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THE RISK MANAGER

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Lawyers Mutual Congratulates the First Ever Certified Kentucky Paralegals

In 2010 the Kentucky Paralegal Association (KPA) initiated the KPA Certified Paralegal Program with this statement of purpose:

> The purpose of the Kentucky Paralegal Association's Certified Paralegal Program is to implement Kentucky Supreme Court Rule 3.700 for paralegals in Kentucky by establishing a procedure for paralegal certification, which will promote competence and high standards of professional responsibility, including the Kentucky Paralegal Association's Paralegal Professional Standards of Conduct. This is accomplished by setting minimum training, work experience, and education requirements for eligibility to be a designated Certified Kentucky Paralegal. The ultimate purpose of this self-regulation program is to improve the quality of legal service in Kentucky and make it more readily available to the public. Certification of qualifications and commitment to high professional and ethical standards by paralegals will lead to appropriate recognition of the substantial and essential contribution paralegals make to the provision of legal services in Kentucky.

Last November the KPA conducted its first examination on ethics and professional responsibility for qualified paralegals seeking the designation of Certified Kentucky Paralegal. Please go to the KPA Website at kypa.org to review the qualifications required to take the exam and the extensive study materials that must be mastered. As you will see this is a demanding program and earning the designation of Certified Kentucky Paralegal does not come easily.

Our sincere congratulations to the successful candidates for certification listed below. The lawyers employing them can have confidence that their Certified Kentucky Paralegals meet the standards that the Rules of Professional Conduct require lawyers to set for paralegals. Additionally, just think how helpful it will be when hiring a paralegal to know that she or he is a Certified Kentucky Paralegal – now that's good risk management!

Prescilla Adams, Campton, KY
Tonja Arnold, Lexington, KY
Lola Ball, Princeton, KY
Anne Bratton-Jeffery, Louisville, KY
Mary Burden, Louisville, KY
Jessy Carte, Nicholasville, KY
Jan Chapman, Sadieville, KY
Gregory Conn, Lexington, KY
Heather Davis, Winchester, KY
Debra Ewen, LaGrange, KY
Julie Franklin, Madisonville, KY
Kathy Gillum, Winchester, KY
Kathy Grentzer, Metropolis, IL
Juanita Griffiths, Ashland, KY

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"A synonym for 'scrivener' is 'defendant.'"

Douglas Richmond

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James Halcomb, Lexington, KY
Jill Hardin, Louisville, KY
Sarah House, Louisville, KY
Vicki Howard, Lexington, KY
Christina Inskeep, Russell, KY
Sadie Jackson, Louisville, KY
Samantha Jackson, Burlington, KY
Stephanie Jones, Louisville, KY
Dianne Kuhnell, Covington, KY
Sharon Locker, Winchester, KY
Kristen Miller, Nicholasville, KY
Paula Peters, Louisville, KY
Tammy Penn, Winchester, KY
Dawn Powers, Versailles, KY
Amanda Ramsey, Taylorsville, KY
Sherry Ramsey, Bowling Green, KY
Melissa Reynolds, Louisville, KY
Tammy Rhodus, Louisville, KY
Dawn Shrebtienko, Pekin, IN
Judith Spalding, Louisville, KY
Tonya Taylor, Sidney, KY
Therese Warrick, Lexington, KY
Stephanie Webb, Ashland, KY
Tammy Wethington, Bowling Green, KY
Rebecca Wireman, New Albany, IN
Tressia Wright, Springfield, KY

Documenting the File Involves Much More Than You May Think

It is heart breaking when defending a malpractice claim to find that a key defense document in the client file is merely a draft or an unauthenticated copy of an order or judgment and is of little probative value standing alone. When the court records fail to substantiate the validity of the document, a winning case can suddenly become a loser. We asked David Yewell, of Yewell Law, LLC, Owensboro, and a member of Lawyers Mutual's Board of Directors, to share how his office risk manages this concern:

