The Risk Manager

Lawyers Mutual Insurance Co. of Kentucky

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A Message From Pete Gullett – Lawyers Mutual's Executive Vice President

To the Members of the Kentucky Bar Association:

I am happy to be able to report that Lawyers Mutual Insurance Company of Kentucky had an excellent year in 2005. The annual report will show a profit of about $500,000, and an increase to capital surplus in excess of $300,000.

The company is managed in a conservative manner, remembering the reason Kentucky lawyers contributed to the concept originally. Lawyers Mutual continues to be a one line, one state insurance company. We **only** write legal malpractice insurance, and only for lawyers whose offices are in Kentucky.

The Board of Directors is made up of seventeen lawyers from all over Kentucky, drawn from a wide variety of practice fields and firm sizes. The president, president-elect and immediate past-president of the Kentucky Bar Association serve on the Board.

I am often asked what type of claim is most prevalent, and the answer stays quite static. More mistakes are made in plaintiff's personal injury work and real estate practice than in any other areas. These two types of practice generate 40% to 50% of our claims on an annual basis, and the errors are often mundane. The old reliable missed statute of limitations, the overlooked lien on mortgages, and the failure to properly look up and apply the law continue to cross my desk with mind numbing regularity.

The lesson to be learned: There exists no magic process or computer program that will eliminate all mistakes. Even after good office procedures are in place, each lawyer and staff person must understand them and practice them on a constant basis. As unpleasant as this sounds, there is no better way to prevent the cost and embarrassment of malpractice other than to methodically grind away every day, bringing scrupulous care and attention to each task. Do it that way for your clients, and do it that way for yourself.

I will be looking forward to seeing many of you at the KBA Annual Convention in June and the Kentucky Law Updates this fall. Please come by and say hello.

2006 ANNUAL POLICYHOLDERS' MEETING

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 7:00 am Wednesday, June 14, 2006, Cincinnati Marriott at RiverCenter, 10 West RiverCenter Blvd., Covington, Kentucky. 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.

Illinois Statute of Limitations Malpractice Case a Good Object Lesson for Kentucky Lawyers

One of the surest malpractice claim losers is a missed statute of limitations. In *Lopez v. Clifford Law Offices, PC* (Ill. App. Ct. 1st Dist., No. 1-04-1805, 12/12/05) an Illinois firm tried to dodge a bullet for their negligence in getting a limitations period wrong by claiming superseding negligence by a successor lawyer. Lopez's daughter tragically drowned in a public swimming pool. The Clifford firm accepted Lopez's request to represent the daughter's estate in a wrongful death action. Several months after accepting the representation a Clifford lawyer wrote Lopez a disengagement letter in which Lopez was incorrectly advised that the statute of limitations for the action was two years. In fact, because the defendant was a municipality, the statute of limitations was only one year. The letter included language that the firm's withdrawal was not an opinion on the merits of the case and encouraged Lopez to contact another lawyer immediately if he intended to pursue the case further. The disengagement letter was sent well before the actual one year limitations period expired.

Shortly after Clifford disengaged, and within the one year statute of limitations, Lopez consulted with

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Loran asking him to take the case. Loran declined to take the case within the one year limitations period. In his letter of nonengagement Loran gave generic advice that all actions had statutes of limitations and encouraged Lopez to contact other lawyers. He specifically refrained from advising Lopez what the statute of limitations for the case was. Subsequently, and after the limitations period had expired by one month, Lopez retained another lawyer. That lawyer advised Lopez that he no longer had a viable cause of action and that Clifford may have committed malpractice.

In the ensuing malpractice suit Clifford defended arguing "that the malpractice action against them could not stand because they terminated the attorney-client relationship with Lopez within the one-year limitations period when the wrongful death action was still viable and … Loran's 'intervention' within that one-year period extinguished any duty the Clifford defendants owed to Lopez." The lower court agreed and granted Clifford's motion to dismiss.

On appeal Clifford again argued that the case was still viable when they disengaged and that "[a]t a minimum, Loran, by declining the case after consultation, was responsible for advising Lopez as to the exact amount of time remaining on the limitations period." This superseding negligence was an intervening fact that broke the chain of causation for any damages. In rejecting this argument the appellate court first noted that a lawyer, who after a preliminary consultation, declines to accept a prospective client's case does not assume responsibility and liability for a prior lawyer's negligence. The court found that Lopez had not retained a successor lawyer until after the limitations period had expired and that lawyer could not have repaired Clifford's negligence. The court remanded the case on the basis that "since no superseding cause operated … to defeat the Clifford defendants' liability as a matter of law, proximate cause … should be decided not as a matter of law, but by a trier of fact."

