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THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

Could This Happen to You?

$2.5 MILLION PERSONAL INJURY SUIT DISMISSED

BECAUSE LAWYER UNDERPAID THE FILING FEE BY $2.00

A Virginia lawyer representing an assistant band director in a personal injury suit mailed the complaint and a check for filing fees of $344.00 on September 2, 2010 to the circuit court. This amount was determined by a staff assistant asking a nearby clerk's office and not that of the circuit court where the case was to be filed.

The clerk of the circuit court received the complaint and fees on September 3, 2010. On September 9, 2010, the day the statute of limitations expired, the clerk informed the lawyer that the check for filing was $2.00 short – it did not cover a library assessment. The lawyer immediately **mailed** a check for $2.00 with the result that the clerk, after receipt of the check, filed the action on September 13, 2010.

The lawyer dealt with the resulting statute of limitations issue by taking a voluntary nonsuit and refiled the action. The defendant promptly moved that the case be dismissed because the initial complaint was not filed within the two-year statute of limitations. The Circuit Court judge agreed and dismissed the case. The Virginia Supreme Court affirmed the lower court's dismissal. *(Landini v. Bil-Jax, Inc., Supreme Court of Virginia, Record No. 140591, Circuit Court No. CL12-062 (unpub. order) (1/30/2015))*

You cannot make this stuff up. Why would a staff assistant not check with the clerk of the circuit court that had jurisdiction over the case? Why would a filing fee deficiency be **mailed** on the day that the statute of limitations expired? Was it assumed that the clerk filed the action without the entire filing fee being paid? What kind of docket control were they using? Why wait

CONTINUED ON PAGE 2

BEWARE OF BUSINESS CLIENT-IMPOSED GUIDELINES ON OUTSIDE COUNSEL

At the Legal Malpractice & Risk Management Conference last February the presentation "Outside Counsel Guidelines" examined the increasing use of client-imposed guidelines that law firms must accept to receive the client's business. These guidelines are reminiscent of the efforts of insurance companies in the 1980s and '90s to control the costs of defense counsel by unrealistically limiting costs and requiring advance approval before hiring expert witnesses, scheduling depositions, or performing certain legal research. The ethics problem these guidelines created for defense lawyers was resolved in KBA Ethics Formal Opinions E-331 and E-368. Those opinions made it clear that while insurance companies have an interest in limiting defense costs, this cannot be accomplished by compromising a lawyer's ethical duty to an insured client.

The difference today is that the guidelines are coming from the client – not an insurance company providing a defense to an insured. One commentator described the situation as a duel between a law firm's letter of engagement and the client's outside counsel guidelines. Another difference is that many of the guidelines do not invoke ethics issues for the lawyer, but may impose intrusive requirements that may be expensive and unnecessary for the practice of the matter. While these guidelines

CONTINUED ON PAGE 3

INSIDE THIS ISSUE:

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UNDERPAID FILING FEE

CONTINUED FROM FRONT PAGE

until seven days before the statute of limitations expired to file the suit? What were they thinking? How will the lawyer defend the $2.5 million malpractice claim that he is sure to receive? Will he argue, "Aw shucks the claim was only worth about $25,000?" Good luck with that.

We hope that this could never happen to you – but it just might. Lawyers Mutual has had claims based on court clerks allegedly failing to file mailed complaints, mortgages, and other legal documents either in a timely manner or not at all. In one case the clerk's office was in the process of moving when the mailed document should have been received. In other cases the clerk's position was that the mail was never received. The result is that deadlines and statutes of limitations are missed and unrecorded mortgages go unnoticed until it is too late to avoid a claim. Without irrefutable evidence that the document and filing fee were timely received by the clerk, a lawyer has little defense against a malpractice claim. Ultimately, it is always the lawyer's responsibility to determine that mailed documents are received and filed or recorded in time.

HOW DOES YOUR FIRM RISK MANAGE OUTGOING MAIL?

- Do you take it for granted that your mail gets to the proper destination and on time if you mailed it with a reasonable amount of time to get there?
- Do you assume that the court clerk received and deposited your mailed filing fee and promptly filed the legal document accompanying the fee?
- Do you avoid using overnight, express delivery companies with Internet tracking service to cut down on costs?
- Are you familiar with the postage rates, weight limitations on mail, and restrictions on where mail can be dropped?
- Do you docket time sensitive mailings for follow-up to confirm arrival at the correct destination?
- Do you have an office procedure to confirm that mailed filing fees have been deposited in a timely manner?
- Do you use "Address Service Requested" on First-Class Mail®?
- Do you get the temporary addresses of clients who go south for the winter as part of your routine client intake procedures?

