

**Bridge the Gap Mentoring Program**  
**Introduction to Malpractice Insurance and Malpractice and Grievance Traps**  
**Resource 18**

Resource 18 will start a discussion about common malpractice insurance and malpractice and grievance traps and how to avoid common pitfalls.

- Discuss common malpractice mistakes, particularly in the new lawyer's practice area(s), and share ways to avoid them, such as:
  - Mentorship Programs
  - Continuing Legal Education
  - Supervision
  - Peer Review
  - Case Acceptance and Conflict Avoidance Procedures
  - Calendaring Systems
  - Professional Responsibility Partners or Committees.
  - See Restatement Third Law Governing Lawyers §48 G
- Discuss a lawyer's obligation to act competently, work diligently and communicate effectively with every client. See Rule 16-101 NMRA, Rule 16-103 NMRA and Rule 16-104 NMRA. <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0> <http://www.law.cornell.edu/ethics/nm/code/>.
- Discuss common grievance problems that arise, particularly in the new lawyer's practice area(s) and ways to avoid them. Discuss the attached article about malpractice traps and grievances. American Bar Association Standing Committee on Lawyers Professional Liability. "The Top Ten Malpractice Traps and How to Avoid Them." n.d. Print. and Blackford, Jason C. "Avoiding Unintentional Grievances." Cleveland Bar Journal Vol. 74 No.9 July/August (2003) pg. 24.
- Give the new lawyer practical pointers on the types of practices in which s/he should engage to minimize client dissatisfaction and client complaints, including the best ways to communicate with your client and how to involve your client in their representation.
- Share with the new lawyer your firm's procedures to ensure that the law firm staff does not inadvertently disclose client confidences. Discuss the tips in the attached article, Hall, Kirk. "Not so well-kept secrets." American Bar Journal.
- Suggest resources that the new lawyer can consult for making important ethical decisions, including the following:
  - Identify the procedure for obtaining Inside ethics advice (if you are in an Inside mentoring relationship.)

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- Provide suggestions for finding outside ethics counsel and when such action is recommended. Identify for the new lawyer that the State Bar of New Mexico has an Ethics Helpline to answer ethics questions: 1-800-326-8115 or go to: <http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html> for past Committee positions on ethical rules. Discuss procedures for requesting or researching ethics advisory opinions of the New Mexico State Bar.
- Identify other helpful material, where they can be found, and the importance of supplementing general ethics resources with independent research on New Mexico disciplinary case law when the ethics resources reviewed are not based on the New Mexico Rules of Professional Conduct.
- Discuss the best time to involve a malpractice carrier into a claim against you for malpractice liability or ethical misconduct.
- Discuss the reasons for maintaining malpractice insurance and considerations for choosing the right policy. Discuss "What Attorneys Need to Know about Professional Liability Insurance." <http://www.nmbar.org/AboutSBNM/Committees/LPL/LPL.html>
- Discuss the natural concerns and fears that occur when allegations of malpractice or ethical misconduct are made and share ways to overcome such fears. Read the attached article by Stock, Kendall, and Donna D. Lange. "Not to Panic-Suits Happen." ABA Journal Nov. 1994, Professional Liability.
- When an attorney chooses not to carry malpractice insurance, discuss his or her obligation to disclose to clients that s/he does not carry malpractice insurance. See Rule 16-104(c) NMRA.
- Discuss the best time to involve a malpractice carrier into a claim against you for malpractice liability or ethical misconduct.
- Discuss the resources available to new attorneys in the matters of: a fee dispute, <http://www.nmbar.org/Public/feearbitration.html> or ethical misconduct allegation. There is a wealth of ethical information at the Ethics Archives: <http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html> has all formal opinions issued by the State Bar's Ethics Advisory Committee arranged by year and by topic; The Ethics Helpline at (800) 326-8155 provides quick answers to ethics questions over the phone; and The Ethics Advisory Committee will provide written informal written opinions – Questions must be regarding your own conduct and submitted in writing to [rspinello@nmbar.org](mailto:rspinello@nmbar.org).
- Discuss the propriety of settling claims for malpractice with your client. See Rule 16-108 (H) (2). (find at <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0> or <http://www.law.cornell.edu/ethics/nm/code/> )

Resource 18

# The Top Ten Malpractice Traps and How to Avoid Them

**Trap #1: Missing Deadlines.** Calendaring errors remain a leading cause of malpractice claims. Common mistakes include data entry errors, failing to use file review dates, absence of a back-up calendar and procrastinating until the last minute to file documents. To avoid this trap, an office must have at its organizational core an office-wide calendar and practices in place regarding its use. The system should contain the following characteristics:

- Be easy to use, maintain and teach to new personnel
- Include some redundancy, either through multiple paper calendars or the computer
- Contain an off-site calendar backup in the event of a fire or other disaster
- Have the capacity to crosscheck between the master calendar and the back up calendar to catch calendaring errors
- Have at least one docket date for every open file to ensure that all files are reviewed regularly
- Include tracking procedures that enable the firm to identify who made any given entry
- Make all attorney and non-attorney staff accountable

A standard calendaring system sets forth all items to be calendared, the frequency of reminder dates, the applicable deadlines for the various types of cases the firm handles and the firm's own deadlines for events it considers critical. For example, a firm might require all lawsuits to be filed no later than three months prior to the running of the statute of limitations. When the office accepts a tort claim, for example, support staff knows that a 3-month date (which indicates the imminent running of the statute of limitations) must be calendared. Critical firm deadline dates of this type will dictate the calendar entries made by the staff. Of course, it is the attorney's responsibility to calculate those important dates, and it is recommended that the attorney place his or her initials on the file intake sheet to identify who is responsible for the calculating of a particular date.

**Trap #2: Stress and Substance Abuse.** It takes just one dysfunctional attorney to ruin a firm's reputation and add significantly to its malpractice claims history. All too often the problem is compounded by inaction on the part of the law firm. Certain practices can reduce the chances of encountering such a problem.

***Improved Communications Among Firm Members*** Does your firm have an open door policy? Can problems be discussed confidentially within the confines of the firm? Too many attorneys today view partnership as a purely economic relationship and feel no sense of loyalty to one another. In this setting dysfunctional or troubled attorneys have no one in whom they can confide. Monthly meetings, sharing advice or insights on a matter and getting together in non-work settings can help build effective and satisfying working relationships.

The Committee wishes to thank Mark C. S. Bassingthwaite, J.D., Loss Control Specialist and Robert D. Reis, Risk Manager from Attorneys Liability Protection Society, A Mutual Risk Retention Group for their considerable contributions to this article's second edition.

You may also consider appointing a fair-minded and well-respected partner as an ombudsman for intra-firm problems and conflicts. Sole practitioners can find this support by seeking out other lawyers similarly situated, though confidentiality concerns and other business and ethical constraints require caution in this type of a situation.

**Workloads.** Stress can push predisposed attorneys into clinical depression or cause other mental health problems, including anxiety disorders. Although it may be impossible to remove stress completely from the workplace, it is possible to manage and reduce the level of stress.

Does the firm measure attorney worth solely on billable hours or the number of open files being handled? While such a system may be necessary to some degree, it can not and should not be the sole measure of one's value. Caseloads should be reviewed periodically to ensure a fair division of labor. Reasonable limits should be placed on the number of files or cases that may be handled at one time.

Are firm members able to take personal time off without feeling guilty or without being penalized? Firm members should feel some flexibility insofar as being able to take the occasional hour or so for a child's school activity or to run a personal errand that cannot be handled after hours. Instituting a policy requiring attorneys to take vacations away from town and away from files and clients can contribute significantly to maintaining morale and ensuring enthusiasm in the workplace.

Sensitivity and accommodation for the attorney who is dealing with the added stress of personal crises is mandatory. During this period, reduced workload or other adjustments should be made. Stress should not be ignored. Everyone has a breaking point.

**Know the Signs of Substance Abuse and Depression.** Symptoms of substance abuse include frequent Monday morning tardiness, missing deadlines, neglecting mail and phone calls and missing appointments. There is a slow but steady deterioration in work product and productivity and an increase in frequency of excuses in personal relationships. Apparent behavioral changes could include drinking, defiance, impatience, intolerance, unpredictability or impulsiveness.

Other apparent behavioral changes associated with depression include inappropriate anger (often in men), tearfulness, self-criticism, distractibility and lack of interest in pursuing activities that once brought pleasure, difficulty concentrating and forgetfulness.

**Seek Help from Professionals in Cases of Mental Health Problems or Substance Abuse.**

Most attorneys acknowledge that substance abuse and mental health issues can increase tremendously the risk of a malpractice claim and can devastate families, professionals and entire social circles. Unfortunately, far fewer will take the risk to intervene and help a colleague find help unless or until the problem has reached crisis proportions. By the time that point is reached, the neglect, misconduct or mistake has occurred and the cost to the firm could be substantial. In the presence of indicia of mental health issues or substance abuse, one should be encouraged to seek professional help. These problems are treatable, particularly if recognized and dealt with at an early stage. For substance abuse issues, state bar

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committees are a good place to begin. Typically, they are a committed group of people who have faced similar challenges successfully.

**Trap #3: Poor Client Relations.** Every malpractice claim begins with a dissatisfied client. Poor client relations and conflicted working relationships can transpire into malpractice claims with amazing haste. Inadequate attorney-client communication usually is at the heart of the problem. Typical mistakes include failure to obtain client consent, failure to inform a client of a case development or failure to follow the client's instructions. Many client relationship errors can be avoided by adopting a simple, commonsense approach to working with clients.

- Explain clearly to each new client orally *and in writing* the purpose for which the firm was hired, the fee arrangements, the reporting and billing procedures and the client's obligations.
- Listen to the client. Clients may want to pursue non-litigation avenues. Time should be taken at the beginning of the attorney-client relationship to identify clearly the client's goals or objectives.
- Realistic client expectations should be encouraged. Clear and documented explanations about the services to be performed or not to be performed are crucial. Legal procedures should be explained in simple, clear language so the client understands what to expect from the representation and has a clear timetable in mind.
- Maintenance of good client communications requires the prompt return of all telephone calls, keeping appointment times with clients and not keeping them waiting, sending regular case status reports and reporting negative information promptly. If the client is copied with correspondence or pleadings, the client must be informed as to their meaning and purpose. Assignments should be completed on a timely basis. If an unforeseen delay arises, it should be explained and a revised expected completion date should be given. Clients should be billed regularly and all charges should be explained fully. Clients should be encouraged to provide ongoing feedback on the quality of the representation they are receiving.
- All discussions, recommendations and actions taken, including a decision not to accept a client, should be documented.
- Letters of closure should be used at the end of the representation to document what was accomplished.
- Support staff should be taught the importance of courtesy, timeliness, professionalism and confidentiality when dealing with clients. Staff provides the interface between attorneys and clients. If staff is depressed, overworked, feel taken for granted or dissatisfied generally, it is important to understand that negative messages, however unintended, are being sent to clients.

