Lawyers Mutual
www.lmick.com

The Risk Manager

A quarterly newsletter by Lawyers Mutual Insurance Company of Kentucky

SUMMER 2008
Volume 19, Issue 3

Charles English Completes 23 Years of Service with Lawyers Mutual

After twenty-three years of service, Charles English has stepped down as President of Lawyers Mutual and left the Board of Directors at the expiration of his term on June 30, 2008. Mr. English was a key leader in visualizing, organizing and capitalizing the company resulting in him being in the service of Lawyers Mutual and its insured lawyers for over two decades.

Mr. English devoted copious amounts of time to the company to assure it would be the success it is today. He provided consistently wise counsel throughout the entire life of the company from its inception to a mature insurer. Mr. English's expertise in finance, audit, accounting and prudent investing was tailor made for Lawyers Mutual's needs as it proceeded from a fledgling company to a mature, well capitalized insurer.

Mr. English will be sorely missed. In Mr. English's honor and in recognition of his great efforts on its behalf, Lawyers Mutual has made a contribution to his alma mater, the University of Kentucky College of Law.

"Make your next move from where you actually are."

Frank Kupper

How Safe is the Bank that Holds Your Client Trust Account?

The current turmoil in the banking industry with predictions of numerous bank failures, especially among smaller regional banks, means it is now appropriate to review your client trust account banking arrangements. In *Client Trust Account Principles & Management for Kentucky Lawyers* we provided the following information on insured bank accounts:

> Kentucky Rule of Professional Conduct 1.15 does not require that client trust accounts be insured, but good risk management does. Accounts should be opened only in banks that are covered by the Federal Deposit Insurance Corporation (FDIC) that provides insurance up to $100,000 for each account. If the funds in a trust account exceed the $100,000 FDIC coverage, be sure the bank has adequate other insurance. Confirm this in writing. In some cases it may be necessary for the lawyer to purchase firm insurance for the account or to open additional accounts in other banks to adequately protect client funds. It is always good practice to get client instructions on how large amounts are to be deposited and with what security.

continued

continued from page 1

You must follow the FDIC disclosure rules to acquire $100,000 FDIC insurance for the funds of each client held in a pooled client trust account. In addition, make sure that a client does not have an account in the same bank as your trust account that combined with the client's funds in the trust account exceeds $100,000. Go to **www.fdic.gov** and search for fiduciary accounts or lawyer fiduciary accounts for guidance on how to comply with FDIC rules.

The "New New" Thing in Inadvertent Disclosure -- Risk Managing Redaction

There is much concern with metadata mining – the ability of recipients of e-documents, including e-mail, to view data hidden in these documents that is generated during the course of creating and editing them. This information, while usually of no significance, can contain confidential information and work product. If you are keeping up with e-document risk management, you know that care must be taken to avoid sending metadata in e-documents to avoid ethics and malpractice issues.

The latest variation on metadata risk management concerns computer procedures that permit viewers to see what is behind the black in redacted e-documents. Douglas S. Malan in his article *Redacted documents become viewable on PACER* (The National Law Journal, page S5, 6/9/2008) writes of an ongoing discrimination class action against GE. The plaintiff's counsel redacted extensive portions of briefs filed on the PACER federal court filing system to make them inaccessible to the public. What happened next was someone discovered that the redacted language was readable by downloading documents from PACER, copying the redacting black bars covering text, and then pasting them to a Word document. Thus, sensitive information about GE's personnel policies that were ordered sealed became a matter of public information.

> ***"The latest variation on metadata risk management concerns computer procedures that permit viewers to see what is behind the black in redacted e-documents."***

Wright explains, "[R]edaction in the digital world requires special software and the know-how to delete the words behind the shield." He advises that redaction mining is easier when older versions of Adobe are used. He cites the Connecticut Bar Association's Legal Technology Committee for the advice that the newest version of Adobe simplifies redacting text and deleting the covered text.

The special software that Wright refers to is Redax, a product of Appligent Inc. Information on Appligent's website indicates it should do the job. At this writing it costs $249 and requires an Adobe program that must be purchased. (*Editor's Note: We do not recommend products – just provide information to assist in your own evaluation of what may be useful*.)

