

THE RISK MANAGER

Lawyers Mutual Insurance Co. of Kentucky



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"The good lawyer is not the man who has an eye to every side and angle of contingency, and qualifies all his qualifications, but who throws himself on your part so heartily, that he can get you out of a scrape."

Ralph Waldo Emerson

"The best index to a person's character is how he treats people who can't do him any good, and how he treats people who can't fight back."

Abigail Van Buren

Risk Managing Representation of Clients with IRS Tax Problems

The Internal Revenue Service has announced that it is going to return to more vigorous tax enforcement than in recent years. This means that lawyers should see an increase in clients seeking help with IRS problems – good for business maybe, but if you are inexperienced or rusty on tax disputes, the risk of a malpractice claim is significant. Theodore M. David's article "Ten Things Every Lawyer Should Know About The IRS" in the December 2004 issue of the *ALI-ABA Practical Lawyer* could be just what you need to be sure you have a good grasp of the basics of representing a client in a dispute with the IRS.

In identifying ten key areas of IRS tax dispute practice, David provides a structure for reviewing your current understanding of the IRS dispute process and for preparing and explaining to a client the course of action you propose to take. David recommends that at the inception of a tax dispute representation lawyers have clients complete IRS Form 2848, Power of Attorney. This permits lawyers to represent clients at all levels of the IRS appeals system and subjects them to the IRS Rules of Conduct. A letter of engagement should be executed clearly describing exactly what the scope of the representation is and is not.

The ten areas David identifies with a brief synopsis are:

1. **Examination:** A brief explanation of which returns are selected for audit and how the IRS processes them.
2. **Statute of Limitations:** A useful recap of time limits for filing protests of IRS administrative rulings, time limitations on additional IRS tax assessments, time limitations on IRS collection actions, the time period for claiming refunds, and the criminal statute of limitations.
3. **Summonses:** Explains how the IRS uses the summons process for discovery and how the process works with some thoughts for the taxpayer's counsel.
4. **IRS Appeals Branch:** Describes the operations of the IRS in administratively resolving tax disputes. Covers administrative appeals procedure and Branch settlement techniques.

5. **Collection:** An overview of the procedures the IRS uses for collection, compromise, and levy of assets.
6. **Criminal Actions:** A brief description of the deterrence motive of the IRS criminal tax system and comment on the defense of a criminal tax case.
7. **Tax Court:** An overview of the tax court system.
8. **Claims:** Describes the separate appeals system consisting of both administrative and court procedures for clients seeking refund of paid taxes.
9. **Penalties and Interest:** An overview of how penalties and interest are calculated and applied.
10. **Obtaining Information from the IRS:** Identifies sources of law and regulation on IRS dispute resolution.

"Ten Things Every Lawyer Should Know About The IRS" is worthwhile reading for lawyers representing clients in tax disputes with the IRS. The good news is that it is available online for \$15 at www.ali-aba.org. Go to Publications, *The Practical Lawyer* December 2004 issue, and the rest is easy.

Computer Assisted Legal Research – CALR – Are You on Board?

It is old news that, thanks to the Internet, lawyers no longer must wait appreciable periods of time before learning of recent case decisions, developing law, and legal news. It is all available virtually instantly with a few clicks of a computer mouse. Of course, to have access you must have a

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computer, an Internet connection, and know how to do electronic research. These capabilities and skills are no longer “nice to have” features of law practice. Rather, they have become fundamental to maintenance of lawyer competence and diligence. For those of you still resistant to this change in how law is delivered today consider that failure to use CALR could lead to a malpractice claim. We expressed this concern in a previous newsletter as follows:

When will failure to do legal research using the resources computers offer become legal negligence? With increasing real time legal information available on the Internet that day draws near. A good example is a products liability case that the trial judge dismissed because it was preempted by federal law. No appeal was timely made. Just 85 days later the Supreme Court limited the preemption defense. When the plaintiff’s lawyer attempted to reopen the litigation the 7th Circuit Court of Appeals ruled: “Ignorance of the Supreme Court’s docket, although ‘neglect,’ is not ‘excusable’ – it is nothing but negligence, which does not justify untimely action.” (*Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1075 (7th Cir. 1997)). To keep up with fast breaking legal news and avoid getting caught short like the lawyer in *Norgaard* it is critical that lawyers routinely use CALR as a matter of competent client representation and careful risk management.

