

# THE RISK MANAGER

Lawyers Mutual Insurance Co. of Kentucky



## Lawyers Mutual Celebrates Its 20th Anniversary

Lawyers Mutual opened for business on November 1, 1987. Twenty years later to the surprise of some we are still here and going strong. Many current members of the Kentucky bar were not in practice in the difficult days that led to the creation of Lawyers Mutual so it is only fitting on this significant anniversary date to review why Lawyers Mutual was formed by the Kentucky Bar Association, its purpose, and where we were in the beginning and where we are now.

### Why We Are Special

Lawyers professional liability insurance was not a major concern for lawyers until the 1970s. Lawyers in earlier days infrequently filed malpractice claims against other lawyers and many did not carry liability insurance. From the late '70s on malpractice claims against lawyers increased dramatically and with it the demand by lawyers for insurance. By the mid '80s the cost of lawyers liability insurance provided by commercial carriers had also increased dramatically nationwide. During this period premiums for some Kentucky lawyers doubled and re-doubled for no apparent reason. Along with other state bars, the KBA came to believe that the increased premiums paid by its membership were subsidizing payment of claims of high risk practices in a few major cities.

These developments led to the bar-related insurance company movement. Bar-related insurers are formed by bar leadership, capitalized by insured lawyers, and owned and governed by insured lawyers. Kentucky's experience is representative of this movement. In 1985 a KBA committee spearheaded the capitalization drive to raise the assets to start a mutual insurance company for Kentucky lawyers only. Thanks to the dedicated work of numerous members of our bar \$3,500,000 was raised enabling Lawyers Mutual Insurance Company of Kentucky to open its doors on November 1, 1987. The company's Articles of Incorporation calls for a Board of Directors that includes the KBA President, President-Elect, and Immediate Past-President. As a mutual insurance company, it is owned by its policyholders – all Kentucky lawyers.

### Lawyers Mutual's Mission

- *Assure that Kentucky lawyers always have access to lawyers liability insurance for a reasonable premium.*

Lawyers Mutual provides insurance only to Kentucky lawyers and cannot leave the state as commercial carriers are free to

do. Premium rates are based on the claims experience of Kentucky lawyers. We have never promised the lowest premium for insurance. Some commercial carriers enter a market with unprofitable low quotations to build a book of business hoping to catch up later. Our policy is to price our insurance on the basis of actuarial reviews that result in a fair premium schedule that adequately covers claims and provides for the company's long-term viability. This policy has enabled us to build financial strength while promptly paying claims as they are due.

- *Provide Claims Service Second To None*

The Kentucky lawyers that manage Lawyers Mutual know Kentucky law, know other Kentucky lawyers in all parts of the state, and understand the local judicial landscape. If a claim against an insured lawyer cannot be resolved administratively, the lawyer is provided a defense counsel that is knowledgeable in both the relevant law and the part of the state in which the insured lawyer practices. Lawyers Mutual's Claims Counsel are available to consult with insured lawyers any time they have a malpractice question, help them in determining whether they have a potential claim, and assist them in claims repair.

- *Provide loss prevention information for the use of all Kentucky lawyers to avoid and prevent malpractice claims.*

Lawyers Mutual began publishing a quarterly risk management newsletter in 1990 and is now in its 18<sup>th</sup> year of sending it to every member of the bar in the state. Members of the Lawyers Mutual staff for many years have worked closely with the KBA New Lawyers Program, provided

**continued**

FALL 2007  
NEWSLETTER  
Volume 18 Issue 4

Contact us  
1-800-800-6101  
or visit  
our web site at  
[www.lmick.com](http://www.lmick.com)



"All glory comes  
from daring to  
begin."

*Anonymous*

"The secret of  
success is constancy  
to purpose."

*Benjamin Disraeli*

CLE seminars across the state on legal malpractice and professional responsibility, and participated in numerous ethics and risk management programs at KBA conventions, CLE programs, and local bar meetings. Articles on ethics and risk management sponsored by Lawyers Mutual appear in the *KBA Bench & Bar* on a regular basis. As a bar-related company we see it as part of our mission to be of service to the entire Kentucky bar as well as to our insured lawyers.

### Where We Are Today

Over the last 20 years we have had our ups and downs as have virtually all other insurance companies. We have weathered all storms and gotten through those early years of operations when a start-up company is the most vulnerable. We look back with pride by how our conservative management practices have carried us through tough years and strengthened us in good years. The numbers illustrate this:

*At the end of Lawyers Mutual's first full calendar year of operations in 1988 the company had enforce 397 policies insuring 1,005 lawyers. Invested assets were \$4,002,000 and capital surplus was \$3,054,000.*

*At the end of August 2007 the company had enforce 1,268 policies insuring 2,702 lawyers. Invested assets were \$20,608,000 and capital surplus was \$6,500,000.*

The result is that after 20 years we have laid a solid financial foundation for our insurance program, established long-term relations with outstanding reinsurers to help us out with larger claims, and are well situated for continued growth for many years to come. We are still the insurance company owned and operated by Kentucky lawyers. If you are not already with us, please give us a look and come on board – Kentucky lawyers helping Kentucky lawyers is what we are all about.

