

# THE RISK MANAGER

Lawyers Mutual Insurance Co. of Kentucky



## SPRING 2004 NEWSLETTER

Volume 15 Issue 2

Contact us  
**1-800-800-6101**

or visit  
our web site at  
**www.lmick.com**

*"Suing a client for fees is  
like playing leap frog with  
a unicorn."*

*Anonymous*

*"For instance" is not proof.*

*Hebrew Saying*

## 2003 ANNUAL POLICYHOLDERS' MEETING

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 7:00 am Wednesday, June 23, 2004, in Ballroom 1, Radisson Plaza Hotel, 369 West Vine Street, 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.



## Looking for an Ethics CLE Program?

Lawyers Mutual is dedicated to malpractice reduction through education. We are pleased to offer ethics and risk management CLE seminars on the Kentucky Rules of Professional Conduct and malpractice prevention as a bar service. The goal of each seminar is to capitalize on the experience of attending lawyers to come up with realistic resolutions of ethics and malpractice issues pertinent to day-to-day practice. These programs can be approved by the CLE Commission for 1/2 to 2 hours of ethics credits.

Our CLE programs are presented by Pete Gullett. In addition to his duties as Lawyers Mutual's chief operating officer, Pete works extensively with the KBA and local bar groups providing CLE seminars. He will present a program for any local bar or other group of Kentucky lawyers at no cost. Pete provides a copy of the required written materials. All you need to do is apply to the CLE Commission for credit, copy the materials for distribution, and draw a crowd. Please contact Pete Gullett at 1-800-800-6101 or 1-502-568-6100 to set up your CLE event.

The following seminar programs are available in a two hour format:

**1. Amanda Kumars Case** – Features a video that tells the story of a young child who may have been sickened by a defective drug. Issues presented for discussion include the permissible limits of deception in the negotiation process, nuts and bolts of the initial contact with and ultimate representation of an unsophisticated client, the conflicts inherent in dual representation of parent and child, use of discovery to discourage claims, plus much more.

**2. Seaside Resort Investment** – Features a four part video on representing business clients. The scenario begins with the startup of a new business and ends with

disaster. Issues raised in the video include conflicts of interest, advising the organizational client, fees, and lawyer negligence.

**3. The Case of the Silent Alarm** – Features a seven part video that focuses on a broad variety of ethical issues raised in a case in litigation from formation of the attorney-client relationship through settlement.

- **The Lawyer Interview.** (*professionalism, client relations and screening*)
- **Who's In Charge Here?** (*scope of representation, zeal, trial tactics, withdrawal*)
- **The Smoking Gun.** (*conflicts of interest, business entity clients, negotiations*)
- **The Mistake Of Fax.** (*confidentiality, risk management, supervisory responsibility*)
- **Playing To The Jury.** (*improper influence, misconduct*)
- **The Morning Lawyer.** (*impaired lawyers, supervisory responsibility, negotiations*)
- **Blowing The Whistle!** (*safekeeping property, reporting misconduct*)

**4. Dinner At Sharswood's Cafe** – Features a video of four thirtysomething lawyers who meet for dinner while attending their law school class reunion. Over the course of dinner the lawyers tell these stories about tough professional responsibility issues they are facing:

**continued**

- “Black Market Babies” – Client confidentiality and candor toward the tribunal.
- “Take No Prisoners” – Fairness to the opposing party when the opposing lawyer is an inexperienced rookie who thinks you are the epitome of what a lawyer should be.
- “Fun and Games in a Corporate General Counsel’s Office” – Partner supervisory responsibility, corporate client duties, and sexual harassment in the corporate law office.
- “The Case of the Smoking Floppy Disk” – The ethics of lawyer custody of real evidence in the age of cyberspace.

#### 5. *The Challenges Of In-House Counsel At*

***Homewares Corporation, USA*** – Features a seven part video that gives lawyers providing legal services to corporations and other business entities either as outside counsel or in-house counsel an opportunity to test their knowledge of the applicable Kentucky Rules of Professional Conduct. Professional responsibility issues covered are corporate governance, advising constituents of a corporation, outside counsel billing controls, outside counsel relations, dealing with illegal conduct of a constituent, situations when professional obligations conflict with the corporation’s interests, and sexual harassment.

6. ***“Where Angels Fear to Tread” – A Study in Conflicts and Professionalism*** – Features a video depicting an employee discrimination case that raises issues concerning the establishment and confidentiality of the attorney-client relationship; conflicts of interest; responsibilities of supervisory and subordinate attorneys; professionalism; plaintiff’s counsel responsibilities; and withdrawal from representation.

7. ***Adventures in Professional Responsibility*** – Features a video of several vignettes depicting ethical and malpractice issues in realistic situations. These situations focus on:

- Conflicts of interest which arise when one firm represents both parties in a real estate transaction.
- Candor toward the tribunal in the context of an automobile accident personal injury case and potentially fraudulent evidence.
- The basic rules of professional responsibility of outside and house counsel to their business entity clients.
- The reasonableness of fees charged to business entity clients by outside counsel and the professional responsibility of house and outside counsel when abuse is suspected.

