



THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

THE RISK MANAGEMENT CHECKLIST EDITION

Here then is our situation at the start of the twenty-first century: We have accumulated stupendous know-how.... Nonetheless, the know-how is often unmanageable. Avoidable failures are common and persistent.... And the reason increasingly evident: the volume and complexity of what we know has exceeded our individual ability to deliver its benefits correctly, safely, or reliably.

You want people to make sure to get the stupid stuff right.

This means we need a different strategy for overcoming failure, one that builds on experience and takes advantage of the knowledge people have but somehow also makes up for our inevitable human inadequacies.

And there is such a strategy.... It is a checklist.

From "The Checklist Manifesto" by Atul Gawande

Lawyers have long used practice guides – checklists – to competently deliver legal service in all phases of the practice of law. A glaring exception to this exemplary approach for many lawyers is the failure to commit the same attention to using checklists to prevent malpractice. For the last 27 years Lawyers Mutual has steadily worked to develop malpractice prevention checklists for Kentucky lawyers. They include a comprehensive Law Practice Assessment, a checklist for closing a practice, common real estate errors, and many more. These checklists are available on Lawyers Mutual's website at www.lmick.com. Click on **Resources, Risk Management Articles Subject Index**, and go to **Checklists**.

In this newsletter we provide several new checklists from opinions addressing the complexity that new technology and the Internet bring to malpractice prevention plus checklists for maternity leave from practice. 

“WE ARE LIVING IN THE AGE OF **HUMAN ERROR**. SINCE WE'RE ALL HUMAN, SINCE ANYBODY CAN MAKE MISTAKES, SINCE NOBODY IS PERFECT, AND SINCE EVERYBODY IS EQUAL, A HUMAN ERROR IS **DEMOCRACY IN ACTION**.”

Florence King

DECIDING WHETHER TO USE NEW TECHNOLOGY TO TRANSMIT OR STORE CONFIDENTIAL CLIENT INFORMATION

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2010-179 considered this issue by asking:

Does an attorney violate the duties of confidentiality and competence he or she owes to a client by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties?

The Committee concluded:

Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate:

- 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security;

CONTINUED ON PAGE 2

INSIDE THIS ISSUE:

The Risk Management Checklist Edition	1
Deciding Whether To Use New Technology To Transmit Or Store Confidential Client Information	1
Do I Need To Encrypt This Email?.....	2
Risk Management Checklists for Maternity Leave?.....	3
Are You Ready for the Next Scam Targeting Lawyers?	4
Are You Competent to Accept a Matter That Will Require Extensive E-Discovery?.....	6



Lawyers Mutual

www.lmick.com

MEMBER NATIONAL ASSOCIATION OF BAR RELATED INSURANCE COMPANIES

DO I NEED TO ENCRYPT THIS EMAIL?

KBA Ethics Opinion E-403 (1998) provided a general rule for answering this question when responding to the issue: May a lawyer use electronic mail services including the Internet to communicate with clients without encryption? The opinion held that Kentucky lawyers may use electronic mail services to communicate with clients without encryption **unless unusual circumstances require enhanced security measures.**



Now ethics experts are raising the question whether this general rule is still valid with all the changes in technology and massive computer hacking going on today. Are these unusual circumstances that a competent lawyer concerned with protecting client confidentiality should heed by using special security measures such as encryption when using the Internet?

The Professional Ethics Committee for the State Bar of Texas Opinion No. 648 (2015) is one of the first ethics opinions addressing this new concern. The opinion responded to this inquiry from a firm:

When they started practicing law, the lawyers typically delivered written communication by facsimile or the U.S. Postal Service. Now, most of their written communication is delivered by web-based email, such as unencrypted Gmail.

Having read reports about email accounts being hacked and the National Security Agency obtaining email communications without a search warrant, the lawyers are concerned about whether it is proper for them to continue using email to communicate confidential information.

The Committee concluded after a careful review of numerous ethics opinions dealing with email communications that:

In general, considering the present state of technology and email usage, a lawyer may communicate confidential information by email. In some circumstances, however, a lawyer should consider whether the confidentiality of the information will be protected if communicated by email and whether it is prudent to use encrypted email or another form of communication. Examples of such circumstances are:

1. communicating highly sensitive or confidential information via email or unencrypted email connections;

2. sending an email to or from an account that the email sender or recipient shares with others;
3. sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer (see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011));
4. sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
5. sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
6. sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

Editor's note: One of the best risk management procedures for dealing with the use of electronic mail services is to obtain client consent in a letter of engagement for use of email, smart phones, cloud computing, and any other electronic device the firm uses to send client confidential information. 