## What Do You Do When a Joint Client Revokes a Conflict Waiver?

Hypothetical: You jointly represent a long standing client and a new client in a business transaction. You obtain a written consent of waiver of a conflict of interest at the inception of the representation signed by both clients. Subsequently the clients fall out and the new client revokes his consent.

Queries: Must you withdraw from representing both clients? May you withdraw from representing the new client and continue representing the long standing client in the matter?

A recent North Carolina State Bar ethics opinion reasoned that whether the lawyer could continue to represent the other client when one client revoked a conflict waiver depended on:

- the nature of the conflict,
- whether the one client revoked consent because of a material change in circumstances,
- the reasonable expectations of the other client, and
- whether material detriment to the other client or the lawyer would result.

The opinion concluded that a lawyer is not required to withdraw from representing the other client if one client revokes consent without good reason and evaluation of the above factors indicates that continued representation is warranted.

The KBA Ethics 2000 Committee recommended the following addition to the comments to Kentucky Rule of Professional Conduct 1.7 that addresses conflict waiver repudiation. This addition reflects the ABA Model Rules position on this issue and tracks the North Carolina opinion. It is offered here for your information, but should not be considered authority unless and until the Supreme Court adopts it.

A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

This conflict issue has a number of variables too extensive to be covered here. For an in-depth consideration of the question read North Carolina State Bar 2007 Formal Ethics Opinion 11 (7/13/2007), Lawyer's Duties when Client Revokes Consent to Conflict, and DC Legal Ethics Committee Opinion 317 (2002), Repudiation of Conflict of Interest Waivers. Both opinions are available on the Internet – just Google the bar Web sites.

The DC opinion recommends the risk management technique of covering conflict consent revocation in a letter of engagement and offers this sample language:

You have the right to repudiate this waiver should you later decide that it is no longer in your interest. Should the conflict addressed by the waiver be in existence or contemplated at that time, however, and should we or the other client(s) involved have acted in reliance on the waiver, we will have the right—and possibly the duty, under the applicable rules of professional conduct—to withdraw from representing you and (if permitted by such rules) to continue representing the other involved client(s) even though the other representation may be adverse to you.

Never forget that when all else fails in dealing with an ethics question, call the KBA Ethics Hotline for help -- get some insurance for resolving a tough question.

**"If you would be remembered, do one thing superbly well."**

*Saunders Norvell*



## Should You Accept Credit Cards for Fee Payments?

At a recent KBA Member Services Committee meeting the question was raised of how many Kentucky lawyers accept credit cards to collect fees. No one knew the answer and the group's best guess was that relatively few did. If this is correct, many Kentucky lawyers are missing out on both a good business practice and a good risk management practice.

Lawyers, steeped in tradition, are often slow to accept change in how they practice – especially if the change tends to ‘commercialize’ the way legal service is delivered. This may account for the conclusion that many lawyers in Kentucky do not accept credit cards. If this is the case, however, they are ignoring that we now live in a society that thrives on use of credit cards to pay for services. Offering a credit card option for fee payment improves client service by providing a convenient way for fee payment consistent with the way many people now routinely pay their bills.

Even more important is that accepting credit card payments for earned fees, retainers, and advance expenses facilitates payment at the inception of a representation as well as payment for replenishment of retainers and payment of in-progress billing. Fee disputes often arise at the end of a representation when a large fee is due – this is especially the case if the client was disappointed in the outcome of his matter. Regular billing and payment by credit card reduces client disputes over fees that frequently lead to bar complaints and malpractice claims. Best of all you get paid for your valuable services.

So what's the problem? While it is true that fee collection by credit card was recognized many years ago as permissible for Kentucky lawyers, accepting credit card payments was inhibited because there were a number of unanswered ethics questions about how to safeguard fees paid by credit card. This made it difficult to know how to manage a firm's accounts. Specifically:

- May all billing to a client be paid by credit card or only earned or non-refundable fees? What about retainers (unearned fees) and advance expense payments?
- In what kind of firm bank account should credit card payments be deposited when received by the bank – an office account or a trust account?
- How are bank credit card service charges applied? Does the full amount charged apply to the client's bill or only an amount net of bank service charges?
- If a client disputes a charge and directs the credit card issuer to “charge back” the payment against the firm's trust account, is the firm at risk of using other client funds to cover firm obligations?

