

## **Supreme Court Approves Limited Liability Forms of Practice for Kentucky Lawyers**

New Supreme Court rules effective February 1, 2000 permit Kentucky Lawyers to engage in limited liability forms of law practice - registered limited liability partnerships, limited liability companies, and professional service corporations. Under the new rules an attorney remains personally liable and accountable to clients for the attorney's own acts, errors, and omissions, and those of any attorney directly supervised.

The rules require attorneys practicing in limited liability forms of practice to maintain "adequate" insurance or maintain other acceptable forms of adequate financial coverage for errors and omissions. Adequate insurance is defined as \$50,000 per claim multiplied by the number of lawyers in the entity, with an aggregate maximum limit of liability per policy year for all claims of at least \$100,000 multiplied by the number of attorneys in the entity. The rule goes on to set a minimum limit of \$250,000 per claim and minimum aggregate for all claims of \$500,000 per policy year for limited liability forms of practice.

The foregoing is only a thumbnail sketch of the new rules. SCR 3.022 Forms of Practice of Law and SCR 3.024 Requirements of Practicing Law in Limited Liability Entities are in the January 2000 *Bench & Bar* and are an absolute must read. They are the biggest change in lawyer liability in Kentucky ever. Vicarious liability for the negligence of those you practice with, but do not supervise, now may be avoided with a limited liability form of practice and the right insurance program. Your house no longer need be put at risk by the negligence of other lawyers in the firm over whom you have no supervision.

Now is the time to review your business entity form of practice and professional liability insurance program (or lack thereof) to determine what you need to do to get in compliance with the new rules. If your firm is not a limited liability entity, this is a good time to review your situation. The January 2000 *Bench & Bar* article, Kentucky Supreme Court Approves The Practice Of Law In Limited Liability Entities, by Sieffert, Dolson, and Rutledge is a big help in making this review. In looking at your professional liability insurance program remember that we do insurance programs at Lawyers Mutual - give us a call.

## **Bull Markets and Malpractice**

The current good economic times have created wealth that dramatically increased the nature and value of the assets of a lot of people. Your clients often have a house, a car, and a large retirement account. They own financial instruments of all kinds and have financial interests in a variety of novel arrangements. It is difficult in the extreme to identify and evaluate a client's or an opposing party's assets in this day of stock options, IRA's, Roth IRA's, SEP IRA's, 401K's, defined contribution pension plans, annual bonuses, two income families, a host of new closely held businesses, and an apparently ever rising stock market.

New asset issues seem to arise daily. Is an inheritance income that should be used in setting child support? (*no in Arkansas*) Is an annual bonus that varies from year to year income that should be used in setting child support? (*yes in Iowa*) In a divorce settlement

must a disability payment be shared? (*only to the extent it is intended to serve as retirement benefits in New Hampshire*) The latest asset issue concerns frequent flyer miles and other rewards programs. Are these assets that should be considered in estate planning and divorce settlements? While this may initially seem a frivolous consideration, in fact, these rewards programs can have a significant value and be a hot button issue for some clients.

Lawyers practicing family law, bankruptcy law, and estate planning are particularly vulnerable to a claim that all assets were not identified and evaluated accurately - but this risk is not exclusively theirs. Both litigation and transaction lawyers must get the numbers right to serve their clients competently. Claims may result from inaccurately evaluating a family business, not considering how capital gains taxes impact on a division of stocks, mutual funds, and real estate, or simply failing to get a complete inventory of assets.

Procrastination is dangerous. A sudden large move in a stock price can radically change negotiation positions in a divorce action. Thus, not moving quickly to closure when using financial instrument valuations as part of a negotiation or agreement opens a window of market fluctuation risk for a lawyer. The client will blame the lawyer if it looks like the lawyer could have in any way avoided a disadvantageous price change (no matter how unfair it is to do so).

The first step in managing asset valuation risk is to recognize the problem. If your practice involves evaluation of assets - and most do - then you need a systematic way of making a thorough asset investigation every time.

*Some things to consider are:*

- *Are you well informed on financial markets, business financial statements, and retirement plans?* If not, make a special effort to acquire the knowledge you need to practice a matter competently that requires this kind of expertise. If you don't have the time to come up to speed, do not take the matter.
- *Use experts in accounting, retirement programs, and financial planning to assist you in analyzing assets.* In a divorce case the husband's pension plan statement reflected his contribution and earnings. It did not show that the employer was to make a substantial contribution at time of retirement. Thanks to the expert the wife's lawyer used to bring this out, the wife got an extra \$1,500 per month.
- *During the representation, monitor carefully the value of assets like stock that fluctuate in value.* Take into consideration that most retirement plans grow in value over time. Real estate may or may not appreciate. Check it out.
- *Understand the tax implications of an asset evaluation* - especially capital gains taxes.

- *Ask your client lots of questions to identify assets.* They need more help in this regard than you might think for both innocent and not so innocent reasons. Use discovery to flush out opposing party assets. Be meticulous because every asset missed will likely come back to haunt you - especially in divorce settlements which take on a life of their own. Document the file carefully to show your diligence.
- *Be alert to developing asset evaluation issues.* What else is out there like frequent flyer miles that could surprise you?
- *Use asset checklists based on the type of matter* - divorce, business dissolution, partnership formation, etc.