### Trap # 4: Ineffective Client Screening

After being served with a malpractice action, attorneys will often mutter "I knew I shouldn't have taken on that client." These "problem" clients are often the result of ineffective client screening. Successful practitioners augment their "gut feelings" with standardized office-wide screening procedures. A firm-wide policy of screening each prospective client according to a predetermined set of standards is critical. Each member of the firm is responsible for the clients the other members bring to the firm. With a standardized and effective screening process, potential disaster clients may be identified and avoided.

A set of screening questions subject to review and modification goes a long way toward weaning out undesirable clients. A periodic review of problem cases to decipher warning signs of potential danger also makes sense. Since screening needs vary greatly by practice area, it is wise to check with experienced and respected practitioners in the geographical area in which one practices to see what aids are being used and for what other practitioners are screening. It is also a good practice to analyze the office screening procedures periodically, perhaps annually, to see that they are netting matters and clients desired, match firm expertise and style and will be profitable for the firm.

- ***Do you have the time to take on the new case and give it the proper attention that the case deserves?*** If not, say no.
- ***Do you have the expertise necessary to handle the case?*** Don't dabble! There is no such thing as a simple will or a cut-and-dried personal injury case. If you are not prepared to handle the difficult cases in a given area of practice, do not accept the seemingly simple things. Often you fail to see where the problems are. Yes, you can develop the expertise given sufficient time, but keep in mind that sufficient time will be far more than meets the eye at first glance and the client will not be willing to pay for your education.
- ***If this is a contingency fee case, do you have adequate funds to take the case?*** You want to avoid being placed in the situation where case management decisions are being dictated by economics instead of by legal judgment.
- ***Can the client afford your services?*** If not, say no. A fee dispute is in the making if you accept a client who is on a different financial footing. Minimally, collection is likely to become an issue, and if you are compelled to collect the fee, the odds of facing a malpractice claim increase significantly.
- ***Is the prospective client a family member or friend?*** Don't be fooled. First, if the work is not satisfactory, favor or not, even the family member or friend will sue. Accepting work under this situation is foolhardy. Second, if you are unqualified to represent a stranger in a particular matter, likewise you are unqualified to represent a friend or family member. Don't be pushed into something you are uncomfortable handling.
- ***Has the prospective client brought you the matter at the eleventh hour?*** If so, say no. If you do not have adequate time to perform a thorough investigation, you run the risk of missing a possible claim, failing to identify a defendant or letting the statute of limitations run. You don't want to end up paying for your client's procrastination.
- ***Has the prospective client had several different attorneys?*** Heed the warning light! The client may wish to avoid paying fees, may be impossible to satisfy, may be bringing a case all others before you believed lacked merit or will be impossible to resolve satisfactorily.
- ***Does the prospective client behave irrationally or appear confrontational?*** If you are unable to work effectively with someone during the initial interview, it is unlikely to get better over time. The difficult client all too readily becomes the angry client who will not hesitate to bring a suit.

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- *Does the client have unrealistic expectations?* You cannot guarantee results nor obtain a million-dollar judgment on a simple slip and fall. Do not take on clients whose expectations are simply unobtainable.

### Trap #5: Inadequate Research and Investigation

The ABA has reported that substantive errors account for over 46% of malpractice claims. Common errors include failure to know or properly apply the law, failure to know or ascertain a deadline, inadequate discovery or investigation and planning or procedural choice errors.

Many of these errors can be prevented through careful, methodical research and procedures. It is important to review carefully the work of all staff, including contract attorneys and other professionals. The attorney of record is responsible ultimately for the work of these individuals. Experts should be consulted if uncertainty about a point of law exists. Lawyers should take the time to study and keep abreast of new developments in the law and should check closed files in the face of new statutory and case law that might affect clients' positions and rights. Association with expert co-counsel on significant matters outside one's practice area is crucial.

As the law changes, the standard of care does not decrease. Lawyers must continue to study the law by reading, attending seminars, seeking expert consultation and by researching particular issues that need to be addressed by clients.

### Trap #6: Conflicts of Interest and Conflicts of Matter

Conflicts of interest and conflicts of matter can arise from a variety of situations. Each firm must establish stringent procedures for identifying and resolving situations in which these unexpected conflicts may arise. Practitioners should be wary of these situations.

- Representation of two parties, such as a divorcing couple, an estate and its beneficiaries or a buyer and a seller who announce "we agreed to the property settlement and we just want you to write the agreement."
- Representation of opposing theories of law for different, but similarly situated clients, i.e. a "conflict of matter" situation.
- Representation of opposing sides of an issue, even though the clients are not involved with one another, such as Exxon and Greenpeace.
- Personal involvement in a client's business interests.
- Service as a director or officer of a client company.
- An unclear statement of non-representation in situations where a clear conflict of interest exists.
- Conflicts arising from law firm acquisitions and lateral hires.

Lawyers must be vigilant about the possibility of conflicts of interest and conflicts of matter in undertaking representation. The following guidelines offer some helpful hints.

- Establish a conflict system to disclose conflicts as early as possible.
- Avoid suing former clients.
- Take only one side of any case or transaction. Confirm this in writing.
- Avoid becoming a director, officer or shareholder of a corporation concurrent with acting as its lawyer. Reject offers of remuneration in the form of stock.
- Avoid joint representation in potential conflict situations if there is any risk of an actual conflict materializing.
- If any possibility of conflict exists, seek permission from each client to disclose your representation and its effect on all clients before accepting representation. Absent permission, withdrawal is the only option.
- If you intend to engage in a joint or multiple client representation, give full disclosure to all clients regarding potential and reasonably foreseeable conflicts of interest and their ramifications. Discuss the effect of both potential and actual conflicts upon your representation of all clients. Advise the multiple clients that there is no confidentiality between them on matters concerning the joint representation. Advise multiple clients to seek the advice of independent counsel on the issue of whether joint representation is appropriate. Obtain the written consent of each of the multiple clients after full disclosure and before continuing the representation.
- Strongly urge consultation with independent counsel in cases of actual conflict. Seriously consider not proceeding with representation if the clients refuse to consult with independent counsel regarding the issue of joint representation. Have independent counsel acknowledge in writing the fact of having been consulted with regard to a multiple representation situation.
- Do not work for a real estate commission, which is based on percentage, while being asked for your legal opinion regarding a transaction or project.
- Do not represent clients with potentially inconsistent defenses or differing liability in civil or criminal cases without written disclosures, as described above, and the clients' written consent. If their potential conflicts become actual conflicts, you cannot represent them jointly, even with their informed, written consent.

Memories alone are insufficient to record and check potential conflicts of interest and conflicts of matter. Law practices need systematized procedures for documenting and analyzing potential conflicts for every new client and new matter accepted by the firm. A two-part system is recommended.

The first part should provide for a method of matching names, which can be accomplished either manually or by computer. Large firms should have a computerized system. Additionally, firms with more than one office need a database with matters and names from all offices, as well as communications capability to access the entire database from any office. The database, whether consisting of index cards at the receptionist's desk or a computer program, should include many parties. The list found at the end of this chapter, developed by the Professional Liability Fund that insurers all Oregon attorneys, is the best quick reference discovered.



The second part should include a practice of circulating a "new matter memo" to all professionals and support staff whenever the firm accepts a new case. This serves as a good conflict of opposing theories check. The memo should include the following information: identification of all parties, identification of the intake attorney, all relevant administrative details, a statement of the case and a description of the work to be performed. In addition to serving as a further updated conflicts check, circulation of this information allows everyone in the office to pool resources and thus contribute to the efficient handling of the matter. It also serves as a warning against accepting a subsequent matter that would require advancing a theory or position that would be contrary to the new client's interests.

A current and complete database enables the firm to identify and advise clients of relevant changes in the law affecting their cases. Such a system also permits the firm to analyze the strengths and weaknesses of certain practice areas and to address them through education, improved planning and revised procedures.

It is important to remember that a conflicts-checking system is only as good as the people who use it. It must be used rigorously and consistently to be effective. The database must be checked and updated every time a new case is accepted. New matter memos must be circulated and returned to the intake attorney in a prompt fashion and must have affirmative documentation confirming their review by all attorneys and staff.

### **Trap #7: Inappropriate Involvement in Client Interests**

A lawyer's inappropriate involvement in a client's entrepreneurial interests raises conflict of interest issues and is increasingly a significant basis for legal malpractice. This involvement can take several forms.

- Acting as director or officer of a client company.
- Investing in client securities.
- Becoming involved in one-to-one business deals with a client.
- Accepting stock from a client in lieu of a cash fee.
- Agreeing to contingent cash fees.
- Soliciting other investors on behalf of a client's enterprise.

Problems caused by these activities are many, including: (1) inadequate or nonexistent directors' and officers' insurance for the lawyer acting both as outside counsel and director of a company; (2) vicarious liability of the law firm for the acts of a firm member serving as a director or officer of a client company; (3) higher standard of care and due diligence imposed under federal securities laws on a director who is also the company's lawyer, as compared to a director who is not the company's lawyer; (4) weakened defense to a malpractice claim by third parties in cases where a lawyer is also a director of the company and (5) serious conflict-of-interest issues arising out of a lawyer or law firm's personal involvement or investment in a client's business interests.

Robert E. O'Malley, vice chairman of the Board and Loss Prevention Counsel for Attorneys' Liability Assurance Society, suggests six commandments for lawyer involvement in client interests.

