THE RISK MANAGER

Lawyers Mutual Insurance Co. of Kentucky

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2007 ANNUAL POLICYHOLDERS' MEETING

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 7:00 am Wednesday, June 20, 2007, at 323 West Main Street, Second Floor of the Waterfront Plaza, Louisville, 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.

Please Release Me – A Malpractice Trap for the Unwary

In *Abney v. Nationwide Mutual Insurance Company, Et Al* (2004-SC-000937-DG, 3/22/07) the Kentucky Supreme Court reviewed KRS 411.182 for the first time since its enactment. The issue decided was whether "a release negotiated with one joint tortfeasor discharging 'all other persons, firms or corporations liable, or who might be claimed to be liable' effectively release another joint tortfeasor who had not negotiated or paid any consideration for the release?" The following extracts from the opinion are offered to alert you to the high risk of malpractice a lawyer now faces when using standard release forms in wide use in Kentucky.

- **The Facts:**

"… Ernest Abney was a passenger in a pickup truck owned by Grady Brake and driven by his son, Arthur Brake, when Arthur Brake rear-ended another vehicle driven by Tonya Wright. Just before the accident, Tonya Wright either slowed down or stopped her vehicle abruptly to retrieve her purse, which her husband had thrown out the car window in an argument that the couple was having. As a result of the accident, Abney sustained significant injuries including a broken right hand and a back injury that required surgical intervention.

At the time of the accident, Kentucky Farm Bureau Mutual Insurance Company (KFB) insured Tonya Wright. And Nationwide Mutual Insurance Company insured the Brakes.

Abney and his wife, Kristy, executed a release with KFB at a local KFB agent's office. At the time the Abneys signed the release, they did not have legal counsel present."

- **The Release Form:**

"The one-page release was entitled 'RELEASE OF ALL CLAIMS.' It released, acquitted and forever discharged 'both Tonya Wright and KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY or THE FB INSURANCE COMPANY, their heirs, executors, administrators, agents and assigns.' The release also released:

... all other persons, firms or corporations liable, or who might be claimed to be liable, of and from any and all actions, causes of action, claims, demands, costs, loss of services, expenses and compensation, or suits at law or in equity, of whatsoever kind or nature, arising out of any and all known and unknown injuries and damages resulting or to result from an accident that occurred on or about the 2 day of October, 1999 at or near Bethlehem Road Bourbon County Kentucky."

- **The Injured Party's Misunderstanding:**

"After executing this release, Abney filed an automobile negligence claim against Arthur Brake and Grady Brake and an insurance bad faith claim against Nationwide. The Brakes filed a motion for summary judgment on the basis of the release, which the trial court ultimately granted. Consequently, the trial court dismissed the action as to all defendants."

- **The Law:**

"KRS 411.182, in relevant part, is as follows:

(4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section."

- **The Holding:**

"Does a release that releases, acquits and forever discharges one joint tortfeasor, her insurer, and all other persons, firms or corporations liable, or who might be

continued

claimed to be liable, satisfy the 'unless it so provides' requirement of KRS 411.182(4)? By the plain terms of the statute and the plain terms of the release, we hold that it does.

It is of no consequence to our decision that neither the Brakes nor Nationwide are specifically named or specifically identified in the release. If our legislature had intended to impose a specific identity requirement, as Abney urges this Court to impose, it would have so provided.

....

It is further of no consequence to our decision that the release was a standard, fill-in the blank form that was broad in scope. It is a contract nonetheless. *See Richardson*, 660 S.W.2d at 8. As with contracts generally, the courts must look to the language of the release to determine the parties' intentions. *See Woodruff v. Bourbon Stock Yards Co.*, 149 Ky. 576, 149 S.W. 960, 962 (1912). When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine that intent.

....

The description of the discharged parties read in context of this release shows that the parties' intention was to put an end to all of Abney's claims relating to the accident that occurred on October 2, 1999, at Bethlehem Road, Bourbon County, Kentucky. This included any possible third party claims against the KFB insured. Summary judgment in favor of the Brakes and Nationwide on the basis of this release as evaluated under KRS 411.182(4) was appropriate."