- We keep a written list of all tendered orders and judgments in all cases that have left this office or are known to us to exist in which we have an interest.
- If there is a time limitation on entry, we note that date on the list and calendar to check on the actual entry at least two to three days in advance and then daily until entered by the due date.
- If there is no time limit, and after a reasonable time (normally five to seven days) we have not received our signed and entered copy, we start checking on the status of its entry. First we call the clerk and make sure it is not in the record. Then we work backwards by calling the attorneys and ultimately, if not located, the judge's office to inquire as to its status.
- If the document cannot be located, we re-circulate the instrument and start the process over making sure of its ultimate entry.
- When we receive the "filed-stamped copy" for our office-pleading file, we immediately index its entry into our file and make sure it is placed in proper order.
- Finally, as one last check – every 60 to 90 days for every active lawsuit, we match our office-pleading file with that of the actual court record. This can usually be done on-line by use of the KBA CourtNet database and, of course, on the website of the federal courts. I sleep better knowing my office-pleading files match exactly the court records.
- While this may not be a perfect process, it has worked for us here. I have found that we all make mistakes – lawyers, paralegals, secretaries, runners, clerks and yes, even judges. The key to this is that when such a mistake is realized, we can honestly state that this is the process we have followed that produced knowledge of a mistake which we immediately acted upon by notification of the court with a properly prepared notice motion or pleading of some nature. It is not so much what happens rather than HOW we deal with it.

Be Careful What You Tell Clients When Informing Them That Mistakes Were Made

It is bad enough to have to notify a client that you have been negligent in handling his matter, but it compounds the error when that notification includes incorrect information – malpractice upon malpractice. A Georgia lawyer learned this the hard way when he was sued for malpractice and defended by asserting that the statute of limitations barred the malpractice suit.

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"A decision is the action an executive must take when he has information so incomplete that the answer does not suggest itself."

Arthur William Radford

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The plaintiff argued that lawyer's written erroneous representation to her of when the limitation period began to run constituted fraud that tolled the running of the limitation period. (*Sowerby v. Doyal*, Ga. Ct. App., No. A10A1584, 10/22/10).

The *Sowerby* case prompts us to offer the following update of previous Lawyers Mutual newsletters and articles* on the risk management considerations when notifying a client of malpractice:

- Under Kentucky Rule of Professional Conduct 1.4, Communication, a lawyer is required to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. Patently, a question of malpractice is a matter that must be promptly brought to a client's attention. This may be done by telephone or letter, but the recommended procedure is a personal meeting with the client followed with a letter. Two complete files should be made – one for the firm and one for the client at the appropriate time. It may be prudent to have another lawyer from the firm present with the errant lawyer when the client is advised of the problem. It is imperative that no representation be made to the client that the firm's malpractice insurance will cover the claim. While candor is required when first notifying a client of an apparent error, admissions against interest concerning details of the error or value of the claim should not be made. It is best not to apologize when informing a client about a malpractice issue beyond saying "I'm sorry this happened." An apology that overtly or indirectly concedes error will be introduced at trial if the situation goes that far. There usually should be no attempt at this juncture to settle the claim.

- Providing a specific statute of limitation time for a malpractice claim should be avoided. Even though the Kentucky statute of limitations for legal malpractice appears straightforward, its application involves several variables that make an evaluation of when the statute begins to run or is tolled problematic. This calculation is best left for a successor lawyer to determine. Simply inform a client that K.R.S. 413.245 provides the statute of limitations for legal malpractice suits and that legal advice should be sought promptly to determine its application. It is especially important to do this if it appears the limitations period will expire in a short period of time.

- It is beyond the scope of this article to go into detail about the Kentucky legal malpractice statute of limitations. What follows are the major considerations in applying the statute. They illustrate the complexity of determining the legal malpractice statute of limitations and why it is prudent not to advise on it in a notification of malpractice. Interestingly, in *Sowerby* the defendant admitted that he had not even researched the issue before advising his client of when the statute began to run:

  1. The K.R.S. 413.245 limitation period for legal malpractice in Kentucky is "... one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured."

  2. Our statute adopts the discovery rule that recognizes that the client is at a disadvantage in the attorney-client relationship and may not appreciate that malpractice has occurred. Thus, the limitations period is tolled until the client has or reasonably should have learned of the malpractice. This rule's effect is to lengthen malpractice exposure in many cases well beyond one year.

