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THE RISK MANAGER

A quarterly newsletter by Lawyers Mutual Insurance Company of Kentucky

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Lawyers Mutual Offers Expanded Insurance Coverage

We are pleased to announce that the Board of Directors has approved the following two new benefits for our insured lawyers at no additional cost and with no deductible requirement.

✓ **Bar Complaint Defense up to $10,000:** The Company will pay up to $10,000 for attorney fees incurred as a result of a timely reported complaint, investigation, or proceeding before the Kentucky Bar Association.

✓ **$500 Daily Reimbursement for Out-of-Office Time Defending a Claim:** The Company will pay $500 for loss of earnings for each day or part of a day for attendance, at the Company's request, at a trial, arbitration, mediation, or deposition subject to a $10,000 limit per policy period.

These new benefits will be extended beginning in December 2008 to all our insured lawyers as they renew existing policies and to lawyers new to our program when they first insure with us. For the complete terms and conditions for these benefits be sure to carefully read your new policy when you receive it.

21 Since 1987

"A new year is a clean slate, a chance to suck in your breath, decide all is not lost and give yourself another chance."

Sarah Overstreet

Getting Paid in Hard Economic Times

The news is full of reports of law firm layoffs, decreased legal business, and increased client resistance to high billing for legal fees. In these times lawyers can expect more frequent fee disputes. These disputes can lead to malpractice claims motivated in part to avoid paying a legal fee; or counter-claims that are the result of suing a client for fees – the surest way of drawing a malpractice claim.

The first line of defense in getting paid is to know what you are doing in billing clients. What is your attitude about a client's commitment to pay your fees? What are the common mistakes made by lawyers in billing? What are good billing practices? What follows is a review of these questions.

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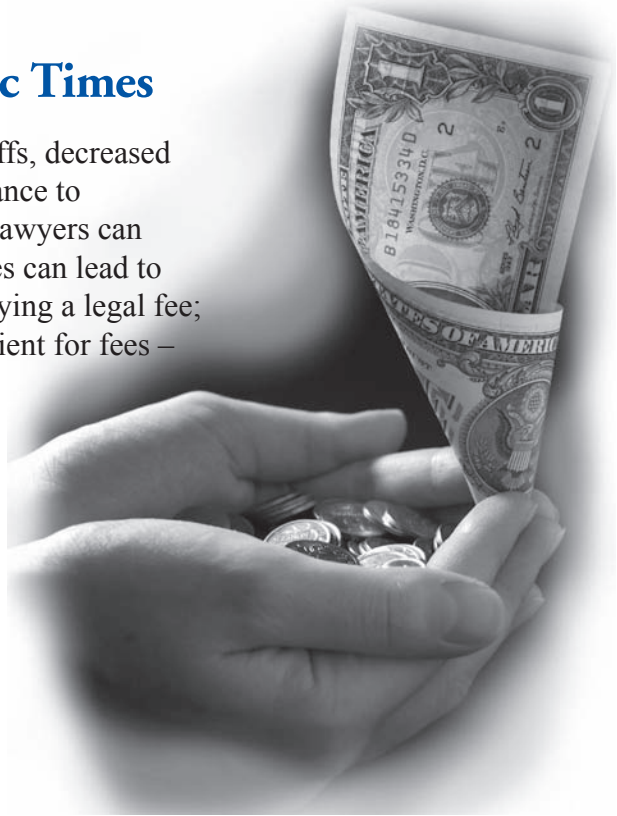

continued from page 1

An Attitude Check

Do you believe:

- If you do good work, your client will appreciate the quality and will pay you for it?
- If you send a reasonable bill, your client will pay it?
- If you do not charge the client for all the work you did, the client will be more likely to pay the bill?
- Paying your bill is as high priority for your client as getting paid is for you?
- Your client understands that you have bills to pay and that you need the money?
- Your client cares that you need the money and will therefore pay your bill?
- If you charge lower rates than the competition, you will get more clients and they will pay your bills?
- People of modest means are more likely not to pay their bills than wealthy people?
- The client's gratitude for the good job will endure after you have finished the job?
- The new client sitting in your office right now is the last client you will ever get. Therefore, you cannot make the client angry by asking for an advance retainer; you must take whatever the client is willing to pay because something is better than nothing; and anyway the client will be grateful and send you a lucrative personal injury case in the future?

