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THE RISK MANAGER

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Kentucky Supreme Court Expands Malpractice Exposure for Claims by Minors

In the landmark decision *Branham v. Stewart* (No. 2007-SC-000250-DG, 3/18/10) the Kentucky Supreme Court held that a minor may make a claim for legal malpractice or breach of fiduciary duty against a lawyer retained by a person acting as the minor's next friend or statutory guardian.

Branham is a must read Supreme Court case for Kentucky lawyers. While clarifying the professional relationship of lawyers with minors, the decision also raises ethical questions regarding representing minors. What follows is a brief synopsis of the case, identification of issues raised in a vigorous dissent, and risk management suggestions.

Facts: When the minor Gary Stewart was seriously injured in a car accident in which his brother was killed, Stewart's mother retained Branham to represent her individually, as Next Friend of Stewart, and as administrator of her deceased son's estate. Branham also represented the mother in obtaining appointment as statutory guardian of Stewart. The mother then settled all tort claims for $1,300,000. Branham and the mother allocated one-half of the net settlement to Stewart. Branham paid Stewart's share of the settlement to the mother as Stewart's guardian. The mother never filed an accounting in the guardianship proceedings and allegedly dissipated the funds belonging to Stewart.

After Stewart reached his majority and while living in Arkansas, his wife petitioned to have him declared incompetent apparently because of brain damage he suffered in the car accident. The petition was granted and the wife named guardian. The wife then filed a legal malpractice and breach of fiduciary duty suit against Branham in Pike Circuit Court. She alleged "that an attorney-client relationship between Branham and Stewart was formed by Branham's representation of Stewart's mother as his Next Friend and Guardian and that Branham breached his duties to Stewart."

Branham defended in part on the basis that he had no attorney-client relationship with Stewart and owed professional duties only to the mother. The Court granted him summary judgment after concluding that this cause of action was one that "had never before been recognized by Kentucky courts."

The Holding: The Supreme Court held "that an attorney pursuing a claim on behalf of a minor does have an attorney-client relationship with the minor. And that relationship means that the attorney owes professional duties to the minor, who is the real party in interest." The Court applied the following reasoning in reaching its decision:

> Under Kentucky law, a next friend may bring an action on behalf of a minor. The next friend is the minor's agent under Kentucky law. And the minor is the real party in interest in any lawsuit filed on the minor's behalf by the minor's next friend. Kentucky case law has long boldly proclaimed that the minor himself is the plaintiff in cases filed by the minor's next friend.

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Since 1987

"A secret is what you tell somebody else not to tell because you can't keep it yourself."

Leonard Louis Levinson

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> Unlike a next friend, whose authority is limited to filing suit on the minor's behalf and who lacks the authority to settle the lawsuit, a statutorily appointed guardian has a broader scope of authority and may settle a lawsuit on the ward's behalf with court approval. A guardian is the ward's agent under Kentucky law and, thus, actually represents the ward in any litigation in which the guardian retained the attorney in the capacity as guardian of the ward. And a guardian's statutory authority to prosecute or defend claims is expressly intended to protect the ward's estate. But the guardian's authority to settle litigation is intended to be on behalf of the ward, not on behalf of the guardian's own interests. In other words, any legal action by the guardian must be to help the ward, not necessarily the guardian.
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> ….
>
> And we perceive no conflict between an attorney furthering the interests of the minor or ward and any duties the attorney would owe the person who retained the attorney in the capacity as next friend or guardian. The role of both the next friend and the guardian is to protect and further the minor's or ward's interests. Indeed, not protecting the ward's interests exposes the guardian to potential liability for breach of fiduciary duty and other claims….
>
> ….
>
> On the other hand, were we to hold that the attorney retained by the individual acting in the capacity as next friend or guardian was not the attorney for the minor or ward, the minor or ward would be unrepresented, which would be contrary to the clear legislative intent to protect minors. Surely the Kentucky General Assembly did not enact a comprehensive legislative scheme concerning appointing guardians to further the "best interest" of minors, yet, intend for these minors to be unrepresented in litigation filed or settled on their behalf. *(footnotes omitted)*