Of course, all of this could have been avoided simply by getting the limitations period right in the first place. Fortunately, Kentucky lawyers have a new resource for just this purpose that Lawyers Mutual was pleased to help with funding. It is the UK/CLE's ***Kentucky Statutes of Limitations and Time Standards 2005 Deskbook***. Every practice regardless of size should have a copy of this invaluable publication to assure competent service to clients and as part of their risk management program. For information on purchasing this publication call the UK College of Law Office of Continuing Legal Education at (859) 257-2921 or visit their website at www.uky.edu/Law/CLE.

A final risk management lesson from the *Lopez* case is that Loran, in declining the representation after Clifford disengaged, used a letter of nonengagement. This letter was key to establishing that he had declined representation, had given only generic advice about statute of limitations considerations, and had not given any negligent advice that would have caused him to be liable for missing the limitation period. We strongly recommend that you always use letters of nonengagement for declined representations that are often best sent by certified mail, return receipt requested. A good nonengagement letter:

- Thanks the prospective client for making the personal contact, calling, or coming into the office.
- Includes the date and subject matter of the consultation.
- Provides clearly that representation will not be undertaken.
- Repeats any legal advice or information given -- making sure that it complies with the applicable standard of care.
- Advises that there is always a potential for a statute of limitations or notice requirement problem if the matter is not promptly pursued elsewhere. *Providing specific statute of limitations times should be avoided because of the limited information typically received in a preliminary consultation. If, however, it appears that a limitations period will expire in a short period of time, the declined prospective client should be informed of this concern and urged to seek another lawyer immediately.*
- Advises that other legal advice be sought.
- Avoids giving an exact reason for the declination, why the claim lacks merit, or why other parties are not liable.
- Encourages the person to call again.

"A Computer Virus Ate My Billing Records" is No Defense to a Bar Complaint Over Fees

A North Dakota lawyer received a reprimand and was required to refund $2,750 to a client because he had no records to prove he had earned all of a retainer (*In Re Ward*, N.D., No. 20050092, 7/25/05). The lawyer received a $6,000 advance on future fees from a client that he deposited in his client trust account. Subsequently, the lawyer was charged by bar counsel with failing to maintain billing records proving that he earned all of the advance fees. This charge was based on the North Dakota rule of professional conduct that requires lawyers to keep records for at least six years after the termination of a representation to show that client funds were properly expended. Kentucky has a similar rule requiring maintenance of billing records for five years (SCR 3.130(1.15 Safekeeping Property)).

"Every beginning is a consequence – every beginning ends something."

Paul Valery

The lawyer defended by asserting that he suspected that an agent of the client who had access to the client file had stripped it of records showing he had earned the advance fee and that a computer virus destroyed his backup records. The North Dakota Supreme Court found that: "There is no evidence to support [the lawyer's] contention

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that the billing records were removed from his client file by … Mickelson. Although it is unfortunate that a computer virus destroyed [his] backup billing record files, it does not relieve him of his duty to maintain records." The Court concluded that the lawyer's failure to maintain duplicate billing records enabling him to prove that he earned advance fees was misconduct and, in addition to refunding the $2,750 in question, required him to pay disciplinary counsel costs of over $3,000.

"Nothing happens without consequences; nothing ever did happen without antecedents."

Anonymous

There is no surer way of being disciplined by the Bar than mishandling client funds. In the publication *Client Trust Account Principles & Management for Kentucky Lawyers* we advised that:

> There is no prohibition against using computers to compile client trust account records. Numerous affordable computer software programs are available that offer all the functions needed to properly administer client trust accounts. Given the efficiency and accuracy of these programs, they are an improvement over a manual system. Care must be taken, however, to backup the system and produce paper records for the file. In time electronic records alone may be acceptable for compliance with professional responsibility requirements, but until then the chart of accounts, statements, and reconciliation reports should be routinely printed out and filed. It is essential to backup financial data and maintain an off-site storage facility for it that is refreshed at least weekly.

We will be glad to send you a copy of *Client Trust Account Principles & Management for Kentucky Lawyers* – just give us a call or send an e-mail requesting a copy.

Risk Managing Senior Status Lawyers

The legal profession offers a gentle landing for older lawyers. Rather than completely retiring they often enter a form of senior status that lets them maintain office space in the firm and handle only a few, or in some cases, no client matters. There is a natural tendency in the firm to relax oversight of these lawyers and assume they pose little malpractice exposure. While that assumption may be true, it does not warrant excluding senior status lawyers from any of the firm's work control and risk management programs.