NEW TECHNOLOGY

CONTINUED FROM FRONT PAGE

- 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information;
- 3) the degree of sensitivity of the information;
- 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product;
- 5) the urgency of the situation; and
- 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.

The opinion includes a good analysis of this checklist well worth reading and is readily available via Google. (last viewed on 9/15/2015) 

“YOU CANNOT **AVOID A DECISION**, BECAUSE EVEN THE AVOIDANCE IS A CONCEALED DECISION.” *YKarol Irzykowski*

RISK MANAGEMENT CHECKLISTS FOR MATERNITY LEAVE

The key malpractice prevention procedure for maternity leave is a plan for a smooth transition to a backup lawyer ready and qualified to perform required services during the leave. In larger firms this is relatively easy and the professional responsibility issues of client confidentiality, client communication, conflicts, client trust accounts, and fees are usually manageable. For the solo practitioner none of this is easy. The answer most often recommended is to have a plan for the solo practice to cover lengthy absences, expected and unexpected. A gloss of recommendations from several commentators on an effective plan follows:

FIND A BACKUP LAWYER

- ◆ Reach agreement, preferably in writing, with a trusted lawyer to back up your practice during defined absences; e.g., maternity leave, vacations, and extended illness.
- ◆ For Kentucky practices the backup lawyer should be a licensed KBA member in good standing with appropriate qualifications for your practice, unlikely to have conflicts with your clients, and with professional liability insurance.
- ◆ The agreement should define the duration and scope of the backup lawyer's authority. Is the backup to handle all client matters? Only matters in litigation? For how long – short term or long term?
- ◆ Consider making arrangements for the backup to handle your client trust account. One way is to make the backup a signatory on the trust account. A better way is a special power of attorney that permits the backup to act for you only in specified circumstances.
- ◆ The agreement should cover when and how much the backup is to be compensated. Consider such things as the time spent on the matter by you, the backup, and whether the case is on a contingency fee basis. Identify the source of funds from which the backup will be paid; e.g., accounts receivable, settlements, or fees received for the backup's services only. It is almost certain that Kentucky Rule of Professional Conduct 1.5(e) on fee sharing will apply. Be sure to comply with its disclosure and client consent provisions.

CLIENT CONSIDERATIONS

- ◆ Backup arrangements may be implemented only with client consent. The best practice is to notify clients in

advance of these arrangements. Many lawyers do this in a letter of engagement acknowledged in writing by the client. This has the advantage of in-place client consent for a backup to

take over a matter without delay. Some lawyers send a letter to clients shortly prior to taking maternity leave informing them of the forthcoming absence, explaining the backup arrangements, and asking for client consent. In either case the backup lawyer should always notify clients immediately upon taking over to avoid any misunderstandings.

- ◆ Protecting client confidentiality is the paramount concern in backup situations. In sudden emergencies such as the death of a lawyer it is permissible for an unassociated lawyer to inspect the deceased lawyer's client files without client consent to the extent necessary to identify clients and determine matters that require immediate attention. Given the long lead-time in planning for maternity leave there should be no sudden emergency. There is ample opportunity to get client consent for backup service and avoid any question of breach of confidentiality by an apparent interloper.

YOUR RISK MANAGEMENT ACTIONS PRIOR TO TAKING MATERNITY LEAVE

- ◆ The goal for every lawyer going on a lengthy absence is to be sure all active cases have up-to-date files, are accurately calendared, and in a posture to be continued without interruption. This is best accomplished by completing detailed case management plans for every active matter that includes a description of work done and a schedule for accomplishing remaining work. This also helps to determine how fees could be shared with the backup.
- ◆ In a perfect world, every practice has a written law office procedures manual or standing operating procedure – in this world relatively few do. If your practice does not have written procedures, you should prepare them for



CONTINUED ON PAGE 5

“EXPERIENCE – A COMB LIFE GIVES YOU AFTER YOU LOSE YOUR HAIR.” | Judith Stern

ARE YOU READY FOR THE NEXT SCAM TARGETING LAWYERS?