Lawyers who fail to effectively redact e-documents risk court sanctions, ethics violations, and malpractice claims. We recommend that you add redaction to your risk management program. If you need more information on metadata mining read the *Bench & Bar* article in the May 2008 issue *The Impact of the Internet on a Lawyer's Standard of Care and Professional Responsibility – Part I* (available on Lawyers Mutual's website at **www.lmick.com** -- go to the Risk Management/ *Bench & Bar* page).

"Be pleasant until ten o'clock in the morning and the rest of the day will take care of itself."

Elbert Hubbard

A Checklist for Avoiding Inadvertent Disclosure of Confidential Information and Privileged Communications

The following checklist for avoiding inadvertent disclosure of information is from an article by Willis S. Baughman in the Lawyers Mutual Insurance Company of California's Spring 2008 Bulletin. It contains guidance for both lawyers sending and receiving documents. We have modified the checklist to show Kentucky authority when applicable.

Tips for "Sending" Lawyers

√ On all outgoing documents include an appropriate legend indicating:
- Privileged & Confidential
- Attorney-Client Communication
- Attorney Work Product

√ Avoid using "Reply All" feature in replying to e-mail.

√ Avoid using "Speed Dial" feature for facsimile transmissions – instead manually punch in numbers.

√ Be cautious when disconnecting from conference calls.

√ With respect to all modes of communication check carefully before sending!

√ Sad but true: If you don't know and trust your adversary, guard your files!

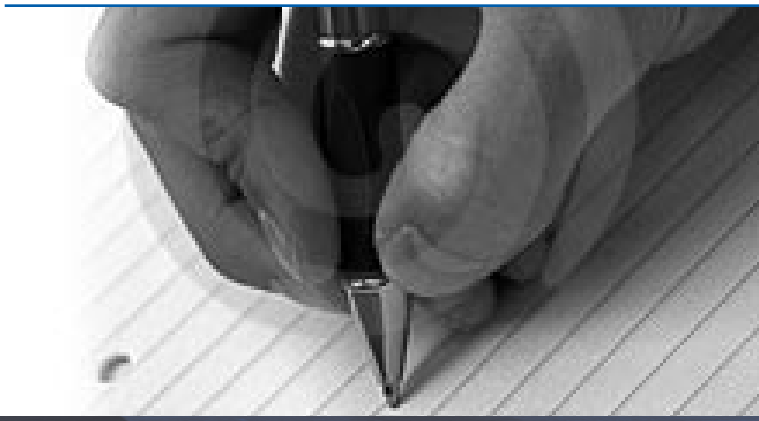
√ Once it is discovered that privileged or confidential information has been inadvertently sent, immediately contact the receiving lawyer. Consider as guidance proposed Federal Rule of Evidence Sec. 502 that provides:
- Inadvertent disclosure of protected communication or information is not a waiver if:
  - The sender took reasonable steps to prevent disclosure; and
  - The sender employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

√ Special tips for sending electronic documents:
- Eliminate metadata with scrubbing programs.
- Train personnel to use programs that clean and seal documents before sending them to a third person.
- Establish policies and procedures to apply to all outgoing documents.
- Avoid sending the electronic document in the first place.
- Save and transmit documents in non-electronic formats, such as:
  - Hard copy;
  - Create an image; and
  - Print and fax.

Tips For "Receiving" Lawyers

√ The moment it becomes reasonably clear that the material was inadvertently sent and not intended for you:
- Review the material only to the extent necessary to ascertain if it is in fact privileged or confidential.
- The moment it becomes reasonably clear the material is privileged or confidential follow the guidance in KBA ethics opinion E-375 (1995) that provides:
  - A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall:
    - refrain from reading the document,
    - promptly notify the sender, and
    - abide by the instructions of the sender regarding its disposition.

continued



"Health is when every day it hurts in a different place."

Faina Ranevskaya

continued from page 3

√ Work with the sending lawyer to resolve the situation through mutual agreement.

√ In situations where mutual agreement is not feasible or possible seek judicial guidance:
- Consider using judicial intervention;
- Consider protective orders where necessary.

