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THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

ANGELA L. EDWARDS TO BE NAMED CHIEF EXECUTIVE OFFICER OF LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

Angela L. Edwards joined Lawyers Mutual Insurance Company of Kentucky on February 5th. She will assume the position of Chief Executive Officer on July 1, 2018.

During the interim period Ms. Edwards will work closely with Asa P. "Pete" Gullett, Lawyers Mutual's current Executive Vice President and Chief Executive Officer, the company staff, and the Board of Directors. Upon assuming the position of Chief Executive Officer, and in partnership with the Board of Directors, Ms. Edwards will be responsible for company policy, planning, and directing day-to-day company operations.

Mr. Gullett will step down from his position on July 1st. He will continue to work at Lawyers Mutual as assistant claims counsel, offer CLE presentations, and be a resource on legal malpractice matters for Kentucky lawyers.

Lawyers Mutual President Ruth Baxter, said, "The Board and staff are pleased to welcome Ms. Edwards. Her leadership and experience in litigation, malpractice defense, and finance ensure a strong foundation for understanding company operations and the unique mission of the company to serve the Kentucky Bar. We are pleased that Pete Gullett will continue to offer his expertise and service to the organization in his new role as assistant claims counsel."

Prior to joining Lawyers Mutual, Ms. Edwards was a partner in the Litigation Department of Dinsmore & Shohl, LLP. She practiced in the areas of ERISA litigation, commercial litigation, and accountant and attorney malpractice defense litigation. Ms. Edwards received a juris doctorate degree from the University of Kentucky College of Law and her bachelor's degree in Finance from Transylvania University. She currently serves on the Visiting Committee of the University of Kentucky College Of Law. She is on the Board of Regents for Transylvania University, and the Board of Trustees for the University of Kentucky. She has served as a commissioner of the Executive Branch of the Ethics Commission and President of the Louisville Bar Association.

RISK MANAGING EMAIL

Back in the 1990s when email and the Internet were becoming a major method of lawyer communications there was considerable concern whether professional responsibility rules would work with this new technology. After some reflection, ethics authorities realized that the principles of the rules were equally applicable to modern communication systems only needing amendments to emphasize the requirement that lawyers protect client confidences and maintain competence in communication technology.

This resulted in ABA and KBA opinions approving the use of email with cautionary advice on client confidentiality. ABA Ethics Committee Formal Opinion 477R (5/22/17) updated prior opinions with a fresh look at advances in technology and concluded that:

> A lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent

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Lawyers Mutual
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RISK MANAGING EMAIL

MARK COMMUNICATIONS AS PRIVILEGED AND CONFIDENTIAL TO PUT ANY UNINTENDED LAWYER RECIPIENT ON NOTICE THAT THE INFORMATION IS PRIVILEGED AND CONFIDENTIAL.

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inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

The Committee cited the factors in paragraph 18 of the Comment to Model Rule 1.6, Confidentiality of Information, to evaluate when special security precautions are required:

- the sensitivity of the information;
- the likelihood of disclosure if additional safeguards are not employed;
- the cost of employing additional safeguards;
- the difficulty of implementing the safeguards; and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

Next the Committee offered this guidance for guarding against disclosures:

1. **Understand the nature of the threat.** Consider the sensitivity of the client's information and whether it poses a greater risk of cyber theft. If there is a higher risk, greater protections may be warranted.
2. **Understand how client confidential information is transmitted and where it is stored.** Have a basic understanding of how your firm manages and accesses client data. Be aware of the multiple devices such as smartphones, laptops and tablets that are used to access client data, as each device is an access point and should be evaluated for security compliance.
3. **Understand and use reasonable electronic security measures.** Have an understanding of the security measures that are available to provide reasonable protections for client data. What is reasonable may depend on the facts of each case, and may include security procedures such as using secure Wi-Fi, firewalls and anti-spyware/anti-virus software and encryption.
4. **Determine how electronic communications about clients' matters should be protected.** Discuss with the client the level of security that is appropriate when communicating electronically. If the information is sensitive or warrants extra security, consider safeguards such as encryption or password protection for attachments. Take into account the client's level of sophistication with electronic communications. If the client is unsophisticated or has limited access to appropriate technology protections, alternative nonelectronic communication may be warranted.
5. **Label client confidential information.** Mark communications as privileged and confidential to put any unintended lawyer recipient on notice that the information is privileged and confidential. Under Model Rule 4.4(b) *Respect for Rights of Third Persons*, the inadvertent recipient then would be on notice to promptly notify the sender.