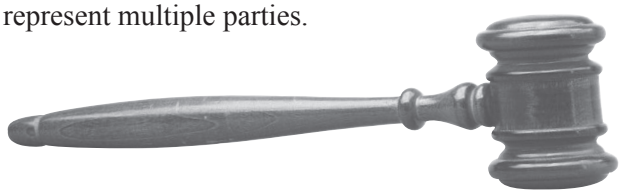
The Dissent: In his dissent Justice Scott pointed out the serious problems he sees with the majority opinion "extending the attorney-client relationship with a guardian to the ward of the guardian actually represented."

- The opinion opens the door to even greater extensions of third party malpractice claims in further derogation of the traditional concept of attorney-client fiduciary duties.
- The opinion "introduces an expensive complexity into litigation for minors that is unjustified given its infrequency and the fact that matters related to guardianships are committed to the exclusive supervision of the courts."
- The opinion "will necessarily endanger the finality of a guardian's decisions even though approved by a court."
- The opinion creates conflicts of interest that will "extend, by several multiples, the attorneys necessary to represent a parent/guardian with multiple children/wards, not to mention the additional attorney necessary for the parent's personal claims. With such a 'cast of counsel' imposed on one lay parent – each arguing for inconsistent results – how can one realistically expect our current statutory scheme to function inexpensively and expeditiously?"

Be sure to read the dissent as well as the majority opinion for a full appreciation of the added complexity of representations involving minors.

Managing the Risk: 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).
- 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.



"Statistics are but mendacious truths."

Lionel Strachey

More Evidence that the Government Will Aggressively Go after Lawyers Under the Medicare Secondary Payer Act (MSP)

A recent suit under the MSP reinforces the warning in our Spring 2009 Newsletter that lawyers must be alert to their potential liability for repayment of conditional Medicare payments. In December 2009 the United States filed suit against attorneys, law firms, and insurance companies concerning a $300 million settlement of a PCB contamination suit for failure to repay Medicare for conditional benefits paid to 907 clients. The fees paid the attorneys were $129 million. (*U.S. v. Stricker, et. al.*, CV-09-PT-2423-E, N.D. Ala. Dec. 1, 2009)

In our 2009 article we covered *U.S. v. Harris* (2009 WL 891931, N.D.W.Va.) that concerned a lawyer who was required to pay Medicare $11,367.78 plus interest because conditional Medicare payments to his client were not repaid. This article is available on our Web Site at lmick.com. Click on Resources and select The Risk Manager (by year). What follows is an update of risk management suggestions in that article:

- Read *Harris* – This case clearly explains an attorney's exposure for repayment of a client's Medicare payments complete with statutory and regulatory citations.
- Determine at the inception of a personal injury representation whether Medicare benefits are involved. If so, advise the client that any recovery may be reduced because recovered medical expenses for which conditional Medicare payments were received must be reimbursed.
- Include in the client's letter of engagement that reimbursement of Medicare medical payments will come from the client's share of any recovery – not from the lawyer's fee. In cases of substantial Medicare payments, alert clients that reimbursement of these benefits will significantly reduce the recovery. Get the client's written consent for you to pay Medicare's claim from the recovery.
- Upon receiving an award or settlement for a claim by a client who received Medicare conditional payments, be sure to reserve an adequate amount in your client trust account to cover potential Medicare repayments.
- If a client disputes reimbursement to Medicare from a recovery received by you, be sure to comply with Kentucky Rule of Professional Conduct 1.15, Safekeeping Property, in resolving the dispute.
- If the client receives the recovery directly and you have reason to believe he intends to ignore Medicare's interest, contact the KBA Ethics Hotline for guidance (SCR 3.530). Protect yourself from an allegation that you assisted a client in conduct that you knew was criminal or fraudulent.
- Ascertain from Medicare how much they are claiming and then attempt to negotiate a reduction. Be sure to conduct the negotiations with Medicare before a case is settled or tried so litigation strategy can be adjusted. A cost-benefit analysis could indicate that so little would be recovered after repaying Medicare that it is not worthwhile to pursue a third party claim. This consideration could be useful in negotiating a reduction in Medicare's claim.
- Examine every bill to verify what portion Medicare paid. Be sure that medical expenses not related to the recovery are not included in the Medicare claim.
- Do not rely on the client to pay Medicare. The safest practice is for the lawyer to obtain written authority from the client to pay Medicare from the recovery before making disbursement to the client.