RECOMMENDED OUTGOING MAIL RISK MANAGEMENT PROCEDURES

Every practice should have tight control procedures for outgoing mail:

- For all outgoing mail double check addressing to make sure that a complete address is used, including any suite numbers and nine-digit zip codes.
- Use the post office's Special Address Services (Ancillary Service Endorsements) for outgoing first class mail to give the Postal Service specific instructions for how to handle your mail if it is undeliverable as addressed. These services include:
  - Address Service Requested
  - Return Service Requested;
  - Change Service Requested;
  - Forwarding Service Requested; and
  - Electronic Service Requested.
- If you are representing clients who go south for the winter, make sure you get their temporary address as part of your client intake procedures.
- All outgoing mail that contains time sensitive documents must be sent in a way to track the date of its arrival at the correct destination. This can be done any number of ways, the most obvious being via registered U.S. mail return receipt requested with signature of the receiving person.
- Overnight mail and express delivery services provide both Internet tracking and recipient signature service. Many firms, if not most, use these services for time-sensitive documents.
- Consult the USPS guides for mailing to be sure you are in compliance with current mailing regulations. Start with USPS Business Mail 101. It is readily available on the Internet – just Google.

None of this is rocket science. It is much harder than that. It requires constant attention to detail by docketing time sensitive outgoing mail and e-mail for follow-up to assure that they were received in a timely manner by the right addressee and, when a filing fee is involved, that the fee was deposited.

If the fee is not deposited in the regular course of business, you are on notice that something is amiss requiring prompt action. Never, never send by regular mail or e-mail any time sensitive document when there is not enough time to get the irrefutable confirmation that it was received on time. Following this rule could save you from a malpractice claim and a major out-of-pocket expense.

"TO LOVE WHAT YOU DO AND FEEL THAT IT MATTERS – HOW COULD ANYTHING BE MORE FUN?" *Katharine Graham*

CLIENT-IMPOSED GUIDELINES

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are especially significant for large law firms, they are a growing business practice in controlling legal service. Lawyers in any size firm must be aware of their potential for ethics violations, malpractice claims, and unwarranted interference with a firm's business practices.

EVALUATING GUIDELINES

Client guidelines are typically divided into three categories – those that may reasonably be required of all outside counsel; those that a major client could reasonably apply to a large law firm; and those that overreach by resulting in unethical practice or are too intrusive in law firm management. The following examples of each category are from *"When Intervention Goes Too Far,"* by Rees W. Morrison, New York Law Journal (2/21/2008):

Reasonably acceptable guidelines:

- Deliver work product electronically.
- Present invoices electronically.
- Not bill for too many meetings among the lawyers of the firm or with too many people at the meetings.
- Maintain files and records of the client after the matter closes.
- Notify the law department of billing-rate increases.

OK for big client/big firm:

- Firm must provide training beyond firm standard CLE events.
- Firm must appoint a client relationship partner who devotes non-trivial amounts of non-billable time to overseeing the relationship.
- Firm must absorb costs of training associates who are new to a matter.
- Firm must assign and keep a core group of lawyers on their matters.
- Firm must bill in tenths of an hour.
- Firm must prepare budgets in the form the client wants on major matters.
- Firm must charge in agreed-to ways for travel time.

Over-Reach:

- Client evaluates the performance and influences the promotion of individual law firm lawyers.
- Client restricts in a heavy-handed way the addition to core teams of extra lawyers.
- Client forces work into imposed staffing models.
- Client insists that only associates with more than a certain number of years of experience work on matters.
- Client seeks disclosure of total billable hours of lawyers who work on their matters.
- Client demands non-billable project managers on major cases or matters.
- Client demands most-favored-nation billing terms.
- Client freezes billing rate for years.
- Client seeks real-time billing information.
- Client requests metrics on other companies' matters, even if the data is redacted.
- Client forces firm to absorb too many internal costs.
- Client requires disclosure of conflicts of interest that are potential or related to business issues.

