The Risk Manager

Lawyers Mutual Insurance Co. of Kentucky

Fall 2006 Newsletter

Volume 17 Issue 4

Contact us

1-800-800-6101

or visit

our web site at

www.lmick.com

The Pitfalls of Practicing Law by Mail

- Do you take it for granted that your mail gets to the proper destination and on time if you mailed it with a reasonable amount of time to get there?
- Do you assume that the court clerk received and deposited your mailed filing fee and promptly filed the legal document accompanying the fee?
- Do you avoid using overnight, express delivery companies with Internet tracking service to cut down on costs?
- Are you familiar with the postage rates, weight limitations on mail, and restrictions on where mail can be dropped?
- Do you docket time sensitive mailings for follow-up to confirm arrival at the correct destination?
- Do you have an office procedure to confirm that mailed filing fees have been deposited in a timely manner?
- Do you use "Address Service Requested" on first class mail?
- Do you get the temporary address of clients who go south for the winter as part of your routine client intake procedures?

We have had claims based on court clerks allegedly failing to file mailed complaints, mortgages, and other legal documents either in a timely manner or not at all. In one case the clerk's office was in the process of moving when the mailed document should have been received. In other cases the clerk's position was that the mail was never received. The result is that deadlines and statutes of limitations are missed and unrecorded mortgages go unnoticed until it is too late to avoid a claim. Without irrefutable evidence that the document and filing fee were timely received by the clerk, a lawyer has little defense against a malpractice claim. Ultimately, it is always the lawyer's responsibility to determine that mailed documents are received and filed in time.

Every practice should have tight mail control procedures for both incoming and outgoing mail. For all outgoing mail double check addresses to make sure that a complete address is used including any suite number and nine digit zip code. Use the Post Office's ancillary service "Address Service Requested" for all outgoing first class mail. With this service for a small charge the Post Office will forward mail to changed addresses and notify you what the changed address is. Check with the Mailing Requirements Department of your Post Office for guidance on how Address Service Requested is used for outgoing mail. If you are representing clients who go south for the winter, make sure you get their temporary address as part of your client intake procedures.

All outgoing mail that contains time sensitive documents must be sent in a way to track the date of its arrival at the correct destination. This can be done any number of ways, the most obvious being via registered U.S. mail return receipt requested with signature of the receiving person. Overnight mail and express delivery services provide both Internet tracking and recipient signature service. These services are used by many, if not most, firms for time sensitive documents.

When filing appeals to the Court of Appeals or the Supreme Court be sure to consider the requirements of CR 76.40 (2) Timely filing:

> To be timely filed, a document must be received by the Clerk of the Supreme Court or the Clerk of the Court of Appeals within the time specified for filing, except that any document shall be deemed timely filed if it has been transmitted by United States registered (not certified) or express mail, or by other recognized mail carriers, with the date the transmitting agency received said document from the sender noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.

None of this is rocket science. It is much harder than that. It requires constant attention to detail by docketing time sensitive outgoing mail for follow-up to

continued

"One of the worst things that can happen in life is to win a bet on a horse at an early age."

Danny McGoorty

assure that it was received in a timely manner by the right addressee and, when a filing fee is involved, that the fee was deposited. If the fee is not deposited in the regular course of business, you are on notice that something is amiss requiring prompt action. Never, never send by regular mail any time sensitive document when there is not enough time to get the irrefutable confirmation that it was received on time. Following this rule could save you from a malpractice claim and a major out-of-pocket expense.

New Ruling Makes a Major Change in Contingent Fee Dispute Resolution

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.

One way to invite a malpractice claim or be accused of an ethics violation is to have a fee dispute with a client. An angry client sued for a fee is very likely to fight back with allegations of malpractice and misconduct. The Kentucky Supreme Court in *Wo Sin Chiu v. Shapero* (2004-SC-0639-DG, 10/19/2006) made a significant change in the method for calculating an attorney's lien for legal fees involving a contingency fee contract that should be carefully considered when deciding to sue a client for contingency fees.

In a fee dispute arising out of a personal injury case, the attorneys were found to have been discharged "without cause" by Chiu who subsequently recovered $175,000. The discharged attorneys had a contingent fee contract for their services and filed a civil action claiming entitlement to the contingency fee as set forth in the employment agreement. In the course of litigation Chiu raised the issue of whether there was an unethical solicitation of his case because he had signed the employment contract while in his hospital bed soon after being injured.

