

THE RISK MANAGER

Lawyers Mutual Insurance Co. of Kentucky



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"We are responsible for actions performed in response to circumstances for which we are not responsible."

Allan Massie

2005 Annual Policyholders' Meeting

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 7:00 am Wednesday, June 8, 2005, 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.

Common Errors Disclosed in Appellate Decisions

By Senior Status Judge Stan Billingsley

Editor's Note: This article is the first 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.

For a number of years I have had the job of writing a synopsis of every decision issued by Kentucky appellate courts for LawReader.com. These decisions reveal an amazingly large number of errors committed at trial and in appellate practice. All of these errors could be easily avoided by merely following the Rules of Evidence and the Rules of Procedure.

- **Filing Appeals Out of Time:** The grossest error seen and this happens more than a few times each year, is the failure to file a timely notice of appeal. Sometimes this is alleged to be due to a failure of the clerk to notify a party of the entry of the final judgment. While the trial judge has some discretion to remedy these situations, not all judges will do that. While the rules direct the clerk to notice all parties of the entry of a judgment, the clerk's failure to do so does not release the attorney and his client from the consequences of the appeal time tolling. We suggest you check every few days with the clerk to see when the judgment is filed if you plan to appeal the ruling.
- **Failure to Protect and Designate the Record:** Frequently appeals are dismissed due to the failure of the appellant to properly designate and include a reference to the portion of the record in issue. The appellate court will not write the trial clerk to search for a record you didn't send them. Sometimes the palpable error rule might save you, but don't count on it.
- **Appealing the Wrong Case:** In 2004 the worst error was a case in which the attorney appealed the wrong case. He filed the appeal timely, but in the heading misidentified the case he was appealing...oops! The Court, of course, dismissed the appeal.

How do you explain that one to your client?

- **Failure to Correctly Include Parties in Appeal:** Another error is the failure to give proper notice of appeal by styling the action against "Joe Smith, et al." While Joe Smith has notice, the Court of Appeals does not know anyone named "et al." or "et ux." and will not include him or her in the appeal. Clearly identify and name each party in your notice of appeal.
- **Failure to Make Timely Objection:** Failure to make timely objections is a common error. If the error is not preserved, it will generally not be heard by the court. The theory supporting this rule is that the trial court should be given an opportunity to correct error during the trial. Besides stating that you object on the record, you are required to "make known to the court the action which that party desires the court to take..." That can be a request for an admonition, a motion for mistrial, or motion to strike the offending evidence, etc. Whenever in doubt always object, state the relief sought from the court, and get it in the record, preferably in writing.
- **Curing Errors During Trial:** A party who has made an error can limit the effect of that error by promptly asking the judge to issue an admonition.
- **The Problem with Continuing Objections:** Don't fall into the practice of informing the court

continued

that you have a continuing objection and thereafter relying on that to protect your record. Merely making the motion has no binding effect. The trial judge must specifically approve the motion. A judge's silence or nod is rarely on the record and rarely will be held to be an affirmative ruling. Further you will prevent disagreements about the breadth of the issue actually covered by the judge's order.

- **Failure to Move for a Directed Verdict During Trial:** The failure to move for a directed verdict during the trial is an inexcusable error. All one has to do is to approach the bench at the close of the plaintiff's case and make an oral motion on the record. This should be done after the opposing party rests, and at the close of all the evidence at the end of the trial the motion should be renewed. (*The best practice is to prepare motions for directed verdict in writing prior to the trial, and hand a copy of the motion to the clerk to assure it gets in the record.*) At the very least be sure that the court stenographer or the audio/visual equipment actually is turned on and records the tendering of the motion. It is your duty to protect your record! There was a recent case dismissed because the trial attorney (while making a directed verdict motion at the close of the plaintiff's case) failed to renew the motion after the plaintiff had called rebuttal witnesses. I have never seen a case thrown out because the party made too many motions for directed verdict.

Conflict Avoidance: Top Ten List

This checklist was presented at the 2005 Legal Malpractice & Risk Management Conference by Holland & Knight LLP, Tallahassee, Florida. It is reprinted here with their kind permission.

1. **"Just the names, ma'am."** Get no substantive or confidential information about a prospective representation until *after* getting the pertinent names, running a conflict check, and making sure no conflict exists. Advise potential clients, including those receiving a presentation or holding a "beauty contest," that no attorney-client relationship exists until a conflict check is completed and a formal engagement entered.
2. **Ignorance is no excuse.** Complete all information on every new matter memo, especially adverse parties, corporate and ownership affiliations, opposing counsel, and a detailed matter description. You have an affirmative duty to find out. Ask. And, by the way, SPELLING COUNTS.

