The Risk Manager

Lawyers Mutual Insurance Co. of Kentucky

Fall 2005 Newsletter

Volume 16 Issue 4

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"Silent gratitude isn't much use to anyone."

Gladys Browyn Stern

Common Errors that Prevent Use Of An Expert Witness

By Senior Status Judge 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.

Some errors at trial seem to keep happening year after year. We continuously see instances when parties, usually plaintiff's lawyers, don't follow the correct steps to permit them to call an expert witness. A recent example is *Turner v. Appalachian Regional Healthcare, Inc.* (No. 2004-CA-000977-MR (Ky.App. 05/27/2005)) in which the court held that a failure to qualify one's expert witness in a medical malpractice case justifies summary judgment against the plaintiff. Obviously, errors like this can result in a malpractice claim.

The Standard for Qualifying an Expert Witness

KRE 702 authorizes the introduction of expert opinion testimony when:

1. the witness is qualified to render an opinion on the subject matter,
2. the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993),
3. the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and
4. the opinion will assist the trier of fact per KRE 702. See *Rogers v. Commonwealth of Kentucky* (No. 1997-SC-0851-MR (Ky. 09/26/2002)).

Note that in Kentucky not all cases require an expert. For example, if the conduct of a defendant physician is within the realm of knowledge of a juror, such as when the doctor operates on the wrong leg, an expert is not required. These exceptions are rare however.

The Two Most Common Mistakes in Qualifying an Expert

1. Most trial judges send out trial orders, usually months before a trial, that require each party to disclose by a certain date the names of all expert witnesses they intend to call. While one would think that an attorney would actually read these trial orders, they frequently ignore them, and finally give notice of the name of the expert they intend to call a few days before the trial date. The opposing counsel then moves the court to exclude the expert and, more likely than not, the expert is precluded from being called. This is only fair, since the opposing party was not given an opportunity to depose that witness and prepare to rebut the witness with his own expert witness. The offending attorney always screams bloody murder – and we can only imagine what they tell their client (if they tell at all) what happened to their case.
2. The second common error we see is when the expert called for a party cannot pass the test of being qualified to testify on the subject matter for which he is being called. Unless a person has subject matter knowledge by skill, practice, or training, that person will not usually be allowed to give an expert opinion to the jury. One shouldn't expect to qualify a nurse to testify as to the standard of care for a neurosurgeon about some technique employed in the surgery.

You should always be sure that your expert can meet a reasonable evaluation by the trial judge as to his qualifications, and you should disclose the name of the expert as required by the trial order in a timely manner. We suggest the best practice for assuring that you have an expert who can be qualified is to select someone in the same subject matter type of practice or job, with years of experience, and the ability to support his position. A good rule is to hire the expert and question him prior to filing the lawsuit. Then seek a ruling by the court well in advance of the trial that the expert is qualified.

IRS Standards for Lawyers Advising on Tax Shelters Clarified

The IRS issued final regulations in T.D. 9201 on May 18, 2005 that revise and clarify IRS Circular 230 standards for lawyers providing advice on tax shelters practicing before the IRS. This is a must read for all tax practitioners. The revised Circular 230 is available on the Internet at www.irs.gov/pub/irs-regs/td9201.pdf. For an overview of the revisions see *ABA/BNA Lawyers' Manual On Professional Conduct, Current Reports,* Vol. 21, No. 11, page 284 (6/1/05).

D.C. Federal District Court Ruling That Privacy Laws Don't Apply to Lawyers Appealed

The Federal Trade Commission caused a furor when it did not exempt lawyers from the Gramm-Leach-Bliley Act that requires financial institutions to notify customers of privacy procedures annually. The ABA and the New York State Bar both filed suits against the FTC. They argued that the FTC exceeded its authority in applying the law to lawyers because Congress had not intended in the Act to alter state regulation of lawyers. The D.C. Federal District Court agreed in *New York State Bar Ass'n v. Federal Trade Comm'n,* 2004 U.S. Dist. LEXIS 7698. The FTC filed an appeal, but advised that they will not pursue enforcement of the GLB privacy provisions against attorneys engaged in the practice of law unless and until there is a reversal of the district court's decision. Keep your eye on this one – we are not out of the woods yet. For details on the status of this issue go to www.abanet.org/poladv/glbfactsheet.html. See also *ABA/BNA Lawyers' Manual On Professional Conduct, Current Reports,* Vol. 21, No. 5, page 132 (3/9/05) and Vol. 20, No. 9, page 219 (5/5/04).

