

Lawyers Mutual Insurance Co. of Kentucky

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GULLETT REPLACES BRETZ as Lawyers Mutual's Chief Operating Officer

A Message From Pete Gullett

As the new Chief Operating Officer of Lawyers Mutual Insurance Company of Kentucky, I extend warm greetings to all who receive our newsletter. My thanks to the Board of Directors and the policyholders of the company for trusting me with the job — and to Bob Breetz and Del O'Roark, my predecessors who significantly contributed to Lawyers Mutual's early success. Based on an innovative concept, Bob, Del, and the Board, with the support of the lawyers of Kentucky, built a financially strong professional liability insurance company exclusively for Kentucky lawyers. I am happy to advise that Bob remains with us as Chief Claims Counsel and Del as editor of this newsletter and as our risk management consultant.



In my new capacity I make two promises to the lawyers of Kentucky:

- 1 First, Lawyers Mutual will remain a policyholder friendly company dedicated to providing not only protection, but also outstanding service to every lawyer we insure and to the bar as a whole. We will provide continuing legal education on ethics and risk management to your local bar. If you have questions about your insurance program or loss prevention, we are only a free telephone call away.
- 2 Second, Lawyers Mutual will continue to be operated in a financially prudent manner. We will provide comprehensive coverage at reasonable rates protecting you from malpractice claims and preserving your investment in this company. In short we will be here when you need us — especially when the going gets tough. That is our commitment to you. We are your company and your call will be as welcome when you report a claim as when you called to purchase insurance.

I look forward to participating in the continued progress of Lawyers Mutual and serving the Kentucky Bar. Please do not hesitate to contact me if I can be of any assistance to you regarding your insurance program or any questions you have about Lawyers Mutual.

QDROs, PENSIONS, AND MALPRACTICE

A blossoming area of malpractice concerns failure to properly cover pension plans in divorce Qualified Domestic Relations Orders. Frequently a pension plan is the most valuable marital asset to be divided. In today's economy there are defined benefit plans, defined contribution plans, ERISA governed plans, 401(k)s, SEP IRAs, Simple IRAs, etc., etc. A plan may have a wide spectrum of investment options from little or no employee discretion on how funds are invested to plans that have as many as 37 different mutual funds for employees to select. Sylvia Hsieh covers in her article "Divorce Lawyers Are Still Making Big Mistakes With Pension Plans" important considerations in avoiding QDRO

malpractice and some good risk management advice. (Lawyers Weekly USA, 2000 LWUSA 1061, 12/11/00). What follows highlights the article's key points with some thoughts of our own.

Common QDRO Pension Plan Errors

Failure to obtain the pension plan terms and conditions: Pension plan administrators make distributions according to legal requirements that determine what benefits and options are available for payment. Action should be taken immediately upon undertaking a divorce representation to acquire a complete copy of all pension plans of the parties. In addition to providing the information necessary for meaningful negotiations they should indicate whether there are any loans outstanding on a

pension account. It then can be made clear who is responsible for repayment.

Failure to consider death benefits: Under most plans death benefits and survivor benefits that continue after the employee's death must be included in the QDRO for the spouse to receive them. Key questions to ask are:

- What benefits does a spouse have when the employee dies before retiring? After retiring?

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Heads-up risk mangers!

"If everything appears to be going well, you are most probably not aware of everything that is going on."

– Corollary to Murphy's Law

– Should the QDRO provide for “shared interest” benefits which means that if the spouse dies first benefits revert to the employee; or “separate interest” benefits which means that benefits do not revert to the employee if the spouse dies first and could allow the spouse to elect someone else to receive the benefits?

Failure to protect the spouse’s interest before the QDRO is qualified: During the divorce proceedings, but before the QDRO is final, there is the risk that the employee will take loans from the pension account, make early withdrawals, or close it — all to the detriment of the spouse. Accordingly, an order freezing assets during this period to preclude the employee from dissipating pension assets is often advisable. Similarly, a temporary order covering death and survivor benefits should be obtained if it appears that there will be an appreciable period of time before the QDRO is final. It is essential that plan administrators be advised promptly of the divorce action and served with any orders protecting survivor benefits and freezing assets.

Failure to consider other plan benefits: Plans often offer other types of benefits such as early retirement bonuses. The QDRO should specifically cover these benefits just like basic benefits to assure that the spouse receives a share.

Failure to include all accounts: A complete inventory and asset evaluation of all pension plan accounts is an absolute necessity. The QDRO should be based on plan distribution options and consistent with those options indicate in detail from which accounts and in what proportion benefits will be paid.