Managing the Risk:

1. Read the *Abney* case in its entirety and make sure every lawyer in your firm reads it.
2. Review all release forms you use in your practice. Carefully identify those forms that are "full releases" and those that are partial or tailored releases.
3. Prior to advising a client to execute a release, review the file for other claims the client may have that might be covered by the release. Remember your duty to look beyond the scope of a representation no matter how broad or narrow to at least identify for the client other potential related legal issues. In *Daugherty v. Runner*, Ky.App., 581 S.W.2d 12 (1978) the Court held "An attorney cannot completely disregard matters coming to his attention which should reasonably put him on notice that his client may have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney." Be sure a release proffered by the opposing party is appropriate for your client's situation.

The Dangers of Serving as an Escrow Agent

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.

"Silence is the unbearable repartee."

G. K Chesterton

The Kentucky Court of Appeals sent a strong message of warning to members of the Kentucky Bar about the risk of entering into escrow agreements when representing one party in an adversarial matter in *Baker v. Coombs* (NO. 2005-CA-001993-MR, 3/23/07).

In this divorce case the husband, Collins, was represented by attorney Coombs. As part of the property settlement the husband agreed to pay substantial amounts to his wife, Baker. "As security for these payments, Baker was given liens on all of Collins's stock holdings in a number of closely-held corporations. The agreement provided that Collins was to 'execute all necessary documents to effectuate these liens' and that '[t]he Certificates shall be held by … Coombs, Attorney.' " "In effect, Coombs pledged himself as a *de facto* escrow agent on behalf of Baker as to the certificates – despite his representation of Collins. He thereby created or acquiesced in the appearance that a fiduciary duty might have arisen." Collins did not deliver the stock certificates to Coombs. He died on September 30, 1999. Baker learned after Collin's death that one of the corporations had been sold and that the others were not in his estate.

"Silence is one of the great arts of conversation."

Hannah More

Baker sued Coombs alleging that he failed in his fiduciary obligation to her by not obtaining and holding Collins's stock certificates. This allowed Collins's businesses to be sold without taking action to assure that Baker was paid what was owed her. The trial court found that Coombs had no affirmative duty "to force or compel Collins to provide him with the certificates – or in the alternative – to advise Baker that he could not obtain them." "…Coombs signed the Agreement only in his capacity as Collins's counsel and not as a party to the Agreement itself. Thus, only Collins and his estate should bear liability for the financial consequences of Collins's failure to perform under the contract."

The Court of Appeals agreed with the trial court's findings that Coombs had no affirmative duty to obtain the stock certificates or inform Baker that he did not have them. In its opinion the Court stressed the conflict of interest implications of a lawyer agreeing to act on the behalf of an opposing party in an adversarial representation as follows:

"Our predecessor court has held that '[t]here can be no escrow without conditional delivery of the instrument to a third person as depositary.' ….

continued

[B]ecause Coombs never took possession of Collins's stock certificates, his arguable duty to Baker never arose. …. If he had been provided with those certificates, we agree that he would have been obligated to Baker for having voluntarily agreed to assume the fiduciary duties attendant to holding the certificates.

….

There is no doubt that Coombs became embroiled in a situation in which there was a potential for him to become conflicted with his own client. We have held that 'one may be an agent of both parties to an escrow if there is nothing inconsistent or antagonistic between his acts for the one and the other.' …. However, questions of divided loyalty may foreseeably develop under the factual situation of this case. The property Settlement Agreement was generated by adversarial litigation …. Kentucky's Rules of Professional Conduct emphasize that '[l]oyalty is an essential element in the lawyer's relationship to a client.' …. This case presents a clear *caveat* for attorneys to weigh SCR 3.130, Rule 1.7 before embarking upon a similarly perilous course of representation."

"Silence. One of the hardest arguments to refute."
Josh Billings

Claims against lawyers serving in the dual capacity of lawyer and escrow agent usually involve the accusation that the lawyer favored his client over the opposing party in the transaction by not acting in the required neutral role of an escrow agent. If the client was disfavored, the client will allege a conflict of interest that will be hard to defend. Good risk management is to avoid in adversarial representations the tension created by serving as lawyer and escrow agent – stay in your capacity of lawyer.

Risk Managing Conflicts of Interest When Advising the Elderly in Estate Planning

A New York law firm advised a husband 86 years old and his wife on an estate plan that gave the wife control over a trust that included the husband's major assets and an apartment and house worth a total of $15 million. The husband later alleged malpractice asserting among other claims that the lawyers failed to inform him of the conflict of interest in representing both. The firm defended by showing two documents the husband signed that included language that he and the wife understood the inherent conflict of interest of the joint representation, had had the opportunity to consult independent counsel, and waived the conflict.

