



Lawyers Mutual

www.lmick.com

THE

# RISK MANAGER

A quarterly newsletter by Lawyers Mutual Insurance Company of Kentucky

FALL 2009  
Volume 20, Issue 4



## NANCY MEYERS IS LAWYERS MUTUAL'S NEW MARKETING DIRECTOR

**L**awyers Mutual welcomes Nancy Meyers as our new Marketing Director. Nancy is from Versailles, Kentucky and is a graduate of Centre College. Nancy has nine years of marketing experience concentrating in sales and client service.

During those years she worked as an Account Manager at Symbiotix, Inc. and in the Association Management Division of IMG Group (formerly Host Communications).

Nancy is responsible for planning and executing all marketing activities of Lawyers Mutual. This includes contacting lawyers about Lawyers Mutual's insurance program, managing Lawyers Mutual's advertising program, managing the New Attorney Insurance program, and facilitating Lawyers Mutual's sponsorship of Continuing Legal Education presentations.

Nancy is an outstanding addition to our staff. She is looking forward to meeting Kentucky lawyers and working with them to be sure they have the protection they need. Nancy is available at 1- (800) 800-6101 or 1- (502) 568-6100. Her e-mail address is [Meyers@lmick.com](mailto:Meyers@lmick.com). Nancy welcomes your calls and e-mails to discuss with you the benefits of insuring with Lawyers Mutual.



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

*Ambrose Bierce*

## Kentucky Supreme Court Rules That Loss Of Consortium Damages Under KRS 411.145 Do Not Cease At Death.

*By Ruth Baxter, President of Lawyers Mutual Insurance  
Company of Kentucky*

**I**n *Tina Martin, Administratrix of the Estate of Billie Carol Shreve, Deceased; and Donald Ray Shreve, Individually Appellants v. Ohio County Hospital Corporation* (2008-SC-000211-DG, 10/1/2009) the Kentucky Supreme Court in a unanimous decision recognized spousal loss of consortium damages beyond the death of the injured spouse for the unlawful acts of a third party. Prior to this ruling, Kentucky was one of only four states that did not recognize these damages.

There are at least five lessons in the *Martin* case for Kentucky lawyers:



**continued**

continued from page 1

### 1. *Damages for surviving spouse's loss of consortium after death are now compensable.* What does this mean?

- If you have a pending case that is applicable, review the pleadings and file a Motion to Amend Complaint to assert a loss of consortium damages claim, if not already claiming them.
- Update the proof of value of the claim for use at trial or in settlement and mediation negotiations, and give notice to opposing parties.
- Amend your answers to interrogatories to include the loss of consortium aspect of damages and the amount claimed under that heading. Without the amendment you are limited or excluded from making such claims.
- For more guidance on the dangers of not amending answers to interrogatories to cover all damages sought read *Fratzke vs. Murphy*, Ky., 12 S.W.3d 269 (2000) and the article in Lawyers Mutual's Summer 2003 newsletter "Another One Bites The Dust! Civil Rule 8.01 Takes Out Plaintiffs (And Their Counsel)" available at [www.lmick.com](http://www.lmick.com). – go to the Risk Management page and select Newsletters.

### 2. *Protective cross-motion.*

The Appellant lost the true benefit of the value of the appeal because of a failure to cross appeal. To protect a client's interest it is often necessary in the appellate process to file a protective cross motion for discretionary review. Read the appellate rules to determine if you are required to protect a verdict with such a notice.

### 3. *Limitation on damages (Again!).*

The Supreme Court once again upheld its previous decisions that the amount listed in the interrogatories limits the damages that can be claimed at trial. As the plaintiffs received the maximum damages listed in the interrogatories, winning the appeal did not increase their recovery.

### 4. *Damages for "children" over the age of majority confirmed.*

While prior to *Martin* damages for loss of consortium for children were recognized under Kentucky law, some courts remained confused about whether the damage claim could extend beyond the child's age of majority. *Martin* confirms the child's entitlement to damages after the age of 18. If

you have a case with a 'child' who can make this claim, review the pleadings, the answers to interrogatories, and settlement demands to confirm that the value of this claim is accurately calculated.

### 5. *The Emergency Medical Treatment and Active Labor Act (EMTALA) damage instructions.*

The Supreme Court previous to *Martin* had not issued EMTALA damage instructions. Lawyers practicing medical malpractice cases must read *Martin* for guidance on the proof required at trial to obtain an instruction that avoids a directed verdict. The wording for such an instruction is set out in *Martin*. This ruling represents new law in this phase of statutory litigation. I think it also tells us that this Court is strict constructionist because the Court used the exact wording of the statute in crafting the new jury instruction. This sends a message to all litigants claiming a statutory violation on how instructions must be worded.