- Do not permit any partner or employee of the law firm to serve as chair, president, chief executive officer, chief operating officer, chief financial officer or general partner of any publicly held client.
- Do not permit any partner or employee of the law firm to be a director or officer of a start-up company that is financing itself with an initial public offering where the law firm is securities counsel to the company or the underwriter.
- If the law firm is acting as securities counsel to the issuer or the underwriter in an initial public offering under the Security Act of 1933, neither the firm itself nor any partner or employee of the firm should invest in the underwriter's original allotment (as distinguished from the aftermarket).
- If the law firm is acting as securities counsel to the issuer in any public offering under the Security Act of 1933, the firm should not agree to accept any part of the stock in lieu of a cash fee.
- If the law firm, partner or employee of the firm owns securities of a company that is about to make an initial public offering, the law firm should not act as securities counsel to either the issuer or the underwriter, unless such securities are redeemed prior to the offering or are "locked up," so that there is no possibility of a quick windfall profit for the firm or any of its partners or employees as a result of the public offering.
- If the law firm is acting as securities counsel to the issuer or the underwriter in any public offering under the Security Act of 1933, the firm should avoid any advance agreement whereby a substantial portion of its fee is explicitly contingent on the marketing of the offering.

### **Trap #8: Lack of Adequate Documentation of Work**

Insufficient documentation of work accounts for many of the client relations and missed-deadline errors associated with legal malpractice claims. Simple office procedures can prevent many of these errors from occurring. Each firm or practice should have in place a system for checking the accuracy and content of all outgoing documents, such as letters, briefs, contracts and motions. The system should include provisions for cross-checking of these matters by more than one person.

Good file management should include maintaining a file on all documents prepared or received by the lawyer for each client matter. Telephone messages and memoranda should also be logged for future reference. Daily filing procedures help to ensure that information is not lost and is available when needed. Office files should be reviewed regularly to avoid missing deadlines and to ensure that the system is performing as intended.

As the practice of law keeps pace with our evolving paperless world, the importance of administrative details - the seemingly menial side of a law practice - becomes more important, not less. Consideration of how electronic files will be stored, backed up, kept secure and retrieved is essential to an efficient office operation. Consciously designing a uniform computer filing system, reviewing it regularly and updating it often to assure that files are maintained confidentially and retrieved easily, is critical. Making certain there is a relatively current back up copy of all data and programs, which is

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kept at all times in a secure place outside the office, is mandatory to this evolving paperless computer driven world. Adhering to these measures will permit prompt resumption of work should a catastrophe occur, and will assure attorneys' compliance with their obligations to safeguard client information.

### Trap #9: Zealous Efforts to Collect a Fee

Fee disputes are at the heart of a significant percentage of all legal malpractice claims brought against attorneys each year. Typically, the attorney sues the client for unpaid fees and then is countersued for legal malpractice. In some cases, merely mailing a final bill triggers a threat of legal malpractice. In order to avoid fee disputes, use of the following rules in billing and collecting fees for legal services is important.

***Don't accept clients who cannot afford your legal services:*** It is a lose/lose situation to take on a client who is overly concerned about fees and who ultimately will not be able to pay his or her legal bill. If you represent such clients, you will be torn between putting in the required number of hours and minimizing the final costs. Learn to say "no" to these clients.

***Written fee arrangements:*** Consider documenting fees and the scope of work to be done in all matters. Doing work without a written agreement should be extremely rare. Each engagement letter or contingent fee agreement should contain a clear explanation of the legal fees that will be charged for the work to be performed. Any restriction on the scope of work must be detailed in this agreement. In addition, be specific and itemize the types of out-of-pocket expenses for which the client will be responsible, such as filing fees, court costs, expert witness fees, photocopying charges and computer research. Clients are often astonished by the amount of out-of-pocket expenses incurred on their behalf. Finally, it is inadvisable to adopt a new fee structure or draft a subsequent fee agreement while the client's matter is pending.

***Bill on a monthly basis:*** Attorneys who charge an hourly fee should always bill the client on at least a monthly basis, unless the client has specifically requested another arrangement. Avoid billing the client at the project's completion, unless the total cost of the representation has been agreed upon in advance. The key to hourly billing is to send bills and collect your fees on a frequent basis in order to avoid large, unexpected bills. For improved client communication and satisfaction, it is good practice to send a zero balance bill on occasion, along with a note indicating why no charges were made in a particular month, and advising that you are proceeding on the case.

***Detailed billing statements:*** Provide detailed billing statements that describe the work performed by each attorney or paralegal on a daily basis and how long it took. Entries such as 20 hours for "research" are unacceptable. Rather, the entry should read "research state case law on piercing the corporate veil."

***Daily time entries:*** Every attorney and paralegal that bills on an hourly basis must record his or her time on a daily basis. Keep a time sheet or pad of paper next to your desk on which you record your work or make regular entries in the computerized timekeeping system. It has been proven that attorneys fail to record all of their time more often when regular timekeeping is not required. Require each attorney to submit his or her time sheets for the preceding week every Monday morning.

**Review all bills:** The attorney responsible for the case or matter should review each bill for errors before it is mailed to the client. In addition to looking for errors, an ongoing assessment of the charges and the value received for the work should be made. If the time expended was greater than what would have been spent by an attorney with experience in the area, consider writing off some of the time.

***Copy the client on all meaningful correspondence and other materials relating to the client's matter:***

Ask yourself who is more likely to pay his or her bill? Choice A: the client who has not received a single sheet of paper from the attorney in three months. Choice B: the client who receives informational copies from the attorney on a regular basis. It is equally important, however, to avoid forwarding a mass of paper to the client that confuses rather than communicates. Be sure the office and the client understand from the outset what communication is necessary and desirable. Follow the agreed upon plan, straying only to send more not less, and never allowing a copy to go to the client that is not explained by prior developments or an attached note.

***Take prompt action on accounts in arrears:*** This is the single biggest mistake that attorneys make with respect to fee disputes. Most attorneys joined the legal profession in order to practice law, not to collect delinquent fees. Unfortunately, the client who cannot pay a fee today is not likely to pay it tomorrow. The key to being paid is no secret. The key is doing the unpleasant, that is, working on past due bills early and with conviction.

First, the firm's partners should review all past due accounts on a monthly basis. Be sure that engagement letters and contracts of employment state the consequences to the client for failing to stay current with the legal fees, such as withdrawal conditions. Next, the partner responsible for a matter in arrears should contact the client and inform him or her that the firm will withdraw from the matter or enforce the other stated conditions if the past due fees are not paid within a stated grace period. Although courts place many restrictions on withdrawal, the vast majority of clients with fee payment problems who start off paying slowly become even slower at time goes on. Exercising the firm's withdrawal or other options early in the matter is far more likely to produce the desired results.

Beware of clients who promise you money "next month." It usually does not materialize. The moral of the story is that it is better to withdraw and cut your losses when you are owed \$1,000 than wait in hopes of payment only to find yourself suing later to collect a \$10,000 arrearage.

Some firms have begun to accept credit cards for fees. This may be a good option but should be examined carefully. Among other concerns, there is the need to account for the issuing bank's fees. For example, if an advance for fees is charged to a credit card and the credit is given to the client by depositing it into the client trust fund, the trust fund must equal the gross amount of the card charge, not the net you will receive. In some cases this will necessitate a deposit in addition to what is received on the account from the bank.

***Never sue for fees:*** Establish a strict policy against suing for fees. If you cannot work out a realistic payment plan with the client, consider other alternatives such as arbitration or mediation. If you are tempted to sue for fees, consider this: the counterclaim for legal malpractice usually seeks an amount far in excess of the legal fees in dispute. In a recent case, a sole practitioner sued his client for \$9,000 in legal fees and received a counterclaim for an amount in excess of \$250,000. In the vast majority of these cases, the attorney ends up dropping his fee suit to get rid of the malpractice claim.

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**Collect retainers:** If you are having difficulty collecting fees on a regular basis, require a retainer fee up front. If the client takes his or her business elsewhere because you were realistic in setting the fee and in asking for a significant percentage of the fee as a retainer, this may be a client you are better off not having. The area with the largest accounts receivables is family law. The family law attorneys who are most successful in being paid promptly have well-crafted retainer agreements which require the client to maintain a certain amount on deposit and allow the attorney to withdraw if fees are in arrears.

**Have another attorney do a thorough, objective file review:** There are times when, regardless of having obtained a retainer up front, an increasing number of unforeseen hours is spent on a case that outstrips the initial retainer funds. If this occurs, and even if the client has no intention of paying, it is a good idea to have an independent attorney (preferably a senior member of the firm or a member of the local bar skilled in the practice area and in duties owed clients) review the case to assess whether due diligence was performed. Once a client is in your pocket for a significant sum, it is nearly impossible to be objective about the file and the work that you have done for that client.

**Call the client:** Far more success results from personal telephone calls from the attorney to the client than from letters from the accounting department or collection agency. Even if the client steadfastly refuses to pay the bill, at least you have made a good faith effort to collect and if there is any client dissatisfaction, most likely your conversation has yielded that information. Keeping in mind that the precipitating factor for a professional liability claim is the perception of the client more than the reality of the facts, information from the call may provide a good indication as to whether further collection efforts are warranted.

**If you decide to pursue collection activity, never do this work yourself:** One of the most important services provided a client in an attorney-client relationship is the objectivity of a knowledgeable third party whose goal it is to protect his or her client's interests. Avail yourself of the benefits of an attorney-client fee dispute specialist who can be objective and mediate concerns that may arise.

### Trap #10: Unwillingness to Believe You May be Sued for Malpractice

In spite of all the publicity that legal malpractice claims have received in the past few years, many attorneys believe erroneously that either because they perform adequately for their clients, or they know their clients so well, they will never be the targets of a malpractice claim. Trends in the frequency and dollar value of claims suggest otherwise. At present attorneys in private practice have between a 4 percent and 17 percent chance of being sued for malpractice each year depending on the jurisdiction and the nature of their practices.

As the law becomes more complex, the standard of care does not decrease. Lawyers must continue to study the law through reading, attending CLE seminars, consulting with experts on difficult legal issues and researching issues that need to be addressed by their clients.

While you may be one of the lucky ones who are not targeted for malpractice during your career, you cannot count on it. The key to minimizing your risk is to be acutely aware of the malpractice exposure of each and every case you take on. Only by recognizing your malpractice risk and by implementing effective prevention procedures will you lessen the chances of becoming a malpractice statistic.

