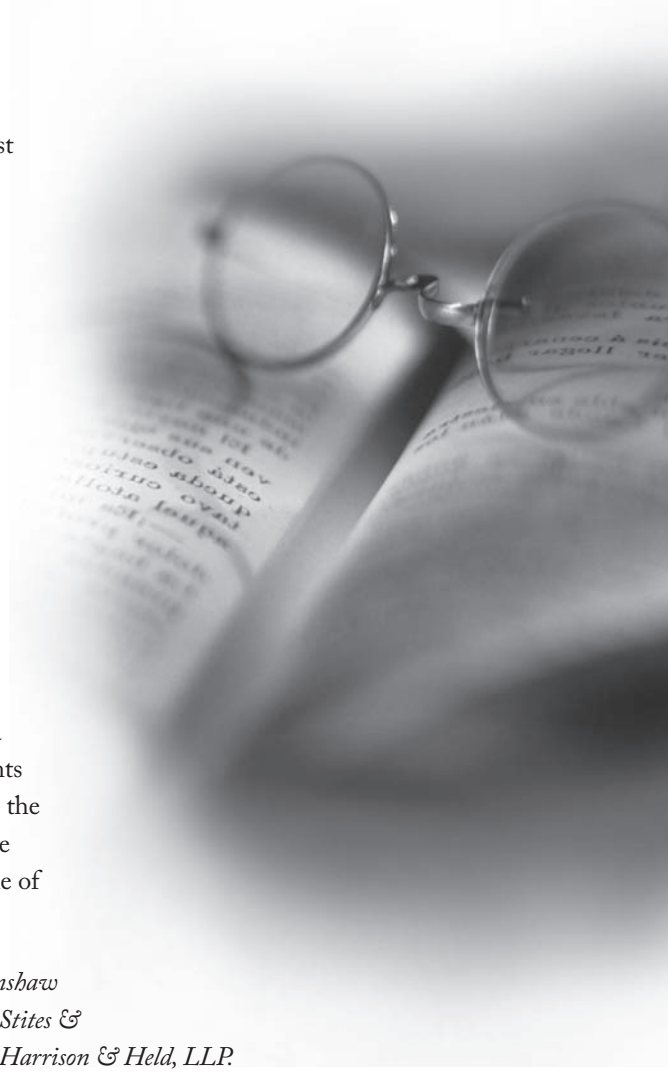
*"Be like a postage stamp. Stick to one thing until you get there."*

*Josh Billings*



## The Risk Manager



4. A lawyer has a duty to advise multiple parties who are involved with a decedent's estate or trust regarding the identity of the lawyer's client, and the lawyer's obligations to that client. A lawyer should not imply that the lawyer represents the estate or trust or the beneficiaries of the estate or trust because of the probability of confusion. Further, in order to avoid such confusion, a lawyer should not use the term "lawyer for the estate" or the term "lawyer for the trust" on documents or correspondence or in other dealings with the fiduciary or the beneficiaries.

5. A lawyer may represent the fiduciary of a decedent's estate or a trust and the beneficiaries of an estate or trust if the lawyer obtains the consent of the multiple clients, and explains the limitations on the lawyer's actions in the event a conflict arises, and the consequences to the clients if a conflict occurs. Further, a lawyer may obtain the consent of multiple clients only after appropriate consultation with the multiple clients at the time of the commencement of the representation.

** Panelists were Frances M. O'Meara, Partner, Hinshaw & Culbertson LLP, Matthew W. Breetz, Member, Stites & Harbison, PLLC, and Louis S. Harrison, Partner, Harrison & Held, LLP.*