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The Risk Manager

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RISK MANAGING THE AGING OF THE LEGAL PROFESSION

Background

In the 1990s it was recognized that people were living much longer than ever before. This resulted in a need for lawyers to develop improved communication skills and risk management procedures for dealing with older adults. Little consideration was given to the fact that lawyers themselves were aging right along with the general population. Now in this century, when many lawyers practice well after the traditional retirement age of 65, there is an increasing concern that some older lawyers may have experienced a cognitive diminishment in their ability to practice law. What is the professional responsibility of older lawyers and their associates to deal with this development? What risk management steps should be taken to avoid bar complaints and malpractice claims?

Lawyers Mutual's Pete Gullett presents at this year's Kentucky Law Update the program *"Age-Related Cognitive Impairment: What to do When 'Forgetfulness' Becomes an Ethical Violation."* He provides a comprehensive analysis of aging lawyer issues from both a professional responsibility and risk management perspective.

The program centers on the effects of the natural aging process – not lawyers suffering impairment from serious illness or ongoing substance abuse and alcoholism. It concerns lawyers with mental impairment that may be either temporary or permanent. This includes early stages of dementia and Alzheimer's, and age-related mental impairment resulting from past alcoholism and substance abuse.

This article supplements Pete's presentation by providing risk management considerations and guidelines for dealing with cognitively impaired aging lawyers for those who cannot attend the Kentucky Law Update.

Rules of Professional Conduct

Cognitive impairment is not a defense to a violation of the Kentucky Rules of Professional Conduct. Lawyers with age-related cognitive impairment are most likely to violate the following Rules:

- Rule 1.1 Competence
- Rule 1.2(a) Scope of Representation and Allocation of Authority Between Client and Lawyer
- Rule 1.3 Diligence
- Rule 1.4 Communication
- Rule 1.6(a) Confidentiality of Information
- Rule 1.16 Declining or Terminating Representation: Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if…. (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client….

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"If you look at what you have in life, you will always have more. If you look at what you don't have in life, you'll never have enough."

Oprah Winfrey

At this year's Kentucky Law Update don't miss Pete Gullett's cutting edge program *Age-Related Cognitive Impairment: What to do When "Forgetfulness" Becomes an Ethical Violation.*

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Rule 5.1, Responsibilities of a Partner or Supervisory Lawyer, requires that partners and supervisory lawyers ensure compliance with ethics rules. Failure to deal with a cognitively impaired lawyer can lead to disciplinary action against the responsible lawyers in a firm. An especially difficult issue is the question of when a cognitively impaired lawyer must be reported to the bar authorities under the reporting requirement of Rule 8.3. See the following ABA ethics opinions for guidance on reporting a cognitively impaired lawyer in a firm or an unassociated lawyer:

- ABA Formal Opinion 03-429 (6/11/03), *Obligation With Respect to Mentally Impaired Lawyer in the Firm*
- ABA Formal Opinion 03-431 (8/8/2003), *Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment*

The Malpractice Risk of Cognitively Impaired Lawyers

The materials supporting Pete's KLU presentation offer the following observations on cognitively impaired lawyer malpractice risk:

> Cognitively impaired lawyers can malpractice in all the same ways that unimpaired lawyers do. The major malpractice risk, however, is cognitively impaired lawyers simply lose control of the administration and management of their practice resulting in lack of diligence and procrastination. This in turn leads to missed deadlines and filings as well as statute of limitations violations. One authority describes the problem well:
>
> > Lack of diligence is a special and widespread variety of incompetence. It consists of incompetently failing to act when advancing or protecting a client's interests calls for action. The types of inactivity range from virtual abandonment of the client to procrastination. Some few lawyers in particular matters seem to be seized by pathology of extreme inaction similar to abandoning a client. (Wolfrom, *Modern Legal Ethics* (1986), § 5.1, p.191)
>
> Aggravating the liability for lack of diligence and procrastination is that almost invariably there is no defense to the malpractice – the statute of limitations was missed, the personal injury case was irreversibly lost for failure to file a timely appeal, or rules for fees and client trust accounts were violated and the money is gone.

Managing the Risk of Cognitively Impaired Lawyers

A. From *The Ethical and Malpractice Risks of Impaired Lawyers and Their Unimpaired Associates*; by Pete Gullett and Del O'Roark, KBA *Bench & Bar*, Vol. 70 No. 4, (July 2006):

Docket and Work Control: The catastrophic risk impaired lawyers present is when they lose control of the administration and management of their practice resulting in a deluge of indefensible claims. The best way to prevent this negligence is to implement docket and work control management systems that force frequent periodic review of all active matters in the firm.