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"EACH LIFE IS MADE UP OF **MISTAKES** AND **LEARNING**, WAITING AND GROWING, PRACTICING **PATIENCE** AND BEING **PERSISTENT**." *Billy Graham*

EMAIL PLAYS SIGNIFICANT PART IN OVERRULING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT LAWYER IN MALPRACTICE SUIT

Todd signed a notice of withdrawal from Cesso's divorce action on July 25, 2008. After the action was tried by successor counsel, Cesso sued both Todd and successor counsel for malpractice. Todd defended the suit claiming that his representation of Cesso ceased on the date he signed the notice of withdrawal. The trial court granted his motion for summary judgment. The appellate court reversed the summary judgment in part. The facts showed that Cesso copied Todd on seven emails sent to successor counsel after July 25, 2008. These emails requested that Todd appear at upcoming hearings with successor counsel, requested a conference call with both lawyers to discuss team strategy, and requested a clarification of the roles between the two lawyers now that Todd was withdrawing. Todd did not respond to the emails. The appellate court found that: "On this record, reasonable persons could differ as to the existence of an attorney-client relationship so this issue must be resolved by the trier of fact." (*Cesso v. Todd*, 92 Mass. App. Ct. 131 (8/ 28/2017))

GOOD RISK MANAGEMENT REQUIRES THAT ONCE A CLIENT-ATTORNEY RELATIONSHIP IS TERMINATED THERE SHOULD BE NO FURTHER CONTACT REGARDING THE MERITS OF THE MATTER WITH THE FORMER CLIENT.

Good risk management requires that once a client-attorney relationship is terminated there should be no further contact regarding the merits of the matter with the former client to avoid creating a reasonable expectation on the former client's part that the lawyer continues to represent him. Email and other social media communications are too easily sent that create misleading impressions of representation.

RISK MANAGING EMAIL

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6. **Train lawyers and nonlawyer assistants in technology and information security.** Under Model Rules 5.1 and 5.3, take steps to ensure that lawyers and support personnel in the firm understand how to use reasonably secure methods of communication with clients. Also, follow up with law firm personnel to ensure that security procedures are adhered to, and periodically reassess and update security procedures.
7. **Conduct due diligence on vendors providing communication technology.** Take steps to ensure that any outside vendor's conduct comports with the professional obligations of the lawyer.

Kentucky is in line with the ABA Model Rule standards on the use of email by lawyers. KBA Ethics Opinion E-403 (3/1998) included the following guidance for use of email by Kentucky lawyers:

> [B]ecause (1) the expectation of privacy for electronic mail is no less reasonable than the expectation of privacy for ordinary telephone calls, and (2) the unauthorized interception of an electronic message subject to the ECPA is illegal, a lawyer does not violate Rule 1.6 by communicating with a client using electronic mail services, including the Internet, without encryption. …. The Committee recognizes that there may be unusual circumstances involving an extraordinarily sensitive matter that might require enhanced security measures like encryption.

To emphasize that Kentucky lawyers must keep up with computer technology the Kentucky Supreme Court promulgated a change effective January 1, 2018 to paragraph (6) Maintaining Competence of SCR 3.130(1.1) Competence:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology,** engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. *(emphasis added)*

Make no mistake – it may be an ethics violation or malpractice not to know what you are doing when sending email or any other e-document. The remainder of this newsletter is a review of the variety of ways email raises risk management issues.

"LIFE IS NOT ABOUT HOW FAST YOU RUN OR HOW HIGH YOU CLIMB, BUT HOW WELL YOU BOUNCE." *Vivian Komori*

HOW SHOULD A FIRM MANAGE EMAIL SENT TO THE FIRM FOR A LAWYER NO LONGER ASSOCIATED WITH THE FIRM?