Hurricane Katrina and Law Firm Disaster Planning

As a result of Katrina, all along the Gulf Coast lawyers lost entire offices with little chance of recovering records of any kind unless they had taken extraordinary steps to store data off-site or use data storage services that offer online encrypted data storage. While you may practice where catastrophic events are unlikely, a fire can strike anywhere with the same devastating Katrina results for the burned-out firm. Now is a good time to review your disaster plan or develop one if you do not have a plan. Reading the *Bench & Bar* articles *"Getting Physical – Are You Ready for an Office Catastrophe?"* and *"What Happens To Your Clients If Something Happens To You?"* is a good place to start. They are available on our web site at www.lmick.com – go to the Risk Management/Bench & Bar Articles page.

Keeping Up With the Servicemembers Civil Relief Act

Once again Congress has amended the SCRA (Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-596 (LEXIS 2004)). With the many Kentuckians engaged in active military service today it is important for our bar to be familiar with the SCRA to assure that servicemembers and their families receive the full benefits of its protection. Recent changes include:

- A new definition of judgment provides that a judgment is "any judgment, decree, order, or ruling, temporary or final." The idea is to apply judgment broadly and not limit it only to final judgments in cases.
- Waiver of SCRA rights must now be in writing and in a document separate from any other document relating to an obligation or liability.
- The provisions of the SCRA that allow servicemember defendants to obtain a stay of civil proceedings are expanded to include plaintiffs as well.
- The provisions of the SCRA concerning the right to terminate residential and automobile leases are expanded to include servicemembers who are called to deploy as individuals (formerly only those deployed as a member of a unit were covered) and now apply to joint leases by a servicemember and dependent.

> *"Torture the data long enough, and it will confess to whatever you want it to."*
>
> *Barry Ritholtz*

For more detail on these changes see *Servicemembers Civil Relief Act (SCRA) and Uniformed Services Employment and Reemployment Rights Act (USERRA) Amendments and Updates* by LTC J. Thomas Parker, The Army Lawyer, March 2005, page 22 at www.jagcnet.army.mil/jagcnet in the Public Pages/Forms and Publications section. A helpful overview of the SCRA is available in the December 2003 issue of The Army Lawyer at page 38.

BEWARE the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Malpractice Avoidance: Steps taken to evaluate substantive areas of practice or methods of practice and to make decisions about whether to avoid or eliminate certain areas of law because of the malpractice risks and exposure involved.

The new bankruptcy act is described as a "labyrinth of administrative, procedural, and substantive requirements." It has made bankruptcy practice and adjudication more time consuming and expensive for clients, more labor intensive for lawyers and judges, while increasing malpractice exposure for lawyers. If this was not enough, the legislation is frequently criticized for being poorly written and ambiguous.

CCH offers a special eight page report on this new law in *"Bankruptcy Overhaul Enacted – New Rules for Bankruptcy Implemented"* available on its Web site at www.cch.com/bankruptcy/Bankruptcy 04-21.pdf. It provides a useful overview of the law and flags significant changes. Of particular interest to lawyers are those provisions that:

- Require the debtor's lawyer to certify the accuracy of factual representations in bankruptcy petitions and schedules – errors in these representations can lead to civil penalties and liability for trustee costs and fees for the lawyer.
- Require the debtor's lawyer to certify the debtor's ability to pay under reaffirmation agreements. This potentially opens the lawyer to claims from creditors when the debtor defaults.
- Include lawyers in the category of "debt relief agency" with the result that debtors' lawyers must comply with client disclosure requirements that include alternatives to bankruptcy. They must also state in advertising and other communications an announcement that: "We are a debt relief agency."

Even if you do not practice bankruptcy law it may affect your practice. For example, the new law has implications for employee-benefits lawyers, real estate lawyers involved with reorganizing a single-asset real estate business, and lawyers representing active-duty military personnel with debt problems. This new law should be given a high priority in your CLE program regardless of how much bankruptcy law you practice.

Sources for this item in addition to the CCH article are "Bankruptcy bar braces for impact of new code," Peter Geier, The National Law Journal, page 1, 9/5/2005; "Bankruptcy Law – Costs of the New Act," Craig Rankin & Christopher Alliots, The National Law Journal, page 13, 4/11/2005; and "Debtor's attorneys see red in Senate bill," Marcia Coyle, The National Law Journal, page 1, 3/14/2005.

Do You Know How to Risk Manage E-Discovery?