## Close Is Not Good Enough to Preserve an Uninsured Motorist Claim

**C**lose is good enough in horseshoes, drive-in movies, and hand grenades. However, according to the Kentucky Supreme Court close is not good enough to preserve a UIM claim (*Malone v. Kentucky Farm Bureau Mutual Ins. Co.*, 2007-SC-000468-DG, 6/25/2009).

In *Malone* plaintiff's attorney attempted to comply with the notice requirements of KRS 304.39-320 in a certified letter as follows:

Atlanta Casualty has advised that they have policy limits of \$25,000.00 and this amount has been offered to settle their portion of Mr. Malone's claim. **We are considering whether to accept this offer.** In the meantime, because of the seriousness of Mr. Malone's injuries, we are making a claim for policy limits of all applicable policies issued by Kentucky Farm Bureau for underinsured motorist coverage. (*emphasis added*)

By way of this letter, and in keeping with the mandates of K.R.S. 304.39-320, *Coots*

continued

"Never believe anything until it is officially denied."

Claude Cockburn

**continued from page 2**

*vs. Allstate Insurance Co.*, Ky., 853 S.W.2d 895 (1993), and *Allstate Ins. Co. v. Dicke*, 862 S.W.2d 327 (Ky. 1993), you must, within thirty (30) days consent to settlement with the wrongdoer or forward a check in the amount of the liability carriers' policy limits. If you wish to preserve your subrogation position you must advance a sum of money equivalent to the limits of liability of the wrongdoer's carriers.

The Court held that: "In sum, although Malone's letter informed Farm Bureau that an offer had been tendered and provided Farm Bureau with instructions on how to protect its subrogation rights, as to whether he had actually agreed to settle, Malone merely stated that he was 'considering whether to accept this offer.' This purported notice only revealed that an offer had been made and was not sufficient under KRS 304.39-320 to put Farm Bureau on notice that 'an injured person or . . . personal representative, *agree[d]* to settle a claim with a liability insurer and its insured.' Thus, even though Malone allegedly intended to notify Farm Bureau of his agreement to settle, the plain language of his letter did not convey that an agreement had been reached as required by KRS 304.39-320."

The lesson learned is that the UIM carrier must be given notice of a binding settlement agreement between plaintiff and the liability carrier. Anything less is insufficient under KRS 304.39-320.

## High-Risk Behavior Leads to Malpractice Claims

**T**he theme for ABA's Fall 2009 National Legal Malpractice Conference was "Identifying Risk in a Changing Law Firm Landscape." One of the most helpful programs was "Highest-Risk Behavior: Specific Lawyer Activities Likely to Lead to Malpractice Claims." The panelists gave a comprehensive review of current malpractice risks by area of practice and size of firm.

The program began with the point that firms of all sizes make the same errors. Currently the most common errors occur in the following practice areas – the so-called "Fab Four."

- Plaintiff personal injury
- Real estate
- Family law
- Estate, trust, and probate

The seven most common errors of all firm sizes are:

1. **Communications-related errors:** failure to follow the client's instructions; poor client communications; failure to obtain the client's consent or inform the client.
2. **Time management and deadlines:** failure to know or ascertain a deadline; failure to calendar; failure to react to calendar; procrastination.
3. **Digging a bit deeper:** inadequate discovery or inadequate investigation.
4. **Clerical delegation errors:** simple clerical errors; mathematical calculation errors; failure to supervise.
5. **Conflicts of interest:** litigation lawyers avoid conflicts best; business transaction lawyers are less adept at recognizing conflicts.
6. **Tax errors:** failure to understand and anticipate tax consequences.
7. **Fraud:** real estate fraud; fraud by firm lawyers and staff; lawyer scams.

The panel then discussed current frequent errors by area of practice. What follows are the highlights of this presentation drawing on the comments of the panelists, their power point presentation, and the written materials they provided.\*

### Personal Injury – Plaintiff

#### *Statute of Limitation mistakes:*

- Ineffective declination of a case: after initial meeting and some investigation lawyer ineffectively declines representation or gives misinformation in a letter of declination – usually about the statute of limitations or merits of the case.
- Not knowing the applicable statute of limitations.
- Missing dram shop statute requirement to notify business or insurance carrier of claim.
- Failure to give notice to a government entity or employee of intention to bring a claim and failure to exhaust administrative remedies, *e.g.*, Federal Tort Claims Act.
- Improper calendaring of deadlines.

#### *Failure to name the correct entity.*

#### *Failure to bring a worker's compensation claim.*

- This can happen in personal injury matters or vice versa.

**continued**

*"Get it 'til it's perfect, then cut two minutes."*

*Fred Astaire*



continued from page 3

### ***Settling the matter for too little/disgruntled clients.***

- Client settlement remorse is a frequent occurrence – the so-called “settle and sue your lawyer” client tactic.

