



## 2002 ANNUAL POLICYHOLDERS' MEETING

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 7:00am Wednesday, June 12, 2002, Salon 1, Cincinnati Marriott at RiverCenter, 10 West RiverCenter Blvd., Covington, 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.

### National Conference Studies Malpractice and Risk Management Trends

The National Conference on Legal Malpractice and Risk Management met in March in Chicago. A conference report by Joan C. Rogers appears in the March 27th Current Reports of the ABA/BNA Lawyers' Manual on Professional Conduct (Vol. 18, No. 7, p. 196). What follows are highlights of Ms. Rogers' report with a few editorial comments. Her report is recommended reading for all our policyholders.

#### Malpractice Trends

**Proving Transaction Malpractice Damages:** With considerable alarm it was noted that a California court recently ruled the "case within a case" technique used in litigation malpractice cases to prove that a lawyer's negligence damaged a client is not applicable to transaction malpractice cases. The client may use expert testimony to establish what an appropriate outcome of the transaction should have been rather than showing what it would have been but for the lawyer's negligence in the underlying case—a much easier standard of proof. (*Viner v. Sweet*, 112 Cal. Rptr.2d 426, 2001, 17 Law. Man. Prof. Conduct 596). This decision is pending appeal.

**Settlement Remorse:** Conferees reported an increase in clients suing lawyers over settled cases. Settlement remorse in divorce cases was identified as an especially high risk. *Editorial Comment:* It is important to recognize that settlement of a divorce case does not carry with it the same finality of other settlements. A divorce settlement is a new beginning—not the end of the matter for the client. The consequences of faulty divorce settlements reveal lawyer negligence with a vengeance. For analysis and risk management guidance on settlement malpractice read the *Bench & Bar* article "Unsettling Settlements"

available at [www.lmick.com](http://www.lmick.com) in the Avoiding Malpractice section.

**Suing for Fees:** Not exactly a trend because suing clients for fees has been in the top ten ways to be accused of malpractice for years, it still was the subject of considerable comment at the conference. Rogers captured the essence of the risk in her quote of Brian Holohan who observed, "To speed the case along when you sue for fees, just call your first pleading 'Complaint and Response to Counterclaim.'" *Editorial Comment:* Stephen M. Blumberg and Willis S. Baughman in "Preventing Legal Malpractice - California Case Studies" offer this risk management guidance on fee disputes:

"Experience has shown that a great many legal malpractice cross-complaints are filed in response to the attorney's suit for unpaid fees. Often, the fees were not properly established, billed or collected prior to the litigation.

1. As a general rule, avoid suing clients for fees.
2. The preventive fee arrangement: By carefully handling your fees from the outset of a new case, the need to sue a client can often be avoided.
  - a. Enter a written fee agreement early in the course of representation.
  - b. In the fee arrangement clearly spell out the method of billing and the scope of engagement.
  - c. Use itemized billings so that the client can tell what is being done on his behalf.
  - d. Bill periodically, preferably monthly.
  - e. Keep an accurate time log reflecting daily efforts expended on behalf of the client.

f. Do not attempt to change your method of compensation in the middle of the case.

3. If you are determined to sue a client for fees, first consider the following checklist:

- a. Is a substantial amount of money involved insofar as your law firm is concerned?
- b. Was a good result obtained in the underlying case?
- c. Has an uninvolved attorney of experience reviewed the file for possible malpractice?
- d. Does your state have statutory arbitration requirements that must precede litigation?
- e. Will any judgment obtained be collectible?

#### Risk Management Trends

**Hardening Insurance Market:** The conference agenda included a panel called "Insurance: the Crisis." Panelists conducted a general discussion of the first hard insurance market in 17 years, noting that more than a dozen insurers have dropped lawyers liability insurance in the recent past. One observer went so far as to estimate that legal malpractice insurance may go up 100-125 percent. Lawyers were advised to take more time when completing applications and to be more thorough. Since many insurance underwriters consider small firms and solo practitioners more risky than larger firms, one panelist predicted lawyers in these practices will "take a hit." *Editorial Comment:* The April 15, 2002 issue of

**Never joke with the press. Irony does not translate into newsprint.**

**Erica Jong**

Lawyers Weekly USA includes the article "Malpractice Insurance Market Hardens" that echoes the panelists' concerns. This is clearly the time to note that Lawyers Mutual came into being during the last insurance hard market and we will be here to insure Kentucky lawyers come what may. We are particularly committed to solo practitioners and small firms. We will work with our reinsurers to maintain the lowest premiums consistent with sound business practices during hard and soft markets.

**E-Mail Confidentiality Risks:** The confidentiality of e-mail was a hot topic at the conference. While unencrypted e-mailing of confidential information is ethically permissible in most states including Kentucky (KBA E-403, 1998), it is not without risk. Hackers are out there and lawyers must keep up with Internet vulnerability. *Editorial Comment:* Some sensitive situations require encryption. Lawyers must be alert to those matters and use discretion. Letters of engagement should include a paragraph that explains all forms of electronic communication a firm uses. The client should consent to their use or special arrangements should be agreed.

**Internet Risks:** Rogers quoted Ross Kodner on these Internet issues:

- When e-mailing the final version of a document, don't send it in a format that can be edited. Otherwise, Kodner noted, the client may decide to improve your draft and produce the [client's] own version of the document. Sending out a "pdf" document created

with Adobe Acrobat may make more sense, he suggested.

- Don't maintain a full-time, always-on Internet connection—which makes you vulnerable to electronic intrusion—without a firewall consisting of hardware, software, or both, even if you don't consider your firm likely to be targeted. Most hackers use "packet sniffers" to look for open doors rather than trying to break into a selected site, Kodner explained. Large law firms often have a full-time person assigned to maintain security, he noted.
- Implement a policy governing employees' use of the Internet and e-mail. [*Editorial Comment:* see "My Kingdom for an Effective Internet Policy" by Wendy Leibowitz at [www.llrx.com/features/internetpolicy.htm](http://www.llrx.com/features/internetpolicy.htm).]
- Be aware that recipients of Microsoft Word documents can view "metadata" that reveal all changes that have been made to such documents. Use a software program specially designed to wipe out this information in Word documents, or save the Word file as a "pdf" document, he suggested.

### Advising Real Estate Broker Clients

"Legal Scan 2001" is a nationwide report on real estate broker liability trends prepared by the Legal Research Center, Inc. for the National Association of Realtors. The appendices to the report include recent case law, current statutes, and regulations. Trends identified concern agent/broker liability, real estate office

employment relations, fair housing, and property management. The report is free to lawyers belonging to the National Association of Realtors. For more information on what appears to be a valuable research tool for real estate lawyers go online to [www.realtors.org](http://www.realtors.org). For information about the Legal Research Center go online to [www.lrci.com](http://www.lrci.com).

*Source: "Survey Tracks Liability Trends Against Real Estate Brokers" by Michael M. Bowden, Lawyers Weekly USA, 2001 LWUSA 560, 7/9/2001.*

**Plagiarism: The sincerest form of battery.**

**John Leonard**

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