Lawyers Mutual
www.lmick.com

The Risk Manager

A quarterly newsletter by Lawyers Mutual Insurance Company of Kentucky

WINTER 2010
Volume 21, Issue 1

Lawyers Mutual Now Offers Court Bonds Through the Lawyers Mutual Insurance Agency

Late last year Lawyers Mutual Insurance Company of Kentucky (LMICK) formed Lawyers Mutual Insurance Agency (LMIA). The agency was formed to expand our product offerings beyond the legal professional liability coverage underwritten by LMICK. (Please visit www.lmick.com for additional information regarding LMICK.)

LMIA provides Kentucky lawyers with court bonds that are underwritten by The Bar Plan Mutual Insurance Company. We make purchasing a court bond as simple and cost effective as possible.

Bonds available are:

- Supersedeas
- Fiduciary
- Injunction
- Lost Instrument
- Replevin

LMIA offers:

- Professionalism – A bond program managed by lawyers for lawyers.
- Speed – Bonds issued in 24 hours or less with most applications.
- Expertise – Underwriting by knowledgeable, experienced specialists.
- Security – Proven financial strength and stability.

To learn more about how to obtain a court bond visit LMIA's Web site at www.lmia.onlinecourtbonds.com, or contact The Bar Plan Mutual Insurance Company by phone at 877-553-6376 from 8:00 AM – 5:00 PM Central Time.

Risk Managing Aggregate Settlements

Events in Kentucky of a few years ago are an object lesson in how bad things can go when lawyers represent multiple clients and make an aggregate settlement of large sums of money. The recent Mississippi case *Waggoner v. Williamson* (8 So. 3d 147 (Miss. 2009)) once again demonstrates how vital it is to carefully risk manage an aggregate settlement.

The underlying case concerned a claim against a manufacturer of diet drugs. The Waggoners opted out of a class action and retained lawyer Williamson to represent them on an individual basis. Unknown to the Waggoners, Williamson actually represented more than 30 other plaintiffs against the same defendant. He also had a fee sharing agreement with lawyer Miller who

continued

Since 1987

"The taxpayer – that's someone who works for the federal government but doesn't have to take the civil service examination."

Ronald Reagan

continued from page 1

represented 14 clients who were all part of the same suit with the Waggoners. After signing a settlement agreement, the Waggoners learned of the true situation and sued Williamson and Miller for breach of fiduciary duty, breach of contract, and negligent representation. They alleged that they did not know that they were not individually represented and that they were never told of the existence and the amount of the aggregate settlement of $73,500,000 (Williamson admitted that the Waggoners were purposefully not told of the aggregate settlement). The Waggoners also claimed that they were never informed of the other claims included in the aggregate settlement, the financial allocation to each claimant, or the basis for calculating distributions. Finally, they alleged that they were given only 20 minutes to agree to sign the settlement and were informed if they did not sign they could forfeit any entitlement to the settlement. The trial court granted summary judgment for the lawyers on all the important aspects of the case. The Mississippi Supreme Court reversed the trial court's summary judgment and returned the case for a jury trial on the merits.

With the Mississippi case in mind, begin risk managing aggregate settlements by using this definition from ABA Formal Opinion 06-438 (2/10/2006):

> An aggregate settlement or aggregated agreement occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas.

Next consider Kentucky Rules of Professional Conduct Rule 1.8(g): Aggregate settlements:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. (*emphasis added*)

Then read Comment (13) to Rule 1.8(g):

> Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The Rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

At the beginning of the representation use a letter of engagement that explains what an aggregate settlement is and the terms, conditions, and procedures that will be followed in allocating awards or contributions agreed in the aggregate settlement.