### ***Failure to secure insurance.***

- Failure to obtain uninsured motorist coverage or determine insurance limits.

### ***Failing to timely provide expert disclosures.***

- When an expert’s opinion and testimony is excluded a malpractice claim is in the offing.

### ***Inattention to file.***

- Failure to respond to discovery requests and motions, failure to file required documents with the court, missing deadline to file notice of appeal, and procrastination.

### ***Negligent decline of representations or termination of representation.***

### ***Insufficient recovery for injuries sustained.***

- Failure to plead all damages and causes of action; failure to investigate extent of injuries; failure to name all parties; failure to determine all available insurance; failure to document client’s settlement instructions.

### ***Negligent binding arbitration referral advice.***

- Experience shows that arbitration is not the panacea once believed to be the case. Lawyers are recommending it without carefully considering the downside.

### ***Pro bono clinical work.***

- Failure to supervise.

## **Real Estate**

### ***Fraud.***

- Fraud claims involve unauthorized use of powers of attorney, and fraud schemes to defraud lenders.
- Lawyers are accused of negligence because they did not verify the validity of a power of attorney used to execute a real estate deal gone bad.
- Lawyer prepares real estate closing package based on instructions of lender, but when loan goes bad because of borrower or broker fraud, lender alleges lawyer participated in scheme or failed to uncover it.

### ***Title searching errors.***

### ***Failure to file deed on time or discover mortgage resulting in a loss of priority.***

### ***Improper contract drafting.***

- Leaving out clauses covering who can terminate the contract, liquidation, and consequences of breach.

### ***No due diligence for zoning restrictions etc.***

### ***Conflicts of interest.***

- Lawyer is asked to be scrivener for a real estate transaction, but fails to get conflict waivers from the parties and use a letter of engagement that limits the scope to that of scrivener. When the deal goes bad one or more of the parties allege that the lawyer represented them and was negligent.

### ***Real estate development partnerships/corporations representations.***

- Multiple clients often lead to conflicts of interest.
- Using sketchy or sparse letters of engagement for complicated deals leads to allegations of failure to properly perform all required legal services causing the business transaction to fail.

### ***Purchase and sale contracts.***

- Escrow agent claims for disputed funds.
- Negligent modification of a contract.

### ***Powers of attorney.***

- Improper drafting and use.

## **Family Law**

### ***Failure to know or properly apply the law.***

- The complexity of family law results in substantive law errors occurring almost three times more frequently than in other practice areas.

### ***Failure to follow client’s instructions.***

- Family law lawyers frequently fail to document advice given to clients and the client’s instructions. When a client later remembers the advice differently than the lawyer, it becomes a swearing contest.

### ***Failure to obtain client consent or to inform the client.***

### ***Inadequate discovery of facts (assets) or inadequate investigation.***

### ***Procrastination.***

### ***Adoptions.***

- All adoptions are not the same and an erroneous adoption can lead to a serious malpractice claim.

### ***Conflicts of interest.***

- Representing both husband and wife in a divorce action is a recipe for disaster.

continued

continued from page 4

**Divorce actions.**

- Missing marital assets, e.g., community property, business property, pensions, and investment funds.
- Failure to use experts to ascertain value of marital assets.

**Child custody disputes.**

- Child support is too low because all assets are not identified.

**Pre-nuptial agreements.**

- Representing both parties leads to conflicts of interest.

**Estate, Trust, and Probate**

**Failure to ensure decedent had testamentary capacity.**

- Allegations of lack of testamentary capacity often occur when a lawyer changes a will for a client just before the client's death that disinherits beneficiaries.

**Failure to investigate and properly account for all assets prior to formulating an estate plan.**

**Allowing depletion of trust assets.**

- Negligence often alleged when a lawyer is directing investment of funds or overseeing trustee and the trust incurs substantial losses.

**Tax errors.**

- Failure to timely file.
- Failure to know tax law.

**Conflicts of interest.**

- Lawyer self-dealing.

**Lack of documentation.**

- Failure to document important information and advice given to clients.

**Drafting errors.**

**Theft of estate funds.**

**Trust creation and modifications.**

- Allegations of negligence in changes involving disinheritance and beneficiary removal.

**Tax consequences of trust and estate planning.**

- Clients claim negligence when a lawyer fails to explain the tax and penalty risks of a plan and the cost to defend an IRS action.

**Trustee/executor services.**

- Wasting of assets and excessive fees.

Most of the negligence discussed by the panel could have been easily prevented by routine risk management practices such as:

- clearly identifying who the client is;
- carefully describing what is and what is not within the scope of the representation;
- not dabbling in areas of law in which the lawyer has little or no competence;
- documenting all important advice given to clients and instructions received from clients, preferably in a confirming letter to the client; and
- using a reliable calendaring and conflicts check system

Practicing good risk management pays off – always.

