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THE RISK MANAGER

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SPECIAL ISSUE • RISK MANAGING THE 2009 KENTUCKY RULES OF PROFESSIONAL CONDUCT

Editor's Note: The 2009 Kentucky Rules of Professional Conduct (SCR 3.130, effective July 15, 2009) constitute a major advance in ethics standards for Kentucky lawyers. The 2009 Rules expand, strengthen, and substantially improve the 1990 Rules. Virtually every 1990 rule is revised for clarity, important new rules are added, and comments to the rules are improved by providing practical guidance on applying the rules. Significantly, the 2009 Rules feature more risk management considerations than in the past. This newsletter identifies those considered most important for evaluation and application to your practice.

With the promulgation of these new and tougher professional conduct rules, the recent addition to our insurance program covering attorney fees up to $10,000 incurred as a result of a bar complaint could not have come at a better time. This new benefit began in December 2008 and is extended to all our insured lawyers as they renew existing policies and to lawyers new to our program when they first insure with us.

Since 1987

"If someone tells you to do the math, it is not a math problem you are dealing with."

Anonymous

WRITING REQUIREMENTS

Numerous rules require that the informed consent of a client be confirmed in writing and in some cases that the client sign the writing. Rule 1.0, Terminology, includes definitions for informed consent (1.0(e)), writing (1.0(n)), and confirmed in writing (1.0(c)).

Rules that require that informed consent be confirmed in writing are:

- 1.5(e): Division of fees between lawyers not in the same firm.
- 1.7(b): Conflicts of interest waivers.
- 1.9(a) and (b): Former client conflicts waivers.
- 1.10(c): Firm conflicts waivers (cross-reference to Rule 1.7).
- 1.11(a): Conflict waivers for lawyers formerly in government service.
- 1.11(d): Conflict waivers for government lawyers formerly in private practice.
- 1.12 (a): Conflict waivers for lawyer who has acted as a judge, arbitrator, or mediator in a matter.
- 1.17, Comment (11): Waivers for conflicts created by sale of a law practice (cross-reference to Rule 1.7).
- 1.18(d): Waivers of conflicts created by receiving information from a prospective client.
- 3.7, Comment (6): Waivers of conflicts for lawyer or firm acting both as advocate and witness.
- 6.5, Comment (3): Conflict waivers for known conflicts created by short-term representations in legal services programs (cross-reference to Rules 1.7, 1.9, and 1.10).

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Rules that require that a client sign a writing are:

- 1.5(c): Contingent fee agreements.
- 1.5(f): Non-refundable retainer agreements.
- 1.8(a)(3): Business transactions between client and lawyer.
- 1.8(g): Aggregate settlements.

Rules that require that a client be advised in writing of the desirability of obtaining the advice of independent counsel are:

- 1.8(a)(2): Business transactions.
- 1.8(h): Settling claim with an unrepresented client or former client.

Note: This list is a modified version of a list prepared by Professor William H. Fortune, College of Law, University of Kentucky, for a presentation at the 2009 KBA Convention.

Writing requirements should be risk managed by conducting a training program to educate everyone in the firm – lawyers and staff – on what they are and how to comply with them. Develop form letters for your office form database suitable for tailoring to the specific situation requiring a writing. Use a file checklist for assuring that all writing requirements are met, that any required client signature is obtained, and that the file is documented showing compliance.

If writings are not presented to the client in person, send them in a way that confirms receipt. At a minimum use return service mail. Many situations will call for use of delivery services that provide proof of delivery. If you deliver by e-mail, be sure to employ a procedure that confirms that the e-mail reached its addressee. If you use electronic office files for writings, be sure office data management is well organized to file and retrieve them. Backup of office computer systems is critical to this process – daily backup is recommended.

NEW EMPHASIS ON SUPERVISORY PROFESSIONAL RESPONSIBILITY

The 2009 Rules provide more detailed and strengthened guidance for those responsible for managing a practice to include encouraging good risk management practices. For example, Comment (2) to Rule 5.1, Responsibilities of Partners, Managers and Supervisory Lawyers, is a new comment with the following risk management guidance:

- Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

Similarly, a significant change to Comment (1) and new Comment (2) to Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, makes it clear that it is mandatory for firm management to take a proactive role in assuring that the office staff complies with ethics standards:

- A key sentence in Comment (1) was changed to read "A lawyer ~~should~~ must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product."

- Comment (2) provides in part: Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct.

Nationwide we are seeing a significant increase in disciplinary and malpractice cases involving a failure to properly supervise lawyers and staff. Attention must be paid to this responsibility. For help in developing procedures read the KBA Bench & Bar article "Boss Professional Responsibility," available on Lawyers Mutual's website at www.lmick.com – click on Risk Management, Bench & Bar Articles, and select the article.