Resource 18

Permission Granted Cleveland Bar  
Journal 2003

by Jason C. Blackford

## Avoiding Unintentional Grievances

The corporate fraud excesses that have come to light in recent years have raised the level of lawyers' concern with professional ethics. Congressional legislation has forced the Securities and Exchange Commission to set forth very strict guidelines for attorney conduct when representing publicly held companies.

Most of these complaints to certified grievance committees do not involve violations of the Code of Professional Responsibility but result from inadequate attorney-client communications, poor law office management and ignorance by the attorneys of their responsibilities. These problems can be easily avoided. Unfortunately, the grievance committees are still charged with the responsibility of investigating these complaints. The purpose of this article is to assist lawyers in avoiding unintentional breaches of the Code of Professional Responsibility.

**1. Default Under A Child Support Order.** An attorney admitted to practice in Ohio is subject to an immediate interim suspension from practice if there is a final and enforceable determination that the attorney is in default under a child support order. See, Rules for the Government of the Bar, Rule V, Section 5(A)(1).

R.C. §4705.021 requires the child support enforcement agency to advise disciplinary authorities of the attorney's non-support. A certified copy of the entry of default under a child support order is conclusive evidence of that default. Reinstatement is permitted when there is a certified copy of a judgment entry reversing the determination of default under a child support order or a notice that the attorney is no longer in default under the child support order. This

reinstatement does not terminate any pending disciplinary proceeding.

**2. Failure to File Income Taxes.** The willful failure to file income tax returns is a violation of Disciplinary Rule 1-102(A)(6) and warrants a suspension from the practice of law (*Office of Disciplinary Counsel v. Bowen*, 38 Ohio St.3d 323, 528 N.E. 2d 172 (1988); *Office of Disciplinary Counsel v. Roetzel*, 70 Ohio St.3d 376, 639 N.E.2d 50 (1994)). In a more recent case, a lawyer was suspended for failing for 10 years to report and remit 941 liabilities owed on his secretary's earnings. He also filed fraudulent W-2 forms and did not report or pay amounts for the secretary's coverage by the Ohio Unemployment Compensation system. This constituted a violation of Disciplinary Rule 1-102(A)(3), (4) and (6). The Supreme Court concluded that the lawyer had basically converted over \$40,000 that he should have paid on his secretary's behalf and had tried to conceal the theft with false documentation (*Office of Disciplinary Counsel v. Bruner*, 98 Ohio St.3d 312, 2003-Ohio-736). File those returns and pay those taxes!

**3. Referral Fees.** A lawyer who pays "kickbacks" or makes gifts to an in-house counsel in exchange for receiving work as the corporation's outside counsel is in violation of Disciplinary Rule 2-103(B) (*Ohio State Bar Ass'n. v. Zuckerman*, 83 Ohio St.3d 148, 699 N.E.2d 40 (1998); *Ohio State Bar Ass'n. v. Kanter*, 86 Ohio St.3d 554, 715 N.E. 2d 1140 (1999); *Office of Disciplinary Counsel v. Lunick*, 84 Ohio St.3d 489, 705 N.E.2d 667 (1999)).

Disciplinary Rule 2-103(B) prohibits a lawyer from compensating a person or giving anything of value for the recommendation or the securing of employment as an attorney.

Furthermore, Disciplinary Rule 2-107(A) prohibits a division of fees by lawyers not in the same firm without, *inter alia*, the written disclosure of the terms of division, the identities of the lawyers and the prior consent of the client. The division of fees should be in accordance with the services provided by each attorney. By written agreement with the client, all attorneys must assume responsibility for the representation. Disciplinary Rule 3-102 states, with limited exceptions, a lawyer should not share legal fees with a non-lawyer. For example, it is ethically improper under Disciplinary Rules 3-103(A) and 5-104(A) for a lawyer to accept a fee from a financial services group for referring clients in need of financial services (Board of Commissioners on Grievances and Discipline, Opinion 2000-1 (Feb. 11, 2000)).

**4. Legal Malpractice Protection.** Disciplinary Rule 1-104 requires attorneys who do not maintain legal malpractice insurance in the minimum amounts of \$100,000 per occurrence and \$300,000 in the aggregate to inform their clients in writing of this fact. Further, they are to secure their client's written acknowledgment of this fact and maintain a copy of the written signed notice for a five-year period after the termination of the representation of the client. The Disciplinary Rule specifies the exact language that must be used in notifying the client and the client acknowledgment. Any lawyer failing to maintain the minimum legal malpractice insurance must follow through with the requirements of Disciplinary Rule 1-104(A)-(C). There are exceptions for government attorneys and house counsel.

**5. Threatened Criminal Action.** A

lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter (Disciplinary Rule 7-105(A)). Such conduct not only can be a violation of the Code of Professional Responsibility but can also lay the basis for civil action against the lawyer making the threat.

**6. Competence.** It may surprise many lawyers that the Code of Professional Responsibility requires a level of legal competence. Canon 6 provides that "a lawyer should represent a client competently." Disciplinary Rule 6-101(A) states that a lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle without assistance from a lawyer who is competent to handle it.

Ethical Consideration 6-2 urges that a lawyer keep abreast of current legal literature, participate in continuing legal education programs and concentrate in particular areas of the law. Ethical Consideration 6-3 permits a lawyer to accept employment if in good faith he expects to become qualified through study and examination, so long as the "preparation would not result in an unreasonable delay or expense" to the client. The requirement of competency will be enforced by the Board of Commissioners on Discipline and Grievance and the Ohio Supreme Court. See, *Cincinnati Bar Association v. Harman*, 17 Ohio St.3d 69 (1985).

**7. Communication.** One of the major problems for lawyers in their dealings with their clients is the failure to communicate. Laymen inexperienced with the judicial process are concerned about the status of their cases and require frequent updates and explanations. While a client's case may be just another matter to the attorney, the client's lack of knowledge regarding the status of the case may create uncertainty and undermine the attorney-client relationship. Unfortunately, grievance committees are inundated with calls from clients complaining that their attorney does not reply to their telephone calls. When the grievance committee or Disciplinary Counsel contacts the lawyer, the lawyer is incensed that the client has gone to the bar association or to Disciplinary Counsel.

The two simplest things a lawyer can do to forestall such an unwelcome call from a bar association or Disciplinary Counsel is to 1) return all phone calls from the client and 2) keep the client advised with routine written status reports. There is dicta in *Disciplinary Counsel v. Mauck*, 1987, 32 Ohio

St.3d 164, requiring a lawyer to provide the client with the attorney's address and telephone number.

**8. Surreptitious Recordings of Conversations Without Notification or Consent.** How often have you thought how helpful it would have been to have recorded that conversation with opposing counsel? The act of recordings by attorneys of clients, witnesses and opposing counsel without their consent or notification may violate Disciplinary Rule 1-102(A)(4). The only exception is when the context of the circumstances does not rise to the level of dishonesty, fraud or deceit.

The burden is on the attorney to justify the surreptitious action on a case-by-case basis (Board of Commissioners on Grievances and Discipline, Opinion 97-3 (June 13, 1997)). See also, American Bar Association Formal Opinion 337 (1974). The only exception noted was for federal or state prosecuting attorneys acting within strict limitations conforming to constitutional requirements. Recordings can be made with the consent of all parties to the communication.


**9. Failing to Have a Trust Account and**

**Commingling of Funds.** There are few breaches of conduct which receive more consistent penalties from the Supreme Court than lawyers who fail to establish a separate escrow account for their clients' funds and property. Disciplinary Rule 9-102 requires a lawyer to deposit all clients' funds in one or more identifiable bank accounts in which no funds belonging to the lawyer are deposited.

Where a lawyer uses his trust fund to receive personal as well as client funds and to pay personal bills and business expenses, Disciplinary Rule 9-102 is violated (*Ohio State Bar Ass'n v. Kanter*, 86 Ohio St.3d 554, 715 N.E.2d 1140 (1999); *Dayton Bar Ass'n v. Rogers*, 86 Ohio St.3d 25, 711 N.E.2d 222 (1999); *Disciplinary Counsel v. Phillips*, 81 Ohio St.3d 80, 689 N.E.2d 541 (1998)). The recent U.S. Supreme Court decision in *Brown v. Legal Foundation of Washington* (2003) has upheld the IOLTA trust account system and eliminated any argument to the system's validity.

**10. Improper Advertising.** The Ohio Code of Professional Responsibility regulates lawyer advertising in Disciplinary Rules 2-

*Continued on page 41*




how are we going to  
get through  
all of those  
depositions?  
everyone's so busy

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# CBA Committee/ Section Meetings

Unless otherwise indicated, all meetings are held at the Cleveland Bar Association offices at 113 St. Clair Ave., Suite 100, Cleveland. For more information: (216) 696-3525.

## August

- 2 **Bankruptcy & Commercial Law Section – Blossom Music Center**
- 5 **CAP Board – 11:30 a.m.**  
**Grievance Committee – Noon**
- 6 **Ethics & Professionalism Committee – Noon**
- 12 **E-Publications Committee – Noon**  
**ADR Committee – Noon**
- 13 **Government Attorneys Section – Noon**  
**Justice for All Committee – Noon**  
**Unauthorized Practice of Law Committee – Noon**
- 19 **Grievance Committee – Noon**
- 20 **Minority Outreach Committee – Noon**  
**Location: Justice Center**
- 21 **CAP Membership – 11:30 a.m.**
- 26 **Real Estate Law Section – Noon**
- 27 **CBA Board of Trustees – Noon**
- 28 **Bar Leadership Institute – 11:30 a.m.**

## September

- 2 **CAP Board – 11:30 a.m.**  
**Grievance Committee – Noon**
- 3 **Ethics & Professionalism Committee – Noon**
- 8 **Environmental Law Section – Noon**
- 9 **ADR Committee – Noon**  
**Corporation & Business Law Section – Noon**
- 10 **Unauthorized Practice of Law Committee – Noon**  
**Justice for All Committee – Noon**

## Continued from page 25 Avoiding Unintentional ...

101 through 2-105. In advertising legal services, it is improper for an attorney or a law firm to list settlements or verdict amounts obtained in past cases. Statements such as, "Trip/fall sidewalk-brain injury, a One Million Dollar verdict" or "Dog bite, \$50,000 settlement" are misleading, self-laudatory and may be unfair (Board of Commissioners on Grievances and Discipline, Opinion 2002-7 (June 14, 2002)). A list of settlement and verdict amounts lacks information as to the strengths and weaknesses of cases, severity of damages, information as to credibility of witnesses, availability of insurance coverage, or other factors that would influence the settlement or verdict amounts.