THE FIRM **MUST LOOK AT THE EMAILS** TO DETERMINE ITS RESPONSIBILITIES TO **CURRENT CLIENTS, FORMER CLIENTS,** AND **CLIENTS** GOING **WITH** THE **DEPARTING LAWYER.**

The Philadelphia Bar Association Professional Guidance Committee in Opinion 2013-4 (Sept. 2013) was asked to consider the situation where a departed lawyer's email account at the firm was set up to reply that the lawyer was no longer with the firm. The firm read the emails and forwarded them to the departed lawyer if they related to business the lawyer took with him. The committee found this procedure appropriate based on the firm's duty to protect the interest of clients during a transition, to assure continuity in work being performed for clients, and to assure that the firm takes reasonable steps to protect clients' interest when the firm withdraws.

The departed lawyer asked that the firm just "bounce back" the emails to sender without reading them. The committee ruled this was not appropriate as the firm must look at the emails to determine its responsibilities to current clients, former clients, and clients going with the departing lawyer.

The committee advised the firm to immediately provide to email inquiring clients and former clients sufficient information that would allow them to make prompt contact with the ex-partner prior to offering the firm's services as an alternative.

Hinshaw in its December 2013 issue of "The Lawyers' Lawyer Newsletter" reviewed the opinion in the article *E-Mail Communications Between Clients and a Departing Attorney* and made this good point not covered by the committee:

> [T]he Opinion requires modification in one respect, namely that once a client has indicated its desire that the departing lawyer and his or her new firm should take over the representation, from that moment forward the law firm should have no interest in the contents of emails from or relating to that client, and indeed would be violating the client's attorney-client privilege with their "new" lawyer in continuing to review the contents of emails sent to the departing lawyer's account. Until that point is reached, however, the Opinion correctly gives the firm the obligation as well as the right to review emails sent to the departing lawyer's account.

THE RISK MANAGER
PUBLISHED BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

DEL O'ROARK
Newsletter Editor

"IF YOU DON'T DESIGN **YOUR OWN LIFE PLAN**, CHANCES ARE YOU'LL FALL INTO **SOMEONE ELSE'S PLAN**. AND GUESS WHAT THEY HAVE PLANNED FOR YOU? **NOT MUCH**." *Jim Rohn*

REASONS NOT TO USE "CC:" "BCC:" OR "REPLY ALL:" WHEN COPYING EMAILS TO A CLIENT

More than one lawyer has erred when sending, forwarding, or copying emails to a client. KBA Formal Ethics Opinion E-442 (11/17/17) provides guidance for coping with this issue for Kentucky lawyers. The opinion advised that:

- When a lawyer sends an email to an opposing lawyer with "cc" to a client of the sending lawyer, the receiving lawyer should not respond to the sending lawyer by using the "reply all" key. This is a violation SCR 3.130, Rule 4.2, Communication with person represented by counsel.
- A lawyer sending an email to an opposing lawyer with "cc" to a client of the sending lawyer risks violating confidentiality rules by revealing the identity of the client, that the client received the email with any attachments, and "in the case of corporate clients, the individuals the lawyer believes are connected to the matters and the corporate client's decision makers."

The opinion concludes with the advice that to avoid these problems "forward" emails to clients or use the "bcc" button for clients on email sent to other lawyers. Other precautions are to move the "reply all" button away from the reply button or install warning messages to prompt people to be sure they want to reply to all before they send.

As a supplement to the KBA opinion, we offer the following extracts from the N.Y. State Bar Association Committee on Professional Ethics Opinion 1076 (12/8/15) with this helpful guidance on use of "cc:" "bcc:" or "reply all:"

- Although it is not deceptive for a lawyer to send to his or her client blind copies of communications with opposing counsel, there are other reasons why use of the either "cc:" or "bcc:" when e-mailing the client is not a best practice.
- "cc:" risks disclosing the client's e-mail address. It also could be deemed by opposing counsel to be an invitation to send communications to the inquirer's client. …. Rule 4.2(a) applies even though the represented party initiates or consents to the communication.
- Although sending the client a "bcc:" may initially avoid the problem of disclosing the client's email address, it raises other problems if the client mistakenly responds to the e-mail by hitting "reply all." For example, if the inquirer and opposing counsel are communicating about a possible settlement of litigation, the inquirer bccs his or her client, and the client hits "reply all" when commenting on the proposal, the client may inadvertently disclose to opposing counsel confidential information otherwise protected by Rule 1.6.