Failure to specify an accurate calculation date: The calculation date set for determination of benefits amounts should be selected taking into consideration when accounts are credited with contributions. Selecting a

calculation date other than a plan’s annual or quarterly update of account assets can lead to an important reduction in benefits for a spouse. Note that some plans provide for a substantial employer contribution at time of retirement. Another calculation issue is how to treat increases or decreases in an account from the time the QDRO is in place to the time benefits are paid which can be years later. If the parties cannot agree on a date, the courts look to state law which can be the date of separation, divorce, or retirement.

Risk Management Actions

Client interview – Discuss pension plans issues with the client at the inception of the representation. Do not simply accept the client’s explanation of what pension plan benefits are. Get the plan documents for your own evaluation. Explain what a QDRO is and the necessity to get it in place promptly.

Draft the QDRO yourself – especially if you are representing the spouse – Similar to structured settlements, the parties have differing interest in the timing and content of pension plan QDROs. Beware of using plan forms to draft the QDRO. They make it easy for the plan administrator to determine benefits, but may not include all the beneficiary options. If necessary, go to a pension QDRO expert for assistance.

Notify the plan administrator early and often of the divorce action and developments – If the circumstances warrant, obtain and serve on the plan administrator temporary court orders freezing assets and preserving the spouse’s pension claims and survivor benefits until the QDRO is in place (some experts urge doing this in all cases). Get the administrator to confirm notification in writing.

Get the plan administrator’s approval of the QDRO prior to court approval — This simplifies everything and saves having to return to court to explain why the QDRO requires modification.

Documentation and file retention – Document thoroughly discussions with clients and actions taken to address pension plan issues in divorce proceedings. Recognize that pension QDROs are like wills in that malpractice is usually not an issue until long after the divorce is final. Accordingly, retain files indefinitely or until you are certain that there is no further possibility of a claim.

A recent case over a claim for child support payments from an ERISA governed pension plan illustrates how complicated things get when an employee with a history of informal living arrangements died leaving a designated pension plan beneficiary and a former companion by whom he had two children. The court upheld the claim for child support payments over the designated beneficiary based on a detailed evaluation of how ERISA recognizes state QDROs. The case is noteworthy because it concerns child support payments not part of a divorce action. Key to the success of the former companion was that she had obtained a state court child support order, notified the plan of her claim, and was actively seeking a QDRO when the employee died (*Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise*, U.S. Ct. App., 9th Circuit, No. 96-16799, 12/6/00).

NEW AND RECENT LEGAL MALPRACTICE AND PROFESSIONAL RESPONSIBILITY PUBLICATIONS

NEW — Legal Malpractice 5th Edition, Mallen & Smith, West Group, shipped \$332.00 (800-328-4880): *Legal Malpractice* is the seminal treatise on this subject. The 5th edition was released just last December in five volumes –

Remind you of law school?

“I have yet to see any problem, however complicated, which, when you looked at it in the right way, did not become still more complicated.”

– Poul Anderson

up from four. It retains its eight part organization of an introduction to legal malpractice, loss prevention, theories of liability, damages, defenses, recurring areas of liability, litigation of legal malpractice claims, and lawyers' professional liability insurance. No research of a legal malpractice issue is complete until this massive authority is consulted. Of particular note is the loss prevention part. It is an up-to-date practical review of key risk management practices complete with form letters and other risk management tools.

 **NEW — Restatement of the Law Governing Lawyers**, American Law Institute, shipped \$206.00 (800-253-6397): This two volume first edition was released last August. It contains eight chapters with 135 sections focusing on laws applying to the practice of law. It is unique in that it is the only *ALI Restatement* edition dedicated to a specific vocation. Its scope covers more than ethics rules. It includes the formation of the client-attorney relationship and legal malpractice as well. The *Restatement* is *avant-garde* and often departs significantly from current disciplinary rules and ethics codes. Even in its draft stages courts cited the *Restatement of the Law Governing Lawyers* making it a must for most law libraries.

 **NEW – The Lawyer's Deskbook on Professional Responsibility**, Ronald D. Rotunda, ABA Center for Professional Responsibility, West Group, shipped \$48.00 (800-328-4880): A good basic professional responsibility reference covering both lawyer and judicial rules by one of the leading professional responsibility law professors.

