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THE

# RISK MANAGER

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## 2014 ANNUAL POLICYHOLDERS' MEETING

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 8:00 am, Wednesday, June 18, in the Riverview II room at the Marriott in Covington, KY. 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 proxies and to attend the meeting.

### The Kentucky Supreme Court Locks Down the Legal Malpractice Statute of Limitations in *Abel v. Austin* (411 S.W. 3d 728 (Ky, 2013))

First, some perspective on just how significant this decision is for Kentucky lawyers. Prior to the 1970s legal malpractice claims were infrequent. From then on, however, they ballooned into a major risk of the practice of law today. Often the affirmative defense of the Kentucky one-year professional services malpractice statute of limitations is available to defeat this increasing number of claims. This in turn generated novel pleadings to convert a legal malpractice claim into another cause of action with a longer statute of limitations. Many of these claims are styled as fraud, misrepresentation, and breach of contract based on a letter of engagement or fee agreement.

#### Kentucky Statute of Limitations for Professional Services Claims

KRS 413.245 provides:

Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within 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. Time shall not commence against a party under legal disability until removal of the disability.

The killer development to enlarge the statute of limitations and put more pressure on lawyers to settle is to allege a fiduciary duties breach instead of malpractice. This allows a routine malpractice matter invoking the lawyer standard of care into a cause of action based on a breach by a lawyer of the fiduciary obligations of undivided loyalty or confidentiality. These suits usually are couched in general terms that fail to specify damages or clearly describe the wrong or breach of duty committed. A fiduciary breach claim often enlarges the statute of limitations and connotes a treacherous act by a lawyer as opposed to mere negligence. With professional reputation at stake and loss of a one-year statute of limitations defense, lawyers sometimes will settle rather than dispute frivolous and questionable fiduciary breach claims.

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*"Nobody can go back and start a new beginning, but anyone can start today and make a new ending."*

*Maria Robinson*

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The Kentucky Supreme Court resolved this muddled situation for Kentucky in *Abel v. Austin*. The facts of *Abel* stem from the class action tort lawsuits arising from injuries to Fen-Phen consumers. The essential facts for the purposes of this article are that 53 plaintiffs discovered that instead of receiving the \$47,943.84 to which they were entitled, they received only \$29,500. Fifty of these plaintiffs brought suit against the defendant lawyers alleging fraud, misrepresentation, and breach of fiduciary duty. The Circuit Court dismissed the suit because it was not commenced within the Kentucky one-year statute of limitations for professional services claims, KRS. § 413.245. The Court of Appeals affirmed, as did the Supreme Court.

In its decision the Supreme Court covers:

- When the Kentucky professional services statute of limitations applies in cases involving another jurisdiction;
- Why KRS § 413.245 is the exclusive statute of limitations for claims against lawyers for acts or omissions arising out of the rendition of professional services regardless of how pled; and
- Provides an instructive analysis of the facts of *Abel* in determining when the plaintiffs discovered or reasonably should have learned of the malpractice to start the statute of limitations to run. It was concluded that the plaintiffs knew of their claim one year and 15 days before filing suit and thus, were out of time.

*Abel* means that in Kentucky a legal malpractice claim by any other name still has a one-year statute of limitations. Gaming the system to enlarge the limitation period and pressure lawyers to settle will not work anymore. *Abel* is highly recommended professional reading. For a quick refresher on the Kentucky professional services statute of limitations as it applies to lawyers go to Lawyers Mutual's Website at [lmick.com](http://lmick.com) – click on Resources, Subject Index, Statute of Limitations for Legal Malpractice, and on the article “The Supreme Court Clears the Air.”

## Attorney-Client Relationship – Third Party Liability – Statutory Beneficiaries:

***Kentucky Supreme Court Clarifies the Scope of Representation for Plaintiff Lawyers in Wrongful Death Suits in Pete v. Anderson (2011-SC-000692-DG (11/21/2013)).***

This malpractice suit concerned Pete's representation of Elizabeth, wife of Michael Anderson who was killed in a van accident. He filed a wrongful death suit on behalf of Elizabeth as personal representative of Michael's estate, and a loss of consortium claim for Elizabeth. Pete did not file a loss of parental consortium claim on behalf of Anderson's two minor children. This suit was dismissed because plaintiff's expert witnesses were excluded from testifying. Two years later the two children filed a malpractice suit against Pete alleging negligence, gross negligence, breach of fiduciary duty, and negligent or fraudulent misrepresentations.