*\* The panelists were Daniel Pinnington of practicePro Lawyers' Professional Indemnity Co.; Noelle Albanese of Liberty International Underwriters; Carter L. Hampton of Hampton Law; Mark O. Krueger of Minnesota Lawyers Mutual Insurance Co.; and Christine L. Mast of Hawkins & Parnell.*

## LAWYER SCAMS

Lawyers are frequently the target of scams that, if effective, result in losses in client trust accounts and violations of trust account fiduciary rules. Real estate, litigation, and estate planning lawyers are primary targets, but all lawyers should expect a scam attempt. The Lawyers' Professional Indemnity Company (LawPro) is doing outstanding bar service by providing information and guidance on scams. LawPro's fact sheet *Fraud – How to avoid becoming its next victim* offers the following advice:

Fraudsters retain the firm on a contrived legal matter so that they can run a counterfeit check or bank draft through the firm trust account and walk away with real money. When the bad check or draft bounces, there will be a shortfall in the trust account.

**Business loan fraud**

- New client retains your firm's services to help with buying small business equipment or inventory.
- Documentation in client's file looks real (invoices, letters, etc).
- Background checks (corporate ... searches) may look normal.
- You're asked to represent lender and borrower.
- Certified check from "lender" arrives promptly, gets deposited to your trust account.
- Certified check looks authentic and has all normal security features.
- Funds are disbursed to the client.
- Days later your bank tells you the check/draft is fraudulent.

continued

*"There is only one rule for being a good talker – be a good listener."*

*Christopher Morley*



**Lawyers Mutual**

www.lmick.com

Waterfront Plaza  
323 West Main Street, Suite 600  
Louisville, KY 40202

PRESORTED STANDARD  
U.S. POSTAGE  
PAID  
LOUISVILLE, KY  
PERMIT NO. 879

*This newsletter is a periodic publication of Lawyers Mutual Insurance Co. of Kentucky. The contents are intended for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is not the intent of this newsletter to establish an attorney's standard of due care for a particular situation. Rather, it is our intent to advise our insureds to act in a manner which may be well above the standard of due care in order to avoid claims having merit as well as those without merit.*

## Malpractice Avoidance Update

Member National Association of Bar Related Insurance Companies

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](http://www.lmick.com)

### Board of Directors

RUTH H. BAXTER  
Carrollton

BARBARA D. BONAR  
Covington

BRUCE K. DAVIS  
Lexington

GLENN D. DENTON  
Paducah

CYNTHIA L. EFFINGER  
Louisville

CHARLES E. "BUZZ" ENGLISH, JR.  
Bowling Green

RONALD L. GAFFNEY  
Louisville

ESCUM L. MOORE, III  
Lexington

JOHN G. PRATHER, JR.  
Somerset

MARCIA MILBY RIDINGS  
London

BEVERLY R. STORM  
Covington

DANIEL P. STRATTON  
Pikeville

MARCIA L. WIREMAN  
Jackson

STEPHEN D. WOLNITZEK  
Covington

DAVID L. YEWELL  
Owensboro

Newsletter Editor:  
DEL O'ROARK

continued from page 5

## LAWYER SCAMS

### Debt collection fraud

- Generally targets litigators.
- New client (often offshore) contacts your firm seeking representation on a debt collection.
- Client provides legitimate documentation including invoices, demand letters, etc.
- Collection is hassle-free; debtor returns calls and pays up promptly.
- Certified check looks authentic and has all normal security features.
- You're instructed to send funds, minus legal fees, to an offshore account.
- Days later your bank tells you the check/draft is fraudulent.

### RED FLAGS

- Client is offshore, unknown to the firm and/or in a rush – pressures you to "do the deal" quickly.
- Client willing to pay higher-than-usual fees on a contingent basis from (bogus) funds you are to receive.
- Client shows up around banking holidays – when banks are closed and offices short-staffed.
- Debtor pays without any hassle – unusual given client's need to retain you to get payment in the first place.

### TIP: DIG DEEPER

- Do a reverse phone number search on the company and use Google to verify phone numbers, addresses and e-mail contacts.
- Contact the company to confirm that they are expecting debtor's payment or business loan.
- Go to bank website to verify branch transit number, address and phone number on the check.
- Hold funds until your bank confirms the funds are "good" by contacting the other bank, and it's safe to withdraw the deposit.

Go to LawPro's Website [www.practicepro.ca/fraud](http://www.practicepro.ca/fraud) (last viewed on 10/6/2009) for the rest of this article and many other highly useful articles on dealing with fraud from both within and without the firm.