Board of Commissioners on Grievances and Discipline, Opinion 2002-6 (Dec. 1, 2002) found it was improper for a law firm's web site home page to include quotations from clients describing the nature of the legal services provided, responsiveness of the law firm and other non-substantive aspects of the firm's representation. Such client quotations are client testimonials prohibited by Disciplinary Rule 2-101(A)(3). Furthermore, these may be misleading to the public under Disciplinary Rules 2-101(A)(1) and (C) depending upon the content of the quotation.

**11. Advancing Expenses.** A lawyer, while representing a client in contemplated or pending litigation, shall not advance or guarantee financial assistance to the client (Disciplinary Rule 5-103(B)). There are exceptions which permit a lawyer to advance or guarantee expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence. The repayment of these costs of litigation may be contingent upon the outcome of the matter.

**12. Continuing Legal Education.** A lawyer may be suspended from the practice of law for failing to meet the continuing legal education requirements (*In re Report of the Commission on Continuing Legal Education* (2000), 88 Ohio St.3d 1468, 726 N.E.2d 1006). The failure to meet the continuing legal education requirements also violates Rule X of the Rules for the Government of the Bar. See also, *Office of Disciplinary Counsel v. Richardson*, 95 Ohio St.3d 499, 769 N.E.2d 824, 2002-Ohio-2484 (2002).

**13. Contingent Fee Agreements.** Revised Code Section 4705.15 requires that all contingent fee contracts must be in

writing and signed by the attorney and the client. The attorney must provide a copy of the signed contingent fee agreement to the client.

Furthermore, R.C. 4705.15(C) requires that if the attorney is entitled to compensation under a contingent fee agreement, a signed closing statement shall be prepared and provided to the client at the time of or prior to the receipt of the compensation under the agreement. This closing statement must specify the manner in which the compensation of the lawyer was determined together with any costs and expenses deducted by the attorney from the judgment or settlement involved and any proposed division of attorney's fees, costs and expenses with referring or associated counsel. A failure to memorialize a contingent fee arrangement in writing may subject the attorney to discipline (*Office of Disciplinary Counsel v. Richardson*, 95 Ohio St.3d 499, 969 N.E.2d 824, 2002-Ohio-2484 (2002)).

A lawyer will violate Disciplinary Rule 2-106(A) if he enters into a contingent fee agreement with a client and then attempts to obtain a fee based on an hourly rate (*Office of Disciplinary Counsel v. Watson*, 95 Ohio St.3d 364, 768 N.E.2d 617, 2002-Ohio-2222 (2002)). In that same case the Supreme Court found that the lawyer violated Disciplinary Rule 1-102(A)(4) and (5) when he filed a civil suit against the client and did not disclose the contingent fee arrangement.

In the field of legal ethics the attorney is his own client. The bar associations make available avenues to answer a lawyer's questions concerning professional ethics in a real world setting. Too few lawyers take advantage of this service.

It is also advisable to request another lawyer to review one's office procedures to see if there is any inadvertent violation of the Code of Professional Responsibility. With increasing professional liability premiums, an audit of one's practice may not only be an ethical responsibility but an economic necessity. Many bar associations, including the Cleveland Bar Association, have ethics committees to assist lawyers in handling ethics questions in their practice. ■



Jason C. Blackford, a partner of Weston Hurd Fallon Paisley & Howley, is a member of the Cleveland Bar Association's Ethics and Professionalism Committee.



# Not So Well-Kept Secrets

## Office checkup will prevent unintended breach of client's confidence

BY KIRK R. HALL

Clients trust that the information they pass on in confidence to their lawyers will not fall into the hands of others.

But is there a basis for that trust? Is your office being maintained and operated in a way that assures the protection of client confidences?

The answers have potentially high stakes. Failing to protect client confidences and secrets not only violates professional conduct rules for lawyers, but also may cause the loss of attorney-client and work product privileges, and result in serious malpractice claims, as well.

Take a walk through your firm's offices—listen to what is being said and look at what is open to view.

If you don't like what you see and hear, it is time to make changes in your office procedures to protect your clients' confidential information from unauthorized disclosure. Begin the assessment as soon as you enter the offices:

**Reception area.** Think of times you have been waiting in a doctor's office, and other patients or sales people have come in. It is a natural tendency to listen to what these people are telling the receptionist or nurse. The same thing is happening in your reception area.

Any discussion between firm lawyers and clients about their cases should be conducted away from the reception area, preferably in lawyers' offices or conference rooms.

But discussions about cases can occur in other contexts, as well. For instance, a secretary or paralegal called to the reception area to retrieve materials being dropped off by a client often becomes engaged in a discussion about the client's matters. In such cases, the client should be guided to an area that offers privacy, especially if others already are in the

reception area.

Does the firm's receptionist announce the name of the person holding for you on the telephone and the purpose of the call so that everyone within earshot can hear? Such a practice may give away important information. At a minimum, it may be better to use only the caller's last name.

What about outside the office?



Do you ever hear lawyers or staff discussing cases or clients in the elevator or sitting at the next table at lunch? Everyone at the firm should be reminded not to discuss any client matters outside the office.

**Files.** Are files left lying around in open view of visitors? Given natural curiosity, it can be very tempting to a visitor to read what is in plain view if the lawyer leaves the office even for a few minutes.

Clients should not be left alone even with their own files, which may contain information or notes that could be misconstrued. A secretary or paralegal who is meeting with the client should take the entire file when going to make photocopies.

Sometimes clients or other visitors may ask to use the phone. If this is allowed in your office, be sure the telephone is in an area away from any client files.

**Computer screens.** Does the computer at your firm's reception desk face visitors when they approach? Can any information on the

screen be read by someone standing at the desk? This is another way client confidences can be inadvertently divulged.

A computer screen should either face away from visitors or the terminal's dimmer switch should be used to blank the screen. Some software programs have features that will blank screens after as little as a minute without a keystroke being entered; all it takes is a keystroke to bring the screen back.

**Discarded paper.**

Most law offices never give their wastepaper a second thought because they trust their janitorial services. The Oregon State Bar Professional Liability Fund recently received a call, however, from a lawyer concerned about the fact that a box of a client's documents left sitting on the floor had been discarded by the janitorial staff.

Many boxes of documents received from clients may look like discarded paper, so there should be some understanding with the janitorial service about what should and should not be touched.

Recently a group claimed that its members had gone through Dr. Jack Kevorkian's discarded trash and found what it considered damning information relating to one of Kevorkian's assisted suicides. Could a similar scenario unfold at your law office?

Many law offices now recycle paper. It may be wise to consider shredding it first.

The Professional Liability Fund office in Oregon, for example, contracts with a mobile shredding unit that routinely shreds all of its paper before recycling it. Small shredding machines can be purchased for less than \$100, which makes the safeguard affordable for even the solo practitioner.

During World War II, a familiar saying cautioned that "loose lips sink ships." Don't let a loose policy toward protecting confidential information put a hole in your law firm. This may be the time to institute new procedures to assure that your client confidences are safe. ■

*Kirk R. Hall is chief executive officer of the Oregon State Bar Professional Liability Fund in Lake Oswego, the only U.S. provider of malpractice coverage owned by a mandatory bar association.*

## **Resource 18**

State Bar of New Mexico No  
Permission Needed

### ***WHAT ATTORNEYS NEED TO KNOW ABOUT PROFESSIONAL LIABILITY INSURANCE***

**Prepared By The Lawyers Professional Liability and Insurance Committee (LPLIC)  
Of the New Mexico State Bar.**

#### **What is Professional Liability Insurance?**

In its simplest terms, professional liability insurance is special insurance that provides (a) a defense for claims asserted against a lawyer by an existing client, a former client, or a third party for an injury or damages arising out of the delivery or provision of legal services, and (b) for the payment of a settlement or judgment against the lawyer. Some policies may provide for, or reimburse a lawyer (after the fact) for, the costs of defending a complaint filed against the lawyer with the Disciplinary Board. It is also known as "errors and omissions" coverage or "legal malpractice insurance."

Professional Liability Insurance is referred to as "special" insurance because it is limited to damages arising out of the delivery of professional services. It normally does not cover property damage claims or personal injury claims like emotional distress, assault and battery, and sexual misconduct. Like any insurance policy, professional liability coverage is subject to deductibles and exclusions, which are discussed in detail below.

Lawyers who maintain an office open to the public often have other forms of insurance, which should not be confused with professional liability insurance. General commercial liability coverage is needed to protect the lawyer and the firm from personal injury claims that include premises liability, advertising liability, slander and defamation, and many other traditional torts. Lawyers often carry fire and property coverage to protect the premises and the contents of their office. This type of coverage can be acquired whether you own or lease or rent the premises. When a lawyer or a firm employs more than three people, it will need workers compensation coverage, and the firm may want to purchase coverage for employment related claims. A surety bond is required for any person who is a notary public. Dishonesty or fidelity bond coverage may be needed for those who handle money. None of these types of insurance typically provide coverage for professional liability claims.

It is not uncommon for insurance companies to provide a "comprehensive business package" of insurance. A lawyer should not assume that the word "comprehensive" means the policy includes professional liability coverage, because in the majority of situations *it does not*. There are, however, some companies that provide lawyers and law firms with comprehensive coverage that includes professional liability coverage.

#### **Do Lawyers Need Professional Liability Insurance?**

Approximately 55,000 lawyers in the United States are likely to face an allegation of professional liability in a given year. As the number of lawyers has increased the incidence of claims has increased. It is estimated that there is a 50% chance that a lawyer

in private practice for 25 years will be the subject of at least one disciplinary complaint or claim of professional malpractice. Every lawyer is at risk. Where you practice makes no difference. However, the size of the firm in which you practice and the area of law in which you practice can increase your chances of being the subject of a complaint. Many complaints do not result in a settlement or a judgment. Regardless of the outcome, handling a disciplinary or professional liability complaint can be expensive. It takes time away from family and the practice, it creates anxiety, and in the end it can cost you your license or greatly diminish your net worth. For an excellent article on what a claim can cost and why you should have insurance go to <http://www.nmbar.org/AboutSBNM/Committees/LPL/FindingandKeepingPLI.pdf>.