Docket systems can be maintained on computers, paper calendars, or a combination of both. Every time-sensitive matter in the firm should be recorded in three places – the lawyer's personal calendar, the lawyer's secretary's calendar, and a central firm calendar monitored by a third member of the firm who follows-up to assure that the responsible lawyer responds to a reminder on time. Solo practitioners can program their computer to act as their "third person." The system should operate to alert lawyers of a pending time-sensitive matter with ample lead-time to respond. Reminders then should occur the day before the deadline and the day of the deadline. Computer programs that show this information to lawyers when they first start their computer in the morning are especially effective. If the docket and work control information is maintained exclusively on computers, daily backup is mandatory and off-site storage of computer data is essential.

Other procedures to use in combination with a docket and work control system are:

- No new file is opened without applicable limitations periods being recorded in the file in writing by a lawyer or that there are none.
- Stamp on the front of a file applicable limitations periods.
- The responsible lawyer after meeting a deadline should record the next deadline for the file.
- Assign an alternative lawyer responsibility to respond to a reminder notice if the responsible lawyer is unavailable or fails to respond.
- Conduct stale file reviews on a regular basis – review all files that have had no docketing or billing activity for three months.
- Inspect at regular intervals all office filing locations for inactive files, stale files, and missing files.
- Establish file-closing procedures that check for whether any required action has been overlooked.

Follow the Money: Mismanagement of funds, conversion, commingling, and failure to account for and return fees are a major impaired lawyer risk. Firms should have a strict

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"If someone tells you he is going to make 'a realistic decision,' you immediately understand that he has resolved to do something bad."
Mary McCarthy

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system of internal controls to assure that no one person in the firm has the ability to unilaterally expend firm and client funds. Limit check writing authority, require double signatures on high dollar checks, and whenever possible have two people involved in a financial transaction (*e.g.*, if one person deposits money someone else records the deposit in the office books). Outside annual CPA audits are recommended.

B. From *Risk Managing Senior Status Lawyers*, LMICK Newsletter *The Risk Manager*, Spring 2006:

A firm must monitor the activities of senior status lawyers connected to the firm in any way just like other lawyers in the firm:

- Senior status lawyers must use the firm's work control and docketing system, billing procedures, and work product review procedures.
- No firm lawyer, including senior status lawyers, should be allowed to open client trust accounts or fiduciary accounts under their exclusive management – all firm lawyers must use the firm's financial management system.
- Senior status lawyers should be required at least annually to update the firm on:
  - their membership in organizations;
  - service as an officer, director, or other interests in business;
  - performance of fiduciary services such as trustee, conservator, administrator, or executor; and
  - powers of attorney held involving financial matters.
- All members of the firm should be given specific guidance on the relationship of the firm with senior status lawyers.

C. From ABA Formal Opinion 03-429 (6/11/03), *Obligation With Respect to Mentally Impaired Lawyer in the Firm*:

The firm's paramount obligation is to take steps to protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.

Some impairments may be accommodated. A lawyer who, because of his mental impairment is unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the Model Rules if he can work in an unpressured environment. In addition, the type of work involved, as opposed to the circumstances under which the work occurs, might need to be examined when considering the effect that an impairment might have on a lawyer's performance. For example, an impairment may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents. Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm.

D. From *Managing Your Practice — Lawyer impairment should not be overlooked*, by Emily Eichenhorn, Oregon State Bar Bulletin — July 2003:

Dealing with Malpractice:

- Quick action in dealing with the lawyer's work files is as important to controlling professional liability losses as intervention is to the lawyer's health. The first order of business is to determine immediately what files the lawyer currently is responsible for and where each matter stands. Designate one person to oversee the process, through whom all decisions and communications must flow. In this way you have a better chance of keeping track of all of the files; you are better able to present consistent information to courts, clients and co-workers and you are less likely to have something slip through the cracks.
- Make a thorough search of every file, reviewing every piece of paper. For each matter, determine the last completed action and move forward from there. Examine everything in the lawyer's office: calendars, case management systems, computer files, billing records, time sheets and the piles on the desk and the floor. Check the lawyer's home as well. Leave no stone unturned, no drawer unopened. Stories are now legend of firms discovering file drawers filled with literally years of neglected files.
- Reassign every pending file to another attorney. Even if you anticipate that the impaired attorney may return to work relatively soon, or if it appears that there is no need for any immediate action on a particular file, give it to someone else. The firm needs to exercise complete control over all of the work at this point. If

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appropriate, the matter can be returned to the impaired lawyer at a later time. After you have gotten a handle on and reassigned all open files, review any files that the lawyer has closed in the last year or two. Clarify that all necessary work was in fact completed and handled properly. If necessary, reopen the matters and assign lawyers to clean up anything left undone.