A New York firm learned this lesson the hard way. After 26 years of practice a lawyer retired from a prominent New York firm. As a retired partner he was allowed to keep office space at the firm. Apparently without the firm's knowledge, the retired lawyer served as trustee of a relative's trust account that was to be used for her benefit. She suffered from dementia and was living in a nursing home. The lawyer misappropriated over $500,000 from the trust to support a lavish lifestyle for him and his family. The end result was that the firm paid to the trust $575,000 as part of an agreement severing the lawyer's ties with the firm and the lawyer was disbarred.

The risk management principle at work here is that a firm must monitor the activities of senior status lawyers connected to the firm in any way, just like other lawyers in the firm:

- Senior status lawyers must use the firm's work control and docketing system, billing procedures, and work product review procedures.
- No firm lawyers, including senior status lawyers, should be allowed to open client trust accounts or fiduciary accounts under their exclusive management – all firm lawyers must use the firm's financial management system.
- Senior status lawyers should be required at least annually to update the firm on:
  - their membership in organizations;
  - service as an officer, director, or other interests in business;
  - performance of fiduciary services such as trustee, conservator, administrator, or executor; and
  - powers of attorney held involving financial matters.
- All members of the firm should be given specific guidance on the relationship of the firm with senior status lawyers.

Source: In the Matter of Allan Blumstein, 2005 WL 2354996 (N.Y.A.D. 1 Dept.) 2005 N.Y. Slip Op. 06886; Hinshaw & Culbertson, The Lawyers' Lawyer Newsletter, p.2, Dec. 2005.

Competence in the Law is Mandatory and the Best Risk Management

By Retired 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 an Internet legal research service specializing in Kentucky law. For more about LawReader go to www.LawReader.com.

Two recent Kentucky Court of Appeals cases concern potential violations of Supreme Court Rule 3.130(1.1) that requires an attorney to be competent in the representation of his client. The rule requires that:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Keep Up with Statutory Law: An attorney must fully understand the statute under which his client is charged before counseling a guilty plea. In the unpublished case of *Allen v. Commonwealth* (2005-CA-000648, 3/31/06) an attorney counseled a guilty plea to a sex offense felony based on a statute that did not apply to his client. The client's conduct was governed by a version of the statute in effect at the time of the offense. At that time, the offense was a misdemeanor. Under the newly amended

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provisions of KRS 17.510, the increased penalties only applied to persons required to register as sexual offenders after the date of the amendment. The defendant was not accurately advised on this point. The Court opined:

> "A competent attorney would undoubtedly research the changes in the amended statute, especially considering the increased penalty, along with Allen's prior registration under the statute. Counsel's failure to investigate the status of the law, as applicable to Allen, constitutes error falling outside the range of competent professional assistance."

Keep Up with Immigration Law Too: The Court of Appeals in *Padilla v. Commonwealth* (2004-CA-001981, 3/31/06) found that an immigrant defendant specifically asked his attorney if a guilty plea to the pending charge would cause him to be deported. He was advised that he "did not have to worry about immigration status since he had been in the country so long." This advice was incorrect, and ironically worked to the client's advantage, but not to the lawyer's. In *Commonwealth v. Fuartado* (170 S.W.3d 384 Ky. 2005) the Kentucky Supreme Court held that a defendant is not entitled to post-conviction relief based on failure of trial counsel to investigate or advise him of possible deportation consequences of a plea. The *Fuartado* case was distinguished in *Padilla* as not depriving Padilla of post-conviction relief because he had made a specific inquiry about the deportation risk. The Court reasoned that:

> *"Those who cannot remember the past are condemned to repeat it."*
>
> *George Santayana*

> "In contrast to an omission in advising a client of the collateral consequences of a plea, an affirmative act of "gross misadvice" relating to collateral matters can justify post-conviction relief. Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir.1988)."

To avoid embarrassing case decision depictions of your lack of competence and the potential malpractice claims that can attend them, you must know what you are doing. If you aren't knowledgeable in an area of the law such as immigration law, or if you aren't up-to-date on criminal law, you must either take the time to review the relevant law, associate with a more knowledgeable lawyer, or refer your client to a lawyer who is competent to represent the client.

For more information about Lawyers Mutual, call **(502) 568-6100** or KY wats **1-800-800-6101** or visit our web site at **www.lmick.com**

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