Thanks to the numerous web sites that offer free legal information along with sophisticated commercial legal research sites there is no shortage of access to CALR for Kentucky lawyers. A drawback of some of the commercial sites, however, is that they can be expensive for sole practitioners and smaller firms. Recently, a more economical CALR service began operating in Kentucky – LawReader. LawReader emphasizes Kentucky law and includes a broad range of legal resources and features. If you are not currently subscribing to a CALR site, LawReader may be a good fit for your practice. You can find out more about LawReader at www.Lawreader.com, by calling (502) 732-4617, or by e-mail: gwenceo@hotmail.com.

Do You Know How to Do the *PRO HAC VICE* AND AVOID A MALPRACTICE CLAIM?

When an out-of-state lawyer wants permission to represent a client in a Kentucky court the lawyer must seek admission *pro hac vice* as required by SCR. 3.030(2). The Supreme Court amended this rule effective January 1, 2005 to include the requirement that the out-of-state lawyer pay a per case fee of \$100 to the KBA. The rule now reads:

A person admitted to practice in another state, but not this state, shall be permitted to practice a case in this state only if he subjects himself or herself to the jurisdiction and rules of the court governing professional conduct, pays a per case fee of \$100.00 to the Kentucky Bar Association and engages a member of the association as co-counsel, whose presence shall be necessary at all trials and at other times when required by the court. No motion for practice in any state court in this jurisdiction shall be granted without submission to the admitting court of a certification from the Kentucky Bar Association of receipt of this fee.

This change to the rule makes this an opportune time to consider the risk management implications of associating as co-counsel with an out-of-state lawyer practicing a single case in Kentucky. Note that the rule does not include specific conditions for eligibility for *pro hac vice* admission other than that the out-of-state lawyer be admitted to practice in another state. (Some states require a showing of good cause why the motion should be granted – Kentucky does not.) Who is responsible for verifying that the out-of-state lawyer is admitted to practice in another state and is in good standing – the out-of-state lawyer, Kentucky co-counsel, the judge? What is Kentucky co-counsel’s responsibility for the case? Must co-counsel supervise the out-of-state lawyer with equal responsibility for the representation; or may co-counsel enter a limited scope representation that reduces exposure to the out-of-state lawyer’s malpractice? To demonstrate co-counsel’s risk in *pro hac vice* situations what follows is our report from a prior newsletter on *Macawber Engineering Inc. v. Robson & Miller* (CA 8, 47 F.3d 253):

Minnesota lawyers serving as local counsel for a New York law firm’s representation of a defendant sued in Minnesota recently dodged a bullet. The New York firm arranged for local counsel with the approval of the defendant. The New York firm had primary responsibility for the defense. Local counsel billed less than 10 hours for filing a *pro hac vice* petition and doing minor work on pleadings and discovery. The New York firm failed to timely respond to plaintiff’s 130 requests for admissions even though local counsel alerted them to the problem. After plaintiff was granted partial summary judgment, the defendant brought a malpractice action against both the New York firm and Minnesota local counsel.

The issue of local counsel’s liability boiled down to the question of whether the scope of local counsel’s engagement created a duty to the defendant to monitor lead counsel’s case

“As soon as one has arrived at any position, try to find in what sense the contrary is true.”

Simone Weil

continued

management. The court found that engagement of local counsel does not automatically create a duty of care for the overall litigation on the part of local counsel. Here the defendant gave lead counsel primary responsibility for the representation. Local counsel accepted only limited responsibility for the matter and owed no duty of care to the defendant on the discovery aspect of the case.

Until there is some Kentucky authority available to clarify co-counsel's responsibilities, it is not safe to assume that co-counsel can be little more than a potted plant during the representation even if that is what the out-of-state lawyer wants. To limit co-counsel's malpractice exposure the following risk management ideas are offered:

- Before agreeing to serve as co-counsel verify that the out-of-state lawyer is, in fact, admitted to practice in another state and is in good standing. A call to the out-of-state lawyer's state bar should produce that information.
- Confirm that the out-of-state lawyer has malpractice insurance and in what amount. Be sure that you are not the deep pockets in the case. Note that there is the anomaly that a Kentucky co-counsel practicing in a limited liability form of practice is required to have insurance, while the out-of-state lawyer may have no similar requirement (SCR 3.024). Check it out.
- Be sure that the out-of-state lawyer is aware of the new per case fee requirement of \$100.
- Document thoroughly with a letter of engagement signed by the out-of-state lawyer and the client exactly what the scope of your engagement is and how you will meet your co-counsel duties.
- Throughout the representation document telephone calls, meetings with the out-of-state lawyer, and all other aspects of co-counsel activities on behalf of the client.
- Be sure that fee sharing arrangements comply with Kentucky Rule of Professional Conduct 1.5.(e). If you trip over this rule, you could be found to be jointly responsible for the matter in spite of efforts to limit the scope of the representation.