- As soon as possible after you have confronted the situation, contact your professional liability insurer for guidance as to how to proceed should you discover malpractice or the basis for potential claims. The insurer can help you sort through your disclosure obligations and, with assistance from claims counsel, determine the best strategy for dealing with clients and the courts. In some circumstances, the insurer may provide counsel to handle some of the open files in an attempt to mitigate any further damage.

AVOID ETHICS VIOLATIONS IN RESPONDING TO HARSH CRITICISM ON THE SOCIAL MEDIA – IF YOU RESPOND AT ALL

The Internet and social media continue to bombard the legal profession with novel ways to run afoul of ethics rules. Former client reviews of lawyer services on the Internet are accelerating at a rapid rate and many of them are just plain nasty. It is tough after doing what you know was a competent and professional job for a client, even though the results were disappointing, to run into what one commentator calls the "Internet Hate Machine." Should you just leave the review laying out there for all to see – or should you post a spirited defense? In the absence of Kentucky authority, this article provides an overview of how other jurisdictions are dealing with this issue.

The leading ethics opinion on this question is the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee Formal Opinion 2014-200, *Lawyer's Response To Client's Negative Online Review*. This opinion provides a comprehensive consideration of the client confidentiality ethics rule with a good review of opinions from other states. It includes these disciplinary actions to demonstrate how lawyers have gotten in trouble over client confidentiality in their online responses:

- In December 2006, the Supreme Court of Oregon approved a stipulation for discipline suspending a lawyer for 90 days for sending an email message to members of a bar listserv in which the lawyer disclosed confidential information about a former client who had fired the lawyer in an effort to warn colleagues that the former client was "attorney shopping." *In re Quillinan*, 20 DB Rptr 288 (Or. 2006).

- The Supreme Court of Wisconsin, in June 2011, suspended the license of a lawyer who wrote and published an Internet blog in which the lawyer revealed confidential information about current and former clients that was sufficiently detailed to identify those clients using public sources. *Office of Lawyer Regulation v. Peshek*, 798 N.W.2d 879 (Wis. 2011).

- The Georgia Supreme Court in a March 2013 ruling rejected as inadequate a recommendation of the Georgia State Bar General Counsel seeking a review panel reprimand for lawyer for violating Rule 1.6. The lawyer admitted to posting on the Internet confidential information about the lawyer's former client in response to negative reviews about the lawyer the client had posted on consumer websites. *In re Skinner*, 740 S.E.2d 171 (Ga. 2013).

- A Chicago lawyer was reprimanded by the Illinois Lawyer Registration and Disciplinary Commission for revealing client communications response to a former client who posted a negative review of the lawyer on Avvo. The parties' stipulated that the lawyer exceeded what was necessary to respond to the client's accusations by revealing in her response to a negative review that the client had beaten up a co-worker. *In re Tsamis*, Commission File No. 2013PR00095 (Ill. 2013).

The Committee considered whether lawyer responses to social media criticism fit the self-defense exceptions to Rule 1.6 Confidentiality of Information.

- May a lawyer reveal confidential information in a response based on the need to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client?

  The Committee found that "Although a genuine disagreement might exist between the lawyer and the client, such a disagreement [*social media criticism*] does not constitute a 'controversy' in the sense contemplated by the rules to permit disclosures necessary to establish a 'claim or defense.'"

- Does the right to defend before an action is commenced exception allow disclosure of confidential information in responding to social media criticism?

  Citing ABA Formal Opinion 10-456 and other authority, the Committee decided that social media criticism does not mean that a proceeding is pending or imminent within the intent of the self-defense exception to Rule 1.6.

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"If you see a bomb technician running, try to keep up with him."