If you believe the answer is 'yes' to these questions, get help fast. Money Magazine once did a survey to determine the priority people gave to paying the bills of the top 25 service providers including doctors, lawyers, plumbers, electricians, etc. Lawyers finished dead last – 25th! If you are looking for friendship and gratitude as a lawyer, the best advice is to get a dog. The point here is not that most clients are deadbeats, but that you must bill in a way that realistically improves the likelihood that you will, in fact, get paid for your services.

Common Billing Mistakes

Amy Stevens (*Wall Street Journal*), Larry Bodine (*Lawyers Weekly USA*), and Jay Foonberg (*Lawyers Weekly USA*) have all written articles listing their 10 favorite "Billing Bloopers." What follows is a gloss of their ideas:

- ☹ The bill is as big as the client's file. (sure looks like churning!)
- ☹ Client gets a large bill that is the first thing the client has heard from you since the initial interview.
- ☹ Secret identities. (no names and no billing rates for the work done)
- ☹ Over-qualified personnel for the work. (charging lawyer rates for administrative work)
- ☹ Too many meetings, telephone calls, and research hours (sure looks like churning!)
- ☹ Billing for several lawyers reviewing or preparing to discuss the file. (sure looks like churning!)
- ☹ Billing for "soft costs" (copying, fax) and general overhead (heat, air conditioning).
- ☹ Itemized bills use generic terms such as "phone call" or "meeting" with no substantive information.
- ☹ All telephone calls take .3 hours; all dollar amounts are nice round numbers or end in five; and inserted along with all the routine itemized expenses is a charge for expert witness fees of several thousand dollars.
- ☹ Billing for billing.
- ☹ Too quick billing reduction if client complains. (must have been overcharging!)
- ☹ Billing out of cycle with the client's preference.

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"The trouble with our times is that the future is not what it used to be."

Paul Valery

continued from page 2

Good Billing Practices

There are a number of good checklists on smart billing. Almost all of it is based on good client communications. Howard L. Murdock in his article *Better Communication Increases the Likelihood That Bills Will Be Paid* (*The National Law Journal*) emphasizes this point by developing 12 ways lawyers can improve their chances of getting paid by proper billing:

1. Improve client communications - at the outset explain the entire billing process.
2. Prepare a client for the total cost of legal services being provided.
3. Prepare written fee letters outlining the specific terms of an engagement.
4. Use retainer arrangements, especially when a client's ability to pay is in question.
5. Identify for the client the people being assigned to work on a matter.
6. Use the billing process to communicate details of the work performed.
7. Reach an agreement about what time and costs will be charged to a client and what will not be charged.
8. Discuss billing formats and what information will make invoices easier for the client to process.
9. Provide a budget, as a matter of firm policy, on all matters in excess of a specified amount.
10. Schedule periodic meetings with clients to discuss ways to improve service.
11. Review invoices to ensure that they contain no mistakes.
12. Send regular reminders for invoices that remain unpaid.

Some lawyers are reluctant to press for a retainer. This is a serious mistake. Lawyers should have a strict policy to get retainers routinely -- especially in labor-intensive matters requiring an immediate big effort, or when the ability of a client to pay is questionable. Clients who have not paid a retainer or fee do not yet have a financial stake in the matter. It gives them a different attitude about paying your bills. It feels like a free ride. Get a retainer.

The October 2008 issue of the ALI/ABA *The Practical Lawyer* includes the helpful article "Creating The (Almost) Perfect Retainer Agreement (With Form)" by Lori A. Colbert. In addition to the model form it includes a practice checklist. It is available on the Internet for $19.00. Just Google *The Practical Lawyer* and go from there.