 **RECENT – Annotated Model Rules of Professional Conduct 4th Edition**, ABA Center for Professional Responsibility, shipped \$76.00 (800-285-2221): Published in 1999 this volume is useful to Kentucky lawyers because our rules with a few exceptions are virtually identical to the Model Rules. Since the Kentucky Rules of Professional Conduct have been in effect for only 11 years, there is often little or no Kentucky authority available to resolve a close question of professional responsibility. *The Annotated Model Rules* contains both rule analysis and a compilation of case and ethics decisions pertaining to each rule. A good first reference that opens the door to more in-depth research.

 **RECENTLY DISCOVERED WEB SITE – The National Organization of Bar Counsel**, <http://www.nobc.org>. Covers recent ethics opinions and cases considered of special interest to bar counsel. It is a good source for recent significant opinions and trends in disciplinary matters.

GET LOSS PREVENTION HELP ON LAWYERS MUTUAL'S WEB SITE

A part of our responsibility as the bar sponsored malpractice insurance program for Kentucky lawyers is to provide information to the bar on a regular basis that helps lawyers avoid and prevent malpractice. We meet this obligation by publishing a quarterly risk management newsletter and by sponsoring articles in the *KBA Bench & Bar* on risk management and professional responsibility. We follow-up by placing newsletters and selected *Bench & Bar* articles on our web site. What follows is a list of recent articles from the newsletter and the *Bench & Bar* now available in the loss prevention section of <http://www.lmick.com> :

 **Bull Markets and Malpractice**, Winter 2000 newsletter – A review of the malpractice risks associated with the variety of financial investments and accounts that many clients now own. The article focuses on asset evaluation and stresses the increased risk that lawyers practicing family law, estate planning, and bankruptcy law now have.

 **Risk Managing Limited Liability Forms of Practice**, Spring 2000 newsletter – This article builds on the article "Supreme Court Approves Limited Liability Forms of Practice for Kentucky Lawyers" that appeared in the Winter 2000 newsletter.

 **Fielding Telephone Inquiries**, Summer 2000 newsletter – A practical guide to the all important task of getting representations off to the right start.

 **What Should You Do If Your Client Asks For Return of Files In Computer Disk Form?**, Fall 2000 newsletter – Modern technology creates new issues for routine matters. The article suggests an approach compatible with KBA ethics opinions.

 **Crossing State Lines Into The Unauthorized Practice Jungle – The Myth of The Single State Practitioner**, *Bench & Bar* January 2000 — Private practitioners often represent interstate clients or in-state clients with interstate legal matters. This has long been true for employed lawyers. Archaic UPL rules do not do justice to the realities of modern interstate practice. This article covers the professional responsibility and UPL issues you should consider when crossing the border.

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 **Limited Scope Representation – Where L.A. Law Meets Home Improvement**, *Bench & Bar* May 2000 — What is ethically permissible in limiting the scope of representation in Kentucky? Does limited scope alter fiduciary obligations? What is the difference between an agreement limiting the scope of representation, which is OK, and an agreement limiting malpractice liability, which is not OK? What risk management techniques should be followed when representing clients on a limited scope basis? This article provides a practical guide to limited scope representation that meets professional responsibility standards and avoids malpractice claims.

 **Investing In Client.Com – The New Economy or the Same Old Moral Hazard?**, *Bench & Bar* September 2000 — This article focuses on the professional responsibility and risk management considerations when a lawyer invests in a client's business.

 **Movin' On Redux – Lawyer Mobility Professional Responsibility and Risk Management Developments**, *Bench & Bar* January 2001 — The article *Movin' On* appeared in the Winter 1998 *Bench & Bar*. It provided an overview of the professional responsibility and risk management issues facing lawyers and firms when lawyers move to new firms. Key points covered were the lawyer's fiduciary obligation to the former firm, the issues when a lawyer leaves taking clients, the firm's defensive options when a lawyer leaves taking clients, and the vicarious liability of leaving partners for firm malpractice occurring before and after the partner departed. The article remains current and is available on Lawyers Mutual's web site. At the time "Movin'On" was written there was little official



guidance available for a departing lawyer. In the recent past the ABA issued its first formal ethics opinion on lawyers changing firms and the Kentucky Supreme Court authorized limited liability forms of practice for Kentucky lawyers. "Movin' On Redux" builds on its predecessor by analyzing these developments with emphasis on the due diligence considerations for the departing lawyer and the hiring firm.

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A guiding principle of the KBA Code of Professional Courtesy:

"Small kindnesses, small courtesies, small considerations, habitually practiced in our social intercourse, give greater charm to the character than the display of great talents and accomplishments." – Mary Ann Kelty

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



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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

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