ANNOUNCEMENT

2018 ANNUAL POLICYHOLDERS' MEETING

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 8:00 a.m., Wednesday, June 13 in the Woodford/Scott Room, Hyatt Regency, 401 West High Street, Lexington, KY 40507. 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. The Annual Financials may be downloaded from the Web site, **LMICK.com**. We urge all policyholders to return their proxies and to attend the meeting.

WEDNESDAY, JUNE 13, 2018
8:00 A.M.
WOODFORD/SCOTT ROOM
HYATT REGENCY
401 WEST HIGH STREET• LEXINGTON, KY 40507

"NEVER RAISE YOUR HAND TO YOUR CHILDREN; IT LEAVES YOUR MIDSECTION UNPROTECTED." *Robert Orben*

FAILURE TO RISK MANAGE SPAM EMAIL COSTS FIRM OPPORTUNITY TO APPEAL ASSESSMENT OF ATTORNEY'S FEES AS HIGH AS $1,000,000.

In *Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC* (Fla. Dist. Court of Appeals, 1st Dist. 8/10/2017) the appellant's law firm, Odom & Barlow, requested the trial judge to re-enter an order assessing attorney's fees so that it could make a timely appeal. The firm claimed that it never received the order.

At the hearing the clerk of the court's IT director testified:

> [T]hat the log from the clerk's e-service system indicated that emails containing the order were sent to the primary and secondary email addresses designated by appellant's attorneys at 7:28 p.m. on March 20, 2014. The clerk's email server contacted the email server for the domain of these addresses and handed off the messages to the recipient server. The IT director explained that if the email had not been accepted by the recipient server, an error message would have been generated notifying the clerk's office that the email had not been delivered. The log contained no such error message. Davis did not know what happened after the email was accepted by the recipient server.

An IT consultant testified that he provided consulting services for the law firm. In 2011 the firm installed its Microsoft Exchange server with a built-in email filtering system. This system was designed to drop and permanently delete emails identified as spam without alerting the recipient that the email was deleted. It did not create logs of received email.

The consultant advised that the firm's email system should not operate to permanently drop and delete emails because the spam filtering on the server was unreliable and risked false positives for otherwise substantive emails. He suggested alternatives to fix this problem, but the firm did not take this advice to save money.

Other expert testimony was offered to the effect that it was more than likely the emails were received by the firm and that it was unusual for a business not to have systems to produce logs of email received and to use a system with "absolutely no back up or disaster recovery procedures."

The appellate court reviewed this record and found that:

- Although appellant claims that its counsel received no notice of the order assessing attorneys' fees until after expiration of the time to appeal, Lendy Davis, William Hankins, and James Todd testified that they reviewed emails logs from the clerk's server and concluded that the emails attaching the order assessing attorneys' fees were electronically served by the clerk's office on March 20, 2014, and received without error by Odom & Barlow's server. …. Based on this evidence, the trial court could conclude that the order assessing attorneys' fees was received by Odom & Barlow's server, which was the equivalent of placing a physical copy of the order in a mailbox.
- [T]he trial court could conclude that Odom & Barlow made a conscious decision to use a defective email system without any safeguards or oversight in order to save money. Such a decision cannot constitute excusable neglect.
- Finally, testimony was presented that opposing counsel … had a protocol where an assigned paralegal would check the court's website every three weeks to see if the court had taken any action or entered any orders. If Odom & Barlow had a similar procedure in place, the firm would have received notice of the order assessing attorneys' fees in time to appeal.
- The neglect of Odom & Barlow's duty to actively check the court's electronic docket was not excusable. See *Yeschick v. Mineta*, 675 F.3d 622, 629-30 (6th Cir. 2012) (holding that counsel's neglect in not checking the docket was not excusable because the parties had an affirmative duty to monitor the docket to keep apprised of the entry of orders that they may wish to appeal); *Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 413 (4th Cir. 2010) (holding that counsel's computer problems did not constitute excusable neglect where counsel failed to actively monitor the court's docket or find some other means by which to stay informed of docket activity).
- In short, there was an absence of "any meaningful procedure in place that, if followed, would have avoided the unfortunate events that resulted in a significant judgment against" appellant. *Hornblower*, 932 So. 2d at 406. Accordingly, the trial court did not abuse its discretion."

