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The Chronicle

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Special Points of Interest

- Offices in Lexington and Louisville
- Statewide coverage
- 30 Attorneys
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- 18 AV-rated lawyers

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Dealing with Former Corporate Employees

By: Mark L. Moseley

In litigation, dealing with former employees of a corporate party raises questions involving both rules of evidence and ethical considerations. Under rules of evidence, communications between the attorney and the client are privileged. The other side cannot find out what the client has told the attorney or what the attorney has told the client. Under ethics rules, an attorney is prohibited from even contacting a witness whom he or she knows is represented by counsel unless the witness' counsel agrees. In practice, this means the attorney cannot simply call and interview the witness, but is usually forced to question the witness only at a deposition, after the witness has been carefully prepared by opposing counsel.

It is well-established that a corporation's current employees are within the zone of protection created by these rules. Ethical attorneys routinely refrain from contacting an adverse party's current employees either directly or indirectly, except by going through the corporation's attorney. But what about former employees? Can an attorney contact them informally? Does it make a difference whether the witness formerly held a management position with the corporation? If an attorney can contact such a witness, are there limits on what the attorney can ask? Are the communications between the witness and the corporation's attorney protected by attorney-client privilege?

Humco, Inc. v. Noble, 31 S.W.3d 916 (Ky. 2000), answered some of the ethical questions for Kentucky lawyers. The opinion makes clear that an attorney is not prohibited from contacting the former employees of an adverse corporate party, even if the witness held a managerial position during his or her employment. This is in line with the way courts in most (but not all) other states have handled that question. However, *Humco* left a gray area about what the attorney can ask regarding confidential information the witness learned while he or she was employed.

The best-known authority on Kentucky evidence law states that communications between the corporation's attorney and its former employees are not protected by the attorney-client privilege. This conclusion is based on the same logic as *Humco*: only current employees are representatives of the client, so when the corporation's attorney communicates with one of them it is not a communication with the "client" and is not protected by the attorney-client privilege.

A different problem exists for the lawyer representing the corporation. A few courts in other states have held that it is improper solicitation for a corporation's attorney to contact former employees, advise them that they need representation as witnesses, and offer to represent them for free (i.e., because the corporation will be paying) where the true purpose of the representation is simply to insulate the witness from informal contacts by the other side. Kentucky appellate courts have not yet addressed this issue.

Because of the different rules involved and the lack of guiding case law on some issues, attorneys on both sides must be careful in dealing with witnesses who are former employees of a corporate litigant.

Evaluating the Claim for Underinsured Motorist (UIM) Benefits in Light of Insured's Entitlement to Workers Compensation Benefits

By Michael K. Nisbet

What effect does the exclusive remedy provision of Kentucky's Workers' Compensation Statute have on a claim for underinsured motorist (UIM) benefits? Does the exclusive remedy provision of Kentucky's Workers' Compensation Statute bar a claim for UIM benefits? Can the UIM policy limits be set off by the amount of workers compensation benefits received by the insured? Can an insured receive a double recovery?

"Does the exclusive remedy provision of Kentucky's Workers' Compensation Statute bar a claim UIM benefits? ."

The answer to these questions begins with an analysis of the purpose of UIM coverage: to place the insured in the same position he would have occupied had the tortfeasor been fully insured. *Cinn. Ins. Co. v. Samples* 192 S.W.3d 311, 316 (Ky. 2006). Accordingly, the analysis of a UIM claim when an insured receives workers compensation benefits begins and ends with the analysis of the civil liability of the alleged underinsured tortfeasor. In other words, if the insured can obtain a judgment against the underinsured tortfeasor, then the insured may be entitled to UIM benefits.

This principle was first applied in the case of *Philadelphia Ins. Co. v. Morris*, 990 S.W.2d 621, 625 (Ky. 1999) where the Court held that the "exclusive remedy" provision does not preclude a worker from recovering UIM benefits. The Court reasoned that the "exclusive remedy" provision is for the protection of the employer and not the UIM carrier. In addition, the Court also held that workers' compensation set off provisions in UIM policies were void as against public policy. Id. at 627.

