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THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

TRUST AND ESTATES NOW VIEWED AS THE RISKIEST PRACTICE AREA FOR MALPRACTICE CLAIMS

At the 2016 Legal Malpractice Risk Management (LMRM) Conference considerable comment was made about the dramatic shift of Trust and Estate practice replacing Real Estate as the leading practice area for legal malpractice claims. This conclusion is based on a 2015 survey by insurance broker Ames and Gough. The primary reasons given for the change are the speculation that baby boomers are in increasing numbers seeking estate planning advice; and that real estate claims have decreased from the flood of claims resulting from the "Great Recession."

Adding to the seriousness of this development is that Trust and Estate practice has significant exposure to nonclient claims. Kentucky is in line with a majority of other jurisdictions by recognizing both a negligent misrepresentation theory and "intended to be benefited" malpractice theory for nonclient liability (see, *Seigle v. Jasper*, Ky. App., 867 S.W. 2d 476 (1993)).

This article identifies some of the more common trust and estate errors. It offers risk management guidance based on the 2016 LMRM Conference program "Death, Taxes and Malpractice: Grappling with Estates, Trusts & Probate Lawyers' Liability" that included citation of several outstanding articles on this developing problem.

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WHAT IS YOUR DUTY TO NOTIFY CLIENTS OF MALPRACTICE AND OTHER ERRORS?

What About Insurers?

We all know that a lawyer's fiduciary duty to clients and SCR 3.130(1.4), Communication, require prompt client notification of important developments in a representation. This is especially true when an issue of malpractice arises or other problems occur. What is not so clear is what constitutes an adequate notification. How much should you tell a client to meet your ethical obligation? How "prompt" must the notification be? Does every error, no matter how inconsequential, require notification? Is there a conflict between the lawyer's duty to notify clients of malpractice and the requirement in lawyer liability insurance policies to "promptly" notify the insurer of malpractice claims?

DUTY TO NOTIFY CLIENTS OF ERRORS

While detailed Kentucky guidance was not found on these questions, the recent North Carolina State Bar Formal Ethics Opinion 4 (7/17/15) is a helpful opinion addressing many of them. What follows is an abstract of the opinion. While this is not Kentucky authority, it makes good sense in evaluating a question of notification of malpractice. (*Note: The North Carolina rules cited below are the same as those in the Kentucky Rules of Professional Conduct.*)

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TYPICAL CLAIMS

Case Management Errors

- Failure to gather sufficient information; e.g., failure to investigate heirs and assets.
- Believing client without independent verification.
- Neglecting communications with client.
- Undue influence on the client by potential beneficiaries.

Drafting Errors

- Not reviewing an entire document – relying on office standard forms.
- Using imprecise terms: Lawyers err when they use imprecise terms to identify a class of beneficiaries or when they use more than one term to mean the same thing. "Children," "issue," "descendants," and "heirs" all have different meanings and should not be intermingled in the same will unless that is the intent of the client.
- Not discussing contingencies: It is incumbent on lawyers to discuss back up beneficiaries and what will happen if all the named beneficiaries predecease the client. Although *[state]* statutes provide for what happens in such situations this may not be what some clients want.
- Omitting provisions in a client's old will that the client may wish to retain but did not mention to you when you drafted a new will using your standard form.
- Neglecting to consider the possibility that your clients may move to another state. If the clients have second homes in other states or know where they might retire, review the laws in those states, especially regarding the proper execution of a will, who can be a witness, and the number of witnesses needed.
- Neglecting to consider the needs of unmarried couples for special provisions such as directing that each other has the authority to make funeral arrangements, that they jointly and equally own certain property, and that they acknowledge their intent not to leave property to family members.
- Failing to conform nonprobate documents to the client's will and estate plan and failing to coordinate the tax implications of the will with nonprobate documents.
- Failing to consider the ramifications of certain drafting, such as the problems with leaving personal property to minors, leaving real estate to numerous married individuals, and the differences between leaving real estate to the estate to sell versus leaving it directly to heirs. In effect, failure to accomplish testator goals or effectuate testator intent.