3. **"Almost" counts.** Submit declined/potential client information to ... new matters staff for entry into the conflict system. Provide the same information as for a new matter, especially including the subject matter of the consultation.
4. **Once is not enough.** Update all categories on the new matter memorandum whenever something changes, especially when a new party enters the case, or a party is acquired by or acquires another entity, or new or additional opposing counsel become involved.
5. **Inquiring minds want to know.** Read the new matter list when it comes out and investigate, or ask a loss prevention partner to investigate any potential conflicts you see.
6. **Shut the door.** When a matter is concluded, write the client a wrap-up letter advising that we are closing the file on that particular matter. Then close the file. If it is the last matter for that client, write a "have a nice life" letter ending the representation.
7. **Don't put all your eggs in one basket.** Open a new file with a separate new matter memorandum *and a new conflict check* for each distinctive matter you undertake (and, per firm policy, for all appellate matters). Avoid charging a variety of legal services involving different parties or counsel to a catch-all or general file or to a file opened for a different matter.
8. **Reading is fundamental.** Learn to read a conflict check accurately and intelligently. The system is not the problem: the users are. When in doubt, ask questions. Keep in mind that the nature of your proposed matter (e.g., a corporate acquisition) might create new conflicts down the road; deal with them now. Call all other attorneys who are listed as having run conflict checks on the same name – they may have opened a matter that is not yet on the list.
9. **Walls make good neighbors.** Yes, we have a lot of ethical walls. But they are important to our ongoing efforts to comply with the rules of ethics. Keep up with the walls that affect you, the people with whom you work most closely, and the people whose files and offices are close to yours. Always be aware of, and comply with, any restrictions that apply to you.
10. **Don't bury your head in the sand.** Each lawyer and non-lawyer staff member has an individual responsibility to comply with the rules of ethics, including the conflicts rules. Don't assume that someone else, no matter how senior or influential in the firm, has handled potential conflicts. Take the initiative: ask questions, check the file, run your own conflict check if necessary. Report any potential problems to a loss prevention partner immediately. **DO NOT GENERATE INTERNAL MEMORANDA PLACING BLAME OR ADMITTING FAULT.**

BONUS. No lawyer is an island. The reality of big-firm practice is that other lawyers, other practice areas, other offices also have clients, and their clients may be opposed to your clients. Stay informed about what the rest of the firm is doing. For example, all litigators should bear in mind that we have an active media practice that often seeks access to sealed files and closed proceedings, and all media lawyers should bear in mind that our litigation clients often have very good cause to seek closure. Be proactive and professional in dealing with business and ethical conflicts.

*"Getting caught
is the mother of
invention."*

Robert Byrne

Family Law: Post-Divorce Risk Management

At long last that nasty divorce representation is over. Everything is settled and agreed. You can now put that unhappy experience behind you and get on with less stressful work. Not so fast there – it is crucial to recognize that the conclusion of a divorce case does not carry with it the same finality typical of other concluded matters. A final divorce is not the end of the matter for the client – rather a new beginning. Post-divorce consequences will reveal any negligence by a lawyer with a vengeance. Long after a divorce is final lawyers can be accused of malpractice for not adequately counseling clients on actions they should take to implement the divorce order and protect their interest by amending official documents and important papers. The firm of Crawford & Baxter, Carrollton, Kentucky uses the following instruction sheet to inform clients of actions they should take post-divorce. It serves the purpose of the client well and documents the file conclusively that a client was properly counseled. Our thanks to Crawford & Baxter for allowing us to share it with you.

Information for Divorced Clients

Our law firm recently represented you when you were divorced from your spouse. While the Court recognizes that you are no longer husband and wife, you are responsible to notify other people that you are divorced, and you should take steps to change your official records and important papers. The following checklist is not exhaustive of all persons to notify, but can be used as a guide:

Employer: Notify your employer to change your company records and the beneficiaries on your group life insurance, health and hospitalization insurance, or disability plan, as well as your retirement benefits, including any profit sharing, 401-K, pension, retirement or deferred compensation benefits or your ex-spouse may receive benefits you do not want him or her to have. If you are receiving a share of your spouse's retirement, pension, or 401-K benefits, make sure you receive a copy of the Qualified Domestic Relations Order (QDRO) awarding you those benefits.

Banks/Investment Clubs: Notify banks, investment clubs and credit unions of marital status changes and close out joint accounts. Change beneficiary on savings, IRA, KEOGH plans, money market or mutual fund accounts. Destroy old joint checks.

Life/Disability Insurance: Contact all companies with whom you have insurance of any kind. Change names of "insured" and "beneficiaries" to reflect your new marital status. Make sure your health, hospitalization and life insurance at work is changed.