MANAGING THE RISK

At the Risk Management & Legal Malpractice Conference, five risk management considerations for client-imposed guidelines were outlined:

1. All lawyers in a firm should be trained regarding client-imposed guidelines and the pitfalls they may contain.
2. Remove the authority of individual partners and lawyers to agree to client-imposed guidelines. Consolidate this authority in a managing partner or executive committee.
3. Negotiate removal of guidelines that create ethics violations or impose too intrusive conditions on the business practices of the firm.
4. Be prepared to walk away if the client insists on conditions that cannot be accommodated for either ethics or business reasons.
5. Begin risk managing client-imposed guidelines by taking an inventory now of guidelines that currently apply to the firm. The point was made that before an inventory is taken, only a sole practitioner could be absolutely sure what guidelines are already in place.

Client-imposed guidelines are expected to become more prevalent in the future as more clients attempt to control legal service expenses and firm business practices. Now is the time to establish a policy on how your firm will risk manage the issues they present.

"IT IS NOT HARD WORK THAT IS DREARY; IT IS SUPERFICIAL WORK." *Amy Hempel*

CANCER STRIKES TWO LAWYERS AND LEADS TO HARSH RESULTS

Neither Lawyer Apparently Had Emergency Plans in the Event of Death or Disability

Recent cases in New York and Ohio once again show how important it is for lawyers to have emergency plans in the event of death or disability. This is especially critical for sole practitioners.

In *Cabrera v. Collazo*, (115 A.D.3d 147 (2014)) Tanzman was retained to represent the administrator of an estate in a wrongful death action based on medical malpractice. Tanzman died of cancer on October 24, 2010 before filing the action. The statute of limitations ran on November 4, 2010. The administrator then sued, among others, Tanzman's estate for malpractice. A motion for dismissal was filed on the theory "that since the attorney-client relationship was terminated by Tanzman's death on October 24, 2010, Tanzman and his law firm cannot be held liable for any damages sustained by plaintiff as a result of the subsequent running of the statutory limitations period on November 4, 2010." This motion was denied and appealed. In upholding the denial the appellate court held:

> According to the Tanzman defendants, neglect of a client matter by an attorney is not actionable if, as here, the attorney dies before the applicable limitations period runs against the client. Granted, it has been held that, for the purpose of determining the timeliness of a professional malpractice action, the action accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court." That a cause of action might accrue when the plaintiff actually sustains a loss, however, does not require the conclusion that an attorney is absolved of responsibility for any and all consequences of his neglect of the matter simply because it occurred *prior* to accrual of an actionable claim.
>
> [I]t appears that the inaction of counsel rendered the lapse of plaintiff's cause of action not merely possible—or even probable—but inevitable. On a motion directed at the sufficiency of the pleadings, the issue is whether the facts alleged fit within any cognizable theory of recovery, not whether the complaint is artfully pleaded, and the circumstances of this matter do not warrant dismissal of the action, at this juncture, as against the Tanzman defendants. (*citations omitted*)

In *Specht v. U.S.* (2015 WL 74539 (S. D. Ohio 2015) (1/6/2015)) the executor of an estate appealed an IRS $1.2 million penalty because the estate's lawyer Backsman, suffering from brain cancer, failed to timely file the estate tax return. Based on this malpractice the lawyer subsequently voluntarily relinquished her law license and was declared incompetent. The Federal District Court reluctantly upheld the penalty in a lengthy opinion concluding with this observation:

> While this Court finds it difficult to hold that Plaintiffs are ultimately responsible for Ms. Backsman's malpractice, that is what binding precedent requires. Notably, in light of Ms. Backsman's malpractice, the State of Ohio refunded the late filing and payment penalties for Ohio estate taxes without the Estate filing a refund suit. It is truly unfortunate that the United States did not follow the State of Ohio's lead.

We may never know how the financial consequences of these tragic circumstances impacted Tanzman's family or Ms. Backsman ability to obtain the care she needed. What we do know is if death and disability emergency plans had been in place, these adverse consequences could have been avoided.

If your firm does not already have an emergency plan for the death or disability of its lawyers, we urge you to implement one immediately. *A Practical Guide To Achieving Excellence in the Practice of Law* offers this checklist for preparing one:

a. Have I left written instructions for steps to be taken if I die or become permanently or temporarily incapacitated?
b. Does my secretary or someone else know where to find these instructions?
c. Have I indicated in my office manual where these instructions are to be found and to whom they should be given?
d. Have I arranged with another lawyer to take necessary protective measures upon my death or incapacitation, including when appropriate:
    1. notifying my clients?
    2. reviewing client files to determine if any immediate action is necessary?