"NEVER WEAR A BACKWARDS BASEBALL CAP TO AN INTERVIEW UNLESS YOU ARE APPLYING FOR THE JOB OF UMPIRE." *Dan Zevin*

WEB-BUGGED EMAILS – AKA "SPYMAIL"

Invisible web-bugged emails sent to opposing counsel tracking how the recipient uses them is a growing risk for lawyers. The Alaska Bar Association Ethics Opinion No. 2016-1 (10/26/16) addressed the issue by considering this question: May a Lawyer Surreptitiously Track Emails and Other Documents Sent to Opposing Counsel?

The opinion begins with a good description of what a web bug is:

> A web bug is a technology tool that tracks certain information about the document to which it is attached. A common method of "web bugging" – used in e-mail newsletters to help track readers, for example – involves placing an image with a unique website address on an Internet server. The document at issue contains a link to this image. The image may be invisible or may be disguised as a part of the document (e.g., part of a footer). When the recipient opens the document, the recipient's computer looks up the image and thereby sends certain information to the sending party.

The opinion includes this list of what web bugs can track without the recipient's knowledge:

- when the email was opened;
- how long the email was reviewed (including whether it was in the foreground or background while the user worked on other activities);
- how many times the email was opened;
- whether the recipient opened attachments to the email;
- how long the attachment (or a page of the attachment) was reviewed;
- whether and when the subject email or attachment was forwarded; and
- the rough geographical location of the recipient.

The Committee concluded:

- The use of a tracking device that provides information about the use of documents – aside from their receipt and having been "read" by opposing counsel – is a violation of Rule 8.4 [*Misconduct*] and also potentially impermissibly infringes on the lawyer's ability to preserve a client's confidences as required by Rule 1.6.

THE USE OF A TRACKING DEVICE THAT PROVIDES INFORMATION ABOUT THE USE OF DOCUMENTS ... IS A VIOLATION OF RULE 8.4 [*MISCONDUCT*].

- The onus is on the sending lawyer to abstain from using a web bug. It may be impracticable because of rapidly changing technology and software to place a duty on the receiving lawyer to take "reasonable precautions" to detect bugged email.

The recent Illinois State Bar Ethics Opinion 18-01 (1/18) concurs with the Alaska opinion and points out that "read receipts" are equivalent to certified mail receipts. The opinion also concluded that it is unethical to use tracking software on email sent to a lawyer's own clients.

There is disagreement with the Alaska opinion on which lawyer has the burden to prevent bugged email. Some authorities argue that the onus should be on the receiving lawyer to risk manage email. The article *Email Tracking: Is It Ethical? Is it Even Legal?* by Chad Gilles* is a thorough discussion of the issue. While it is problematic to anticipate how Kentucky authorities might decide the issue, it is likely they would agree with the Alaska opinion. The best risk management approach is to follow it or call the Kentucky Ethics Hotline for guidance.

**Lawyers' Manual on Professional Conduct, Current Reports, Vol. 33,No. 1, p.21, 1/11/17.*

"NEVER REST ON YOUR LAURELS. NOTHING WILTS FASTER THAN A LAUREL SAT UPON." *Mary Kay Ash*

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KYLAP NOW OFFERS ADDITIONAL MENTAL HEALTH SUPPORT FOR KBA MEMBERS

Yvette Hourigan, Director, Kentucky Lawyer Assistance Program, recently announced:

> The Kentucky Bar Association, through the Kentucky Lawyer Assistance Program, is excited to partner with an employee assistance program (EAP), Human Development Company, to offer an opportunity for mental health support to Kentucky's lawyers and judges. All of the assistance remains **COMPLETELY CONFIDENTIAL**, pursuant to S.C.R. 3.990.
>
> This new partnership will provide additional mental health support for Kentucky's lawyers and judges. The employee assistance program will offer CONFIDENTIAL phone assistance during regular business hours, after hours, and on weekends. Simply call the KYLAP office anytime, day or night, on our NEW DIRECT PHONE NUMBER – no operators required - and after hours you will be directly connected to our employee assistance program. Our **NEW DIRECT NUMBER IS (502) 226-9373**. You may also continue to call through the main switchboard at the Kentucky Bar Association at (502) 564-3795, ext. 266. Someone will be available to answer your call 24 hours a day, 7 days a week.

Check out the upcoming *Bench & Bar* for more details about this exciting service, or call KYLAP at **(502) 226-9373**.