Finally, another good way to get paid is to accept credit card payments. The KBA Ethics Committee issued a comprehensive opinion on proper procedures for Kentucky lawyers to accept credit card fee payments in Ethics Opinion KBA E-426 (March 23, 2007). If you are not already accepting credit card payments, it is recommended that you read this ethics opinion and begin offering your clients a most convenient way to keep up with paying for your valuable services.

Avoiding Malpractice in Foreclosure Suits and Sales

By LawReader Senior Editor Stan Billingsley

Editor's Note: This article is one of a series that LawReader.com has agreed to provide for Lawyers Mutual's newsletter as a bar service. LawReader.com provides Internet legal research service specializing in Kentucky law. For more about LawReader go to www.LawReader.com.

In a foreclosure suit the foreclosing plaintiff must name as parties all those known to have an interest in the property at the time the petition is filed, even if that interest is unrecorded. This includes holders of mortgages, tax liens, *lis pendens*, and in some instances bankruptcy liens. There is no statutory requirement to name those who acquire a lien after the filing of the foreclosure suit and *lis pendens* notice of foreclosure (*Minix v. Maggard*, 652 S.W.2d 93 (Ky.App., 1983)). By joining the lien holder in the foreclosure suit the existence of the lien is included in the judicial sale notice. The court then resolves the priority of liens and claims.

continued

continued from page 3

Of special concern are *lis pendens* on the real estate to be foreclosed. Recall that a *lis pendens* is notice that there is a lawsuit that concerns the title to real property or some interest in the property. A *lis pendens* must include a legal description of the real property and the lawsuit must involve the property. The notice is effective from the time it is recorded in the county court clerk's office (*Breslin v. Gray*, 143 S.W.2d 452; 283 Ky. 785 (Ky., 1940)). This recording gives notice to the defendant (debtor) who owns the real estate that there is a claim on the property.

To avoid a claim of malpractice by a client or third party in bringing a foreclosure action it is essential that all liens, including lis pendens, be identified.

Recording the *lis pendens* also informs the general public, to include those interested in buying or financing the property, that there is a potential claim against it. The effect of a *lis pendens* on a foreclosure sale is illustrated in *Cumberland Lumber Co. v. First and Farmers Bank of Somerset, Inc.* (838 S.W.2d 403 (Ky. App., 1992)). There the Court held that "… one who acquires an interest in property, whether by purchase, lien or other encumbrance, after the filing of a *lis pendens* notice, takes that interest subject to the results of the litigation. Actual knowledge of the pending action is not necessary to bind the *pendente lite* purchaser."

To avoid a claim of malpractice by a client or third party in bringing a foreclosure action it is essential that all liens, including *lis pendens*, be identified. To do this the chain of title to the property must be meticulously searched. If you are not experienced in running titles, employ someone who is.

I recommend that the lawyer for the plaintiff first carefully search the title. Next prepare and file the foreclosure suit. Then file the *lis pendens* notice for the foreclosure suit. Always double back to the clerk's office in a few days to confirm that some error in the clerk's office did not result in an intervening lien being filed. If an intervening

lien is filed, the complaint can be amended. This confirmation is a critical part of risk managing a foreclosure suit because too frequently liens are received by a county court clerk, but are not promptly entered into the appropriate lien book. More than once an unlucky lawyer has been blindsided by a lien that was filed prior to his title search, but recorded afterwards.

Local lawyers are often retained to represent a bank or a large law firm handling a high volume of foreclosure suits at foreclosure sales. These clients make malpractice claims if the sale is missed, the bid is not in exact accordance with instructions, or the representation is in any way unsatisfactory. They take the position that the amount they were willing to bid is the fair market value of the property. Often, the local appraisal and the actual value of the real estate are considerably less. Should you find yourself facing such a claim be aware that under some circumstances it is possible to set aside the sale notwithstanding the error. What follows is an overview of the possible claims repair efforts that should be considered.