  3. Damages are an indispensable element in a malpractice action against an attorney. There must be damage, irrevocable and non-speculative, before a malpractice cause of action arises and the statute of limitations begins to run (*Northwestern Nat. Ins. Co. v. Osborne*, 610 F. Supp. 126, 129 (D.C. Ky. 1985).

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"The most essential gift for a good writer is to have a built-in, shockproof crap detector. This is the writer's radar and all great writers have it."

Ernest Hemingway

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4. If a lawyer continues to represent a client after malpractice has occurred, the continuous representation rule may toll the statute of limitations.

5. In a litigation malpractice claim the key question is whether any appeal is final.

The Georgia lawyer got lucky. The Court found that "Doyal cannot show fraud to overcome the defense that her claim was time-barred because the undisputed evidence showed that she discovered her potential cause of action against Sowerby and the firm within the limitation period. …. Under these circumstances we find no evidence to support Doyal's argument that fraud on the part of Sowerby or the law firm deterred her from bringing her action so as to toll the limitation period."

You may not be so lucky.

** See Hard Economic Times Mean More Malpractice Claims , KBA Bench & Bar, January 2009, Vol. 73, No. 1; The Kentucky Malpractice Statute of Limitations - The Supreme Court Clears the Air, KBA Bench & Bar, Fall 1994, Vol.58, No.4. Both articles are available on Lawyers Mutual's Website at lmick.com – click on Resources and go to Bench & Bar Articles.*

Risk Managing Interpreters

As immigration has increased in Kentucky, lawyers are more frequently involved with clients that require interpreters for effective communication. This development invokes the Kentucky Rules of Professional Conduct on Competence (Rule 1.1), Client Communications (Rule 1.4), and Confidentiality of Information (Rule 1.6).

An effective interpreter is essential for competent representation and clear communications. Additionally, lawyers must ensure that the interpreter understands the obligation to keep the client's communications confidential. If a non-employee interpreter is used, the risk that the attorney-client privilege may be waived must be considered.

The New Hampshire Bar Association Ethics Committee Opinion # 2009/10-2 contains this helpful advice on how to employ interpreters:

> When the attorney cannot communicate directly and fluently with the client in a language that the client can understand—whether the inability to engage in direct communication is because the attorney and the client do not speak the same language, or because either the client or attorney is deaf or hearing impaired—the attorney must make use of the services of a qualified, impartial interpreter. Ideally, the attorney would accomplish this by associating with a bilingual attorney, working with a bilingual employee or staff member who can interpret communications between the attorney and client, or utilizing a commercial or community interpreter service. While this is not always possible, attorneys are cautioned that using relatives or friends of clients as interpreters carries substantial risks. Such interpreters may have a personal interest in the outcome of the representation and, therefore, their interpretation may be biased. Often, cultural and social factors, or family dynamics can interfere with the accuracy of such interpreters' translation. Attorneys should be aware of these risks, and should take steps that are reasonable under the circumstances to ensure that the selected interpreter is appropriate. For example, attorneys should watch for cues that indicate that the interpreter is speaking for the client or filtering the attorney's statements rather than impartially conveying the communications.

Withdrawal Without Cause Results In Loss of Kentucky Lawyer's Fees

The Kentucky Court of Appeals in *Lofton v. Fairmont Specialty Insurance Managers, Inc.* (No. 2009-CA-001631-MR, 10/15/2010) ruled that a lawyer who voluntarily withdrew from a contingency fee case without just cause could only recover expenses.

Lofton represented Maxey in a personal injury action. When Maxey refused to accept a settlement offer of $25,000 Lofton decided that he could not represent her to her satisfaction and was granted permission by the court to withdraw. Maxey then obtained new counsel and ultimately accepted a settlement offer of $25,000. Lofton asked for attorney's fees from the new counsel, but was only reimbursed for his expenses of $3,628.02. Lofton then brought an action for his fees based on quantum merit. The circuit court ruled that Lofton breached his contract with Maxey and only was entitled to recover expenses incurred while representing Maxey.