Health/Hospitalization Insurance: If you are carrying family members on your policy that you no longer are required to carry after your divorce, notify your company and send it a copy of your divorce papers so you will not be charged an extra premium. If you are carried on your spouse's health and hospitalization insurance and you want to continue the coverage at your own expense, contact your ex-spouse's employer or insurance carrier and ask about COBRA rights that entitle you to purchase insurance through them for additional months at your own cost.

Tax Preparer: Contact your tax preparer to discuss new tax status, right to claim exemptions, necessity of changes in withholding on paychecks, and effect on your taxes for the year.

Charge/Credit/Debit Cards, Accounts and Creditors: Notify companies of marital status changes, and close out joint accounts or have them transferred to your name alone. Verify ending balances and destroy joint credit cards.

Important Documents: Review all deeds to real estate, titles to motor vehicles, bills of sale to personal property, stock certificates, bonds, treasury notes, certificates of deposit, checking accounts and savings accounts to verify correct names on the documents and accounts and the proper ownership after divorce. Make arrangements to transfer items or change them as necessary.

Will: A divorce does not automatically change your will. Discuss the legal effect of your divorce upon your will with an attorney. Make the necessary changes to update your will to reflect your divorce and child custody arrangements.

Power of Attorney: If you gave your spouse a power of attorney over your legal affairs, health care or other matters, you need to revoke that power of attorney in writing. Discuss with an attorney what you need to do.

Name Change: If you changed your name as a part of your divorce, you are required to notify the following people to change the listed items:

- a. Circuit Court Clerk - driver's license;
- b. Social Security Administration - social security card;
- c. Employer - W-2;
- d. Bank/Financial Institution - W-4, accounts; and,
- e. Credit Cards/Charge Accounts - cards and accounts.

Social Security Benefits: If you were married ten (10) or more years, you have the right upon retirement to claim your ex-spouse's social security benefits. Keep a copy of your marriage license and your divorce papers and contact the Social Security Administration when you are eligible to file. If your ex-spouse dies while paying child support to you for your children, you can file with Social Security for benefits for yourself and your children until they reach the age of 18 years.

Child Support: If you are awarded child support, make sure the County Attorney's Office has your correct address and social security number so that wage assignment payments will come to you. Keep an accurate list of the dates and amounts of each child support check. You are entitled to receive child support until the child reaches the age of 18 years or graduates from high school, whichever last occurs. If you have a disabled child your right to collect child support continues past this time period throughout the child's disability. If your ex-spouse fails to pay the child support, medical bills or other required expenses

"... you can't teach old fleas new dogs."

Federico Fellini

by court order, you can contact the County Attorney's Office for assistance with collection of those monies, or contact our office to assist you with collection of these amounts. Make sure you have followed the terms of your Agreement to give your ex-spouse written notice of the failure to pay, and copies of any medical bills you are requesting to be reimbursed, together with the statement from the insurance company showing what was or was not paid.

If you are required to pay child support, make sure the wage assignment is in place at your place of employment, and the child support is being taken out of your paycheck so you have an accurate record of what was paid. If you change jobs, it is your responsibility to put a new wage assignment into place at your new place of employment. This can be done by calling the County Attorney's Office or contacting our law firm. If you have to pay your spouse directly until the wage assignment goes into effect, then obtain receipts for for all payments so that your records will reflect the amount you actually paid.

"It's easy to work for somebody else; all you have to do is show up."

Rita Warford

Child support can change until your child reaches 18 or graduates from high school, whichever last occurs. You can request a change in the child support anytime there is a change of circumstances. Examples of changes of circumstances include: 1) Either spouse receiving more or less money; 2) Either spouse is no longer able to work due to injury, disability, lay off or firing; 3) The amount of your health and hospitalization insurance premium changes; or 4) Day care expenses change up or down. To be legally entitled to a change in the child support you are receiving or paying, the child support must increase or decrease at least twenty-five percent (25%) during the first year after the child support order, or at least fifteen percent (15%) in years thereafter based upon the new information. The County Attorney's Office can review your child support with you, or you can contact our office for a review.

Conclusion: Keep a copy of your divorce papers in a secure location with other valuable papers as you will need a copy of them in the years to come. You can obtain another copy of your divorce papers from the Circuit Court Clerk's Office in the courthouse where you were divorced if your divorce papers are lost, destroyed or damaged.

The above list is not intended to include all possible persons and companies to contact, but to make suggestions as to persons who typically should be contacted. If you have any questions or concerns, or have a specific problem that needs to be discussed, feel free to contact us.

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