An odious development on the Internet and Social Media is the growth of scams targeting lawyers often with great success. In our newsletters we alerted you to several of these scams and outlined the technique of using fraudulent checks to trick lawyers into disbursing funds from a client trust account. By now we hope all Kentucky lawyers know what a typosquatter is, how ransomware works, and the danger of biting on a phishing scam. Recently the Bar of the City of New York Committee on Professional Ethics issued Formal Opinion 2015-3: *Lawyers Who Fall Victim to Internet Scams* (April 2015). In addition to providing an overview of the problem the Committee offered two good checklists:



RED FLAGS WHICH MAY ALERT AN ATTORNEY TO AN INTERNET SCAM

A lawyer's suspicion should be aroused by any one or more of these common "red flags" indicating a scam:

- ◆ The email sender is based abroad.
- ◆ The email sender does not provide a referral source. (If the email sender is asked how he found the firm, he may respond that it was through an online search. If prospective clients rarely approach the recipient attorney based on an Internet search, this should be an immediate red flag.)
- ◆ The initial email does not identify the law firm or recipient attorney by name, instead using a salutation such as "Dear barrister/solicitor/counselor."
- ◆ The email uses awkward phrasing or poor grammar, suggesting that it was written by someone with poor English or was converted into English via a translation tool.
- ◆ The email is sent to "undisclosed recipients," suggesting that it is directed to multiple recipients. (Alternatively, the attorney recipient may be blind copied on the email.)
- ◆ The email requests assistance on a legal matter in an area of law the recipient attorney does not practice.
- ◆ The email is vague in other respects, such as stating that the sender has a matter in the attorney's "jurisdiction," rather than specifying the jurisdiction itself.
- ◆ The email sender suggests that for this particular matter the attorney accept a contingency fee arrangement, even though that might not be customary for the attorney's practice.
- ◆ The email sender is quick to sign a retainer agreement, without negotiating over the attorney's fee (since the fee is illusory anyway).
- ◆ The email sender assures the attorney that the matter will resolve quickly.
- ◆ The counterparty, if there is one, will also likely respond quickly, settling the dispute or closing the deal with little or no negotiation.
- ◆ The email sender insists that his funds must be wired to a foreign bank account as soon as the check has cleared. (The sender often claims that there is an emergency requiring the immediate release of the funds.)
- ◆ The email sender or counterparty sends a supposed closing payment or settlement check within a few days. The check is typically a certified check or a cashier's check, often from a bank located outside of the attorney's jurisdiction.

DUTIES OF A LAWYER WHO SUSPECTS OR LEARNS THAT HE IS THE TARGET OF AN INTERNET SCAM

- ◆ An attorney who discovers that he is the target of an Internet-based trust account scam does not have a duty of confidentiality towards the individual attempting to defraud him, and is free to report the individual to law enforcement authorities, because that person does not qualify as a prospective or actual client of the attorney.
- ◆ However, before concluding that an individual is attempting to defraud the attorney and is not owed the duties normally owed to a prospective or actual client, the attorney must exercise reasonable diligence to investigate whether the person is engaged in fraud.
- ◆ In addition, because Internet-based trust account scams may harm other firm clients, a lawyer who receives a request for representation via the Internet has a duty to conduct a reasonable investigation to ascertain whether the person is a legitimate prospective client before accepting the representation.
- ◆ A lawyer who discovers he has been defrauded in a manner that results in harm to other clients of the law firm, such as the loss of client funds due to an escrow account scam, must promptly notify the harmed clients. 

“DON'T JUST COUNT YOUR YEARS, MAKE YOUR YEARS COUNT.”

*George
Meredeth*

MATERNITY LEAVE

CONTINUED FROM PAGE 3

your backup before going on maternity leave. Cover the following information at a minimum and be sure to share it with the backup well before your absence:

- ◆ Calendaring and conflict check systems.
- ◆ Case management plans.
- ◆ Client contact and notification information including telephone numbers and mailing list.
- ◆ Computer system including passwords, backup systems, and software employed.
- ◆ Office file plan.
- ◆ Billing practices including status of accounts receivable and special situations.
- ◆ List of office equipment used in the delivery of legal services.
- ◆ Insurance program to include professional liability and general liability coverage.
- ◆ Employee information.