The Court found no unethical solicitation and overruled prior Kentucky case law that held damages for wrongful breach of a contingent fee employment agreement is determined by the terms of the agreement. See *LaBach v. Hampton*, 585 S.W.2d 434 (Ky. App. 1979). The Court in *Chiu* created a new doctrine to be applied in Kentucky:

> "...when an attorney employed under a contingency fee contract is discharged without cause before completion of the contract, he or she is entitled to fee recovery on a quantum meruit basis only, and not on the terms of the contract."

Under the quantum meruit theory adopted by the Court, litigation concerning attorney's fees will be a fact question to be determined according to the standard set out in *Inn-Group Management Servs., Inc. v. Greer*, 71 S.W.3d 125 (2002). There the Court ruled that "[w]hat constitutes a reasonable attorney fee is an issue of fact when the action is between an attorney and client to collect or defend a fee for representation." *Id.* at 130.

"Losers walking around with money in their pockets are always dangerous, not to be trusted. Some horse always reaches out and grabs them."

Bill Barich

Several Kentucky cases suggest that the recovery for an attorney's fee under a quantum meruit theory "... should be the amount of the contingent fee less such proportion of that sum as is reasonably represented by the labor and attention and expense that would have been required of plaintiffs to complete their undertaking, but which they did not do." See *Henry v. Vance*, 111 Ky. 72, 63 S.W. 273 at 275-276 (1901), which was cited in *Labach v. Hampton*, 585 S.W.2d 434 (Ky.App. 1979). See also *Gilbert v. Walbeck*, Ky., 339 S.W.2d 450 (1960).

This new ruling makes it even more imperative that attorneys carefully document in detail all of their work in a contingency fee case even though not paid on an hourly basis. Thorough documentation is key to the defense of a malpractice claim arising out of a contingency fee dispute and is the surest way of proving the value of legal services. Far too often attorneys find themselves in the awkward position of having spent considerable time in preparing a contingency fee case prior to discharge, but with a file containing only a few documents and no hourly record of work performed.

In "*Avoiding Malpractice*" Stephen M. Blumberg provides this useful risk management analysis of determining whether to sue a client for fees:

Avoid Suing Clients for Fees

Experience has shown that a great many legal malpractice cross-complaints are filed in response to the attorney's suit for unpaid fees. Often, the fees were not properly established, billed or collected prior to the litigation.

1. As a general rule, avoid suing clients for fees.

2. The preventive fee arrangement: By carefully handling your fees from the outset of a new case, the need to sue a client can often be avoided.

   a. Enter a written fee agreement early in the course of representation.
   b. In the fee arrangement, clearly spell out the method of billing and the scope of engagement.
   c. Use itemized billings so that the client can tell what is being done on his behalf.
   d. Bill periodically, preferably monthly.
   e. Keep an accurate time log reflecting daily efforts expended on behalf of the client.
   f. Do not attempt to change your method of compensation in the middle of the case.

continued

3. If you are determined to sue a client for fees, first consider the following checklist:

a. Is a substantial amount of money involved insofar as your law firm is concerned?
b. Was a good result obtained in the underlying case?
c. Has an uninvolved attorney of experience reviewed the file for possible malpractice?
d. Does your State have statutory arbitration requirements that must precede litigation?
e. Will any judgment obtained be collectible?

When is a Client Not a Client and Vice Versa?

Nothing seems easier than knowing when you have a client and most lawyers take it for granted that this is equally clear to others. In fact, there are frequent instances when lawyers believing that a client-attorney relationship was never formed or was terminated have found themselves accused of a conflict of interest or malpractice by a person claiming to be a client. A lawyer's worst nightmare is to have a client and not know it until a statute of limitations passes when nothing can be done to remedy the error. The following recent cases from other jurisdictions are illustrative of the confusion that can arise over the question of whether a lawyer had a client and provide some useful risk management lessons.

"Nobody ever committed suicide who had a good two-year-old in the barn."

Racetrack Proverb

Straggler Clients: In *Jones v. Rabanco Ltd.* (2006 WL 2237708, W.D. Wa 2006) the GTH law firm represented a subsidiary of a company in 2002 that it was now suing on behalf of its employees. The company moved to disqualify GTH claiming to still be a client from the representation of its subsidiary. GTH argued that the company was a former client because the subsidiary's matter had settled in 2002 and the firm had not provided any legal services to the subsidiary since that time which was now over three years. The Court reasoned that some event inconsistent with an attorney-client relationship is necessary to conclude that a representation is terminated. The facts showed that GTH had never sent a closing letter to the subsidiary, had three inactive subsidiary files that GTH considered completed but had never been closed, was paying for storage of dozens of boxes of documents relating to the subsidiary's dispute, had not notified the subsidiary when several lawyers who had worked on its matter left the firm, and assigned a new billing partner at that time for the subsidiary. Furthermore, the settlement agreement named GTH as the contact for any issues regarding the settlement agreement that did not expire until 2011. The Court ruled that these circumstances showed that GTH had the intention of a continuing representation of the subsidiary that required disqualification from representing the plaintiffs in the case against the parent.

