The Risk Manager

Lawyers Mutual Insurance Co. of Kentucky

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Negligent Advice Malpractice Claims

One of the most difficult malpractice claims to defend is an allegation that a lawyer gave negligent advice resulting in an unintended result for a client or intended beneficiary. Too often the lawyer's only defense is a self-serving assertion that correct oral advice was given. A recent Kentucky case illustrates the risk.

The Kentucky Supreme Court considered a malpractice claim of negligent advice by a disgruntled beneficiary of a will that was dismissed on motion for summary judgment. The lawyer prepared a will for the client that gave his wife all his real estate with the residuary estate going to family members to be divided equally. He also prepared a deed for the client giving his wife joint interest with right of survivorship in his home. Both instruments were duly executed and upon the client's death the wife renounced the will, took the home by survivorship, and claimed her dower interest. The lawyer stated that he never represented the wife or advised her of her renunciation option. However, he did prepare the renunciation.

> ***"If someone tells you he is going to make a 'realistic decision,' you immediately understand that he has resolved to do something bad."***
>
> ***Mary McCarthy***

A disgruntled beneficiary of the will then brought a malpractice claim alleging negligent drafting of the will and deed because the deed's terms permitted the wife to frustrate the intentions of the testator. The lawyer defended with testimony that he fully advised the client of the opportunity the wife would have to renounce the will and take the real estate along with dower rights contrary to the intent of the will. Further, that the client acknowledged this advice, but insisted on executing both instruments because he wanted it clear that the wife got the home when he died.

The Court's decision is more important for its discussion of the standards for granting summary judgment than for principles of malpractice law and is recommended reading for that reason alone. The Court reiterated that the standard for granting summary judgment is when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." The Court went on to find that the claimant's support for his case "...was mere supposition, based upon the failed estate plan ...." and that the lawyer had "… met his burden of proving the absence of genuine issues of material fact ...." *(O'Bryan v. Cave, Ky. 202 S.W.3d 585 (2006)).*

The key risk management principle to learn from this case is to look for the red flags in a representation that warrant extra care in communicating with a client, documenting advice given, and avoiding taking subsequent actions that appear inconsistent with a former client's intentions. The red flags in this case are:

- there was some indication of complex family relations;
- although the client apparently understood the inconsistency between the will and deed, he was not going to be available to support the lawyer if the will was renounced;
- a lawyer preparing a renunciation of a will he prepared places himself in an ambivalent position that invites resentment of the disenfranchised and provokes retaliatory malpractice claims.

Of course, thorough documentation of a file is always the best risk

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management in any matter. The concern of many lawyers about documenting a case, however, is that while they want to leave a paper trail of client communications they also want to avoid flooding the client with defensive letters about representation. One lawyer calls letters explaining negative developments as CYA letters – not meaning what you are thinking – rather "Change Your Attitude" letters. Keep expectations realistic. Always document tough issue discussions in a letter sent to the client. Nowhere is this more important than after a settlement talk with a client or when there is an apparent inconsistency in estate planning instruments (think taxes and problematic bequests).

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Keep in mind that when advising a client on complex or tough issues the client does not always appreciate what is important and what is not. To the client it is all important. The client is dealing with a stream of seamless information. Conversely, the lawyer appreciates the significant points and retains what is important. Typically, the client is stressed when he sees a lawyer – his mind is fogged. A client left in that posture often leads to problems. Be sure that within a few days after one of these meetings, the client receives a letter from you stressing the important considerations discussed at the meeting, advice given, and actions to be taken. The client's mind is clear and it takes! Even if the client cannot be there when you need him, the file speaks for itself and the lack of merit of a malpractice claim for inadequate advice is easily shown. Best of all, it should avoid the claim in the first place.