"Vision is the art of seeing things invisible."
Jonathan Swift

ERISA Health Plan Recovers $38,899 of Ohio Personal Injury Lawyer's Fee

Failure to comply with the Medicare Secondary Payer Act is not the only way lawyers are being stung when primary payers are not reimbursed for medical benefits paid to clients. In *Longaberger Co. v. Kolt* (586 F.3d 459, 6th Cir., 2009) Kolt represented a client injured in an auto accident. The client was covered by his employer's ERISA Longaberger Company Health Plan and was paid benefits of $113,668 by the Plan. The Plan terms provided that it had a first priority lien on any third party recovery up to benefits paid. Kolt settled his client's claims for $135,000, which he deposited in his IOLTA client trust account. Without resolving the Plan's lien on the settlement, Kolt disbursed the settlement funds to the client, other involved lawyers, and retained a $45,000 fee. The Plan brought an action against the client and Kolt. The Federal District Court granted summary judgment in favor of the Plan and held Kolt responsible for one-third of the $113,668 lien or $38,899. The Sixth Circuit affirmed the judgment of the District Court.

Longaberger reviews ERISA health plan law and takes the reader through the ins and outs of how it applies to the facts of this case – a case that requires your close attention because private primary payers of health benefits are becoming just as aggressive as Medicare in seeking repayment from lawyers when there is a third party recovery. Risk managing this exposure is similar to that in the preceding article for Medicare. Add to those suggestions these considerations:

- Do not ignore the possibility of an ERISA Health Plan lien on any award or settlement in a personal injury case. Protect yourself by informing yourself – obtain and read the client's ERISA Health Plan if there is one. Your client is not entitled to a windfall that may ultimately come out of your assets.

- At the outset of the representation do a cost-benefit analysis with the client. An overhanging potential large lien may render a personal injury claim against a third party not worth the client's or the lawyer's time. A large lien, however, may provide a strong negotiating position resulting in the Plan reducing its lien to the point that the Plan, client, and lawyer may all come out ahead. It is imperative that such negotiations be conducted before any settlement – after settlement your negotiating leverage is lost.

U.S. Supreme Court Rules that it is Ineffective Assistance of Counsel Not to Inform a Noncitizen Client that a Guilty Plea May Lead to Deportation

In *Commonwealth v. Padilla* (253 S.W.3d 482, Ky., 2008), the Kentucky Supreme Court denied a noncitizen's claim of ineffective assistance of counsel for failure of his defense counsel to correctly advise him of the deportation consequences of a guilty plea. The Court ruled that deportation is merely a collateral consequence of conviction and, therefore, the Sixth Amendment's effective assistance-of-counsel guarantee did not apply.

The U.S. Supreme Court overruled this finding in *Padilla v. Kentucky* (U.S., No. 08–651, 3/31/10) by holding that defense counsel must inform a client of the possibility of deportation if a guilty plea carries that risk. The Court's decision is explained in the case Syllabus as follows:

> Changes to immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges' authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

We first alerted you to the increased risk of malpractice in immigration representations back in 2002. This new risk for Kentucky lawyers was the result of the increasing number of immigrants living in Kentucky and the post-9/11 laws resulting in the strict enforcement of immigration law (read deportation). Our prior newsletters on immigration risk management included two checklists. Now seems an appropriate time to offer them again.