√ Act fairly and reasonably:
- Take steps that protect not only your client's interest, but also the legitimate interests of the opposing lawyer and his client
- Take steps that are in accord with the core value and dignity of:
  - The legal profession;
  - The attorney-client relationship;
  - The judiciary;
  - The administration of justice.

Mediation Requires All the Competence of a Trial

Some Advice from an Expert Mediator

Editor's note: The author of "Preparing You and Your Client for Mediation," Scott Magers, is a retired Army Brigadier General who served 30 years as an Army lawyer. Upon his retirement he established a mediation practice in San Antonio, Texas. Over the last 13 years he mediated over 1800 cases with a better than 90% closure rate. His article is a clear and to the point guide on representing clients in a mediation. What follows is an extract from the article that covers key considerations prior to a mediation. The article in its entirety is available on our website at LMICK.com – click on Risk Management/Subject Index and go to Mediation. Scott's e-mail address is ***SJMAGERS@aol.com****.*

Preparing You and Your Client for Mediation
Scott Magers

A. Selecting the Mediator

Once the decision has been made to participate in a mediation, the attorneys should select a mediator. I understand that in some jurisdictions the judge or other judicial official will appoint the mediator, but the more common practice is for the mediator to be selected by counsel. My assumption in this paper is that counsel will have the opportunity to make the selection. There are several issues involved with the selection.

1. What mediator skills do you want?

I suggest the following are the skills you might want in your mediator: empathy, impartiality, positive attitude, competence, confidence, ability to manage conflict, PATIENCE, ability to listen, integrity and honesty, ability to articulate options, judgment, timing of style and tactics, tolerance for stress, and sensitivity to the parties' circumstances.

You might not be able to find a mediator with all of these positive traits, but you would not want to select anyone without most of these skills. In my opinion, you do not want to make your selection based primarily on the mediator's expertise in the subject matter of the dispute. Although it is helpful that the mediator have a general knowledge of the law concerning the dispute, keep in mind that you are hiring the mediator for skills and experience as a mediator to help the parties resolve the dispute. You can hire separately an expert to help analyze the strength of your position and of course you, the attorney, are responsible for providing the legal advice to your client.

2. Do you want your mediator to be aggressive or more passive?

Each mediator has his or her own mediation style. The number one complaint I hear about mediators is that they are so passive that they only exchanged the demands and offers without providing any evaluation to either side of the risks and costs of the litigation. You may, for good reason, only want that limited contribution from your mediator, but I suggest that the dispute will more likely be resolved in mediation if the mediator plays a more aggressive role in helping both sides understand those risks and costs which will have a significant impact on each sides' position. The mediator who plays the "agent of reality" will, in my opinion, make the greater contribution.

continued

"People are lucky and unlucky not according to what they get absolutely, but according to the ratio between what they get and what they have been led to expect."

Arthur Schopenhauer

continued from page 4

3. Should you agree to a mediator opposing counsel recommends?

Because trust is so important in how well you work with the mediator, it is usually better if you have some knowledge of or experience with the individual. However, often you do not know the mediator suggested. If that is the case, you should talk to the mediator and seek biographical information that will assist you in your decision. The recommendation of the mediator by other lawyers you trust is important, but the acceptance of the recommendation by opposing counsel might be a positive step in showing that you trust opposing counsel and want them to know that you want to work with them in making mediation a success. Certainly I would not reject their suggestion of a mediator without further inquiry.

B. Mediation Location

Mediations are usually conducted at one of the offices of opposing counsel or a neutral site such as rooms at the courthouse or other location with conference rooms. My experience is that the location is of less importance than some might imagine. As long as the location is comfortable and provides private caucus rooms, parties will resolve their disputes if it is in their interest to do so. If you conduct a mediation in your office you must be careful that you do not let other office matters interfere with your ability to concentrate on the mediation being conducted.