Client Trust Account Horror Story

A Florida lawyer's troubles started when he received funds to pay off a mortgage of $118,000 in a real estate transaction and failed to do so. When this omission was discovered the Florida Bar filed a complaint against the lawyer alleging dishonesty, misrepresentation, and violation of client trust account requirements. The lawyer resisted the Bar's request for bank records forcing the Bar to subpoena bank records. Only after the lawyer retained representation did the lawyer cooperate with the Bar leading to a complete audit of his several client trust accounts. The audit showed incidents of mishandling of funds for closings, depositing earned fees and personal checks in a trust account, and paying personal expenses from a trust account. The lawyer also transferred funds between his real estate trust account and other trust accounts for no apparent reason and without fully identifying the name of clients or purpose for the transfers. When asked to explain the transfers the lawyer did not provide a complete written response to the Bar. Finally, the audit found that the lawyer's trust account balances were sometimes negative, trust account checks were returned for insufficient funds, the real estate trust account had prohibited overdraft protection, and the bank had not been instructed to notify the Bar as required of returned trust checks for insufficient funds.

"For fast acting relief, try slowing down."

Lily Tomlin

The lawyer claimed that his trust account problems were primarily the result of a dishonest employee who stole account funds. The facts showed, however, that the lawyer had not filed a report with the police over missing funds until two months after the Bar complaint was filed and 18 months after the funds disappeared. The conclusion reached was that the lawyer failed to adequately supervise the employee and failed to properly maintain trust accounts. The lawyer conceded that he had violated some rules, but insisted that he was innocent of dishonesty, fraud, deceit, or misrepresentation because his failure to supervise the employee was unintentional. The Florida Supreme Court determined that the question is whether the lawyer deliberately or knowingly engaged in the activity in question. The Court found that the lawyer's "… failure to supervise his employee constitutes intent because he knowingly assigned his trust account responsibilities to [the employee] and then failed to supervise her activities." The lawyer was suspended from practice for three years with three years probation from the date of reinstatement (*Florida Bar v. Riggs, Fla.*, SC05-973, 10/5/06).

The Florida lawyer's violation of client trust account rules would violate Kentucky's rules if he practiced here. It is doubtful that a Kentucky lawyer in this same situation would have gotten off so leniently.
For a quick refresher on client trust account professional responsibility we suggest *"Client Trust Account Principles & Management for Kentucky Lawyers."* This 56 page guidebook covers the fundamentals of client trust account management and includes the complete text of key KBA Ethics Committee Opinions on client trust accounts. It is yours for the asking by contacting Lawyers Mutual (502-568-6100 or 800-800-6101) or the IOLTA Fund (502-564-3795 or 800-874-6582).

Standard of Care: Expert Witnesses in Personal Injury Cases

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

When you accept a personal injury case, you represent to the client your ability and willingness to prepare the case according to the lawyer's standard of care. If your client is unhappy with your results, you may find yourself having to convince a jury that you met this burden and are not guilty of malpractice. Since it is well established that representing plaintiffs in personal injury cases is the area of practice most likely to result in a malpractice claim, it is critical to understand what the lawyer's standard of care is for obtaining expert witnesses for these cases.

The standard of care for Kentucky lawyers is well established and can be succinctly described as follows:

- "An attorney is liable to his client for the want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment." *Humboldt Bldg. Assn. Co. v. Ducker's Exr.*, 111 Ky. 759, 64 S.W. 671 (1901).
- "... the standard of care is generally composed of two elements - care and skill. The first has to do with care and diligence which the attorney must exercise. The second is concerned with the minimum degree of skill and knowledge which the attorney must display.... [T]he attorney's act, or failure to act, is judged by the degree of its departure from the quality of professional conduct customarily provided by members of the legal profession." *Daugherty v. Runner*, Ky, 581 S.W.2d 12 (1979).
- "Determining the reasonableness of the lawyer's conduct requires consideration of the following criteria: the requisite skill and knowledge; the degree of skill and knowledge to be possessed and exercised; the effect of local considerations and custom; and any special abilities possessed by the lawyer." (15.2, The Standard of Care Defined, 1 *Legal Malpractice* 856 (3rd Ed) (1989).

