### HUD Issues New Lead-Based Paint Hazard Regulation

The new regulation applies to pre-1978 built housing receiving some federal assistance. It is a comprehensive regulation that includes:

- Standards for determining the amounts of lead in paint, dust, or soil that is considered hazardous,
- Defines "hazards,"
- Requires clearance testing,
- Sets hazard control requirements,and
- Mandates that lead-based paint hazards be inspected or tested by certified inspectors or risk assessors.

Note that the regulatory standard for hazard evaluation of amounts of lead in paint, dust, and soil will be changed in the near future. The change is expected to lower the acceptable amounts.

Commentators observe that the new regulation should establish a standard of care for determining the adequacy of private housing owners' actions or in-actions. The new stricter requirements make it harder for landlords to comply thus increasing liability exposure. This risk is compounded because the rules are now all in one regulation making it difficult to plead ignorance. Conversely, they point out that, if the standards in the regulation are considered state of the art, showing compliance with the standards should be an effective defense. They also speculate that the new standards could make it easier to sue negligent risk assessors and abatement contractors. Finally, they note that the regulation is so turgid and detailed that it will be hard for many small firms and solos to practice lead-based paint cases without expert advice.

The new regulation is in 24 CFR Part 35. It is available along with comment and a question and answer fact sheet on HUD's Lead Control web site at: www.hud.gov/lea.

*Source: "New Lead Paint Rules Are Released by HUD," Lawyers Weekly USA, Issue 21/2000 LWUSA 897, 10/16/00 (www.lawyersweeklyusa.com).*

### What Should You Do If Your Client Asks For Return Of Files In Computer Disk Form?

Returning client files is usually routine. It gets emotional, however, when the lawyer is discharged and fees are owed. Ethics Opinion KBA E-395 (March 1997) makes it clear that a lawyer may not hold the file hostage even when fees are owed. Client files except for work product must be given to the client. The lawyer may charge the reasonable costs of duplication. *Always* keep a complete copy of the file for your records.

The latest file return issue concerns the client who wants them returned in computer disk form. Is the lawyer obligated to comply? No Kentucky guidance on this issue was found, but the Wisconsin bar Formal Ethics Op. E-00-3 (7/10/00) answers the question in a sensible way that is consistent with the philosophy of KBA EĐ395:

1. "... when the client requests documents be provided on a computer disk which the lawyer has maintained electronically, the lawyer should provide those documents in the requested format, so long as it is reasonably practicable to do so."

2. Work product need not be provided.

3. The client may be charged for the staff and professional time required to search databases, but the charges must be reasonable and not impair the client's access to the file.

4. Software contracts and copyright law may inhibit the lawyer's ability to comply with a request for computer disk files, but the ethics rules govern the lawyer's professional responsibility to surrender client information in electronic disk format.

5. Lawyers should anticipate that clients will often want files on computer disk.

Accordingly, law firm computer systems should be configured to facilitate access, retrieval, and disk duplication of client files.

Our Spring 1996 and Summer 1996 newsletters include articles on file retention, closing, and destruction (available at www.lmick.com). In them we advised to cover file management in your client letter of engagement by including how files are to be claimed. Now is a good time to update engagement letters to cover computer disk file returns. With client agreement in writing there is nothing to argue about provided the terms are reasonable and in compliance with the principles of KBA E-395. As a practical matter, other than original documents (deeds, documentary evidence, etc.), it may be good policy to establish for the firm the option to return files on a computer disk in the letter of engagement.

*For an extract of the Wisconsin ethics opinion see Current Reports, p.436, Vol. 16, No. 15, 8/16/00, ABA/BNA Lawyers' Manual On Professional Conduct.*

### Risk Management Lessons Learned From Other Jurisdictions

The best way to learn about risk management is from other lawyers' mistakes in other jurisdictions. Here are a few examples of what's going on "out there."

**Too Accommodating:** A California law firm learned the hard way that a single brief appearance as an accommodation to another lawyer creates an attorney-client relationship with malpractice exposure. A firm lawyer as a professional courtesy appeared for the lawyer at a summary judgment motion hearing. When the lawyer's client later sued for malpractice the "accommodating firm" was sued along with other defendants. The firm argued that it had not advised the client or become associated with the other lawyer. Rather they made a special appearance as the other lawyer's agent on this single motion and owed no duties to his client. The court held, "By appearing at a hearing in a case in which the attorney has no personal interest, the attorney is obviously representing the

interest of someone else, someone who is a party to that action. The client is such a person; the client's attorney of record is not. We conclude that an attorney making a special appearance is representing the client's interests and has a professional attorney-client relationship with the client." *.Streit v. Covington & Crowe, Cal. Ct. App. 4th Dist., No. E023862, 7/20/00; Current Reports, p.399, Vol. 16, No. 14, 8/2/00, ABA/BNA Lawyers' Manual On Professional Conduct.*

**Negligent Escrow Agent Referrals:** Sellers of real estate in Georgia were advised by the lender's lawyer acting as closing attorney that they could avoid capital gains taxes by making a tax free exchange under Internal Revenue Code Sec. 1031. The lawyer gave the sellers a letter and brochure of a company called Section 1031 Facilitator Inc. that claimed to be an "Exchange Facilitator" and a "Licensed Escrow." The sellers contacted James Gideon of Section 1031 Facilitator Inc. and were assured that their $209,000 would be safe in a trust account at Wachovia Bank. The sellers delivered the money to the closing attorney who wired the proceeds to Section 1031 Facilitator Inc. Gideon promptly absconded with the sellers' money and the sellers sued the closing attorney. Investigation established that "Gideon" was an alias and neither he nor the company was a licensed escrow agent or had a trust account at Wachovia Bank. The closing attorney admitted that all he knew about Section 1031 Facilitator Inc. was from the brochure which he believed he received as a member of the real estate section of the Georgia bar. The court rejected Gideon's intervening criminal act as defense for the closing attorney. It found ample evidence showing that the closing attorney might reasonably foresee this referral could cause the sellers injury. Under the circumstances there was a duty to ascertain the legitimacy and trustworthiness of Gideon and Section 1031 Facilitator Inc. before making a referral. *Williamson v. Abellera, Ga. Ct. App, No. A00A0918, 7/7/00; Current Reports, p.400, Vol. 16, No. 14, 8/2/00, ABA/BNA Lawyers' Manual On Professional Conduct.*

**The Same Ole' Story:** A Washington state lawyer was suspended for two years for client trust account abuse. He got into a financial bind when his personal and business accounts were garnisheed to pay overdue child support payments. This led to an inability to meet law office expenses. His solution was to keep earned fees in the trust account. He then paid office and personal expenses out of the trust account. The trust account balance on occasion was less than the amount of client funds required to be in the account, but ultimately no client lost money. The lawyer was lucky in two ways. First, the bar delayed three years in prosecuting the case during which the lawyer took aggressive remedial action. Second, the court made a distinction between intentional theft of client funds and knowing misuse of client property. Finding this case to be the latter, suspension was an adequate punishment. *In Re Tasker, Wash. No. 12426-4, 9/14/00; Current Reports, p.517, Vol. 16, No. 18, 9/27/00, ABA/BNA Lawyers' Manual On Professional Conduct.*