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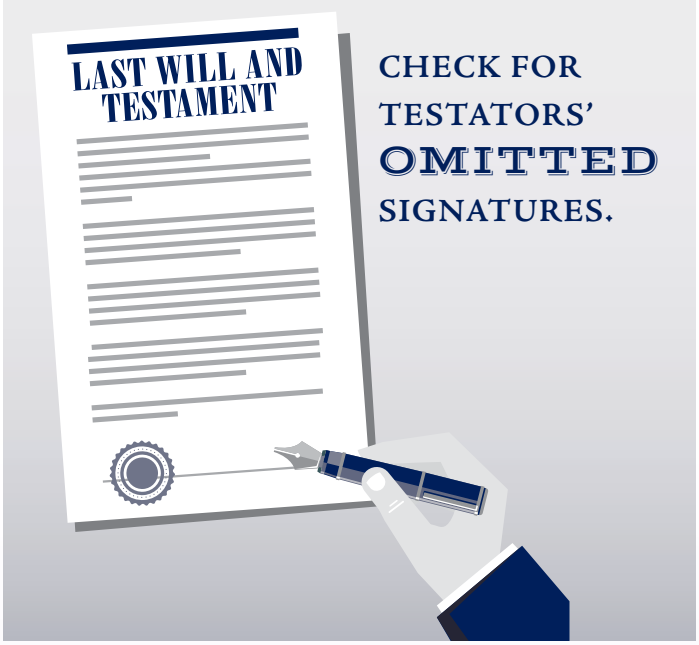
INVESTIGATE **HEIRS** AND **ASSETS**.

"IF YOU CAN'T **BE KIND**, AT LEAST BE VAGUE." *Judith Martin (Miss Manners)*

TRUST AND ESTATES



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Error in Will Execution

- Omitting execution ceremony; *i.e.*, "mail it in."
- Allowing execution when the testator lacked testamentary capacity.
- Testators' signature omitted.
- Insufficient or unauthorized witnesses.
- Flawed execution of duplicate originals.

Error of Law

- E.g.; Failure to update an estate plan based on new laws or facts.

Conflicts of Interest

- E.g.; representing both husband and wife with differing interest.

Fraud, Fiduciary Breach, Overreaching, Self-dealing

Tax Errors *(from "Estate Planning Traps," Risk Management Handouts of Lawyers Mutual of North Carolina)*:

- Failure to fully utilize the tax exemption amounts for both spouses by equalizing their ownership of assets and creating tax savings trusts before the death of the first spouse.
- Failure to realize that the filing of an extension of time for completion of the federal estate tax return (Form 706) does not extend the time in which the taxes must be paid.
- Failure to elect to claim a deduction for qualified terminable interest property (QTIP) on Schedule M of the federal estate tax return.
- Failure to utilize the special use valuation election which permits "current" use values rather than "highest and best" use or not utilizing the alternate valuation method which permits property to be valued as of six months after the decedent's death, rather than using date of death values, on the federal estate tax return.
- Failure to know the rules regarding deferral of the federal estate taxes on a closely held business and how to elect such a deferral.
- Failure to understand how to take certain administration expenses as deductions on either the estate tax return or the fiduciary tax return, and not knowing which method is best for a particular estate.
- Failure to know what the requirements are in order for a trust to be a valid S Corporation shareholder.
- Failure to follow up on changes in tax laws.
- Failure to meet deadlines that incur penalties and interest for the estate.

RISK MANAGING TRUST AND ESTATES PRACTICE

There are few areas of practice more complicated to risk manage than Trusts and Estates. It is well recognized as an area of law requiring special skill and knowledge. For example, the Trust and Estate lawyer, in addition to all the standard risk management practices such as calendaring deadlines must:

- Be competent in substantive law on wills, property, future interest, trusts, probate, and taxation.
- Have a thorough understanding of the complex statutes that regulate the inheritance process.
- Be a skilled and articulate drafter.
- Know how to institute probate proceedings.

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"IF YOU WISH TO BE AGREEABLE IN SOCIETY, YOU MUST CONSENT TO BE TAUGHT MANY THINGS YOU ALREADY KNOW." *Johann Kaspar Lavater*

TRUST AND ESTATES

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- Be competent in litigation to defend against frequent malpractice claims.