Immigration and Naturalization Law Malpractice – Duty to Determine Client's Immigration Status

Immigration and naturalization law practice has grown in Kentucky to the extent that the March 2003 KBA *Bench & Bar* issue was devoted to it. A recent New Mexico case reinforces the point that to avoid malpractice when representing an immigrant it is essential to determine at the outset of the representation the client's immigration status. In *State of New Mexico v. Paredes* (Op. No.: 2004-NSMC-036, 10/31/2004) an immigrant pled guilty to a felony charge of criminal sexual contact of a minor. A conviction on this charge was virtually certain to cause the client to be deported. The record showed that the immigrant's defense counsel had advised the client that "the plea 'could' affect his immigration status." Six days after the guilty plea was accepted the immigrant moved to withdraw it because "he was not

been fully informed as to the effect his plea would have on his immigration status." This led to an appeal to the New Mexico Supreme Court. The Court remanded the case to district court with the following ruling:

We hold that criminal defense attorneys are obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain. Proper advice will allow the defendant to make a knowing and voluntary decision to plead guilty. Furthermore, requiring the attorney to give such advice is consistent with the spirit of Rule 5-303(E)(5), which prohibits the district court from accepting a guilty plea without first determining that the defendant has an understanding of the immigration consequences of the plea. An attorney's failure to provide the required advice regarding immigration consequences will be ineffective assistance of counsel if the defendant suffers prejudice by the attorney's omission.

Paredes is a well-reasoned opinion recommended for professional reading. It is available on the New Mexico Supreme Court web site, www.supremecourt.nm.org/. Also recommended for use is the Immigration Information Checklist we provided in our Spring 2003 newsletter (available on our web site at www.lmick.com in the Risk Management – Newsletters section). Finally, an outstanding law review article is now available on the Internet that comprehensively covers immigration and naturalization practice. It is *The Legal Assistance Attorney's Guide To Immigration and Naturalization*, by Lieutenant Colonel Pamela M. Stahl at 177 Mil. L. Rev. 1 (2003). The Internet address is www.jagcnet.army.mil/MLR. While the article is geared to guiding Army judge advocates in assisting servicemembers and their families, it is an excellent source of law and procedures applicable to immigration practice and a good place to start research.

"Unmitigated seriousness is always out of place in human affairs. Let not the unwary reader think me flippant for saying so; it was Plato, in his solemn old age, who said it."

Santayana

A CHECKLIST FOR RISK MANAGING SETTLEMENTS

1. Do not encourage false or unreasonable expectations. Compromise is hard enough to achieve with reasonable expectations.
2. Discuss settlement with the client throughout the representation. It is not a sign of lawyer weakness to discuss reality with a client.
3. Take plenty of time to explain the advantages and disadvantages of a legitimate offer to the client. Since settlement involves compromise, the client must process some amount of disappointment. This is easier for a well counseled client.
4. Accepting or rejecting a settlement offer is the client's decision. Accordingly, keep the client involved in settlement negotiations from start to finish. After Kentucky's *Clark v. Burden* (Ky., 917 S.W.2d 574 (1996)), getting the client's decision in writing is the only safe way to risk manage settlement negotiations. Often settlement offers come up suddenly just prior to trial, during trial, or at other times when quick action is required and administrative support is limited. Regardless of the circumstances use whatever paper is available, hand-write the client's decision, and have the client sign and date the paper. Document thoroughly all settlement negotiations and client discussions about settlement.
5. Recognize that settlement of a divorce case does not carry with it the same finality typical of other settlements. A divorce settlement is not the end of the matter for the client – rather a new beginning. Future consequences of faulty divorce settlements will reveal a lawyer's negligence with a vengeance. Many settlement malpractice cases involve divorce settlements that have not adequately covered QDROs, taxation, pensions, IRAs, and valuation of real estate.

"The best impromptu speeches are the ones written well in advance."

Ruth Gordon

For more on settlement negotiations read the KBA *Bench & Bar* article "Unsettling Settlements" available in the Risk Management section, *Bench & Bar* Articles, on Lawyers Mutual's web site at www.lmick.com.

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