

## Settlement Negotiations and the "Apparent Authority" Doctrine

The Kentucky Supreme Court in *Clark v. Burden*, 95-SC-572-DG (3/21/96) considered whether a lawyer as agent has the apparent authority to settle a client's case. The court held " The trial court must determine whether appellant gave her attorney express or actual authority to settle the case ... If the court finds that such authority was given, the settlement should be enforced. Even if the trial court finds that no such authority was given, if it should also find that appellees were substantially and adversely affected by their reliance upon the purported settlement, enforcement would be appropriate. On failure to find one or the other of the circumstances... the court should determine that no settlement came into existence." The dissent expresses well the systemic complexities that denial of the lawyer-agent's apparent authority to settle may have. The only sure way to avoid problems under this ruling is to "get it in writing" from the opposing party. This opinion is a must read for all Kentucky lawyers.

## Client Files Part I: How Long Should You Keep Client Files?

A nagging professional responsibility and risk management problem for lawyers is determining how long to maintain client files and how to properly close them. This article addresses the first half of the question -- how long to keep files after a matter is concluded (i.e., no more billing will occur). The second half of the problem will be covered in our next newsletter.

The first consideration in file retention is to ascertain which matters have a prescribed retention period. Kentucky Rule of Professional Conduct 1.15 Safekeeping Property provides that complete records of client trust account funds and other property "shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." Pretty clearly if a lawyer is subject to producing this information on a representation for five years (presumably because of a bar complaint) the rest of the file will be needed as well. Accordingly, the minimum recommended file retention period for Kentucky lawyers is five years. Additionally, keep in mind that federal and state law may require that files be retained for specific periods of time (e.g., the IRS, SEC, certain corporate matters). The US Government Printing Office has available *The Guide To Record Retention Requirements* covering the Code of Federal Regulations file retention rules.

Some experts recommend five years as a rule of thumb for file retention. Others say 10 years if no other compelling considerations control. We recommend the more conservative 10 years retention period. Certain files could require even longer retention to include forever. Examples are:

- cases involving a minor or incompetent.
- estate plans for a client who is still alive ten years after the work is performed.

- contracts, notes, and bills paid over time still being paid off after 10 years.
- cases including a civil judgment which needs to be renewed.
- files establishing a real estate basis.
- criminal law files.
- corporate books and records (e.g., charter, stock, minutes, bylaws).
- files of problem clients or cases.
- adoption files, child support, alimony, custody proceedings.
- files concerning structured settlements.
- wills and estate probate matters.
- trust deeds.
- cases with recyclable work product.

Source: Keeping Client Files, Oregon State Bar "In Brief," January 1996 and "Malpractice Prevention Guidebook," Lawyers Mutual Liability Insurance Company of North Carolina.

### **Negligent Referral To Other Lawyers & Malpractice Liability**

Many lawyers do not appreciate that declining a matter and referring the declined client to another lawyer may result in malpractice liability. This is true even though the referring lawyer receives no fee and has no further participation in the representation. A preliminary consultation with a potential client is sufficient to create a duty to exercise ordinary care and skill when referring that person to another lawyer. The applicable standard of care is based on the nature of the declined representation. Often it will be enough to confirm that the recommended lawyer is licensed to practice law in Kentucky. Licensure gives rise to a presumption that the lawyer is competent and possesses the requisite character and fitness. If the declination is because the matter requires special skill or knowledge, the referring lawyer must be careful to ascertain that the suggested lawyer has the necessary competence. If the matter requires immediate action, the referring lawyer should advise that the new lawyer be consulted expeditiously. Recommending the right lawyer without cautioning that prompt action is necessary can also be a negligent referral. Larry Bodine in his article "The Right Way To Refer A Case" (Lawyers Weekly USA, 94 LWUSA 329, 4/11/94) advises that to limit your malpractice exposure:

- Keep no fee.

- Do not supervise the receiving attorney.
- Get proof that the receiving attorney is indeed a specialist in the legal matter, for example, by checking with the state bar association and other attorneys.
- Expressly advise your client in writing that your role has ended.
- Ascertain that the receiving attorney has malpractice insurance in an adequate amount.