This does not mean that the "exclusive remedy" provision may never bar a claim for UIM benefits. In *State Farm v. Slusher*, 325 S.W.3d 318 (Ky. 2010), the Plaintiff claimed UIM benefits for injuries he sustained while on the job. The injury occurred while the Plaintiff was a passenger in his employer's vehicle which was being driven by a coworker, who was the alleged underinsured tortfeasor. The Court held the Plaintiff was not entitled to UIM benefits because his claim against the co-worker was barred by the "exclusive remedy" provision. The Court reasoned that because it was impossible for the Plaintiff to obtain a judgment against the underinsured tortfeasor, it was impossible to obtain a judgment in excess of the tortfeasor's liability insurance proceeds as required to obtain UIM benefits.

In *Samples*, the underinsured tortfeasor was not a co-worker. The Plaintiff was awarded workers' compensation benefits. The Plaintiff then obtained a jury verdict in excess of the torteasor's liability limits. The question arose as to whether the Plaintiff could receive UIM benefits that were duplicative of the workers' compensation award. Again, the Court looked to the liability of the alleged underinsured tortfeasor. The Court noted that the underinsured tortfeasor is entitled to an offset for those damages awarded by the jury that duplicate workers compensation benefits. This offset decreased the civil liability of the tortfeasor and, accordingly, decreased the Plaintiff's UIM benefits.

There are numerous scenarios that could play out in the case involving a claim for UIM benefits when workers' compensation benefits are involved. However, in each scenario the analysis is the same. You first determine the potential civil liability of the underinsured tortfeasor. If the claim against the tortfeasor is barred because the tortfeasor is a co-worker, then there is no claim for UIM benefits. If the underinsured tortfeasor is not a co-worker, you determine the civil liability of the underinsured tortfeasor in light of any set offs the underinsured tortfeasor would be entitled to because of a workers' compensation award. To put it more simply, you ignore the notion of UIM coverage and evaluate the claim from the perspective of the alleged underinsured tortfeasor's insurance carrier. If you evaluate the claim as being higher than the tortfeasor's liability limits, then the insured is potentially entitled to UIM benefits.

Give Me a Break

By: Tim Davis

Kentucky law can be particular sometimes, especially when it comes to labor and employment requirements. If an employer is not aware of the sometimes strict obligations of wage and hour law, there can be serious consequences if an employee files a lawsuit or if the Kentucky Labor Cabinet investigates an employer. Even if the employer prevails in a lawsuit or convinces the Labor Cabinet it did not violate the law, the lost resources spent in responding to a lawsuit or investigation can have a serious impact on productivity.

One of the areas of Kentucky law in which employers frequently fail to comply is the requirement for employee rest and lunch breaks. In Kentucky, an employer must allow its employees a rest break of at least ten minutes for every four hours worked. KRS 337.365. Employees covered by the Federal Railway Labor Act are the only exception to this requirement. Otherwise, all employees must receive this break—whether they are hourly or salaried and regardless of their profession.

Employers must also pay the employees during the break. In other words, the employer cannot require employees to "clock out" to take the break if clocking out would result in a reduction of the employees' hours worked. If an employer violates this law and either fails to pay the employees during rest breaks or prohibits rest breaks at all, there can be a fine of up to $1,000.00 for each violation. KRS 337.990(10).

Unlike rest breaks, an employer does not have to pay for the employee's time spent on a lunch break. Also in contrast to rest breaks, the law does not require a specific duration for lunch breaks. All that an employer must provide is "a reasonable period for lunch." KRS 337.355. This places employers in a difficult situation when they must determine the appropriate lunch period for employees. The Labor Cabinet has said, "Ordinarily, thirty (30) minutes or more is long enough for a bona fide lunch period. A shorter period may be long enough under special conditions." 803 Ky. Admin. Regs. 1:065. Perhaps the best way an employer can comply with this requirement is to make sure its employees receive at least thirty minutes for lunch.

