Lawyers Mutual Insurance Co. of Kentucky

Volume 12, Issue 2

Spring 2001

2001 Annual Policyholders' Meeting

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 7:00 am Wednesday, June 13, 2001 in the Mary Todd Lincoln Room, Hyatt Regency Hotel, Lexington, 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.

Malpractice Trends

by Pete Gullett

Nonclient Malpractice

Certainly, in this day and age you cannot ignore the necessity for building your practice. Be wary, however, of "friends" who want to spread your good name far and wide. We are seeing an increasing risk for lawyers participating in the marketing programs of those selling advice on investments, estate planning, retirement programs, insurance products, and a variety of business ventures. These marketers are glad to have your participation as a student or teacher at a seminar touting their product. You are glad to be there because you will meet people that may decide to retain you to advise them on the legal aspects of whatever is being sold.

Be careful of providing opinion letters to the sponsor of a marketing program. If you are not, you may find yourself litigating in California, Texas, New York, Florida, or any other place where you have never had a client, never practiced, and don't know anybody. There have been several instances when opinion letters, thought to be between the attorney and a sponsor, were included in marketing materials distributed nationwide. Later the attorneys found that persons they never saw or talked to have taken their "advice." If the product does not then perform as expected, the attorneys inevitably will be joined in the resulting lawsuit. Even if the attorney is ultimately extricated with no indemnity payment, the cost in legal fees, harassment, time, and travel are often heavy.

A request for your participation may be couched in terms such as "Well, we have our own corporate lawyers but I always like to get second opinions. Would you mind doing a little research and dropping me a line giving me your opinion as to whether the way we are approaching these tax matters is OK." Such invitations should be approached with caution. If you decide to do the research and send the opinion letter, remember that when you provide information and opinion letters to clients that you know will be passed on to nonclients you are at risk that the nonclient may rely on that information. This exposes you to liability for erroneous or misleading representations. To avoid any misunderstandings carefully prepare and control opinion letters by following these risk management suggestions found in the Fall 1995 KBA *Bench & Bar* article "Negligence Liability To Nonclients" (available at www.lmick.com).

- ☛ Specify the scope of the opinion, its purpose, authorized uses, and restrictions.
- ☛ Set out the facts and assumptions on which the opinion is based. Be specific about facts based on your own knowledge and those provided by others who bear responsibility for their accuracy. If others are preparing evaluations on other aspects of the transaction, clearly exclude those parts from your opinion. If you are relying on an expert opinion as part of your analysis (e.g., an environmental assessment), spell it out in your opinion.
- ☛ Be complete — include the pro's and con's of the matter. Do not expose yourself to the accusation that you misled by omission. Material limitations must be disclosed.
- ☛ Establish office procedures for quality control of opinion letters. Procedures should indicate who is authorized to sign and release opinion letters for the firm, provide for a formal and cold review before opinion release, and require careful screening for prior inconsistent firm opinion letters. Unrealistically short deadlines for the production of opinion letters should not be accepted from clients and requests for additional information from the client should be made without hesitation. Because opinion letters carry a high risk for claims against both you and the client, they require extra time and often much more than the client anticipates. Be sure the client understands this and is prepared for the high billing that usually goes with a good opinion letter.

Too Accommodating

Two attorneys practiced law in the same building, though not in the same law office. They were acquainted and on friendly terms. The first lawyer, who had successfully settled a case for his client, approached the second lawyer and asked him for the accommodation of depositing the settlement check in the second lawyer's trust account so that everything could be finished that day. The second lawyer's self-protection antennae should have tingled, but did not. The second lawyer had a good relationship with his bank and knew they would immediately credit his account with the deposited funds. He accepted the

(continued on back)

> **"When you have nothing to say, say nothing; a weak defense strengthens your opponent, and silence is less injurious than a weak reply."**
>
> **Charles Caleb Colton**

endorsed check and deposited it into his trust account. That same day he wrote a check to the first lawyer noting on it that it was for the first lawyer's benefit and the benefit of his client.

No one reading this will be surprised to learn that the first lawyer cashed the check, did not take care of his client's medical bills, did not give any money to his client, and was disbarred. The sad ending to this story is that the second lawyer was also sued, also had a bar complaint filed, and although "all he did was try to do a favor for a friend," he lost that suit and was also disbarred (*Hetzel v. Parks*, 971 P. 2d 115 (Wash. App. 1999)). The moral is that even the most innocent appearing accommodation of another lawyer, party, or nonclient can carry huge liability and disciplinary exposure. Sort of like buying Yahoo stock at $240 hoping it will go up to $250, but it is now at $15. The potential benefit just didn't justify the risk of that much capital.

NATIONWIDE FAMILY LAWYERS STRUGGLE WITH MARITAL ASSETS SETTLEMENTS

Maryland: The wife agreed in a divorce settlement that all the personal property then in the husband's possession was his. The husband remarried, but failed to change the beneficiary of his IRA from his former wife to his new wife. When the husband died the new wife claimed the former wife had waived any claim of the IRA. The court held that at the time of the divorce settlement the former wife did not have a property interest in the IRA to waive, but only an expectancy interest. A general personal property waiver does not waive an expectancy interest. The new wife lost. *Maryland Court of Appeals. Paine Webber Inc. v. East, No. 44, September Term, 2000. 3/14/01.* Risk Management Lesson: Specifically identify in the settlement agreement all financial assets to be divided or retained by the parties. Urge clients to promptly change beneficiaries of pension plans, insurance policies, and other financial assets upon divorce and document that this advice was given.

Tennessee: A former wife claimed a share of the husband's disability benefits of $8,000 per month even though payments started after the divorce. She claimed a share because the disability policies premiums were paid from marital assets and the husband became disabled during the marriage. The court held that disability benefits are personal to the injured person and are not marital property. The former wife lost. *Tennessee Supreme Court. Gragg v. Gragg, No. W1998-00734-SC-R11-CV. 1/31/01.* Risk Management Lesson: Cover all significant financial issues, current and contingent, in the divorce settlement agreement.

Federal: In spite of a Washington statute that revokes beneficiary designations after a divorce the ex-wife of a deceased husband got his pension and insurance – children by a former marriage were left out in the cold. The husband failed to change the beneficiaries on either asset before his death. Both were found to be part of an ERISA plan. The US Supreme Court ruled that ERISA pre-empts the state beneficiary revocation statute thus entitling the former wife to the pension and insurance. *Egelhoff v. Egelhoff, No. 99-1529,3/21/01.* Risk Management Lesson: Lawyers must determine whether a divorce client has an ERISA plan with a designated beneficiary and advise accordingly. In a divorce action it is best to get a QDRO covering all pension plans approved before the divorce is complete. Document the file!

Newsletter Editor: Del O'Roark

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

Starks Building
455 South Fourth Avenue, Suite 990
Louisville, KY 40202-9705

PRSRT STD
U.S. POSTAGE
PAID
LOUISVILLE, KY
PERMIT NO. 879