Pete was granted summary judgment based on the argument that he had no attorney-client relationship with the children and that all other claims were barred by the statute of limitations. On appeal the Court of Appeals reversed, ruling that there was a material factual issue in dispute over the existence of an attorney-client relationship with the two children. Furthermore, even if there was none, professional duties were owed the children because they were the intended beneficiaries of the underlying wrongful death suit.

In affirming the Supreme Court addressed the following issues:

***Does the Kentucky professional services one-year statute of limitations bar this suit?***

The Court had little difficulty deciding it did not cite the provision of KRS 413.245 that “Time shall not commence against a party under legal disability until removal of the disability.” This tolling rule permits the two minor children to bring suit within one year of achieving the age of majority. This suit was, therefore, timely.

***Do the children have standing to sue because Pete owed them professional duties?***

Elizabeth's evidence was that she reasonably believed that Pete was representing not only her own interests, but the interests of her minor children as well. She offered

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an undisputed affidavit that Pete discussed the case with her in terms that “I understood that Defendants were representing me, my children, and my husband’s, Mr. Anderson, estate in the Prior Action.”

In its analysis the Court reviewed long-standing considerations in determining whether an attorney-client relationship is formed:

The contractual relationship between an attorney and client may be “either expressed or implied by the conduct of the parties.” . . . . Indeed, an attorney-client relationship may be created as a result of a party’s “reasonable belief or expectation,” based on the attorney’s conduct, that the attorney has endeavored to undertake representation. . . . Therefore, whether a party had a “reasonable belief or expectation” relating to the attorney’s representation of that party’s legal interests is a question of fact. (*citations omitted*)

The Court concluded that the reasonableness of Elizabeth’s belief presented a genuine issue of material fact and was not ripe for summary judgment.

***Is this a case of client liability, third-party liability, or statutory beneficiaries liability?***

In analyzing this aspect of the appeal the Court noted the settled law that a lawyer is liable to the intended beneficiaries of professional services “irrespective of any lack of privity” and observed that with “this principle in mind, we examine the nature of a wrongful death claim in order to determine who is entitled to the benefit of the action, and, in turn, who has standing to sue the attorney for malpractice.”

The Court then provided a tutorial on the history of wrongful death claims in Kentucky reviewing who has responsibility for bringing suit, who is intended to be benefited, the nominal party status of the personal representative, and the statutory beneficiaries of the action as the real parties in interest. The Court concluded that the children in this case were statutory beneficiaries and the real party in interest in the wrongful death suit. As such they have standing to sue Pete because the wrongful death action he brought is construed as undertaken on behalf of the children. A finding of third-party beneficiary liability was not necessary because the children were statutory beneficiaries and real parties in interest.

***Risk management lessons learned from Pete:***

*No Letter of Engagement:*

This is yet another malpractice suit with no evidence of a letter of engagement or fee agreement specifying who the lawyer’s client is or the scope of the engagement. Lawyers without client intake procedures that identify all interested parties in a representation are often blindsided by finding that they have clients they did not know they had – resulting almost always in an indefensible malpractice claim as happened in *Pete*. A carefully crafted letter of engagement clearly indicating who is being represented and the scope of the representation causes lawyers to thoroughly think through any duties assumed for named clients, statutory beneficiaries, and third-parties. Given the current environment when lawyers are seen as deep pockets for any matter gone bad, it is an inexcusable failure of risk management for a firm not to use a comprehensive client intake checklist and detailed letters of engagement – not simply a bare fee agreement.

*Extended risks for plaintiff lawyers filing wrongful death suits:*

*Pete* is recommended professional reading for all Kentucky lawyers. Special emphasis should be placed on the dissents that flag how the decision increases risk for plaintiff lawyers. In particular Justice Noble writes:

I recognize that this decision today places wrongful death attorneys in the difficult position of having to potentially face a malpractice claim many years in the future after young children have gained their majority. The statute requires that a wrongful death action be brought by the personal representative of the estate on behalf of the beneficiaries of the estate. That makes the personal representative the agent of the minor beneficiaries. The only viable argument that the minor children cannot be bound by the acts of their agent is that as minors, they retain their right to file a tort action within one year of reaching their majority without being time barred.