What follows are some of the key risk management considerations for Trust and Estates lawyers.

DO NOT DABBLE IN TRUST AND ESTATES MATTERS

No matter how enticing a trust or estate representation may be, you must be competent before you may accept it. Do not underestimate the complexity. Even a simple will has tax implications that must be discussed with the client. Associating with an experienced trust and estate lawyer is one way to assure a competent representation. Going it alone invites disaster. Matter screening is one of the most effective ways of avoiding trust and estates malpractice claims. Refer the prospective client to a specialist.

LETTERS OF ENGAGEMENT ARE NEVER MORE IMPORTANT THAN IN A TRUST AND ESTATE MATTER

Rule 1: Be specific about who is your client and who is not.

- Name each and every client for whom estate planning advice will be given. Be equally specific about naming individuals, entities, and any third parties you are not advising.

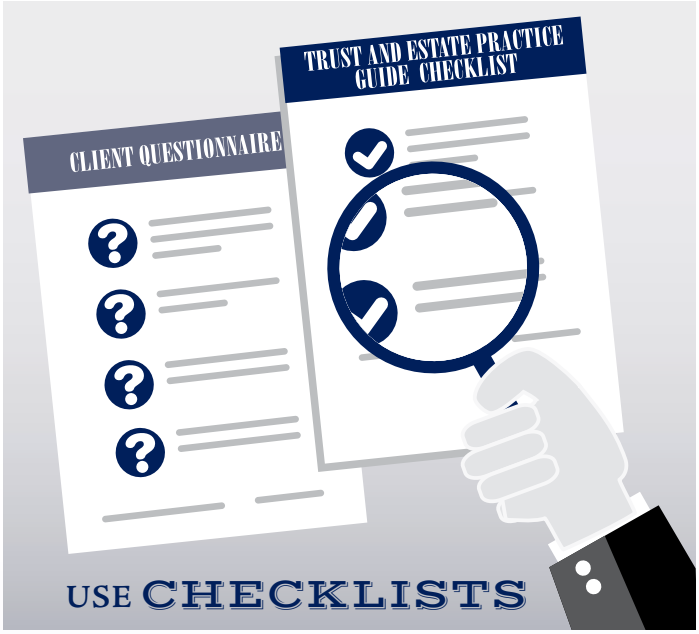
Rule 2: Define the scope of representation.

- Describe in detail what the client's intent is and what you are retained to do and not to do to accomplish this intent. Include in the scope statement that you are providing only estate planning advice and not other legal services.
- If the representation is a joint representation, cover conflict of interest issues to include whether recommending separate counsel or conflict waiver letters are appropriate

Rule 3: The lawyer and client must sign the letter of engagement before any work is done.

Rule 4: Carefully describe who will implement the estate plan.

Rule 5: Do not deviate from the terms of the letter of engagement. If new work is required, supplement the letter of engagement to cover it.



GATHER SUFFICIENT INFORMATION TO COMPETENTLY PERFORM THE WORK AND TO SHOW, IF NECESSARY, THAT IT WAS DONE WITHOUT ERROR OR MISCOMMUNICATION.

- Use checklists – any good Trust and Estate practice guide will offer useful checklists.
- As part of client intake procedures, use a client questionnaire that covers assets, identity of heirs, conflicts of interest, and other useful background information for performing the work. The questionnaire is also Exhibit A for any challenge to the accuracy of your work.

DOCUMENT THE FILE EXTENSIVELY

- Document analysis and advice.
  - Who are we protecting?
  - Reasons why plan was implemented.
- Document strategies rejected by the client.
- Document all instructions and especially unusual instructions or bequests (e.g., disinheriting a child).
- Document with memos to file and protective letters to client.

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"IF YOU HAVE THOROUGHLY BORED SOMEBODY, IT IS NEXT TO IMPOSSIBLE TO UNBORE THEM." *Elizabeth Von Arnim*

TRUST AND ESTATES

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ADDRESS ANY CONTINUING DUTIES OWED THE CLIENT AFTER COMPLETION OF AN ESTATE PLAN OR WILL.

