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THE RISK MANAGER

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# RECENT KENTUCKY SUPREME COURT DECISIONS FEATURE LAWYER LIABILITY AND ETHICS ISSUES

*In recent months the Kentucky Supreme Court issued a burst of opinions of special significance for lawyer liability and risk management. This issue of The Risk Manager captures these decisions in one place to help you stay current on what you need to know to provide competent service and avoid malpractice claims and ethics problems.*

## Kentucky Supreme Court in a Landmark Decision Addresses Whether:

- **The suit-within-a-suit procedure remains the proper method for litigating legal malpractice.**
- **The physical impact rule remains the proper threshold standard for claims involving emotional distress.**
- **Lost punitive damages are recoverable in legal malpractice actions — an issue of first impression in Kentucky.**

In *Osborne v. Keeney* (Ky., Nos. 2010-SC-000397-DG, 2010-SC-000430-DG (12/20/2012)) the Court offered the Bar a clear decision that is a clinic on Kentucky malpractice law – a must read!

**Facts:** Osborne suffered damages when a pilot of a plane lost control and crashed into her home. While Osborne suffered no direct physical harm, her doctor testified that Osborne was emotionally unstable as a result of the destruction of her home and her personal belongings. She received treatment for this condition for an extended period of time after the crash. Her lawyer negotiated a settlement with Osborne's homeowner's insurance carrier with the plan to pursue claims against the pilot. Approximately two years after the crash, and after the one-year statute of limitations had passed, the lawyer advised against proceeding against the pilot. Osborne insisted that suit be filed in the hope of receiving substantial damages. Efforts to overcome the statute of limitations failed and the court entered summary judgment for the pilot.

Osborne then sued the lawyer for breach of contract, legal malpractice, and fraud and deceit. She won on all claims and was awarded $54,924.04 for loss of her personal property; $500,000 for pain and suffering from the airplane crash; $750,000 as punitive damages against the pilot; $53,025.39 for legal fees paid to the lawyer; $250,000 for mental anguish resulting from the lawyer's representation; and $3,500,000 in punitive damages against the lawyer. On appeal the Court of Appeals affirmed in part and substantially reduced the damage award. The Supreme Court reversed and remanded the case to the trial court for further proceedings.

**Decision:**

- **Is the suit-within-a-suit procedure the proper method for litigating legal malpractice? YES**

  When dealing with a situation such as the instant case where a claim is lost, including, but not limited to, because it is barred by an applicable statute of limitations, a plaintiff must

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*"If a small thing has the power to make you angry, does that not indicate something about your size?"*

*Sydney J. Harris*

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recreate an action that was never tried. The plaintiff must bear the burden the plaintiff would have borne in the original trial. And the lawyer is entitled to any defense that the defendant would have been able to assert in the original trial. This is what is commonly known in Kentucky law as the suit-within-a-suit approach. While this approach has been repeatedly affirmed, the actual procedure for trying such a case remains elusive. Here, we are presented with the question of how a jury should be instructed in a suit-within-a-suit.

When trying a suit-within-a-suit, especially when the reason for the lost claim is the expiration of the relevant statute of limitations, "all the issues that would have been litigated in the [barred] action are litigated between the plaintiff and the plaintiff's former lawyer." And, in recreating the litigation, the usual instructions that should be given in the underlying case, including any special verdict forms, are those to be used in the malpractice trial. (*footnotes omitted*)

- **Does the physical impact rule remain the proper threshold standard for claims involving emotional distress? NO**

[W]e hold that the impact rule is no longer the rule of law in Kentucky. A plaintiff claiming emotional distress must satisfy the elements of a general negligence claim, as well as show a severe or serious emotional injury, supported by expert evidence.