Lessons Learned: As tempting as it is for the purposes of new business to foster the idea that a relationship continues once a matter is concluded, the best practice is to use closing letters to make crystal clear that the representation is over and that no further duties are owed the now former client. Had GTH followed this practice it would not have been disqualified because the subsidiary would have been a former client and there was no substantial relationship between the two cases. You are at the mercy of straggler clients when you leave the situation dangling – and don't expect mercy when accused of malpractice or a conflict of interest.

When is Terminating a Client Effective? : An Ohio lawyer fell out with his client who he was defending in a criminal matter. The client later sued the lawyer for malpractice who defended by claiming that the suit was not filed before the malpractice statute of limitations had expired. The case turned on whether the representation was terminated when the lawyer sent the client letters dated August 26, 2002 and August 28, 2002 referring to a telephone conversation in which the lawyer purported to terminate the representation; or not until several days later when the lawyer complied with a local court rule requiring a motion to withdraw. If the local court rule is determinative of the issue, the client's suit was in time. The intermediate appellate court held that the local court rule controlled and that the malpractice suit was timely. The Ohio Supreme Court reversed holding that "The date of termination of an attorney-client relationship … is a fact-specific determination to be made according to the rules set forth by statute and by case law. The determination is not dependent on local rules of court." The Court remanded the case for a determination of the termination date of the attorney-client relationship. (*Smith v. Conley*, 846 N.E.2d 509 (2006))

Lessons Learned: The Ohio lawyer may have been lucky. It is not clear from the decision whether when terminating his client he gave reasonable notice before withdrawing, but it does not appear so. He did the most important thing, however, by memorializing his telephonic withdrawal in letters that show that the client knew not later than August 28, 2002 that the lawyer had withdrawn and that the client was on notice at that time of any malpractice. In so doing the lawyer is able to claim on remand that the client missed the statute by several days and should prevail. Never forget that a terminated client is a high risk for making a malpractice claim or bar complaint.

continued

Always document a termination with a disengagement letter that:

- Confirms that the relationship is ending with a brief description of the reasons for withdrawal.
- Provides reasonable notice before withdrawal is final.
- Avoids imprudent comment on the merits of the case.
- Indicates whether payment is due for fees or expenses.
- Recommends seeking other counsel.
- Explains under what conditions the lawyer will consult with a successor counsel.
- Identifies important deadlines.
- Includes arrangements to transfer client files.
- If appropriate, includes a closing status report.

> *"Nobody has ever bet enough on a winning horse."*
>
> *Anonymous*

Confusion over the Scope of the Engagement: A law firm represented a client in a federal civil rights action over the client's firing as police chief that included a 42 USC Sec. 1983 cause of action and a state breach of contract cause of action. The Court dismissed with prejudice the federal claim and dismissed the state claim without prejudice. The client had six months to file a state court action or until March 13, 2000. The firm sent the client a new retainer agreement in October 1999 for representation in the state action. The client did not sign and return the agreement until July 2000, well after the statute of limitations had passed. The client then sued the firm for malpractice claiming that he believed that he had an existing attorney-client relationship for all aspects of the matter that included the state action. The Court found that the client's unilateral belief that there was a relationship was insufficient to raise a triable issue of fact and that the firm "established their entitlement to judgment as a matter of law because no attorney-client relationship existed … with respect to a state breach of contract action …." Interestingly, the Court added to its opinion that the state action lacked merit in any event. (*Carlos v. Lovett & Gould,* 2006 WL 1413524, N.Y.A.D. 2 Dept., 5/23/2006)

Lessons Learned: The firm may have been lucky in this case as indicated by the Court's gratuitous finding that the state action lacked merit. It should have been apparent from the outset of the representation that a state action might be required. If the firm did not intend to include that as part of the representation, the client should have received a thorough explanation of this limitation. A lawyer has a duty not to ignore circumstances surrounding a representation indicating legal issues for a client because they are outside the scope of representation. These issues should be brought to the attention of the client and the letter of engagement should clearly stipulate that they are not included in the representation.

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**

Lawyers Mutual Insurance Co. of Kentucky
Waterfront Plaza
323 West Main Street, Suite 600
Louisville, KY 40202

Malpractice Avoidance Update

Member National Association of Bar Related Insurance Companies