Some lawyers prefer to offer continuing maintenance services for an estate plan or will. While the repeat business is desirable, experience shows that frequent changes in tax and other laws and the length of time an estate or trust may stay active creates a major risk of missing a change that is simply not worth it. One prominent Kentucky trust and estate lawyer addresses this quandary by inserting this paragraph in the letter of engagement:

> After we complete the estate planning process, and your estate planning documents are signed, it is important that in the future you review all of these matters to determine if the decisions you are making today remain appropriate in light of future developments, such as, increases or decreases in the size of your estate, marital rights, changes in the law and the needs of your family. Please understand that I am not able to undertake a responsibility to keep you advised of future changes in the law, but that I would be pleased to work with you to consider any changes or the status of your matters when called upon by you to do so. Until such time as that may occur we will consider your matters "dormant" pending your future contact with us.

SUMMING UP

The intent of this article is to alert you to the types of Trust and Estate malpractice a lawyer may face and to provide several of the risk management considerations in avoiding such claims. There is a great deal more to it than can be covered in a newsletter.

In the Wisconsin Bar Magazine article "Estate Planning Work – Not for the Timid," the author concluded with this succinct risk management advice:

When doing this work, keep the following in mind:

- Families are changing. Be prepared to deal with fractured families, stepchildren, second and third spouses, and unhappy, disenfranchised beneficiaries.
- A malpractice claim can be brought by someone who was not your client. Third-party claims are becoming more frequent in this area of practice.
- Clearly identify who your client is. Make sure everything is in writing and ask yourself if there are any potential competency issues.
- Spell out the scope of your retainer, and understand your client's intent.
- Proofread, especially if a staff member helps with document drafting.
- Do not succumb to pressure from beneficiaries who want their money quickly.
- Make sure you have expertise when dealing with special needs trusts, tax consequences, land contracts, and charitable gifts.

Editor's Note: This article is a synthesis of the 2016 LMRM Conference program "Death, Taxes and Malpractice: Grappling with Estates, Trusts & Probate Lawyers' Liability" and several of the outstanding articles the program included. Given the nature of loss prevention techniques, redundancy and overlap are inherent in these materials. This makes it difficult to credit any single source for a concept. Accordingly, the following bibliography serves to credit all sources in one large endnote.

"The Modern Estate Planning Lawyer Avoiding the Maelstrom of Malpractice Claims," American Bar Association: http://www.americanbar.org/publications/probate_property_magazine_home/probate_2008_index/probate_nov_dec_2008_index/rppt_mo_premium_rp_publications_magazine_2008_nd_Modern_Estate_Planning_Casteel_McDonald_Odom_Wade.html (last viewed on 6/13/16)

"Estate Planning Traps," Lawyers Mutual Risk Management Handouts: http://files.www.lawyersmutualnc.com/risk-management-resources/risk-managementhandouts/estate-planning-traps/Estate_Planning.pdf *(last viewed on 6/13/16)*

"Avoid Being a Defendant: Estate Planning Malpractice and Ethical Concerns," St. Mary's Journal On Legal Malpractice & Ethics – Includes at the end a useful chart of estate planning malpractice law adopted by various states: http://www.stmaryslawjournal.org/pdfs/Beyer_Step12-Hayes-Final.pdf *(last viewed on 6/13/16)*

"Managing Risk: Estate Planning Work – Not for the Timid," Wisconsin Lawyer: http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=84&Issue=12&ArticleID=2238 *(last viewed on 6/13/16)*

"Risk Managing Estate Planning More Complex Than Ever," Lawyer's Mutual, The Risk Manager: http://www.lmick.com/resources/risk-management-articles/subject-index/item/risk-managing-estateplanning-more-complex-than-ever *(last viewed on 6/13/16)*

THE RISK MANAGER
PUBLISHED BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

DEL O'ROARK
Newsletter Editor

"SPEECH IS THE SMALL CHANGE OF SILENCE." *George Meredith*

DUTY TO NOTIFY CLIENTS

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- **When the lawyer determines that an error that may constitute legal malpractice has occurred, is the lawyer required to disclose the error to the client?**