"Paper is always strongest at the perforations."

Carolyn M. Corry

DISPUTED CLIENT TRUST ACCOUNT FUNDS

The most important change to Rule 1.15, Safekeeping Property, is to provide detailed guidance in the Rule and Comment (3) on handling disputed funds in a lawyer's possession. Comment (3) contains this invaluable risk management information:

- Paragraph (c) describes the handling of disputes, including those between the lawyer and the client, the lawyer and third persons (or entities), and the client and third parties. Paragraph (c) recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property until the claims are resolved. Generally, if the claim is based on a contract obligation, writing signed by the client, statutory lien, court order, legal obligation to ensure payment to a third party employed by the attorney to provide services in furtherance of the client's claim, or other law, the lawyer may not disburse the funds until the dispute is resolved. In these circumstances the client should also be advised of the risks of not paying a valid claim. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

IMPROVED GUIDANCE FOR CONFLICTS OF INTEREST ANALYSIS

The 1990 Rules provided sparse guidance for analyzing and resolving conflicts of interest. The comments to the 2009 conflict rules are much more extensive and contain highly useful instruction. Two prime examples are:

- ***Rule 1.7, Conflict of Interest: Current Clients:*** The 1990 Rules provided little help in determining when a conflict was nonconsentable even though the client was willing to waive the conflict. The 2009 Rule contains four comments addressing this issue. The caption heading these comments is changed to "Prohibited Representations" that, along with Comment (14), stresses that there are representations that are prohibited, not withstanding the informed consent of the client. Comment (15) covers situations when the concern is for the client's protection. Comment (16) covers situations when the representation is forbidden by law. Comment (17) covers situations when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.

- ***Rule 1.9, Duties to Former Clients:*** The key in determining if there is a former client conflict of interest is whether the new client representation is substantially related to the former client matter. The 1990 Rule had no guidance on making this determination. New Comment (3) to the 2009 Rule provides a definition of when matters are substantially related and includes several examples.

Rule 1.8, Conflicts of Interest: Current Clients: Specific Rules, includes these significant changes pertinent to risk management:

- ***Rule 1.8(a) and Comments (1-4)*** concerning business transactions with clients are revised including three new comments with specific instructions on how the transaction must be conducted. Do not engage in a business transaction with a client before you read them.

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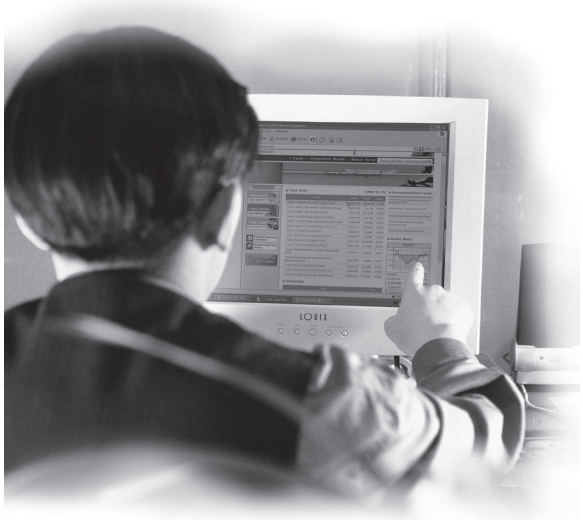
"The obvious is that which is never seen until someone expresses it simply."

Kahlil Gibran

- ***Rule 1.8(h)*** concerning limiting liability and settling malpractice claims is clarified and has two informative new comments as follows:

  - Comment (14): Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

  - Comment (15): Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.



REPORTING INCIDENTS OF POTENTIAL MALPRACTICE TO AN INSURER

Comment (8) to Rule 1.6, Confidentiality of Information, includes this guidance concerning the lawyer defense exception to client confidentiality (1.6(b)(3)):

> Lawyers may also report incidents of potential malpractice that have not ripened into a client claim to a lawyer's liability insurer for legal advice and to comply with policy reporting requirements provided the report is made on a confidential basis and protected by the attorney-client privilege.