When an aggregate settlement is offered, clients should be informed in a writing to be signed by the clients that includes at a minimum the following details as recommended in ABA Formal Opinion 06-438 (2/10/2006):

- The total amount of the aggregate settlement or the result of the aggregated agreement.
- The existence and nature of all of the claims, defenses, or pleas involved in the aggregate settlement or aggregated agreement.
- The details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be their settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the other client(s).

continued

"Why does a slight tax increase cost you $300 and a substantial tax cut saves you 30 cents?"
Peg Bracken

continued from page 2

- The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid in whole or part, from the proceeds of the settlement or by the opposing party or parties.

- The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.

Carefully practicing and managing the risk inherent in aggregate settlements has never been more important for Kentucky lawyers. You should expect clients with aggregate settlement remorse to be quick to claim malpractice or worse and our courts to be especially sensitive to how thoroughly clients are protected when participating in an aggregate settlement.

You Have Eight Weeks To File Suit in a High Dollar Case But Can't Find Your Client! *What Do You Do Now?*

In answering this question consider these three scenarios:

Scenario 1: The client has not given you authority to file suit and you do not have enough information to file a complaint on the client's behalf.

Scenario 2: The client has given you authority to file suit and you have enough information to file a complaint.

Scenario 3: The client has given you authority to file suit, but you do not have enough information to file a complaint.

Kentucky Rules of Professional Conduct to consider are:

- Rule 1.3, Diligence: You have a duty to carry through to conclusion all matters undertaken for a client unless you withdraw.

- Rule 1.16, Declining or Terminating Representation: Is a missing client a basis for withdrawal and, if so, is the time limitation for filing suit so close in the three scenarios that you have waited too long to give the client adequate notice of withdrawal?

- Rule 3.1, Meritorious Claims and Contentions: May you ever file a suit without knowing whether it is frivolous?

There is no known Kentucky authority on the litigation problem of a missing client and a statute of limitations about to run. Nebraska Ethics Advisory Opinion for Lawyers No. 08-03 is a good review of what other states have done with this issue and offers these possible answers to the three scenarios:

Scenario 1: You should not file suit since the client had rendered representation unreasonably difficult.

Scenario 2: You should file suit, but then move to withdraw after the suit is filed if unable to communicate with the client.

Scenario 3: You cannot file suit without adequate information. You may, however, have an obligation to ascertain the facts necessary to file suit. You should use due diligence in locating the missing facts so that you could follow the client's instructions and file suit.

In the Nebraska opinion it was observed of other state ethics opinions that "Each ethics opinion appears to struggle with the issue and for most, the conclusion is fact sensitive." The opinion then goes on to cite Maryland for this general rule:

> In Maryland, it is up to the attorney whether or not to file suit. Maryland Opinion 2006-22 (2006) concludes that if an attorney cannot locate his client despite diligent searches and attempts at contact and the statute of limitations is about to run, the attorney may, but is not required to, file suit. If unable to locate the client after filing suit, the lawyer may withdraw if still unable to contact his client.

continued

"We owe it to our country to pay our taxes without murmuring: the time to get in our fine work is on the evaluation."

Edgar Wilson Nye

continued from page 3

Risk manage the problem of missing clients by client intake procedures that obtain the following information:

- addresses
- telephone numbers
- names of people who will know where the client will be
- social security numbers
- drivers license numbers
- dates of birth
- with impaired clients get the names and numbers of professionals assisting the client with health problems, *e.g.*, health care providers and government agencies working with the impaired client

Cover in the letter of engagement:

- The client's continuing requirement to cooperate and communicate with the attorney and to always inform the lawyer of any change in address;
- The requirement that before any suit is filed the client must authorize it in writing; and
- That the lawyer has the right to withdraw from representation if the lawyer decides the case is without merit.

What constitutes a diligent effort in attempting to locate a missing client is fact specific. Some of the steps that can be taken are:

- Write and telephone the client at all known addresses and telephone numbers.
- Check readily available public information sources such as the telephone directory.
- Attempt to make contact on Google, social networking Web sites, and through newspaper notices.
- Call the client's employer.
- Visit last known addresses.
- Talk to family, friends, acquaintances, or neighbors either known to the lawyer or who may be discovered by the lawyer through the exercise of reasonable diligence.
- Review the file for leads from documents such as medical files or police reports.
- Contact the client's medical provider(s).