Professional liability insurance can ease the burden of dealing with a claim by sharing the monetary risks (by providing indemnity for a judgment or settlement and by providing a defense, or in the case of Disciplinary Board Claim reimbursement for part of the cost of the defense) and by shouldering much of the responsibility for professionally and impartially responding to and defending the claim. No where else is the maxim: "He who defends himself has a fool for a lawyer," more appropriate.

How much professional liability coverage, if any, a lawyer purchases depends on one's personal philosophy about risk-taking, one's financial ability to bear such risk, the type of risks faced in the practice, and your responsibility to protect your clients in the event you make an error that causes them harm. If you need assistance, you should consult with a qualified agent or broker or a member of the LPLIC.

Many lawyers do not hesitate to protect their business, their family and their reputations by purchasing automobile insurance, home owners or renters insurance, or general liability and property insurance to cover their investment in their office space and equipment. They will provide health and disability insurance for themselves and their staff. They want to insure against these risks, and yet they question whether they need to insure themselves against professional liability claims. In the end, the decision to insure or not to insure is yours and yours alone. New Mexico does not require licensed lawyers to be insured.

While you do not need insurance to practice law in New Mexico, effective November 2, 2009 the New Mexico Supreme Court, amended Rule 16-104 NMRA of the Rules of Professional Conduct, which now requires a lawyer who does not have certain limits of liability coverage to inform the client of that fact at the time the lawyer is engaged to handle a matter. The Rule prescribes the acknowledgment form that must be used. For more information regarding this professional obligation, go to <http://www.nmbar.org/AboutSBNM/Committees/LPL/LPL.html>.

### **How Does A Lawyer Obtain Professional Liability Coverage?**

The ABA has a website that provides a great deal of information. <http://www.abanet.org/legalservices/lpl/preventionlibrary.html>.

The process contains six basic steps: (1) find one or more insurance agents, (2) determine the amount of coverage you need, the deductible, and whether or not you need "prior acts" coverage and/or "tail" coverage, (3) accurately and completely fill in the application for insurance, (4) survive the underwriting process, (5) get the policy, read it, and comply with its requirements; and (6) calendar a date nine to ten months in the future to start the renewal process.

**Use One or More Agents:** Some agents represent only one company while others are appointed by several companies. Agents do not issue insurance policies. Like life insurance agents, they earn a commission, and because of this they can be an advocate for the lawyer during the underwriting process. They may also promote a policy that provides them with a better commission, but the lawyer with less coverage. The New Mexico State Bar Association does not endorse any particular agent or insurance carrier. A list of agents and carriers who are known to write insurance for New Mexico lawyers is available on the State Bar Website at: <http://www.nmbar.org/AboutSBNM/Committees/LPL/LPL.html>.

Care should be taken in selecting agents. Like any good agent, they need to discuss with you all of your insurance needs. Experience has taught a number of lawyers that often an agent for a main line insurance company may not be aware of the differences between general commercial liabilities policies and professional liability policies. Sometimes it can be a mistake to rely on a friend or relative who writes automobile or general liability coverage. Look at the agent as a professional expert you are hiring to testify. Check them out. Are they qualified? How long have they been in the insurance business? How long have they been writing professional liability coverage in New Mexico? Will they give you a list of references? Will they provide you with a written explanation of the differences in coverage between carriers?

Agents are either "captive", meaning they work for one company (Your Friendly State Farm Agent) or "independent", meaning they represent more than one company. To find an agent, you can ask other lawyers, check the State Bar Website, contact a member of the Lawyer's Professional Liability Committee, or check your yellow pages for independent agents. If, during the course of the year you receive information from a local or out-of-state agent, you should maintain and keep it in an Insurance Renewal file.

All agents should be able to give you a list of the companies they represent, the types of coverage available from each, the premium structure, the exclusions, etc. If they recommend a particular company, ask them why they are recommending it over the others.

Many insurance companies write policies through preferred, or captive, agents. These are often out-of-state companies. Many of them are excellent in providing advice, service and coverage. Others are companies that want to get into the professional liability insurance business but may be here-today-and-gone-tomorrow. Check them out thoroughly.

For lawyers whose claims experience or areas of specialization make it difficult for them to acquire professional liability insurance, there are specialty line companies that write policies for the more unusual risks.

### **Decide the Type of Coverage you need:**

#### *Commonly Covered Risks.*

Policy language varies, but there are many common provisions and types of coverage. Generally, professional liability insurance provides a defense and indemnity for claims arising out of wrongful acts or omissions committed while rendering professional legal services. The policy covers non-licensed staff members who are under the lawyer's direction and supervision. It will often include errors or omissions arising out of services as a notary public, acting as a trustee or mediator, and while acting as an officer, director or member of a legal profession. The extent of the coverage provided by the policy can be negotiated, and through "endorsements" or amendments to the policy coverage can be expanded or reduced. The rule that "you get what you pay for" applies to coverage. The broader the coverage, generally the higher the premium you will pay.

#### *What is the Definition of "Insured?"*

Every insurance policy has one or more "insuring clauses" or provisions. They are often designated as Coverage A and Coverage B. If a lawyer believes they have a "comprehensive policy" that covers professional liability or the provisions of "professional services," there should be a specific insuring clause. When policies have more than one insuring clause, the exclusions under the policy can relate to all of them or just one of them.

#### *Here are some typical insuring clauses:*

To pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages because of malpractice arising out of the rendering of, or failure to render, subsequent to the Retroactive Date indicated in the Declarations, the following professional services...

.....

The **Company** agrees to pay on behalf of the **Insured** all sums in excess of the deductible that the **Insured** shall become legally obligated to pay as **damages** and **claims expenses** because of a **claim** that is both first made against the Insured and Reported in writing to the **Company** during the **policy period** by reason of any act or omission in the performance of **legal services** by the Insured or by any person for whom the **Insured** is legally liable, provided that ..... [The bold terms are defined terms within the policy]

The following insuring clause does not provide coverage for legal malpractice. It is what is called Coverage B in a policy that provides coverage for both professional services and general torts:

- (b) To pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages because of **personal injury** or **property damage** caused by an **occurrence** subsequent to the **Retroactive Date** indicated in the Declarations and arising out of the Name Insured's business as a .....

There are separate exclusions in Coverage B, and they include an exclusion for liability arising out of the rendering of professional services.

Remember, what the insuring clause giveth, the exclusions can taketh away. A very broad insuring clause can be whittled away to nothing by the exclusions in the policy. When shopping for coverage, do not hesitate to ask for sample policy forms so you can compare one policy against another.

The professional liability coverage should be scrutinized for specific issues like:

- Who falls within the definition of "Insured" for the purposes of professional liability (it should be everyone employed to provide professional services)? Does it include former members or retiring members of the firm? What about part time employees or contract lawyers hired to work on specific matters? If you work as a contract lawyer for one or more other firms, are you covered under your policy? Will the definition of "insured" include a group of lawyers, each with a personal professional corporation, but operating as a "firm?" Does the definition limit coverage to services rendered on behalf of the insured firm, thereby excluding outside activities or work with a former firm?
- What is the definition of "professional services" used in the policy?
- What limits of coverage are available; and, given the type of cases that will be handled *in the next year*, how much coverage is needed?
- Are defense costs (generally, attorney fees and costs expended to defend a claim) "inside" or "outside" the coverage? In other words, do the defense costs decrease the amount of coverage limits?
- What deductibles are available? How does the size of the deductible impact the premium? Do the costs of defense erode the deductible, and if so to what extent?
- What are the exclusions under the policy?
- Does the policy cover prior acts?

- What are the notice requirements in the policy?
- Does the policy cover the handling or defense of Disciplinary Board complaints, and if so, how?
- Do I have a right to select or approve the lawyer hired to defend me?
- Do I have the right to approve a settlement or can the company settle without my consent?
- If I do not agree to accept a settlement the company is prepared to pay, what rights does the company have? This is called a “hammer clause.” The company may be allowed to take the position that because you didn’t agree to settle, you will be personally liable for any judgment in excess of the settlement offer, and, perhaps, all of the costs of defense after the offer are rejected, if the judgment exceeds the offer.
- What are the cancellation provisions?
- What provisions are there for having coverage upon retirement or the closing of the office, usually referred to as Extended Reporting Endorsements or “Tail” coverage?

### **What is Not Insured?**

There has never been an insurance policy of any kind that does not contain exclusions or exceptions to coverage. It is important to review the entire policy. Coverage is not taken away in just the Section called “Exclusions.” There may be terms, conditions, requirements, and endorsements included throughout the policy that limit or void coverage. Pay particular attention to the definitions used in the policy. A definition of “damages” or “personal injury” may limit the coverage. Because of space limitations an exhaustive list is not possible in this paper, but here are some common examples of where exclusionary language can be found.

*Notice of Claims.* All forms of insurance require that the carrier be given notice of a lawsuit within a certain time period. Under a claims-made professional liability policy, there is normally a requirement that you give the carrier notice of potential claims within a certain time, not to exceed the end of the policy period. (Some policies allow for late reporting). If notice is not properly given, the carrier can deny coverage. You should carefully consider how the policy defines a claim and the circumstances under which notice of a claim should be given.

*Definitional Limitations.* Policies are full of definitions, and the manner in which a term used in the policy is defined can have the effect of denying or excluding coverage. The definition of “damages” is often limited. The definition of “personal injury” can limit the

scope of the personal injury coverage by listing only those personal injuries that are covered:

“Personal Injury” is an injury resulting from an act or omission arising out of false arrest, detention or imprisonment; wrongful entry or eviction or other invasions of the right of private occupancy; libel, slander or other disparaging or defamatory materials; a writing or saying in violation of an individual's right to privacy; malicious prosecution or abuse of process.

Not included in this definition are many other types of personal injury – intentional or negligent infliction of emotional distress, mental anguish, loss of consortium, physical injury and more.

*Common Exclusions.* There can be one or more sections of a policy that contain exclusions. If different forms of coverage are provided under the same policy, each type of coverage may have its own exclusion section, and there may be exclusions that apply to all forms of coverage listed in the policy. It is not unusual for an exclusion to be stated, and then an exception to the exclusion will be stated. This is giving, taking, and partially returning coverage.