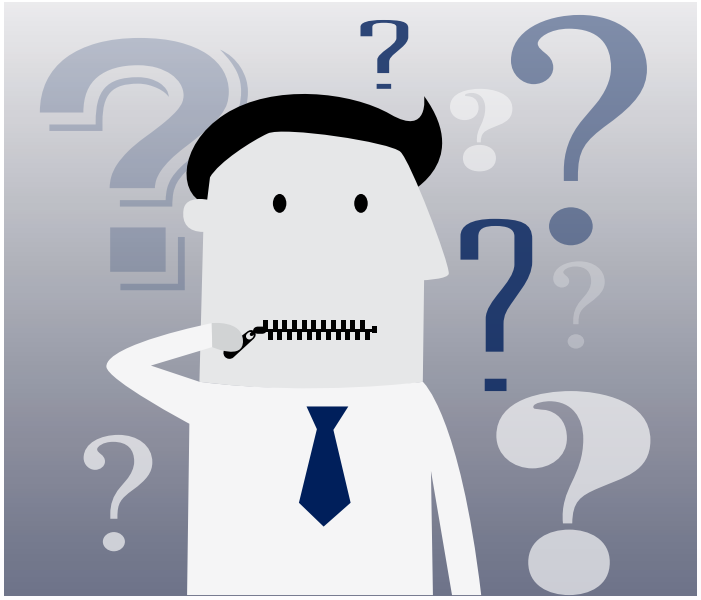
  In the spectrum of possible errors, material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs. At the other end of the spectrum are minor, harmless errors that do not prejudice the client's rights or interests. These include nonsubstantive typographical errors in a pleading or a contract or missing a deadline that causes nothing more than delay. Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests.

  Whether the lawyer must disclose an error to a client depends upon where the error falls on the spectrum and the circumstances at the time that the error is discovered. …. Under this analysis, it is clear that material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim must always be reported to the client. Conversely, if the error is easily corrected or negligible and will not materially prejudice the client's rights or interests, the error does not have to be disclosed to the client.

  Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. …. When a lawyer does not know whether disclosure is required, the lawyer should err on the side of disclosure or should seek the advice of outside counsel, the State Bar's ethics counsel [*in Kentucky call the KBA Ethics Hotline*], or the lawyer's malpractice carrier.

- **Applying the analysis in the opinion above, the lawyer has determined that her error must be disclosed to the client. Is the lawyer also required to withdraw from the representation?**

  [*Not always*], …. Rule 1.7(b) allows a lawyer to proceed with a representation burdened by a conflict if the lawyer reasonably believes that she will be able to provide competent and diligent representation to the client and the client gives informed consent, confirmed in writing. If the lawyer reasonably concludes that she is still able to provide



  the client with competent and diligent representation – that she can exercise independent professional judgment to advance the interests of the client and not solely her own interests – the lawyer may seek the informed consent of the client to continue the representation.

  Of course, when an error is such that the client's objective can no longer be achieved, as when a claim can no longer be filed because the statute of limitations has passed, the lawyer must disclose the error to the client and terminate the representation.

- **If an error must be disclosed to a client, what must the lawyer tell the client?**

  The lawyer must candidly disclose the material facts surrounding the error, including the nature of the error and its effect on the lawyer's continued representation. If the lawyer believes that she can take steps to remedy the situation or mitigate or avoid a loss, the lawyer should discuss these with the client while informing the client that the client has the right to terminate the representation and seek other counsel.

  The lawyer need not advise the client about whether a claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so. The lawyer need not, and should not, make an admission of liability. What must be disclosed are the

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"IF YOU ARE NEVER SCARED OR EMBARRASSED OR HURT, IT MEANS YOU NEVER TAKE ANY CHANCES." *Julia Sorel (Rosalyn Drexler)*

DUTY TO NOTIFY CLIENTS

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facts that surround the error, and the lawyer should inform the client that it might be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client's rights or claims.

Under this approach, the lawyer is not required to inform the client of the statute of limitations applicable to legal malpractice actions, nor is she required to give the client information about the lawyer's malpractice insurance carrier or information about how to file a claim with the carrier. Nevertheless, the lawyer should seek the advice of her malpractice insurance carrier prior to disclosing the error to the client, and should discuss with the carrier what information, if any, should be provided to the client about the lawyer's malpractice coverage or how to file a claim.