Finally, if still in a quandary, call the KBA Ethics Hotline for guidance.

It is Always Good to Hear From a Satisfied Lawyer We Insure

Sheila P. Hiestand of Bubalo, Hiestand & Rotman kindly sent Lawyers Mutual the following letter. We are more than pleased with this feedback and thank Ms. Hiestand for taking the time to send it.

Since I have been practicing law, I have had the great benefit of being insured by Lawyers Mutual Insurance Company of Kentucky. As is the case with most practicing attorneys, my firm has had claims made against it by the occasional unhappy client. Some have had merit; others were completely frivolous. What has made the difference for my firm with these claims is the excellent handling by Lawyers Mutual. Never once have I had any hesitation in calling Pete, Jane or Bob to tell them of a potential claim, as they have always handled it professionally, and most importantly, promptly and discreetly. Having practiced law themselves, they know there can be misunderstandings, which result in unnecessary claims, and honest mistakes that result in claims that need to be resolved with honesty and integrity.

What I believe distinguishes Lawyers Mutual from other legal liability insurers is that they truly understand the nuances of practicing law from every aspect. They will fight the frivolous cases in court, and to their credit (and my relief) have been overwhelmingly successful in defending such claims. Lawyers Mutual also has the unique ability with its genuinely qualified and sincere staff to take the case of a missed statute of limitations or other clear cut liability case, and resolve it in short order with minimum discomfort for their insured.

I look forward to continuing my coverage with Lawyers Mutual for years to come, and would encourage young and not-so-young lawyers to do the same.

On door of tax office: "Sorry, we're open."

Rod Browning

Client Files Cannot be Held Hostage in a Fee Dispute

Kentucky Law Has a Charging Lien But Not a Retaining Lien

By LawReader Senior Editor 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.

We often learn of fee disputes when a lawyer righteously believes that a client's file may be withheld until fees are paid. As reasonable as that may seem, it is expressly forbidden in the 2009 Kentucky Rules of Professional Conduct. Comment (10) to Rule 1.16 provides:

> The lawyer may not condition return of the client's file, papers, and property upon payment of a fee. KRS 376.460 gives a lawyer the right to have payment of fees secured by a judgment the client recovers as a result of the lawyer's efforts. However, a lawyer may withhold uncompensated work product from the client's returned files (*e.g.*, draft of pleadings, agreements and the like), unless the client's interests will be substantially prejudiced without the uncompensated work product. Documents or other relevant evidence, the original or its equivalent that may be required for trial preparation or as evidence for trial or in other legal proceedings, must be surrendered in their original form. See Rule 1.15 for guidance on resolving disputed claims for client funds.

KRS 376.460 permits an attorney's charging lien on a judgment or settlement for the amount of the fee agreed upon, or in the absence of an agreement, for a reasonable fee. If the records show the name of the attorney, the client is held to have notice of the lien. The client may not write a check or deliver something of value from the judgment or settlement until the attorney's charging lien is released. A charging lien is not available in transaction matters and is of no effect in litigation matters if the judgment or settlement does not result in "money or other thing of value."

A survey of Kentucky cases provides the following developments in attorney's lien law:

- **Worker's Compensation**

  In *Land v. Newsome* (614 S.W.2d 948 (Ky., 1981)) an attorney's lien was held not to be valid because KRS 342.320 overrules the attorney's lien statute.

  "There is no statutory authority for the payment of an attorney fee in addition to the award. It is implicit in the wording of KRS 342.320(2) and the attorney fee award that the fee be paid from claimant's funds held by the Special Fund. Since the Special Fund held none of claimant's money, it is not liable for the attorney fee." "A lien cannot arise until the attorney is entitled to a fee. In a workman's compensation case an attorney is not legally entitled to a fee until that fee has been approved by the Board."