The law also requires that an employee receive a lunch break as close to the middle of his or her shift as possible. However, an employer cannot require an employee to take a lunch break before the employee has been working for three hours or after the employee has worked five hours. Once again, the only exception is for employees subject to the Federal Railway Labor Act.

Employers and employees can agree to different requirements for lunch breaks, however. If there is a "mutual agreement" with respect to lunch breaks, the law will not supersede that agreement. Employers should take caution here, though. If an employee later decides to challenge an employer's lunch break practices, the employer should take care to document the terms of any mutual agreement. This can be as simple as an email to the employee or a memo to the employee's file. Employers can also set out the terms of a mutual agreement in a policy handbook, given to and acknowledged by the employee, which is probably the route that provides the most protection to the employer. In the event of a challenge from an employee, proper documentation will prevent any misunderstanding and provide support to the employer.

So, what is the best break practice for an employer? Assuming an employee works a standard eight hour shift starting at 9 am, the employee should take a rest break sometime between 9 am and noon, take at least a thirty minute lunch break at noon, and then take another rest break sometime between 1pm and 5 pm. Although different shifts and different daily hours worked will require a different schedule, this sets out the general rules an employer must follow to provide the required breaks to its employees.

"If an employer is not aware of the sometimes strict obligations of wage and hour law, there can be serious consequences if an employee files a lawsuit or if the Kentucky Labor Cabinet investigates an employer."

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Let us ring the bell for your success.

Welcome to The Chronicle, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms, practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

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IMPORTANCE OF THE RECORDED STATEMENT

By: Evan B. Jones

Landrum and Shouse, LLP recently had a premises liability jury trial which proved the great value of obtaining a recorded statement soon after an injury occurs. Our client ran a multi-unit housing complex which the Plaintiff was visiting at night. Plaintiff claimed that the she tripped in a hole in the yard while cutting through the grass, and fractured her wrist. There was a real injury consisting of permanently installed hardware and screws. The x-ray blowup effectively showed the jury a significant and painful injury.

The Plaintiff had a family member witness the fall. There were no defense or independent liability witnesses. Moreover, we conceded that there was a hole on the property as shown by Plaintiff's photographs.

The importance of the recorded statement came into play for impeachment purposes. The Plaintiff gave a recorded statement two months after the injury. However, the facts given would not have taken her near the hole, nor did she give a good reason for leaving the sidewalk at night. A year later, and after filing suit, she gave a vastly different story about what led her to take a short cut through the yard. This second story involved chasing after a young grandchild to keep her safe from a dog and was fairly sympathetic.

We were allowed to play the recorded statement at trial for impeachment purposes. The Jury then heard the Plaintiff in her own voice give a different version of the story than what had just been presented during direct testimony. She had to admit when confronted with the statement that she had given two different stories. Of course, she maintained that the second story was the truth.

The Jury took the Plaintiff's lack of consistency to heart. They apportioned seventy percent of liability to the Plaintiff, despite there being no defense witnesses on liability, and reduced medical expenses. Remarkably, the Jury awarded her $0 for pain and suffering for a surgically repaired fracture. Clearly, if we had not been able to impeach her with the recorded statement, a much different award would have resulted.

In balance, we put the independent adjuster on the stand to authenticate the recorded statement. Since we used the independent adjuster at trial, the Defendant was able to imply through cross-examination that there may have been some insurance at play. However, with the lack of defense witnesses on liability, it was determined that being able to show the Jury the Plaintiff's complete lack of truthfulness far outweighed the risk of any prejudice created by an insurance issue. The result was a Judgment of $2,091.21 in what may have been a far different case without the statement.