Justice Noble would place the duty on the personal representative “to bring any ancillary claims on behalf of the children in a timely manner, and failure to do so can result in an action being time barred.” She concluded, however, as follows:

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*“I’m going to stop punishing my children by saying, ‘Never mind! I’ll do it myself.’”*

*Erma Bombeck*

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But the majority has decided that the risk is better born by the attorney in a wrongful death action, who is held to professional standards and knowledge, than by the personal representative who often is not informed about the matter. I cannot fault the logic of that distribution of risk, although I do regret the potentially chilling effect this has on wrongful death representation.

Compare *Pete with Branham v. Stewart*, another significant Supreme Court decision protecting the interest of minors (307 S.W.3d 94 (Ky., 2010)):

In *Branaham* the Supreme Court ruled that a lawyer retained by a minor's guardian or next friend to pursue a claim on behalf of the minor has an attorney-client relationship with the minor. This means the lawyer owes professional duties to the minor who is the real party in interest and can file a malpractice suit.

As a matter of good risk management recognize, that the *Pete* and *Branaham* decisions show that the current Supreme Court holds the Bar to enhanced responsibility when a matter involves minors. We offered this risk management advice when we covered *Branaham* in our Summer 2010 Newsletter (available on *Lawyers Mutual's Website at lmick.com* – click on *Resources, Subject Index, Minors/Clients with Diminished Capacity, and on the article "Kentucky Supreme Court Expands Malpractice Exposure for Claims by Minors"*)

It is hard to miss the point of *Branham* that when the real party in interest in any action is a minor, lawyers engaged in representing that interest have an attorney-client relationship with the minor with all attendant ethical duties. Accordingly, it is recommended:

- Read Kentucky Rule of Professional Conduct 1.14, Client with Diminished Capacity, for ethical guidance on representing minors. Note the requirement in the Rule to maintain as far as reasonably possible a normal client-lawyer relationship with the client.
- Read "The Child Client in Domestic Violence Proceedings: The Ethical Dilemma of Child Advocacy in Guardian Ad Litem Appointments" by Crabtree and DiLoreto in the January 2010 issue of the *KBA Bench & Bar* (Vol. 74 No. 1). (available on the *KBA Website*)
- Avoid conflicts of interest when representing more

than one party in matters involving minors. You are likely to be sued either for malpractice or fiduciary duty breach if you fail to do so. Consult the KBA Ethics Hotline to be sure you are on safe ethical ground if you want to represent multiple parties.

## An Update on the Kentucky Paralegal Association's Certified Kentucky Paralegal Program

### *My How We Have Grown!*

In 2010, the Kentucky Paralegal Association (KPA) initiated its Certified Paralegal Program to implement Kentucky Supreme Court Rule 3.700 governing paralegals. The Program establishes procedures for paralegal certification that promotes competence and high standards of professional responsibility. It is based on the Kentucky Rules of Professional Conduct and the KPA's Paralegal Professional Standards of Conduct modeled on the Kentucky Rules. This is accomplished by setting minimum training, work experience, and education requirements for eligibility to take the Certified Kentucky Paralegal examination. 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.

Dean Nicholas Riggs, Director of Paralegal Studies at Sullivan University, and Del O'Roark, Lawyers Mutual's Risk Management Consultant, prepared the certification examination. It requires in-depth knowledge of the professional and ethical standards that a competent paralegal must possess to achieve certification. For more information, go to the KPA's website, *kypa.org*. There you will find a description of the overall program, including the qualifications required to sit for the exam, the extensive study materials that must be mastered, and continuing education requirements.

The first KPA Certified Paralegal examination was given in November 2010. Since then the test has been offered twice a year in May and November. There are currently 150 Certified Kentucky Paralegals. The next exam is scheduled for May 17, 2014.

The KPA Certified Paralegal Program is a significant contribution to the practice of law in Kentucky. It is of major assistance to lawyers in complying with their paralegal professional responsibility duties. By employing paralegals that are Certified Kentucky Paralegals, lawyers

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can be confident that they are bringing into the firm competent and highly motivated professional staff – now that is good risk management!

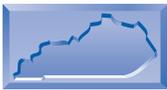
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*"Be obscure clearly."*

*E. B. White*



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