Infantry Journal

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The Committee concluded:

- While it is understandable that a lawyer would want to respond to a client's negative online review about the lawyer's representation, the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, must constrain the lawyer.
- A lawyer cannot reveal client confidential information in response to a negative online review without the client's informed consent.
- Any decision to respond should be guided by the practical consideration of whether a response calls more attention to the review.
- Any response should be proportional and restrained. For example, a response could be:

  "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

We conclude this article with a suggestion. Before you hit the send button on a response to social media criticism think upon this old adage:

Never wrestle with a pig
You both get dirty
Nobody wins, and
The pig likes it!

WHEN DID YOU LAST RECONCILE YOUR CLIENT TRUST ACCOUNT?

Nationwide Lawyers Continue to Lose Substantial Sums of Money to Dishonest Staff by Failing to Reconcile Client Trust Accounts

It astonishes how often the press reports a lawyer or law firm suffering huge losses in client trust accounts resulting from a dishonest employee's embezzlement. In Kentucky a solo practitioner lost over $800,000 this way. Investigation of embezzlement cases often shows that accounts were seldom reconciled and account management entrusted to a single employee with check writing authority.

An auditor in North Carolina who performs random audits of client trust accounts reports that of the 60 law firms he audited in one quarter 60% were not in compliance with account reconciliation requirements. His answer for why so many lawyers fail to reconcile trust accounts is that they simply do not know how. They rely too heavily on trust accounting software that produces pretty reports that are good examples of garbage in – garbage out.

In light of this continuing problem what follows is a brief refresher on internal controls and reconciliation procedures that law firms should employ in managing client trust accounts.

The Basics:

Internal Controls: These are risk management procedures established to assure accurate and reliable control of the integrity of a firm's accounting and cash management. These procedures include:

1. Retention of documents to support account transactions.
2. A chart of accounts to record transactions.
3. Preparation of reports and records for account reconciliation, client information and notification, audits, and response to KBA inquiries.
4. A filing system that assures that required documentation is retained for at least five years after the end of the representation and all funds disbursed.

Reconciliation: All client trust account checkbook registers, dedicated client trust account ledgers, pooled client trust account journals, and subsidiary client ledgers should be reconciled monthly when bank statements are received and never less frequently than quarterly.

This involves a three-part review procedure:

1. Reconcile the balance in the trust bank with the firm's client trust account check register just as you would do with a personal account.
2. Compare the reconciled balance in the trust bank to the firm's client trust account check register balance. These two balances should agree.
3. Compare the total of ending account balances in subsidiary client ledgers to the firm's client trust account balance.

At the completion of this process the reconciled trust bank balance, the firm's client trust account check register balance, and the total of the subsidiary client ledgers should be identical.

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Lawyers Mutual
www.lmick.com

Waterfront Plaza
323 West Main Street, Suite 600
Louisville, KY 40202

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For a good quick review of this balancing procedure Google "Two Minute Tips: How to Reconcile Your Trust Account ..." (last viewed on 8/19/14). For a detailed explanation of this procedure go to the Client Trust Account Recordkeeping section of "Client Trust Account; Principles & Management for Kentucky Lawyers 2nd Edition, pages 22-28, available on Lawyers Mutual's Website at lmick.com/resources, click on the pamphlet (third bullet under the reference information bottom of the page).

Risk Managing the Process

Check Signature Authority:
The recommended practice is for a lawyer, usually the managing partner or lawyer who individually or together with other lawyers possesses comparable managerial authority in a firm, to sign all checks. Do not use signature stamps or computer-generated signatures. Do not use ATMs to withdraw or deposit client funds because unauthorized persons may gain access to the card and ATM receipts do not generate an adequate paper record. There is no implied authority for a lawyer to sign a client's signature on a check. Doing so without authority is conversion of client funds.

Internal Controls:

- No one person should be able to initiate, record, authorize and reconcile a transaction. Divide bookkeeping responsibilities. The person paying the bills should not be the person who reconciles the account.
- Separate mail opening from the writing of deposit slips, and banking from bank statement reconciliation.
- Have bank statements delivered to you unopened.
- Examine all cancelled checks or their equivalent (e.g., substitute checks) as soon as the statement arrives. Watch for authorized signatures, endorsements, and payees.
- Require two signatures on large checks.
- Do not allow checks payable to "cash."
- Require supporting documentation for all checks.
- Approve all client billings and reconcile receipts.
- Control access to checkbooks.
- Give receipts when accepting cash and keep duplicates. If possible, have cash payments witnessed.