The following exclusions may be in a policy, but the list is not exhaustive:

- Criminal acts
- Intentional or malicious acts
- Punitive or exemplary damages
- Dishonest or fraudulent acts
- Services rendered to a business or enterprise that is owned or controlled by the insured lawyer or the law firm.
- A claim arising out of the service on boards of directors, where legal advice is given by the entity is not a formal client of the lawyer or the board.
- Services rendered as a fiduciary under the ERISA Act of 1974
- Claims against one insured against another insured in the same law firm.
- Bodily injury or property damage generated by a lawyer or the law firm. (This is why lawyers are advised to have separate general liability coverage and automobile coverage).
- Violations of statutes or ordinances – this can include a claim against a lawyer under the New Mexico Unfair Trade Practices Act, RICO, and similar statutes where damages can be trebled – which is covered by another common exclusion.
- Civil or criminal fines and penalties imposed by administrative agencies or tribunals
- Economic and trade sanction conditions
- Nonpayment of premium or deductible
- Violations of Title VII of the Civil Rights Act of 1969
- The multiple portion of multiplied award (trebling of damages)
- Claims for injunctive or declaratory relief
- Material misrepresentations in the insurance application submitted to the carrier



- Claims arising from legal services rendered by lawyers or the law firm where the lawyer or the firm knew or should have foreseen the claim at the beginning of the policy coverage period and failed to provide notice of the claim to the carrier as required by the policy provisions.

### **How Much Coverage Do You Need?**

Once you decide that what you need is professional liability, a/k/a legal malpractice or errors and omissions coverage, the next step is determining how much insurance you need. How much depends on a number of factors, including how much risk you are willing to carry on your own shoulders:

- *How experienced are you?* The less experience a lawyer has may increase the likelihood a mistake may occur. As a solo practitioner, less experience may mean a greater risk. As a lawyer in a large firm where you can tap the knowledge and experience of other lawyers, this may be less of a concern.
- *What types of legal matters do you handle?* Not only are there subject areas where the potential for lawsuits is greater (this is called the frequency of claims) there are subject areas where the exposure is greater (the size or severity of the claim). You have to weigh these factors in deciding how much coverage may be appropriate.
- *How large are the transactions or the damages in the majority of your cases?* A lawyer who misses the statute of limitations can be held responsible for the damages that would have been recovered had the case gone to trial. If you handle fender-bender cases, then you don't need a lot of coverage. If you routinely handle wrongful death cases, product liability cases, or other types of big dollar cases, you need more. If you handle wills and estates, how large are the estates? If you only handle criminal defense cases, what might a jury award to a client who is wrongfully convicted because of your malpractice?
- *What are your personal assets?* If you are sued and don't have insurance, a judgment can be collected just like any other judgment – garnishment, attachment, or judgment liens on real property in which you own an interest. If you own a 2001 car, rent an apartment, and have no savings, you may not need that much coverage. If you practice in the form of an LLC, LLP, PA or PC, you are still personally liable for your acts of malpractice, and in many jurisdictions there are coverage requirements in order to be able to limit your coverage through these legal entities.
- *Can you afford to defend a claim yourself?* The cost of defending a case can be enormous, and under all policies of insurance the company will defend the claim. If you hire another lawyer to defend you, you may incur defense costs that exceed the amount of the annual premium. If you decide to defend yourself, other than having a fool for a client, you have to consider how much of your time it will take

to handle the case. This is time that you cannot spend generating income by working on matters for clients. The value of the productive time you lose can quickly exceed what an annual premium will cost.

- *Can you afford the emotional, professional, and social costs of being uninsured?* There is an emotional and social cost to being sued, and not having insurance only exacerbates these costs. What is time with your spouse or your children worth? What if the case can't be settled and you try it and lose and the newspaper reports the result? Can you handle the stress that often accompanies being sued for legal malpractice?
- *What are Single and Aggregate Limits?* Coverage is usually sold in blocks of coverage, designating an amount of money to cover a single claim and the total or aggregate amount of money available under the policy for multiple claims. A policy written for \$100,000/\$250,000 in coverage is a policy that will pay out no more than \$100,000 per claim and a total of no more than \$250,000 for more than one claim asserted during a policy period. A policy with \$1 million/\$3 million will pay up to \$1 million per claim, and \$3 million for all claims asserted in a policy period. Companies assign the levels of coverage and fix a premium based on the level. Lawyers seldom have the ability to dictate their own levels of coverage, but a number of different options will be available to you. Request quotes for multiple options to compare the costs.
- *How Big A Deductible Do You Need?* Almost all policies have deductibles (see the insuring clause examples listed above). Just as with your auto insurance, you can buy insurance with different sized deductibles and the larger the deductible the lower the premium. You should pick a deductible that you can afford to pay, not just one that lowers your premium to a level you prefer. Payment of the deductible is a precondition to the carrier being obligated to paying its limits. As discussed below, deductibles can be eroded by the cost of defense. This means that a policy may have a \$5,000 deductible, and 50% of the cost of defending the case will be paid from the deductible. The result is you pay the lawyer hired by the carrier the first \$2,500 of defense costs and if the case settles or goes to judgment you have to pay the remaining \$2,500 of the deductible before the company has to pay the rest.
- *Will the cost of defense diminish the coverage limits?* Many policies available to New Mexico attorneys provide that the cost of defending a claim will reduce or erode the coverage available under the policy. These are commonly called Pacman policies, because, like the Pacman video game, the cost of defense gobbles up the coverage. Policies will refer to claims expense being "inside" or "outside" the policy or the policy limits. When claims expense is inside the limits, it erodes them. When it is outside the limits, it is in addition to them. It is better to have the costs of defense outside the limits. For some claims it may cost far more than the limits to defend the claim. With a Pacman policy, every dollar spent defending the claims reduces the amount of coverage available to pay a

settlement or a judgment. In New Mexico, an insurance regulation (N.M.A.C 13-11-21) prohibits a policy with limits less than \$500,000 per claim from containing a Pacman provision. For policies providing coverage of \$500,000 or more, claims expense can only erode 50% of the policy limits. However, this regulation allows a carrier to issue, under certain limited circumstances, a policy that permits the cost of defense to erode all of the limits available under the policy. This type of policy is extremely rare.

- *Do I need Retroactive Coverage?* Professional Liability insurance is written on a “claims-made” basis, as opposed to an occurrence basis. Under a claims-made policy the claim must accrue and be made against the policy during the policy period (normally one year). If notice is given to the carrier, the claim is considered “made” at that time. Most professional liability insurance policies have a provision that provides for coverage as long as the claim and notice are made while *that* policy is in effect. As long as a lawyer or a firm stays with the same carrier, claims-made policies do not generally present a credible risk that a claim will not be covered (unless notice was not given as required by the policy). When a lawyer or a firm changes carriers, they run the risk that an unreported or latent claim of malpractice that accrued before the new policy period started may be asserted during the policy period. This claim could be denied. Because a client has four years in which to bring a legal malpractice claim (six years under a breach of contract theory), the actual assertion of a claim may occur long after the claim accrues or becomes known. Retroactive coverage extends the claims-made period backward in time for a fixed number of years. Claims resulting from occurrences prior to the policy’s stated retroactive date will be excluded. The longer the period of retroactive coverage, the more protection it affords, and, therefore, the more expensive it may be. When changing carriers, it is always advisable to purchase retroactive coverage for at least 6 years. Estate planners, real estate lawyers, and others whose errors and omissions may not be discovered until a person dies or a piece of property is resold should have the longest period they can afford.
- *Do I Need Tail Coverage?* Tail coverage is coverage for claims that are made after a claims-made policy is terminated. It extends the reporting or discovery period. A lawyer who retires or who goes into public service (becomes a judge or goes to work for an agency), should consider purchasing tail coverage. Some policies provide a free tail for retiring lawyers of the firm if the lawyer has been insured by the same carrier of a certain number of consecutive years.
- *What If I Am Changing Firms or Hiring A Lawyer From Another firm?* Lawyers changing firms (lateral hires) need to make certain that they will be covered under their old firm’s policy for any errors and omissions that occurred while they worked there, and under their new firm’s policy for any claims that accrue after they start working at the new firm. The amount of the deductible for coverage at the old firm needs to be compared to the cost to the new firm, if the new firm buys prior acts coverage or retroactive coverage for the lateral. One may cost less

than the other. The issue of “claims defense” should be discussed with both the old and the new firm, particularly if open files are going with the lawyer.<sup>1</sup> A firm that is hiring a lawyer who worked at another firm, should conduct its own due diligence and determine if any claims were made against the lawyer at the old firm, if any claims are filed and pending, and whether the old firm’s policy will cover claims that accrued while the lawyer was at the old firm but are not asserted until after the lawyer joins the new firm. The old firm should provide tail coverage for the departing lawyer and/or the new firm should obtain retroactive coverage under its policy. Because the prior firm may not always continue to provide such coverage, it is best for the individual attorney to have the new firm provide coverage in the event that the old firm no longer exists or no longer continues a policy that covers the former attorney. This may or may not be an option the new firm can or will provide, but it should be considered by the attorney and firm.

- *What If I Don’t Understand The Terminology my Agent Spouts?* Any agent should be able to explain to you in language you can understand the nature of your professional liability coverage. Members of the Lawyer Professional Liability & Insurance Committee are available to answer your questions. The current members are listed on the State Bar of New Mexico website site at <http://www.nmbar.org/AboutSBNM/Committees/LPL/LPL.html>. In a pinch, you can get answers regarding many insurance terms at [http://www.ifs-de.com/pages/glossary\\_files/Tgloss.htm](http://www.ifs-de.com/pages/glossary_files/Tgloss.htm)

### **Treat the Application Like a Supreme Court Brief:**

The members of the LPLIC are available to assist lawyers who have questions about coverage or need assistance securing it. While helping attorneys secure coverage, experience has shown that often the problem of getting coverage can be traced back to the application. Every carrier requires a lawyer or a firm to complete an application. This process should be given the same priority and level of importance as the preparation of a Supreme Court brief. Mistakes can be compounded and they can remain in place to influence later attempts to secure coverage.