The Court explained the basis of the new rule as follows:

[T]hese cases should be analyzed under general negligence principles. That is to say that the plaintiff must present evidence of the recognized elements of a common law negligence claim: (1) the defendant owed a duty of care to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury. Furthermore, we recognize that emotional tranquility is rarely attained and that some degree of emotional harm is an unfortunate reality of living in a modern society. In that vein, to ensure claims are genuine, we agree with our sister jurisdiction, Tennessee, that recovery should be provided only for "severe" or "serious" emotional injury. A "serious" or "severe" emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiff's everyday life or require significant treatment will not suffice. And a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment. (*footnotes omitted*)

- **Are lost punitive damages recoverable in Kentucky legal malpractice actions? NO**

We hold that lost punitive damages are not recoverable from the attorney against whom a malpractice claim is brought. We do so for two main reasons: first, the argument that punitive damages can be recast as compensatory damages in a legal malpractice claim is flawed and unsupported by our case law; and, second, the deterrence function of punitive damages would be completely written out of the law because the nexus between the attorney accused of malpractice and the actual wrongdoer is far too attenuated. As such, a client's general right to be made whole should yield in light of the nature and purpose of punitive damages.

Not permitting plaintiffs to recover lost punitive damages means that they may not recover as much as they might have in the underlying action. While this may seem harsh, we recognize that this rule is ameliorated by the fact that a plaintiff may seek punitive damages from the attorney for the attorney's *own* conduct. (*footnotes omitted*)



*""If you would convince others, seem open to conviction yourself."*
*Lord Chesterfield*

## The Kentucky Supreme Court Provides Guidance on Investigating Jurors on Social Media

In *Sluss v. Commonwealth* (Ky., No. 2011-SC-000318-MR (9/20/12)) the Kentucky Supreme Court provided its first guidance for Kentucky lawyers using social media to investigate jurors. The opinion described the issue as follows:

> There is further an unsettled question about the extent to which counsel for a criminal defendant may investigate jurors during or after trial. The question generally involves whether the attorney engaged in inappropriate "communications" with a juror, such as adding the juror as a "friend" on Facebook directly through his own account or through a form of deception, or whether the information was truly public. If the information about a juror is available to the public on a social media site, ethics opinions from other jurisdictions suggest that counsel may investigate that information. …. Given many attorneys' unfamiliarity with the minutiae of social media, it is not unreasonable for an attorney to be cautious as to his conduct while investigating jurors during the trial.
>
> In fact, there is evidence that, while the practice of conducting intensive internet vetting of potential jurors is becoming more commonplace, "lawyers are skittish about discussing the practice, in part because court rules on the subject are murky or nonexistent in most jurisdictions." (*footnotes and citations omitted*)

In determining its guidance the Court cited the *New York County Lawyers Association's Committee on Professional Ethics, Formal Op.* 743 (May 18, 2011)(hereinafter Opinion 743) as follows:

> It is proper and ethical under [Rule of Professional Conduct] 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not "friend" the juror, email, send tweets to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any representations or engage in deceit, directly or indirectly, in reviewing juror social networking sites.

The Court then adopted the opinion's procedure for a lawyer to report jury misconduct when misconduct is discovered:

> In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly comply with [Rule of Professional Conduct] 3.5(d) and bring such misconduct to the attention of the court, before engaging in any further significant activity in the case.

The Court concluded its consideration of this issue as follows:

> Kentucky's SCR 3.130(3.5) is similar to New York's Rule 3.5 in that it prohibits certain communications between a lawyer and a juror, and distinguishes between conduct during the trial and after the jury has been discharged. The New York ethics opinion provides reasonable guidance for counsel by weighing the party's right to have an impartial jury against the lawyer's ethical duty not to interfere with jurors. This Court therefore adopts this model for the type of investigation an attorney may conduct before and during trial into a juror's social media account. Importantly, SCR 3.130(3.5)(c) also clearly governs the circumstances when an attorney may communicate with a juror after the jury has been discharged. The same principles that apply to communications made before and during trial apply to post-trial communications as well. (*footnote omitted*)

We first brought the issue of using social networking sites to investigate a matter in the article *Risk Managing Internet Social Network Investigations* in our Spring 2012 newsletter. That article covered friending represented parties, witnesses, unrepresented potential witnesses, and Internet investigation of juror Internet and social networking postings. It is available on Lawyers Mutual's website at *www.lmick.com*. Click on Resources, Subject Index, scroll to The Risk Manager, select the Spring 2012

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issue, and select the article title.