In following malpractice issues nation-wide we are seeing an increasing number of cases involving botched e-discovery responses with lawyers, along with their clients, being held responsible by courts for mistakes in managing the e-discovery process. Clients then blame their lawyer and make a malpractice claim. This is not an issue only for large litigation firms. With the rapid expansion of the ways that information is stored electronically by government, business, and private individuals, e-discovery requests can occur in virtually any litigation undertaken regardless of the nature or complexity of the case.

When responding to an e-discovery request lawyers must start by asking three questions:

Where are the e-documents? E-documents can be stored in desktop computers, laptop computers, hand-held computers, mainframe computers, network servers, floppies, CD-ROMs, DVDs, backup tapes, etc. They can all be in a central location or dispersed off-site in branch offices, employee homes, storage facilities, etc.

Are the e-documents accessible? E-documents used in current operations of the client are usually readily accessible, but older files may be damaged or readable only with obsolete software that is no longer supported by the supplier. Even if e-documents are accessible, can they be indexed or organized in a way that permits accurate computer identification of responsive documents? E-mail proliferates in such an ad hoc manner that it virtually defies indexing. Often meaningful review can be accomplished only by reading all e-mails in the system – a time consuming and expensive method.

"Luck is the residue of design."

Branch Rickey

How much of it is there? We all know that e-documents are proliferating exponentially. There are estimates that thirty-five billion e-mails will be sent a day in 2005. There can be one copy of an e-document or hundreds of copies in numerous locations. The point is that the potential for receiving a crushing e-discovery request grows everyday. Responding can become overwhelming for the most diligent client and lawyer.*

One authority offers this checklist for ensuring that relevant documents and data are preserved:

1. Advise your clients to adopt **and follow** an electronic document retention policy.
2. Retain an expert, if necessary, to map your client's computer network and determine where information is stored.
3. Delete data pursuant to the policy; make sure the data is actually deleted.
4. Develop policies to avoid saving unnecessary information.
5. Be wary of the existence of metadata.
6. Pay special attention to digitalized voicemails and e-mails.
7. In the event of a lawsuit or claim, institute a means to preserve all relevant evidence.
8. Anticipate discovery requests.
9. Consider cost-shifting.
10. If the court permits an adverse party to invade your client's computer, develop a protocol to protect confidential or privileged information, prevent damage and avoid interference with on-going operations.**

For an overview of e-discovery risk management read *E-Discovery Risk Management Is the "New New Thing"* in the September 2005 KBA Bench & Bar (also available on our Web site at www.lmick.com – go to the Risk Management/ Bench & Bar Articles page. An outstanding free research source for e-discovery is the newsletter *Case Law Update and E-Discovery News* on the Web site of Kroll Ontrack at www.krollontrack.com/.

* Del O'Roark, *E-Discovery Risk Management is the "New New Thing,"* KBA Bench & Bar, September 2005, Vol. 69, No. 5, page 24.

** Frank H. Glasser, *Electronic Discovery: New Issues For Risk Management,* manuscript article, ABA 2004 National Legal Malpractice Conference Materials at page 287 (4/28/2004).

Grabbing and Leaving – KBA Ethics Opinion 424

A lawyer desiring to leave a firm with clients faces many professional responsibility issues further complicated by the often acrimonious relations that develop with the firm before and after departure. To accomplish a move with the best chance of avoiding nasty repercussions, departing lawyers must understand their fiduciary obligation to the former firm, duties owed to clients, how to communicate with clients with regard to representation, the firm's defensive options when a lawyer leaves taking clients, and the malpractice risk management considerations when leaving a firm.

Until KBA E-424 was issued Kentucky lawyers had little Kentucky authority for guidance on the ethical considerations in leaving a firm with clients. The opinion covers duties owed to current clients by the departing lawyer and firm, communications with current and former clients by the departing lawyer, and retention of client files. The opinion does not address how far a lawyer may go in planning to depart before telling the firm, or give specific guidance on using firm information and procedures, apparently because these issues are primarily a matter of law.

> *"Any scam artist that doesn't use the Internet ought to be sued for malpractice."*
>
> *Joseph Borg*

KBA E-424 provides much needed guidance for lawyer mobility in Kentucky. It is in the July 2005 issue of the KBA *Bench & Bar* and is a must read for the entire bar – you never know when it might be relevant to your circumstances. For more information on risk management and other issues related to leaving a firm not covered in KBA E-424 read the *Bench & Bar* article *"Movin' On Redux"* available on our Web site at www.lmick.com – go to the Risk Management/Bench & Bar Articles page.

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