When an attorney makes an error regarding a foreclosure sale he may make a motion to set aside the sale. Granting this motion is within a trial court's discretion if supported by adequate grounds. Grounds for set aside include:

- A trial court may set aside a sale if the sales price is so inadequate in price as to "shock the conscience of the court" or the sale "create(s) the presumption of fraud" or "irregularity" and that "substantial evidence of unfairness" is shown. *Maynard v. Boggs,* 735 S.W.2d 342 (Ky. App., 1987).

continued

continued from page 4

- A Master Commissioner's error in advertising the property requires that the sale be set aside unless it is clear that no prejudice resulted. An example of this is when a series of advertisements published regarding a judicial sale of property listed the incorrect date on which the sale was to occur. *Carnett v. Wright* (Ky. App., 2003), Unpublished, NO. 2002-CA-001033-MR.

- It is well established in Kentucky that "the [c]ommissioner of the court must conduct a sale according to the terms and conditions of the judgment. If he does not, the sale must be set aside unless it is clear that no rights of an interested party were prejudiced by the deviation." *Carnett v. Wright* (Ky. App., 2003), Unpublished, NO. 2002-CA-001033-MR.

The best risk management for foreclosure sale representations is either claims avoidance or claims prevention.

One lawyer got burned when he relied on the oral representation from someone in the Master Commissioner's office that he would be notified of the sale date. He received no notification and missed the advertised date. The Court in denying his motion for set aside held that "…we do not consider appellant's counsel not receiving special notice of the sale date as even close to sufficient reason for setting aside the sale, notwithstanding the assurance given his secretary by the mysterious individual who answered the Master Commissioner's telephone." *Kissell Co. v. Chadwick*, 737 S.W.2d 710 (Ky. App., 1987). There are a number of Kentucky cases on foreclosure set aside motions. Start your research with *Ky. Joint Land Bank Lexington v. Fitzpatrick*, 36 S.W.2d 25; 237 Ky. 624 (Ky., 1931).

The best risk management for foreclosure sale representations is either claims avoidance or claims prevention. The fee paid a local lawyer is small and the malpractice exposure large. Is a $100 fee worth the risk of suffering a malpractice claim and paying a deductible of several thousand dollars – or is this business better avoided? If you accept the representation, prevent malpractice by careful calendaring. Have at least a dual calendaring system (manual or computer) with your secretary keeping a matched calendar. Establish a third party tickler system as an additional safeguard. Calendar all critical dates with adequate lead times for preparation. Conduct a personal, monthly review of all foreclosure sales matters.

Scam Alert

We have received a report of a scam targeting lawyers that we want to pass on to you. Although there can be some variation in the scammer's approach, the following details outline how it is supposed to work:

- A person claiming to represent what turns out to be a fictitious company in a foreign country e-mails a lawyer in the U.S. seeking representation.
- This person informs the lawyer that the company has a customer in the U.S. that is delinquent in payment of funds due the company.
- The lawyer is asked to represent the company in collecting the funds. The company is agreeable to virtually any terms of representation. The lawyer accepts the representation and e-mails a retainer agreement that is signed and faxed to the lawyer.
- The company promptly e-mails the lawyer with the information that the customer has agreed to pay some or all of the delinquent funds – often close to $300,000.
- The lawyer is requested to provide an address to which the customer can send a certified check. The lawyer is instructed that upon receipt of the certified check to deposit it, subtract his fee, and wire the balance to a designated overseas account.

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"There was a time when a fool and his money were soon parted, but now it happens to everybody."
Adlai Stevenson

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continued from page 5

Scam Alert

- The lawyer is then sent a counterfeit certified check delivered by an independent overnight carrier. (In one case the certified check was in the amount of $298,720.) The unsuspecting lawyer deposits the check in his client trust account, withdraws his fee, and, believing that the funds are guaranteed, routinely wires the balance to the overseas account.

The problems for a lawyer caught up in a scam like this once the counterfeit certified check is discovered are obvious and enormous. They include being implicated in a fraud and potentially found responsible for restoring the transferred funds since the likelihood of recovering them is nil. Forewarned is forearmed.

Remember that the best risk management practice with any check deposited in a client trust account is to make no disbursements on it until the check clears regardless of its apparent validity. In today's economy bank failures are a common experience making this practice even more important. Advise clients at the inception of a representation that they will not receive funds until a check received in payment of their matter clears. Put this in your letter of engagement.