In discussing the Internet investigation of juror Internet and social networking postings we cited Opinion 743 as useful guidance until Kentucky authority on the limits of such investigations was forthcoming. Happily, the Supreme Court found this opinion appropriate for its purposes in establishing guidance for Kentucky lawyers. (Unhappily, Opinion 743 was incorrectly cited in the article and is corrected as follows: *New York ~~City~~ County Lawyers Association Committee On Professional Ethics Formal Opinion No.: 743, 5/18/2011.*)

We have two comments regarding the Supreme Court's guidance:

- The Court framed the question in terms of "the extent to which counsel for a criminal defendant may investigate jurors during or after trial." Opinion 743 makes no distinction between criminal and civil trials in applying its guidance. It is probably safe to conclude that the Court intended the guidance in *Sluss* to be equally applicable to civil as well as criminal trials. Supporting this conclusion is that the Court adopted Opinion 743 in the following language without differentiating between civil and criminal trials:

  > "This Court therefore adopts this model [*Opinion 743*] for the type of investigation an attorney may conduct before and during trial into a juror's social media account."

  If in doubt, call the KBA Ethics Hotline.

- Special Internet technology effort must be taken to comply with the requirement that: "[A] lawyer must not … communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring."

  - In Opinion 743 the Committee observed in a footnote that avoiding juror awareness of monitoring is more difficult than it appears: "For example, as of this writing, Twitter apparently conveys a message to the account holder when a new person starts to 'follow' the account, and the social networking site LinkedIn provides a function that allows a user to see who has recently viewed the user's profile. This opinion is intended to apply to whatever technologies now exist or may be developed that enable the account holder to learn the identity of a visitor."

## Kentucky Supreme Court Issues Firm Guidance for Lawyers Serving as Both Executor and Attorney for the Estate

In *Kentucky Bar Association v. Jacobs* (Ky., No.2012-SC-000413-KB (12/4/2012)) the Supreme Court considered a disciplinary action against a lawyer who served as both executor and attorney for the estate. The lawyer was cited for charging an unreasonable fee, co-mingling funds of his client and third parties with his personal accounts, and for failing to provide a full accounting of the fees charged – violations of the Kentucky Rules of Professional Conduct SCR 3.130 (1.5(a) and 1.15(a) and (b). In finding the Respondent guilty of the charges, the Court provided the following guidance for lawyers serving as executor and attorney for an estate:

**Unreasonable Fees:**

- … [i]t is well-settled that an attorney who accepts appointment as an executor cannot also serve as legal counsel for the estate *and receive dual compensation for the additional role*, absent approval of such an arrangement in the will. …. ("To receive dual compensation [as executor and estate's attorney], one must have been appointed and identified as both executor and attorney in the will so as to evince testator's intention that the attorney be compensated in both capacities."). (*citations omitted*)

- … Respondent violated SCR 3.130-1.5(a) by collecting amounts from the Estate as both lawyer and Executor without seeking the prior approval from the court, and by the collection of fees more than twice the maximum authorized … as compensation for an executor ….

- [i]f a court finds an executrix is deserving of pay for extraordinary services over and above the usual commission, it should make a specific finding to that effect. Without such a finding, the excessive fee should be disallowed. …. It is undisputed that no such specific finding was made by the probate court in this case.

**Comingling Client Funds:**

Respondent argued that he considered his advance flat fee earned and, therefore, was properly placed in his personal account. The Court building on its finding that the fees were excessive ruled:

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*"The human mind can bear plenty of reality, but not too much intermittent gloom."*
*Margret Drabble*

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- … because Respondent was not entitled to those amounts, but nevertheless received them and deposited them into his office accounts, he by definition violated SCR 3.130-1.15(a).