- **Offsetting Client Claim**

  In *Exchange Bank of Kentucky v. Wells* (860 S.W.2d 785 (Ky. App., 1993)) Wells obtained an attorney's lien for his fees. Exchange Bank secured a judgment against Wells and sought to set off the attorney's lien with the Bank's larger judgment against Wells. The court held that Wells' attorney's lien took priority over the Bank's offsetting claim and that he was entitled to recover his fees even though the judgment covered by the attorney's lien was less than the judgment the Bank was awarded against Wells.

  In the unpublished opinion *Pinson v. Thacker* (No. 2007-CA-000262-MR (Ky. App. 11/26/2008) (Ky. App., 2008) the Court held that "… Kentucky's rule [is] that an attorney's lien relates back to the time of the commencement of services, and that an attorney's lien takes precedence . ... Further, ... the trial court's right to set off one judgment against another is equitable in nature, and thus, the trial court has the power to determine the amount and manner of set-off."

- **Interest on Attorney's Liens**

  In the unpublished opinion *Pinson v. Thacker* (No. 2007-CA-000262-MR (Ky. App. 11/26/2008) (Ky. App., 2008) the Court held that "As an award of attorney's fees therefore became payable as damages, it was proper for the trial court to award interest on such fees." (*citations omitted*)

- **ERISA and Attorney's Liens**

  In *Commonwealth Health Corp. v. Croslin* (920 S.W.2d 46 (Ky., 1996)) the Court held that an award for attorney's fees is not within the jurisdiction of the state

continued

Lawyers Mutual
www.lmick.com

Waterfront Plaza
323 West Main Street, Suite 600
Louisville, KY 40202

PRESORTED STANDARD
U.S. POSTAGE
PAID
LOUISVILLE, KY
PERMIT NO. 879

Malpractice Avoidance Update

Member National Association of Bar Related Insurance Companies

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***

continued from page 5

court because the underlying ERISA claim was within federal jurisdiction:

> "… we conclude that ERISA, 29 U.S.C. § 1132(e), vests exclusive jurisdiction of this matter in the federal courts.
>
> …
>
> It is understood that if a court does not have subject matter jurisdiction, the court has no "power to do anything at all. Therefore, the trial court order awarding attorney's fees and costs is void." (*citations omitted*)

- **Probate Court and Attorney's Liens**

  In the unpublished opinion *Claypoole v. Gailor* (No. 2006-CA-001646-MR (Ky. App. 5/9/2008) (Ky. App., 2008)) a discharged lawyer in a successful contingency fee case submitted an attorney's lien fee claim to the estate of the deceased. The executor denied the claim and notified the lawyer that if he failed to file an action within sixty days following the date of the notice, he would be forever barred from asserting such claim. The lawyer missed the deadline and then attempted to enforce his lien in this action. The Court held:

  > In order to enforce his [attorney's] lien, an attorney may interplead in the original action or institute an independent action for recovery of his fee. … Here, Claypoole did not initially institute an independent action, but rather sought to enforce his lien through the pending probate action. The probate court then became the proper jurisdiction and venue in which to fully litigate the claim for entitlement to the asserted lien, as was properly found by the trial court. … Any further actions with regard to the asserted lien would necessarily be controlled by the statutes governing probate matters. (*citations omitted*)

- **Filing an Attorney's Lien Can Invite a Malpractice Claim**

  In *Kirk v. Watts* (62 S.W.3d 37 (Ky. App., 2001)) A bankruptcy court denied a discharged lawyer's attorney's lien fee claim and raised malpractice issues on his part. The lawyer had failed to list a sexual harassment claim in the client's bankruptcy filing. This seriously reduced the client's opportunity for a greater recovery on her claim than the bankruptcy trustee awarded her. The client promptly filed this malpractice claim.

Filing for an attorney's lien is the same difference as suing a client for fees. We have often cautioned that the surest way to face a malpractice claim is to sue a client for fees. This is equally true for attorney's liens. You must carefully evaluate your vulnerability to a claim of malpractice before filing.