C. Mediation Date

There is no hard and fast rule for when to mediate, but it is difficult to reach a settlement if you do not know the strengths and weaknesses of your case. How extensive should be the discovery prior to mediation depends on the complexity of the case and the availability of reliable evidence gained through other means. Certainly you must have knowledge of all controlling facts and hopefully you will not be in a position that you will be surprised by information that might be revealed by the opposition at the mediation. On the other hand, discovery is expensive so it might be appropriate to mediate prior to incurring these expenses with the hope of resolving cases where the parties are not expected to be wide apart in their analysis of the case. Of course parties often mediate by a certain date because a judge has so ordered.

D. Counsel's Preparation

Counsel's preparation for mediation begins with the initial preparation for client representation. When first interviewing clients you will determine the clients' interests, legal and factual basis of their position, and consequently the strength of their case. This understanding of the case will allow you to prepare for the mediation as you would for a trial. At the mediation, you and your clients are trying to persuade opposing counsel and client of the merits of your position, as you would try to persuade the judge or jury at a trial. Do not go to the mediation without a thorough understanding of the facts and law that impact on your chance at winning at trial. Not only should you know what your client wants from the mediation, you should try to get an understanding of the interests of the opposing party so you will be in a better position to propose offers or demands that might meet the interests of both parties.

It is also important to provide the mediator with a confidential mediation memorandum prior to the mediation, which gives the mediator an understanding of the law, and facts that will be at issue during the mediation. I also find it helpful for counsel to inform me prior to the mediation of particular issues concerning his or her client that I need to consider during the negotiations.

An important part of counsel's preparation for mediation is to ensure that the client has someone in authority to settle the case at the mediation. Although often the expectation for settlement at mediation is low, experience shows that success improves when decisions makers are present. Being available by phone may be a convenience for one party or the other, but without their physical presence in the mediation process they are put at a disadvantage in evaluating new risks and facts discovered at the mediation. Even worse is saying the individual with authority is at the mediation when in

continued

"The hardest thing is to take less when you can take more."

Frank McKinney Hubbard

Lawyers Mutual
www.lmick.com

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

PRESORTED STANDARD
U.S. POSTAGE
PAID
LOUISVILLE, KY
PERMIT NO. 879

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***

"Experience is something you don't get until just after you need it."

Steven Wright

Board of Directors

RUTH H. BAXTER
Carrollton

BARBARA D. BONAR
Covington

GLENN D. DENTON
Paducah

JANE WINKLER DYCHE
London

CYNTHIA L. EFFINGER
Louisville

CHARLES E."BUZZ" ENGLISH, JR.
Bowling Green

RONALD L. GAFFNEY
Louisville

ESCUM L. MOORE, III
Lexington

JOHN G. PRATHER, JR.
Somerset

MARCIA MILBY RIDINGS
London

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

continued from page 5

fact they are not; this often becomes an issue of bad faith in the eyes of the opposition. My experience convinces me that it is difficult to convey the dynamics of the mediation over the phone.

E. Client's Preparation

The mediation process and its advantages should be explained to the client. This includes an explanation that both sides will be asked by the mediator to consider the risks and costs of further litigation. If you have not done so prior to the decision to mediate, the client must be informed of the best and worst alternatives to a negotiated agreement (BATNA and WATNA). Prior to mediation is the best time to make sure your client does not have an unrealistic expectation of what his case is worth. Even when your initial evaluation of the case was optimistic, if subsequent information has caused you to change your view, the client should be so informed. Do not wait for opposing counsel in the mediation to surprise your client with evidence or legal argument that you have not previously discussed. It is also my opinion that you should inform your client of the monetary costs that will be incurred through trial if agreement is not reached in mediation. I often find I have to explain to the client that because of these costs, the party is better off to accept a lesser amount at mediation than that which could be expected from a favorable verdict at trial. Most clients understand the concept of strengths and weaknesses and pluses and minuses, but these issues are best discussed the first time prior to mediation.

The client should be told that he will be given the opportunity to explain his position to the opposing party during the opening session of the mediation. He should be prepared for making this statement as you would coach or assist him in preparing for testimony at trial. I recommend you remind him to keep his anger or emotion under control although the ability to vent his feelings may be necessary to gain resolution of the dispute. Finally, you should agree with your client over negotiation tactics or the mediation will likely fail.