CONTINUED ON PAGE 5

"ALWAYS BE SMARTER THAN THE PEOPLE WHO HIRE YOU." | *Lena Horne*

CANCER STRIKES

CONTINUED FROM PAGE 4

3. arranging with clients to deliver fiduciary assets to a qualified successor?
4. returning client property?
5. providing for any necessary retention of client files and other office records?

e. If such other lawyer is unavailable, does my secretary have a list of other lawyers to call upon?

f. If I am not in a firm, do I obtain my clients' consent to have an outside lawyer review their files in such an emergency?

g. In asking an outside lawyer to assist in an emergency, do I make sure the lawyer understands that any further action on behalf of my clients requires their consent?

h. Does my will instruct any non-lawyer executor that only a lawyer can review my client files?

i. Does my will further provide for application to a court or disciplinary agency for appointment of a lawyer when necessary to review my files?

For a more detailed consideration of emergency planning and closing a practice read:

- *Closing a Kentucky Law Office: A Guide for After the Death of a Kentucky Sole Practitioner*, Glenn David Denton, Denton & Keuler, LLP, KBA *Bench & Bar* – September 2013
- *What Happens To Your Clients If Something Happens to You?: Checklists for Closing a Practice*, Del O'Roark, Loss Prevention Consultant, Lawyers Mutual Insurance Company of Kentucky, KBA *Bench & Bar* – September 2004

These articles are available on Lawyers Mutual's website at **www. lmick.com**. Click on Resources, Risk Management Articles Subject Index, go to Disaster Planning, and click on the articles.

THE RISK MANAGER
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DEL O'ROARK
Newsletter Editor

CLIENT REFERRALS

CONTINUED FROM PAGE 6

- If the matter requires immediate action, the referring lawyer should advise that the recommended lawyer be consulted expeditiously. Recommending the right lawyer without cautioning that prompt action is necessary also can be a negligent referral.

MANAGING THE RISK

When recommending a specific lawyer:

- Keep no fee.
- Do not supervise the recommended lawyer.
- Confirm that the recommended lawyer is competent for the legal matter. Some ways of doing so are:
  - Checking with the KBA,
  - Consulting other attorneys, and
  - Using the Internet to get information about the recommended lawyer.
- Ascertain that the recommended lawyer has malpractice insurance in an adequate amount.
- Disclose any relationship you have with the recommended lawyer – have you worked with the lawyer – has the lawyer sent you clients?
- Expressly advise the client or potential client in writing that your role has ended.

Parts of this list are from ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, Aon Firm Symposium Vol. 30, No. 22, pages 689-90, 10/22/14.

"PEOPLE ARE NOT THE BEST BECAUSE THEY WORK HARD. THEY WORK HARD BECAUSE THEY ARE THE BEST." *Bette Midler*

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You're Invited…

LMICK 2015 ANNUAL POLICYHOLDERS' MEETING

WEDNESDAY, JUNE 17, 2015
8:00 a.m. • Woodford-Scott Room
Hyatt Regency Lexington
400 West High St., Lexington, KY 40507

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 proxies and to attend the meeting.

27 YEARS LAWYERS MUTUAL 1987-2015

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MALPRACTICE RISKS IN CLIENT AND POTENTIAL CLIENT REFERRALS

Last October at the Aon Law Firm Symposium in Chicago a panel discussed the hazards of referring a client or potential client to another lawyer thereby assuming the risk of a malpractice claim for negligent referral when that lawyer commits malpractice. The panel considered liability in the context of what representations the lawyer might have made about the competence of the recommended lawyer and whether the referral appeared to be reciprocity for cases the lawyer received from the recommended lawyer. The timeliness of this presentation prompts us to offer the following update of our risk management advice on avoiding a negligent referral.

Responsibilities of the Referring Lawyer

- The referring lawyer has a duty to be reasonably sure the recommended lawyer is competent in the practice area the matter involves. This is true even though the referring lawyer receives no fee and has no further participation in the representation.
- A preliminary consultation with a potential client is sufficient to create a duty to exercise ordinary care and skill when referring that person to another lawyer. The applicable standard of care is based on the nature of the declined representation. Often it is enough to confirm that the recommended lawyer is licensed to practice law in Kentucky. Licensure gives rise to a presumption that the lawyer is competent and possesses the requisite character and fitness.
- If referral is because the matter requires special skill or knowledge, the referring lawyer must be careful to ascertain that the suggested lawyer has the necessary competence.

CONTINUED ON PAGE 5