Some agents, particularly independent agents who represent multiple lines, will often ask that you complete a single application, which the agent then presents to multiple carriers. If there is a problem with the application, it can result in being rejected by more than one carrier.

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<sup>1</sup> It is not a bad idea when a departing lawyer is taking open files to reach an agreement that the files being taken will be maintained exactly in the form in which they existed when taken, and that new files will be opened and maintained by the new firm. Firms often have different filing requirements or client numbering systems and the tendency is to convert or change the old files to the new system. If you do this, you cannot easily tell what work was done (or not done) when the file was at the old firm or after it was transferred.

*Assign the Task to a Responsible Person.*

The task of completing the application should be carefully supervised by a lawyer; and if it is not completed by a lawyer, then it should be handled by an experienced staff person. This is not a task to assign to the student who is your part-time receptionist.

Copy the application and work on a copy. Study it carefully. If you need to assign specific tasks to individuals in order to complete the application, do so early and provide clear instructions regarding the tasks to be performed. If you are submitting applications to more than one carrier (through one or more agents) don't assume the applications will ask for the same information in the same format. Putting down information that you compiled for Company A on Company B's application may result in inaccurate or misleading information being supplied to Company B.

*Be Thorough*

For reasons explained below, you need to gather prior policy applications, print out full copies of the web pages that described what the lawyers in the firm do and the type of work you handle, and gather paper marketing materials. Verify how all lawyers and non-lawyers calendar due dates, even if you provide calendaring software.

Answer every question and check every appropriate box on the application. Never guess, and always verify. When you are finished with the application you should keep a copy and all of the backup information on which you relied in completing the application in a single file for at least five years.

If you have questions about anything regarding the application, do not guess – call and question the agent and document the answer you receive.

You should have available for review all prior policies and applications for the last 5 years. Refer to them as necessary in completing the new or the renewal application.

Applications ask for prior claims information. They may ask for disciplinary board actions. If you have listed claims in prior applications and those claims have settled or major defense motions have been granted, update the explanation you used for the previous policy. Be accurate when you are asked to describe the claim – the underwriter may actually check the docket and read the complaint.

The application may require that you list the percentage of revenues or work the firm performs by legal subject area. Do not guess. Use your billing or accounting software to generate as accurate a report as you can. If your software can't track this information, set up a system that can.

*Be Honest and Accurate.*

Many lawyers make a mistake listing as subject areas what they would like to do, as opposed to what they actually do. Stating you represent plaintiffs in class actions, when you want to do it but really haven't, will probably result in a rejection, or, at the very least, a higher premium.

Your application will be reviewed by an underwriter for the carrier that will issue the policy. This underwriting person is not your agent and he or she may not be your friend. The underwriter may compare what you represent in the application to what you say on your website, your My Space or Face Book listing, what you represent in well known law lists, in your blog, etc.

If you didn't list anti-trust work on your application but you represent to the world that you do it, you may be rejected. If the firm represents it handles certain work, but none of the biographies of the lawyers in the firm mention that work, you may be rejected. Anything that the underwriter believes is a material discrepancy may be the basis for a rejection. The underwriter is trying to assess the risk and if they are willing to insure you, what they will charge for a premium.

A problem with inconsistencies can arise when experienced lawyers leave the firm or laterals join the firm. Departing lawyers may take with them the "firm's experience" in a substantive field. New lawyers may bring experience in an area not covered before. If you hire or associate with a new lawyer, as part of your due diligence, thoroughly check the lawyer's prior claims experience.

Just as you would do with a brief to the Supreme Court, proof the application, cite check it (verify the source data used in the application is correct), and make certain it is complete and that it makes sense.

**Dealing with Questions or Rejection During The Underwriting Process:**

Underwriters may have questions they need answered during the underwriting process. These questions may be funneled through the agent or they may call you directly. Make certain that any inquiries are expeditiously handled by the appropriate person. Your entire staff should be instructed to refer questions regarding the policy application to you or some other knowledgeable person. Again, you do not want secretaries answering questions about what the firm really does, or whether it uses a dual calendaring system, because they may not know the answer.

Don't guess. If you need to check records or verify information, tell the adjuster you want to make certain that you have the best current information and you will call them back – and do so promptly.

Rejection is hard for anyone to accept and it is not an uncommon human response to try and forget it and move on. Don't do this if you are rejected by a carrier. Either you

or your agent should call the carrier's underwriter and **professionally and calmly** ask why you were rejected. (Being adversarial will not help – the carrier is under no legal duty to provide you with insurance).

It is not uncommon for an underwriter to tell you why they rejected your application, and many times the reason given can be corrected. One real world example involving a member of the LPLIC involved a senior lawyer who joined a new firm after his old firm imploded. The lawyer had practiced law for 50 years and had handled every type of case you can imagine. He was involved in the General Atomic case, represented plaintiffs and defendants in class actions, and defended large antitrust claims. In the new firm, he did none of this. He was a mentor and friend to many of the lawyers. When the lawyer joined the firm, the office manager uploaded his resume to the firm's website and added his background and experience to the firm's resumes. The firm had both represented and had been insured by the same carrier for many years. The firm was shocked when the carrier declined coverage. When it called the underwriter, the firm learned that the application was rejected because the firm's application did not match the type of work that firm's website represented the senior lawyer handled. An explanation letter from the senior lawyer and a quick fix to the website resulted in the policy being renewed.

Sometimes you can't immediately fix the problem that result in a rejection, but knowing the basis for the rejection may allow you to make adjustments. Perhaps you were rejected because you had a serious claim pending against you and during the year the claim is dismissed. Perhaps a lawyer in the firm with a bad claims experience has left. These changes in circumstances can be stressed when you apply again the next year.

### **Read the Policy and Comply with It:**

When you get the policy, do not file it away. Read it, and make certain it conforms to what you understood you would be getting. Check the definition of "insured" and all of the other definitions. Outline the exclusions and look at the exceptions to the exclusions. Make certain that all of the lawyers in the firm understand the exclusions and the claims notice requirements of the policy.

### **Prepare for the Renewal or Replacement:**

Most policies are written for a period of 12 months. It is not unusual for different types of policies (general liability, workers compensation, etc) to come due at different times. Unlike professional liability policies, other types of policies are often renewed automatically by the agent, and do not involve the intensive application process that professional liability policies involve.

It is a mistake to wait until the last minute to start working on the renewal process. Do not assume you will be automatically renewed. Your current carrier may

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# Not to Panic—Suits Happen

## Bring your malpractice insurance carrier into the case upfront

BY E. KENDALL STOCK  
AND DONNA D. LANGE

Face it: In today's law practice environment, the chances are good that a disgruntled client is going to sue you for legal malpractice.

Once lawyers accept the possibility, if not probability, of being sued, they can become better prepared to respond appropriately when the possibility becomes reality.

As any client could tell you, it is almost impossible to plan for the onslaught of a suit. But at the very least, you should be familiar with your professional liability insurance policy. When the lawsuit is already in hand is not the time to pull out the policy to see what it says.

At least be familiar with these policy elements: the limits of liability, the deductible amount, whether the deductible applies to claims expenses and costs, whether the cost of defense is included in the limits of liability, whether fines or sanctions are covered, and whether pre-judgment interest is covered.

If a lawsuit is filed against you, your initial response will be crucial. Your first step should be to locate your file on the underlying case, organize it and protect it. Second, prepare a statement of the facts as completely and as objectively as you can. Finally, notify your insurance carrier as soon as possible.

During this emotional and traumatizing time, it is essential to remain calm and objective. Do not try to deal with the claim yourself. Under no circumstance should you discuss this matter with the plaintiff—even though that party is (or was) a client—or the plaintiff's attorney. Your insurance company's counsel should deal with them.

*E. Kendall Stock chairs the board of directors for American National Lawyers Insurance Reciprocal (Risk Retention Group), the endorsed professional liability carrier for the Arizona, Hawaii, Tennessee and Virginia state bars. Lawyer Donna D. Lange is the group's assistant vice president of marketing. Stock, a solo practitioner in Leesburg, Va., is on the ABA Standing Committee on Lawyers' Professional Liability.*

Above all, do not ignore the suit because it will not go away.

Reporting the claim immediately provides opportunities for repair or mitigation. Reporting should be done with a telephone call to the carrier followed by a confirming letter.

Report as much detail as possible, even if some of the information

the impact of a settlement on your rights and responsibilities under your malpractice insurance policy.

For instance, does the insurer need your approval to reach a settlement, or do you have a right to reject it? What is the impact of a "hammer clause" in a policy (which provides that, if you do not agree to the settlement, the proposed amount of the settlement becomes the new policy limit)? Can a carrier's decision to settle be appealed? How will a settlement affect your future premium costs or insurability?

If the claim against you alleges vicarious liability arising out of dishonest acts of a partner, most policies cover you as an innocent partner.

You need to take steps immediately, however, to prevent further actions by this partner, and review all of his or her files for further exposure.

If there has been publicity on the case, other former clients of the partner may file additional claims alleging dishonest acts, and there even may be some frivolous claims of negligence.

Obviously, such an occurrence affects your insurance record, and you may consider purchasing an extended reporting endorsement.

An extended reporting endorsement designates some specified period of time after the termination of the policy during which a claim can be reported. In all cases, the professional services that give rise to the claim must have occurred prior to the termination of the underlying policy for the insurer to defend it.

The extended reporting endorsement, or "tail" coverage, is, however, one of the aspects of your malpractice insurance policy that should be evaluated before a claim makes it an imperative.

By addressing questions about your policy coverage before any claims are filed, you may not be able to avoid a claim, but at least you will be prepared for it. ■

in your file is adverse to your case. After you have reported the lawsuit to your carrier, cooperate with it in preparing your defense.

### Stay Involved in Your Case

Lawyers have a tendency to either completely avoid involvement in their cases or to become overly involved. Neither response is productive.

Instead, discuss with your insurance company who your defense counsel will be and whether you have any say in the selection. You are entitled to copies of pleadings and correspondence. The insurance company should not object to your input if you think your representation has been sloppy or inadequate.

On the other hand, do not assume that your defense counsel cannot handle your case because he or she has not practiced in the area of the underlying matter. An experienced malpractice defense lawyer will rely on you and experts to explain the underlying intricacies.

You should be closely informed of any serious settlement discussions. You should also be aware of