North Carolina's Lawyers Mutual Risk Management Practice Guide "Extended Leave" offers guidance for extended leave for solo and small firms. It includes the following checklist that is a useful supplement to the other checklists in this article. To read the Guide,

go to www.lawyersmutualinc.com, click on Risk Management, go to Practice Guides, and click on "Extended Leave." (last viewed on 9/15/2015)

CHECKLIST FOR PREPARING FOR EXTENDED LEAVE

- Notify clients.
- Notify professional contacts.
- Notify malpractice carrier.
- Prepare employee(s).
- Print a master client/contact list.
- Prepare case status summaries.
- Arrange for collection of mail.
- Arrange for payment of bills.
- Arrange for processing of payments received.
- Update voice mail and email messages.
- Update calendar.
- Place a sign on your door.
- Map your files.
- Backup your data.
- Plan for emergencies.
- Prepare for the unexpected.



EXTENSIVE E-DISCOVERY

CONTINUED FROM PAGE 6

- analyze and understand a client's electronically stored information systems and storage;
- advise the client on available options for collection and preservation of electronically stored information;
- identify custodians of potentially relevant electronically stored information;
- meet and confer with opposing counsel concerning an e-discovery plan;
- perform data searches;
- collect responsive electronically stored information in a manner that preserves its integrity; and
- produce non-privileged electronically stored information in a recognized and appropriate manner.

Using a hypothetical fact situation, the opinion provides a good analysis of e-discovery ethical and malpractice considerations. It is readily available via Google. (last viewed on 9/15/2015)

This article is a revision of a prior newsletter article on risk managing maternity leave. To read that article go to Lawyers Mutual's Website at www.lmick.com. Click on Resources, Risk Management Articles Subject Index, and go to Maternity Leave. Our thanks to Lawyers Mutual of North Carolina for use of its helpful "Extended Leave" guide.

THE **RISK MANAGER** DEL O'ROARK
PUBLISHED BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY Newsletter Editor

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.

FOR MORE INFORMATION ABOUT LAWYERS MUTUAL,
 CALL (502) 568-6100 OR KY WATS 1-800-800-6101 OR
 VISIT OUR WEBSITE AT LMICK.COM.

“OFTEN **THERE IS NO NEED FOR AN EXPLANATION: YOUR ENEMIES WON'T BELIEVE IT, AND YOUR FRIENDS DO NOT NEED TO HEAR IT.**” Li Ao



Lawyers Mutual

www.lmick.com

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



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



FOR MORE INFORMATION ABOUT
LAWYERS MUTUAL, CALL (502) 568-6100
OR KY WATS 1-800-800-6101 OR
VISIT OUR WEBSITE AT LMICK.COM.

LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY BOARD OF DIRECTORS

- RUTH H. BAXTER
Carrollton
- GLENN D. DENTON
Paducah
- CHARLES E. "BUZZ" ENGLISH, JR.
Bowling Green
- DOUG FARNSELY
Louisville
- CARL N. FRAZIER
Lexington
- WILLIAM E. JOHNSON
Frankfort
- ANNE MILTON MCMILLIN
Louisville
- JOHN G. MCNEILL
Lexington
- DUSTIN E. MEEK
Louisville
- ESCU L. MOORE, III
Lexington
- RALPH C. PICKARD, JR.
Paducah
- JOHN G. PRATHER, JR.
Somerset
- CHRISTOPHER L. RHOADS
Owensboro
- MARCIA MILBY RIDINGS
London
- BEVERLY R. STORM
Covington
- DANIEL P. STRATTON
Pikeville
- R. MICHAEL SULLIVAN
Owensboro
- MARCIA L. WIREMAN
Jackson

ARE YOU COMPETENT TO ACCEPT A MATTER THAT WILL REQUIRE EXTENSIVE E-DISCOVERY?

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193 addressed this question from the perspective of a lawyer's ethical duty to handle his own client's electronically stored information. The Committee stressed that "a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery ... even where the attorney may otherwise be highly experienced. It also may result in violations of the duty of confidentiality, notwithstanding a lack of bad faith conduct."

The Committee provided two checklists to assist lawyers in deciding whether to accept a matter requiring e-discovery – one when the lawyer does not have the required e-discovery competence and one in which the lawyer does:

1. An attorney lacking the required competence for e-discovery issues has three options:
 1. acquire sufficient learning and skill before performance is required;
 2. associate with or consult technical consultants or competent counsel; or
 3. decline the client representation.
2. Attorneys handling e-discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:
 - assess e-discovery needs and issues at the outset;
 - implement procedures to preserve electronically stored information, or ensure that others do so;

CONTINUED ON PAGE 5