Fortunately, the recent Formal Ethics Opinion KBA-E426 (3/23/2007) answers all these questions. It provides both the professional responsibility guidance and the client trust account management considerations required to confidently accept credit card payments in your practice. This opinion is a must read whether you are currently accepting credit card payments or are considering to do so. The opinion was published in *Bench & Bar*, Vol. 71, No. 4, July 2007.

One question not addressed in KBA-E426 was: Is it permissible to arrange for automatic charges against a client's credit card? This question

was discussed as follows in the article “Credit Cards, Firm Trust Accounts, and Thou,” (*Bench & Bar*, Vol. 67, No.6 , Nov. 2003, available on our web site at [www.lmick.com](http://www.lmick.com) – go to the Risk Management/Bench & Bar Articles page).

The Missouri, South Carolina, and Nassau County (N.Y.) bars permit automatic credit card charges (*i.e.*, without the client signing the credit card slip) if the client agrees. The key consideration in all three states is clarity of client communications. It is not enough simply to include automatic credit card charges as part of the terms in a letter of engagement. A lawyer must discuss the procedure with the client and get specific approval. A receipt must be sent to the client notifying of the charge. South Carolina requires that the client be sent a bill for review before making the pre-authorized charge against the credit card. Nassau County requires a written agreement if charges are for prospective services.

By following the procedures developed in other states for automatic credit card payments, Kentucky lawyers should meet ethical requirements of client communication and fair dealing. Nonetheless, it is an aggressive method of collecting fees that suggests a call to the KBA Ethics Hotline is in order before employing automatic credit card charge procedures. (*footnotes omitted*)

### Avoid a Malpractice Trap When Obtaining Medical Records

By Retired Judge 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](http://www.LawReader.com).*

KRS 422.317 requires a hospital or health care provider to give to a patient without charge a complete copy of his medical record upon written request by the patient. Notwithstanding this law, lawyers advise me of the occasional, but potentially disastrous, incidents of hospitals and health care

**continued**



**“You should buy the best you can afford, not the poorest of what you can't. From the best quality you will get the most satisfaction, the longest wear and the enjoyment of knowing it is the best without having to apologize for it.”**

*Stanley Marcus*



Lawyers Mutual Insurance Co.  
of Kentucky

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

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

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)

providers failing to deliver complete medical records under their control.

While many hospitals have digitized their records and usually provide excellent access to parties authorized to view them, smaller clinics, and particularly physicians' offices, on occasion do a haphazard job of compiling all medical records. Some hospitals or health care providers simply do a poor job of going through their medical records and negligently omit portions of the record.

The result is the lawyer that does not review original records and compare them with his client's history of treatment, may find to his embarrassment that essential documents were overlooked. This could give an advantage to an opposing lawyer who obtained a complete medical file. Examples of this are when you are confronted with critical medical records for the first time at trial, or your expert medical witness working with incomplete medical records has his opinion discredited when his incomplete knowledge of the case is shown on cross-examination.

You can manage this risk by taking a few simple steps:

- Before you obtain medical records, get from your client a thorough history of his treatment including the medical conditions for which treatment was sought, the procedures performed, and the dates of treatment. Emphasize that the purpose of this review is to see if there are any gaps, missed procedures, missed blood or lab reports etc. Have the client show you billing statements received from Medicare and others that show services received. Provide this information to the physician in your discovery request.
- After you get the medical records, go over them with your client by comparing them with his knowledge of his medical history with emphasis on identifying missing records.
- Pay close attention to dates in looking for gaps in the records.
- If the record pages are numbered, look for missing pages.
- If your client reports a medical condition that the records do not show, find out why.

Following these procedures should protect you from a claim of malpractice if a key missing record is later introduced at trial. Some of the more successful personal injury lawyers go a step further by employing the services of a nurse who is trained in reading medical records or consulting with opposing counsel to compare the completeness of key medical records.



### BOARD OF DIRECTORS

RUTH H. BAXTER, Carrollton  
BARBARA D. BONAR, Covington  
GLENN D. DENTON, Paducah  
JANE WINKLER DYCHE, London  
CHARLES E. ENGLISH, Bowling Green  
ROBERT C. EWALD, Louisville  
RONALD L. GAFFNEY, Louisville  
ESCUM L. MOORE, JR., Lexington  
JOHN G. PRATHER, JR., Somerset  
MARCIA MILBY RIDINGS, London  
JOE C. SAVAGE, Lexington  
BEVERLY R. STORM, Covington  
DANIEL P. STRATTON, Pikeville  
MARCIA L. WIREMAN, Jackson  
STEPHEN D. WOLNITZEK, Covington  
DAVID L. YEWELL, Owensboro

**Newsletter Editor:** Del O'Roark