- **Is there any information that the lawyer should not provide to the client when disclosing her error to the client?**

  The lawyer should not disclose to the client whether a claim for malpractice exists or provide legal advice about legal malpractice.

- **When is the lawyer required to inform the client of the error?**

  The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required. See Rule 1.4(a)(1) (lawyer shall promptly inform the client of any decision requiring consent).

- **When disclosing the error to the client, may the lawyer refer the client to another lawyer for advice?**

  Yes, if the lawyer concludes that she can exercise impartial, independent professional judgment in recommending other counsel to the client.

- **If the client has paid legal fees to the lawyer, is the lawyer required to return some or all of the fees that she received?**

  Rule 1.5(a) prohibits a lawyer from collecting a clearly excessive fee. …. [T]here is always a possibility that a lawyer will have to refund some or all of any type of advance fee, if the client-lawyer relationship ends before the contemplated services are rendered. At the conclusion of the representation, the lawyer must review the entire representation and determine whether, in light of the circumstances, a refund is necessary to avoid a clearly excessive fee.

REPORTING ERRORS TO A MALPRACTICE INSURER

All lawyers' malpractice policies include the requirement to give the insurer notice of claims and to cooperate. This contractual requirement in no way overrides the professional responsibility duties owed the client. The three different types of insurer notice are:

- Duty to report claims or potential claims on the insurance application;
- A choice whether to report potential claims – often referred to as incidents;
- Mandatory duty to report actual claims.

Although there is no requirement to notify the insurance company before notifying the client, it is usually best to do so. Using the insurance company's claims counsel as a resource in analyzing the merits of suspected malpractice and how best to inform the client can prove highly beneficial. Bar related companies like Lawyers Mutual uniformly encourage early reporting of claims, potential claims and incidents for the purpose of helping in assessing the merits of a claim, assisting in notifying the client, and having the earliest possible opportunity to conduct claims repair.

At Lawyers Mutual incident reporting costs nothing. 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 insured lawyers. Your goals when an incident occurs should be to fix the problem, meet ethical requirements of client communication, treat the client fairly, and keep the client with your firm. Incident reporting is a strong first step in meeting all these goals.

All insurance policies contain provisions on when and how to report a claim or incident. While telephonic reports are useful for immediate assistance, claims typically must be reported in writing to invoke coverage. Usual requirements for written reports are names of claimants, date the alleged error was discovered, summary of the circumstances, estimate of the potential liability, copies of relevant documents, and the insured lawyer's views on defenses or claims repair that may be available. Lawyers Mutual insured lawyers should go to lmick.com, click on Claims and Incidents, and follow the instructions there for guidance on reporting a claim or incident.

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"I HAVE NEVER KNOWN AGE TO PERFORM A CHARACTER TRANSPLANT ON ANYONE." *William McIlvanney in Strange Loyalties*

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RISK MANAGING CLOSED AND ABANDONED PRACTICES

The Kentucky Bar Association Taskforce on Closed and Abandoned Practices has presented the Bar with an outstanding report for management of law practice closures. It addresses the issues from the perspective of the lawyer planning to close a practice and that of the lawyer who has consented to assist in the closing of a law practice. The KBA describes this report as:

A GUIDE TO CLOSING A LAW PRACTICE

There are many different reasons why a law practice closes, some are planned, for example – retirement, merging firms or entering public office, and others can be unplanned, such as an unexpected disability or death. While no single document or checklist can address all the possible questions or circumstances that will be encountered in the process of closing a practice, these materials attempt to address some of the basic guidelines and recommendations for an effective closure of a law practice.

The Guide is available for download on the KBA Website – click on Resources and then on Closed and Abandoned Practices. We strongly recommend that you include this in your professional reading.

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Most policies contain provisions requiring the cooperation of the insured lawyer and specific guidance on appointment of defense counsel. Insured lawyers should not retain defense counsel without prior coordination with their insurance company. Even if the insurance company denies coverage or issues a reservation of rights letter concerning some aspect of the claim, the insurance company may still have a duty to defend the claim.