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"As for style of writing, if one has anything to say, it drops from him simply and directly, as a stone falls to the ground."

Henry David Thoreau

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On appeal the Court of Appeals affirmed the circuit court's order. After reviewing the law concerning entitlement to fees when a lawyer withdraws or is discharged the Court concluded:

> It is clear from the record that the catalyst for Lofton's withdrawal was a profound disagreement between Lofton and Maxey concerning the reasonableness of the settlement offer versus the potential value of the case. And, Lofton testified that this settlement offer was at least $5,000 less than what he had valued the case. As noted, the contract between Lofton and Maxey did not address this scenario. While a client's failure to follow an attorney's advice concerning acceptance of a settlement offer may constitute just cause under some circumstances, it is our opinion that Lofton's voluntary withdrawal does not constitute just cause under the facts sub judice. 7A C.J.S. Attorney & Client § 268 (2004).
>
> The contract executed by Lofton and Maxey provides that "no settlement will be made without the consent of the CLIENT." In light thereof, Lofton was contractually bound to accept Maxey's decision as to any possible settlement offer. It is simply incongruous for Lofton to agree to such contractual provision and then to withdraw when Maxey exercised her right under the contract. Lofton could easily have included language reserving his right to withdraw if the client refused to accept a reasonable offer. Hence, considering the particular facts herein, we conclude that Lofton's withdrawal was without just cause and that he was not entitled to any fee compensation. *(citation omitted)*

Lofton is highly recommended professional reading. When doing so compare the contingency fee agreement in that case with the following analysis of what the Kentucky Rules of Professional Conduct require to be included in a contingency fee agreement plus some recommended terms – one of which would have resulted in a different outcome in *Lofton*:

> Rule 1.5(c) permits fees contingent on the outcome of the matter. Specific requirements are:
>
> - The fee must meet the requirements of Rule 1.5(a).
> - The fee agreement **must be in a writing signed by the client.**
> - The agreement must include the method by which the fee is determined and the percentage or percentages that accrue to the lawyer in the event of settlement, trial or appeal.
> - The agreement must cover litigation and other expenses to be deducted from the recovery; and must state whether such expenses are to be deducted before or after the contingent fee is calculated.
> - The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.
> - Upon conclusion of a contingent fee matter, the lawyer must provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
>
> While not stipulated in Rule 1.5, recommended additional matters to cover in contingency fee agreements to avoid fee disputes are:
>
> - How the lawyer is paid if the client rejects a reasonable settlement offer and the lawyer withdraws.
> - How the lawyer is paid if the lawyer is terminated by mutual agreement or if the client unilaterally discharges the lawyer and obtains other counsel.
> - Whether the lawyer is obligated to pursue an appeal if there is an adverse judgment.

We also offer this risk management advice when withdrawing:

✔ Whenever possible withdrawal should be a clean break – a clear-cut decision with the client's agreement in writing. Use a disengagement letter that:

- Confirms that the relationship is ending with a brief description of the reasons for withdrawal.
- Provides reasonable notice before withdrawal is final.

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"Opportunities are usually disguised as hard work, so most people don't recognize them."

Ann Landers

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- Avoids imprudent comment on the merits of the case.
- Indicates whether payment is due for fees or expenses.
- Recommends seeking other counsel.
- Explains under what conditions the lawyer will consult with a successor counsel.
- Identifies important deadlines for the matter.
- Includes arrangements to transfer client files.
- If appropriate, includes a closing status report.

✔ After sending the disengagement letter you must carefully follow through on the duty to take necessary actions to protect the client's interest and comply with the representations in the disengagement letter. This avoids a malpractice claim over the manner of withdrawal.

✔ Finally, a complete copy of the file should be retained. A fired client or one that fired you has a high potential to be a malpractice claimant. The first line of defense is a complete file with a comprehensive disengagement letter. This is the best evidence for showing competent and ethical practice in terminating a client. *

* From *How To Fire A Client – The Client From Hell, Dog Cases, and Escape Clauses available on Lawyers Mutual's Website at lmick.com – click on Resources and go to Bench & Bar Articles.*