Meeting this standard of care in personal injury cases has risen over the years because they often turn on the testimony of highly paid, dueling expert witnesses. Lawyers must recognize that many personal injury claims require the lawyer to advance a great deal of money for depositions and expert witnesses to meet the standard of care. If the XYZ Insurance Co. hires two high powered medical experts to contest the testimony of your client's general practitioner family physician on a medical issue, you are going into court at a distinct disadvantage. You may be falling well below the standard of care that is commonly exercised by personal injury lawyers with the financial resources to fund these cases properly.

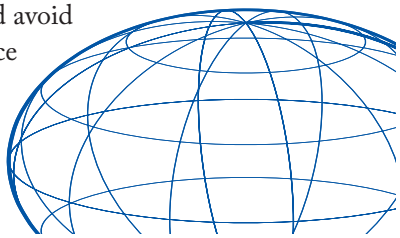
"Hope is the feeling you have that the feeling you have is not permanent."

Jean Kerr

The prevailing standard of care for a personal injury case, in my opinion, requires that you come to court with substantial expert testimony to support your client's claim. You should never file suit until you have determined that credible expert witnesses will support the claim. If the statute of limitations is about to run, get a tolling agreement rather than file a suit anticipating that expert witnesses will be available when needed. It is important to note that more than one lawyer, thinking he has a solid expert witness for a case, has been blindsided after filing suit by an expert refusing to testify or testifying in a dramatically less helpful way than anticipated based on pre-suit interviews. The medical profession especially is proactive in defending medical malpractice claims. There is often peer pressure on potential doctor experts not to cooperate and doctors are quick to sue for malicious prosecution when a personal injury case involving a doctor's malpractice falls apart. Always document the file thoroughly on your efforts to obtain qualified expert witnesses and their opinions that caused you to determine that they were suitable for the issues in the case.

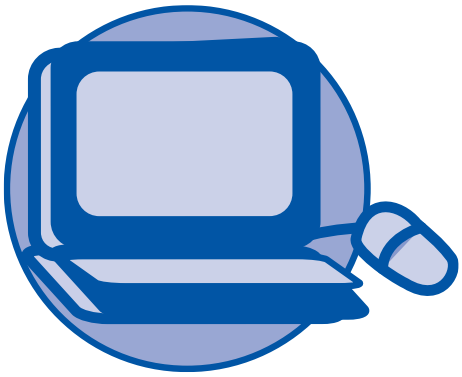
The best risk management is first, avoid weak cases.

Going to court with a poorly prepared case because of the inability to fund expert witnesses places you at risk of a disappointed client who will look to you to make up his loss from your malpractice insurance policy. The best risk management is first, avoid weak cases. Second, decline cases when the statute of limitations is about to run and there is not enough time to investigate the case and identify credible expert witnesses. In those cases taken, if you or your client cannot afford the necessary experts, form a relationship with another lawyer specializing in personal injury cases with the resources to retain expert witnesses. This often is the only way to meet the standard of care that competent representation in a personal injury case requires and avoid a malpractice claim.



Maintaining Competency When Advising Servicemembers and Their Families

With so many Kentuckians serving in the military, Kentucky lawyers can expect clients seeking advice relating to military service and legal matters arising in Kentucky. The Servicemembers Civil Relief Act (SCRA) (50 U.S.C. App. §§ 501-596) is the major law that provides benefits and protections covering such issues as contracts, leases, debt, taxation, and voting. The Army Judge Advocate General's Legal Center recently updated *The Servicemembers Civil Relief Act Guide* (JA 260). It is available at http://www.jagcnet.army.mil. Click on TJAG Legal Center and School (TJAGGLCS); then go to TJAGLSC Publications. The updated *SCRA Guide*, JA 260, is located in the Legal Assistance section. This is an excellent reference that is current and comprehensive.



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Servicemember reemployment rights are covered in the Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C.S. §§ 4301-4334). The Department of Labor published in the Federal Register rules and regulations explaining USERRA (70 Fed. Reg. 75246 (Dec.19, 2005) (to be codified at 20 C.F.R. pt. 1002)). It is another good resource for assisting servicemembers and is readily available on the Internet. Google Federal Register and go from there.

"Speak when you are angry, and you will make the best speech you will ever regret."

Ambrose Bierce

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Malpractice Avoidance Update

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