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"The most corrected copies are commonly the least correct."
Francis Bacon

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From the Winter 2002 Newsletter:

Lawyers should advise all clients not U.S. citizens to carry required documentation with them at all times; *e.g.* green card, student visa, or INS approvals. This is the law, but was not being enforced. It is now. Other considerations are:

- Lawyers defending immigrants in criminal cases are not considering the immigration consequences of pleading guilty to serious crimes. Conviction causes the immigrant to be subject to removal and ineligible for many, if not all, forms of relief from removal. It is essential that defense counsel know the unintended consequences of a guilty plea for immigrants when plea-bargaining.
- Lawyers can expect to be asked to help alien clients prepare for border crossings. This requires a comprehensive review of a client's history to prepare the client for a searching background check when attempting to cross the U.S. border. Refer to the U.S. government's list of terrorist organizations in making this review.
- Immigrants who have overstayed their visa and are "out of status" may seek advice on how to apply for an extension. The old practice of returning to the appropriate consulate overseas to obtain a visa and return to the U.S. is now problematic. There could be considerable difficulty in obtaining a new visa and re-entry into the U.S. is no sure thing. If immigrant clients do leave the U.S. on a trip, advise them to take their complete file of documentation authorizing U.S. residency and an updated letter of employment. It may be appropriate to seek means other than leaving the U.S. to regain legal status.

- Immigrants seeking permanent residency or citizenship may ask for legal advice in preparing application forms. Stress the absolute necessity for meticulous completion of all forms to avoid automatic rejection for an incomplete submission.
- Alien clients should be advised in the strongest terms not to miss an immigration hearing. If they do, they can expect to be pursued by the authorities and face removal.

See "Threat of Terrorism Yields Surge in Immigration" by Diana Digges, Lawyers Weekly USA, 2001 LWUSA 829, 10/15/01.

From the Spring 2003 Newsletter:

F. J. Capriotti III (franco@capriotti.com) and Richard M. Ginsburg published in the Oregon Professional Liability Fund newsletter "In Brief" an excellent checklist for obtaining the key information required for immigrant representation with special emphasis on criminal matters. It is reprinted here with permission.

If your client's case involves an immigrant issue, gather and prepare the following information.

1. Name and all aliases.
2. Date and place of birth.
3. Native language and level of English fluency.
4. Summary of immigration history (including first/last entry to the United States, and prior INS arrests/deportations).
5. A copy of your client's:
   a. Passport (all pages).
   b. "Green card" (front and back) (this card proves that an alien is a lawful permanent resident).
   c. I-94 arrival card (front and back – placed in the passport at the time of arrival).
   d. Any "other" immigration related documents.
6. Information on family, especially parents, children, or spouse who were born in the United States or possess a green card (include ages and birth places) and copies of their immigration related documents.
7. Any immigration documents filed for the client by family members and/or employers and INS receipts and notices.

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"Misquotations are the only quotations that are never misquoted."
Hesketh Pearson

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8. If your client has a green card, when and how he or she got it. (Note: This information appears in different places depending on when the green card was issued. Some cards have the code "ADJ DATE," others have it in reverse-date format such as: 980114.)
9. If your client is or has been a nonimmigrant (such as student, tourist, etc.), list periods and any violations of status or overstays.
10. A list of the crime(s) the client is accused of, including statutory citations, and copies of all charging documents and police reports.
11. A list of the possible crimes (including violations) you are considering as a plea for your client.
12. A list of the sentencing possibilities for pleas you are considering. Include information on statutory maximum sentence possible and years probable (including estimates of years of actual incarceration and year of suspension/probation).
13. If the client has already been convicted, or has prior convictions, provide statutory citations, charging documents, police reports, and relevant orders/judgment/sentence. If not listed on the documents, also provide information on whether this crime is classified as a violation and/or infraction and/or misdemeanor and/or felony, including statutory maximum and actual sentences imposed.
14. Have any of the crimes (including the current crimes) been committed against a spouse, live-in partner or person with whom the client shares a child in common or has the client ever been found to have violated a restraining order?
15. Has the client ever admitted having committed a crime (or the essential elements of a crime) to a government employee, or under oath to anyone?
16. Has the client ever had any other problems or encounters with the law?
17. Is the client being detained and is there an INS hold?