- Client confidentiality and conflicts of interest from the perspective of the defense lawyer selected by an insurance company Claims Counsel to represent an insured defendant.

8. ***“And Here’s The Top Ten”*** – This two hour seminar covers the most prevalent types of legal malpractice. It includes ten practical steps to avoid or prevent the likelihood of receiving a claim. The seminar format draws on the experience and knowledge of the participants to develop realistic methods of risk management.

### EXPANDED NEWSLETTER RISK MANAGEMENT COVERAGE

Our editorial policy has been to annually publish our quarterly newsletter in one four page issue and three two page issues. Based on the interest expressed by our policyholders for more loss prevention information, we have decided to publish all issues in a four page format.

As part of this expansion we invite you to participate in preventing malpractice in Kentucky by contributing to a new newsletter column, *Loss Prevention Exchange*. Just as the overarching principle of Lawyers Mutual’s mission is Kentucky lawyers helping each other, the purpose of *Loss Prevention Exchange* is to allow Kentucky lawyers to share their loss prevention experience and lessons learned for the benefit of all.

Accordingly, we invite you to send us your thoughts, suggestions, and advice on avoiding and preventing malpractice. Advice on loss prevention management systems, alerts about tricky aspects of law and procedure that are malpractice traps, and lessons learned from experience are just some of the subjects we hope you will tell us about. We will be glad to consider any article you author on loss prevention for publication in the newsletter and your comments on newsletter content are always welcome.

Please send your comments to our newsletter editor, Del O’Roark, at [del914@bellsouth.net](mailto:del914@bellsouth.net) or mail them to him at Lawyers Mutual Insurance Company of Kentucky, 455 South Fourth Street, Suite 990, Louisville, KY 40202-9705.

### Loss Prevention Exchange

Feedback we got on the article *Avoiding Malpractice When Making Claims against US Government Agencies* by Dean Hamel in our last issue indicates that it was well received and provides the first contribution to our *Loss Prevention Exchange* column. Steve Schletker of

Covington, Kentucky sent us the following e-mail that is significant to Kentucky lawyers practicing law near Kentucky’s extensive waterways:

**Subject: Federal Torts Claims Act/Suits In Admiralty cases.**

**Mr. Gullett:**

***The avoiding malpractice update on Federal Tort Claims Act cases was very informative.***

***As a footnote to the article, a situation I have reviewed on several occasions from attorneys who do not regularly practice maritime law involves claims against the government for torts occurring at locks and dams maintained by the US Army Corps of Engineers.***

**continued**

*“Those who demand a meaningful dialogue are demanding a discussion that promises in advance to end up agreeing with them.”*

*Leo Rosten*

*The admiralty and maritime jurisdiction of the United States extends to and includes all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.*

*Personal injury or property damage occasioned by the negligence of the Corps of Engineers occurring, for example, at any of the locks on the Ohio River, may not fall under the Federal Tort Claims Act but may be covered by the Suits in Admiralty Act. [46 App. USC 741 et seq.]*

*Thanks again for the malpractice avoidance updates. They are very informative.*

*“Research is a blind date with knowledge.”*

*Anonymous*

Please send your loss prevention ideas to our newsletter editor, Del O’Roark, at [del914@bellsouth.net](mailto:del914@bellsouth.net) or mail them to him at Lawyers Mutual Insurance Company of Kentucky, 455 South Fourth Street, Suite 990, Louisville, KY 40202-9705.

## **Servicemembers Civil Relief Act (SCRA) Signed Into Law**

The Soldiers’ and Sailors’ Civil Relief Act was superseded by the SCRA on December 19, 2003. The SCRA is a major revision of prior law. Lawyers giving advice to servicemembers and their families must be thoroughly familiar with the SCRA to assure that they receive the full protection of this important law and to avoid malpractice. What follows are highlights of the new law to alert you to the significance of the changes and inform your research.

- The SCRA defines military service to provide more extensive coverage for National Guard members in federal service.
- The definition of court now includes “an administrative agency of the United States or any State” and the SCRA applies to “any judicial or administrative proceeding commenced in any court or agency.”
- A servicemember’s legal representative may be an “attorney acting on the behalf of a service member” or an “individual possessing a power of attorney.”
- The SCRA controls when a court or administrative agency may enter a default judgment against a servicemember including a new provision that provides for an automatic initial stay of proceedings for ninety days if requested.
- Procedures for obtaining and applying the six percent interest cap on pre-service loans are clarified.
- The SCRA includes new rules concerning termination of pre-service and during-service leases including automobile leases. These provisions are major changes from the old law.
- The SCRA increases substantially the amount of life insurance for which a servicemember may request premium deferment.
- The SCRA provisions allowing for the suspension of professional liability insurance coverage during active service by professionals specifically includes those providing legal service. During the suspension the insurer is required to provide coverage for claims based on pre-service acts and must reinstate coverage if requested by the professional upon the conclusion of active service.

The Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2003), should be studied by all lawyers providing legal service to servicemembers and their families. A Google search will give you the law and a treasure trove of articles on its impact.

*Source: Servicemembers Civil Relief Act Replaces Soldiers’ and Sailors’ Civil Relief Act, John T. Meixell, Army Law., Dec. 2003, at 38.*

## **CIVIL RULE 60.02 MOTION DOES NOT TOLL THE ONE-YEAR STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE SUITS – KRS 413.245**

The question whether a CR 60.02 motion tolls the one-year professional malpractice statute of limitations was raised in *Faris v. Stone, Ky., 103 S.W. 3d 1 (2003)*. The case concerns divorce litigation in which two years after divorce the wife concluded that her husband had committed fraud by undervaluing business assets. This resulted in her receiving \$1,500 instead of \$162,100 that a jury later decided was the appropriate amount.

The record showed that the wife discovered the malpractice on August 28, 1995 when she was advised by successor counsel that her prior lawyer had committed malpractice by failing to obtain a proper evaluation of the husband’s business. Less than one year later on June 14, 1996 the wife filed a CR 60.02 motion seeking relief on the basis of her ex-husband’s alleged fraud. Approximately seven months later the CR 60.02 motion was denied. On November 7, 1997, over two years and two months after discovering the negligence, the wife made a claim of malpractice against her former lawyer. The lawyer asserted a statute of limitations defense on the basis that it was uncontested that the malpractice had been discovered by the wife more than one year before making her malpractice claim.

A unanimous Supreme Court held:

“We begin with the observation that CR 60.02 is not an appellate vehicle. It is not a part of the normal progression of litigation, but is an extraordinary procedure whereby a collateral attack is made upon a judgment upon specific grounds set forth in the rule. As such, a CR 60.02 claim is not of the same character as an appeal of right or a motion for discretionary review. It is separate and distinct from the main case, and a party may not use it as a means to extend a statutory period. If it were otherwise, statutes of limitation would pass into nonexistence because CR 60.02 (d), (e), and (f) are without any outer limits with respect to time. As such, a party could always bring a CR 60.02 motion and thereby revitalize a time-barred claim.

....

**continued**

Accordingly, we decline to adopt Ms. Faris' argument that the date of her injury did not become fixed and nonspeculative until the denial of the CR 60.02 motion. Pursuant to KRS 413.245, the latter of the date of occurrence or the date of discovery of the negligence commences the one-year statute of limitations. The date of occurrence was the time when the underlying divorce decree became final. As Ms. Faris was not aware of the alleged malpractice at this time, the date of discovery governs commencement of the limitation period. Thus, the one-year period began when she learned that her case had been negligently practiced." (footnotes omitted)

The *Faris* decision is a mini-clinic on how KRS 413.245 applies to legal malpractice claims. The Court succinctly synthesizes the case law covering the key concepts of occurrence, discovery, and continuous representation *dicta*. It is a professional reading must. For more on this subject read *The Kentucky Malpractice Statute of Limitations – The Kentucky Supreme Court Clears the Air* available in the Bench & Bar section of Avoid Malpractice on our website at [www.lmick.com](http://www.lmick.com).

## UNTRUTHFUL NEGOTIATIONS

It is generally accepted that ethical negotiations permit a certain amount of puffing – this includes statements concerning future facts, opinions, quality, value, authenticity, and intentions on settling a claim. Where to draw the line between puffing and lying is the hard part of ethical negotiations. What is clear is that deliberate lying is unethical and can constitute fraud. A lawyer in a Maryland case was referred to bar authorities by a judge for blatantly lying in a written settlement offer. The lawyer represented 25 clients in a Fair Credit Reporting Act action against a

bank. It was alleged that a bank employee was secretly giving credit reports to an unidentified person. In the settlement offer the lawyer asked for \$75,000 per claimant and wrote that he had made confidential arrangements to obtain the name of the person responsible for getting the credit reports from the bank. He would give the bank this name as part of the settlement.

During a later deposition the lawyer admitted that he had no confidential arrangements for finding out whom this person was and that this statement was a lie that he included in the letter for the purpose of settlement bluster. In referring the case to disciplinary authorities the trial judge was clear he believed the lawyer's statement was one of material fact and not settlement bluster. He offered negotiating lawyers this useful analytical outline for staying within the rules:

- What is the statement or omission in dispute?
- Is it untrue or deceptively incomplete in any significant respect?
- Reasonably viewed, is it important to the subject being negotiated?
- At the time it was made, did the attorney know or should have known under the circumstances that the statement was untrue?

Source: *Ausberman v. Bank of America Corp.*, 212 F. Supp. 2d 435 (2002), *ABA/BNA Lawyers' Manual On Professional Conduct Current Reports*, Vol. 18, No.18, page 524 (8/28/02).

*"Middle age: The time when you think in a week or two you'll feel as good as ever."*  
Don Marquis

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](http://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

Member National Association of Bar Related Insurance Companies