- Finally, we will not distinguish between "unearned" funds, in the traditional sense, from funds that are theoretically "earned," but are barred by statute from disbursement without the probate court's approval. It further bears emphasis that this issue deals with a lawyer's handling of client and third-party funds, and it is fundamental that such rules will be strictly enforced.

**Failure to Provide an Itemized Accounting of Fees:**

In response to a request for an accounting of fees the respondent provided a brief description of activities and dates, but no entries regarding time spent on an activity or whether conducted as executor or attorney for the estate. The Court found that:

> The Rule provides that "upon request by the client or third person, [a lawyer] shall promptly render a *full accounting* regarding such property." SCR 3.130-1.15(b) (emphasis added). We are persuaded that in the context of a lawyer providing an accounting of fees charged to a client, fundamental to that process is a reflection of the *time* spent on each of the relevant tasks. …. Only in this way may a client assess whether the charges are reasonable so as to further pursue relief.

The foregoing captures the key points of the opinion. It is essential to read the full opinion to gain all the guidance the Court provides and appreciate the extent of the Court's emphasis on strict accountability when dealing with client and third-party funds. Do not serve as executor and attorney for an estate before you read and study *Kentucky Bar Association v. Jacobs.*

## Kentucky Lawyer's Failure to Properly Withdraw from Representation Results in Criminal Contempt Finding

In *Poindexter v. Commonwealth of Kentucky* (Ky., No.2011-SC-000275-DG, (12/20/2012)) the Supreme Court considered the case of a defendant left without representation when his lawyer failed to appear at arraignment. The judge held the lawyer in criminal contempt and ordered the lawyer to pay a $250 fine and spend 96 hours in jail probated for two years.

The lawyer appealed on the basis that he had properly withdrawn from representation. The Court disagreed finding that the lawyer had not followed court or professional responsibility rules in withdrawing. He therefore had a duty to appear in court and the trial court had not abused its discretion in finding the lawyer in criminal contempt of court.

The risk management and professional responsibility principle concerned in this case is:

> If the matter is before a tribunal, a lawyer may withdraw only with the permission of the tribunal even though good cause for withdrawal exists. Compliance with this requirement typically involves following court rules for filing a motion for withdrawal or substitution of counsel. The court has the discretion to deny a request to withdraw for reasons of judicial economy or in the best interest of the client. If withdrawal is denied, the lawyer must continue the representation with no reduction in responsibilities to the client or diminishment of the client's interest. (*How to Fire a Client*, Kentucky Bench & Bar Vol. 65, No. 3, May 2001; available on Lawyers Mutual's website at *www.lmick.com*. Click on Resources, Subject Index, scroll to Bench & Bar Articles, select the May 2001 issue, and select the article title.

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*"Hope is that feeling you have that the feeling you have isn't permanent."*

*Jean Kerr*

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## Kentucky Lawyer's Failure to Properly Withdraw from Representation Results in Criminal Contempt Finding

It is not difficult to have sympathy for the lawyer in this case (*see the dissent*). However, it is crucial to note this decision is consistent with a stream of Supreme Court rulings holding Kentucky lawyers to the highest professional responsibility standards. In *Poindexter* the client apparently was given little time to find a new lawyer and thereby left unrepresented in court. These facts vividly show that the risk of an unjustified act of withdrawal is that a client will be considered abandoned by the lawyer. A lawyer's worst nightmare is to have a client and not know it. That is exactly the situation when a lawyer mistakenly thinks a withdrawal is effective. The lawyer is then exposed to liability for a claim for all damages proximately caused by the unjustified withdrawal, bar discipline, and contempt findings. When withdrawing from representation it pays to know what you are doing.

## 2013 ANNUAL POLICYHOLDERS' MEETING

**The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 8:00 am, Wednesday, June 19 in the Nunn Room, Galt House East, Louisville, KY. Included in the items of business are the election of a class of the Board of Directors and a report on Company operations. Proxy materials will be mailed to policyholders prior to the meeting. We urge all policyholders to return their proxy and to attend the meeting**