The reason given for this addition in the KBA Ethics 2000 Committee report is:

> Most malpractice situations are covered by the disclosure permitted by Rule 1.6(b)(3), the so-called lawyer defense exception. The question arises, however, of what a lawyer may reveal to an insurer when the probability of a claim is remote instead of immediate. This occurs when the lawyer is dealing with an uncertain situation that may potentially develop into a malpractice claim. Typically the client is unaware of the problem and because of the uncertainty involved the lawyer believes it premature to discuss it with the client. It is hard to argue that the client has waived confidentiality when the client does not even know there may be a problem. Yet it is in the best interest of both the lawyer and the client for the lawyer to report a potential claim to an insurer for legal

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"I figure you have the same chance of winning the lottery whether you play or not."
Fran Lebowitz

advice and to assure policy coverage if the worst occurs. Furthermore, since the report is protected by the attorney-client privilege (Asbury v. Beerbower, Ky., 589 S.W.2d 216 at 217(1979)), there should be no prejudice to the client.

We encourage incident reporting. Lawyers Mutual's claim counsels, experienced Kentucky legal malpractice lawyers, are ready to help you evaluate the issue and advise on the claims prevention or repair steps to take. Claims counsel will determine whether the matter should be treated as a reported incident that means should a claim later be made your current policy will provide coverage. Neither your deductible nor your annual premium will be affected in any way by reporting incidents in any number. Help from our claims counsel is policy service at no charge to our insured lawyers.

DEFINITIVE GUIDANCE ON RETURNING CLIENT FILES

Return of client files has been a long-time troubling problem for lawyers – especially when fees are owed, the lawyer is discharged, or the lawyer withdraws. Revised Comment (9) and new Comment (10) to Rule 1.16, Declining or Terminating Representation, adds to and codifies KBA ethics opinions on return of files. The "must know" requirements in the comments are:

- Comment (9):
  - The client's file, papers, and property after termination must be returned if the client requests the file.
  - The lawyer may retain a copy of the file.
  - A reasonable copying charge is permissible, but return of a client's files, papers, and property must not be conditioned on payment of a copying charge, unless the lawyer has previously provided a copy, either during the representation or after cessation of the representation.
  - One copy of the file and materials must be made available to the client even without payment if the client's interests will be substantially prejudiced without the documents.
- Comment (10):
  - Return of the client's file, papers, and property may not be conditioned on payment of a fee.
  - Uncompensated work product may be withheld, from the client's returned files (*e.g.*, draft of pleadings, agreements and the like), unless the client's interests will be substantially prejudiced without the uncompensated work product.
  - Documents or other relevant evidence, the original or its equivalent that may be required for trial preparation or as evidence for trial or in other legal proceedings, must be surrendered in their original form.

The overriding principle in the ethics of returning client files is that a lawyer's fiduciary obligation of loyalty to a client mandates that the client's interest comes first. A client is entitled to the file regardless of the lawyer's interest if the client will be substantially prejudiced without it.

The Bench & Bar article "The Secret Life of Client Files" (available on Lawyers Mutual's website at www.lmick.com – click on Risk Management, Bench & Bar Articles and select the article) offers this advice in avoiding problems with client files:

> From a risk management perspective the first time to think about file closing is at the time you take the matter. Get client agreement in your letter of engagement on how the client file will be managed. A specific time and procedure for claiming files after the representation should be fixed including a warning that the files are subject to destruction if not claimed as stipulated. Include in letters of engagement who pays for file copying. Be sure that the firm's records destruction practices are coordinated as much as possible with those of business clients. When feasible, the firm should not retain client records that the client's record destruction program would eliminate. Keep track of what has been sent to a client during the course of the representation.

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"The marvelous thing about a joke with a double meaning is that it can only mean one thing."

Ronnie Barker

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Special Issue • Risk Managing the 2009 Kentucky Rules of Professional Conduct

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Often at the conclusion of a matter the client will have most, if not all, of the file. If this is the case, duplication of effort and expense can be avoided by sending only those records the client lacks. The firm's retained copy of a file should be complete. Always consider the possibility of a malpractice claim when stripping a file. Better to keep too much than inadvertently destroy crucial exonerating evidence.

Many experienced Kentucky lawyers have a file return policy of simply 'just give it to 'em," thereby avoiding bar complaints and frivolous malpractice claims.

REFERRAL RISK MANAGEMENT

Comment (7) to Rule 1.5, Fees, includes new language describing the responsibilities of lawyers not in the same firm when jointly representing a client and dividing fees:

- Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

A lawyer making a negligent referral to an incompetent lawyer is exposed to a malpractice claim. It is important to note that declining a matter and referring the declined client to another lawyer carries the same duty to assure that the referent lawyer is competent to practice the matter. Good ethics is good risk management.

The Supreme Court order promulgating the 2009 Kentucky Rules of Professional Conduct was published in the KBA Bench & Bar (Vol. 73 No. 3, May 2009) and is also available on the KBA website – click on Ethics Rules on the Home Page.
Note: The order contains only revised and new rules with their comments.