The court held that given the clarity of the documents in question the husband was bound to read and know what he signed and was, therefore, responsible for his signature. The court was not impressed with the husband's claim that he had a mild cognitive impairment. The court noted that there was no showing that the lawyers knew or should have known of the impairment or that there was any question of the husband's legal capacity.

"Sometimes you have to be silent to be heard."
Stanislaw Lec

The dissent to this decision argued that it was appropriate to consider the husband's age and infirmity in assessing how reasonable the claim of lack of understanding was. The husband's counsel seized on the dissent and stated "I believe there is a particular duty when dealing with a client of advanced age" and that "… the facts of this case, particularly concerning [the husband's] age and impaired mental state, would shock the conscience of the Court of Appeals…."

It is hard to think of how the lawyers in this case could have documented more thoroughly their efforts to cover the conflict of interest issue with the husband and obtain informed consent. Yet even after the lawyers prevailed in two New York courts, the husband was granted leave to appeal to the Court of Appeal in February. This malpractice claim is far from over.

So what is a lawyer to do in risk managing representation of the elderly? Here are some suggestions:

- Recognize that representing older adults presents a different context for meeting fiduciary obligations. The gravity of this context is heightened when the older adult is of questionable competence. You should develop a strategy for serving older adults and coping with the tough issues. Your strategy should include older adult counseling skills, elder law CLE, donated legal service, knowledge of the applicable Kentucky Rules of Professional Conduct, and risk management.
- The most difficult professional responsibility problems commence when representing an older adult with diminished mental capacity. For guidance on dealing with this situation see SCR 3.130 (1.14), Client Under a Disability, and the KBA *Bench & Bar* article *"Golden Oldies"* available in the Risk Management section, *Bench & Bar* Articles, on Lawyers Mutual's web site at *www.lmick.com.*
- The key risk management tools are:
    1. Make absolutely clear who your client is. Older adult clients often are accompanied by relatives who are not your client and must understand that. On occasion relatives or other nonclients pay for your legal services for an older adult. Be sure to comply with SCR 3.130 (Rule 1.8 (f)) on accepting compensation from one other than a client.
    2. Always use letters of engagement, nonengagement, and disengagement when an older adult is involved.

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3. A careful conflict of interest analysis must be conducted at the outset of the representation with emphasis on intergenerational conflicts that typically center on preservation of assets; spousal conflicts in estate planning and divorce matters; and fiduciary conflicts when a lawyer represents a fiduciary or is a fiduciary.
4. Be alert for the development of a conflict of interest during the representation. Older adult representation carries a greater risk of conflicts developing well into the matter than do most other representations.
5. Do not have an older adult client execute a legal instrument immediately after you have advised him that he may want to consult independent counsel concerning a conflict waiver. Give the client at least a day to think it over. Schedule a follow-up appointment for execution. Document the file showing the deliberate way the client was advised and that he had adequate time outside your influence to consider seeking independent counsel. A later claim of undue influence when things do not go to the client's satisfaction should fail using this procedure.
6. Client communication must be emphasized throughout the representation.
7. Documenting the file is essential and most important when getting the older adult's consent to a settlement or when the older adult is making an important financial decision.
8. Withdrawal from representing an impaired older adult is discouraged. When withdrawal cannot be avoided, it must be done carefully and in strict compliance with the requirement to protect the client's interest. See SCR 3.130 (1.16) Declining or Terminating Representation.

Sources: Conflict Waiver and Acknowledgement Stop Former Client's Malpractice Claim, ABA/BNA Lawyers' Manual On Professional Conduct, Current Reports, Vol. 22, No.23, page 550 (12/15/06) citing Bishop v. Maurer, N.Y. Sup. Ct. App. Div. 1st Dep't, No.7693, 10/24/06); Elderly Man's Malpractice Suit Over Estate Advice Dismissed, Anthony Lin, New York Law Journal (10/26/06); extracts from Golden Oldies, Kentucky Bench & Bar, 61, No. 4, Fall 1997.

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"Silence is more eloquent than words."

Thomas Caryle