

Up Advisory

*A newsletter from
The ABA Standing
Committee on Lawyers'
Professional Liability*

The New Bankruptcy Law *A Possible Professional Minefield*

By Robert W. Minto, Jr.

Mark Your Calendar

April 10-12, 2002
Spring National Legal
Malpractice Conference
Charleston Place
Charleston SC

The economy is tanking, interest rates are falling, lawyer approval levels are at an all time low and there are too many lawyers vying for the ever-growing number of Chapter 7 and Chapter 13 Bankruptcy filings. Just when it seems that it can't get any worse, our President and Congress mount a charge to enact a new Bankruptcy law¹. The

needed to streamline the process, correct the abuses that the system has spawned, and to ease the pain of the creditors that pay the price when a bankruptcy gets filed.

In conversations with congressional staffers about the intent of the amendments, they are clear that the provisions focus on deterring lawyers from filing frivolous claims such as Rule 11 does in the civil justice system. The provisions, they say, intend to provide the bankruptcy court a sufficient remedy to give the anti abuse provisions teeth. A reading of the relevant sections seems much broader than Rule 11 and creates a much broader guarantee by the practitioner not contemplated by its civil law counterpart. Query: If they wanted Rule 11 protections why not just repeat the rule and thus extend it to the Bankruptcy Court? Despite the rhetoric to the contrary, the bills intend that a lawyer will be responsible for a client's veracity. If assets are hidden, forgotten, or the client has other fraud in their hearts, the lawyer can be held accountable under the law. What does all this mean to the bankruptcy practitioner, or more importantly to the solo or small firm generalist that does a little bankruptcy work? How will this new legislation impact professional liability insurance? These represent just two of the questions that lawyers ought to have about this new and impending change, but this article only permits us to hit the high points on these two³ issues.

Candidly, under current Lawyers Professional Liability Insurance (LPLI)

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proposed bills and the myriad of adopted amendments are not only foreign to most of us, but the latest round of amendments appear to make lawyers guarantors of the truthfulness and factuality of their clients filings and representations². The pundits tell us that the system is broken and the new legislation is

Bankruptcy Law

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policies there is not likely to be any coverage for these new risks. The penalties imposed by the new law looks, tastes and smells like sanctions rather than damages or incurred loss; accordingly, most policies will not afford direct coverage⁴. Only those few policies that afford coverage for sanctions, fines and punitive damages would come close to responding to a claim of this nature. A close look at the policies available in the market shows that the handful⁵ that do offer sanctions coverage generally limit it to sanctions imposed under Rule 11, and are worded to limit those imposed under other provisions. In the current insurance market it is unlikely that carriers will be broadening coverage to specifically address this issue. In fact, if the bills become law in their present form, it is likely that carriers will consider surcharges for bankruptcy practice and further limitation to assure the status quo.

What is a lawyer to do? It appears likely that many who now practice creditors bankruptcy will be forced to reassess their practice and look to limiting cases they take in Chapter 7 and Chapter 13 situations. Clearly the old adage "know your client" will take on new meaning and the amount

of effort that practitioners put into verification of assets will reach new heights. In short the law has, as intended, a chilling effect on all debt forgiveness proceedings and will serve to increase the cost of legal fees for those that lawyers do file Chapter 7 and Chapter 13 cases.

It is not for the ABA, or the Standing Committee to take sides in the debate about whose ox is being gored, the debtor or the creditor, by the bankruptcy system. It is, however, our right, if not obligation, to look out for the interest of our members who represent those among us who are least able to help themselves (financially or otherwise) and see that justice (yes even in bankruptcy) is equally available to all. These Bills are not law yet so there is still time for changes to be made, but clearly it is our last chance. The battleground is laid—the Conference Committee—all pressure needs to be brought on those members of Congress with a seat on the Conference Committee⁶. You decide if you want to join the fray. If so, contact the Committee and let your feelings be known.

Robert W. Minto, Jr. is a member of the ABA Standing Committee on Lawyer's Professional Liability, and he is the President and CEO of Attorneys Liability Protection Society (ALPS), a mutual risk retention group.

ENDNOTES

¹ Senate Bill 420 and House Bill 333 have now passed their respective houses of congress and reside in a conference committee for reconciliation. As of press time for this article the Senate and the House had named their conferees (see footnote 6 for a list) but the committee had taken no action.

² Senate Bill 420, Title I, Sections 102, 203; House Bill 333, Title I, Sections 102, 203. See also Title I, Sections 227 through 229 for additional burdens placed on bankruptcy attorneys relative to imposition of "credit relief agency" status and regulation.

³ This month the ABA House of Delegates passed a resolution opposing the recent amendments to the legislation that require attorney certification. The ABA Standing Committee, the ABA Bankruptcy Section and the Missouri Bar Association sponsored the resolution before the House and are heading up the effort to get the issues corrected in the Conference Committee session.

⁴ In normal situations with multiple lawyer firms, innocent partner clauses may bring sanctions against a client which a lawyer causes with in coverage, but in this case we are dealing with a direct sanction against a lawyer.

⁵ Please refer to your LPLI policy for specific cover issues involving you and you firm's individual situation.

⁶ If you are inclined to join the fight, a direct contact with the conferees is the best way. The Senate Conferees are: Biden Jr., Joseph (D – DE), DeWine, Mike (R – OH), Durbin, Richard (D – IL), Kohl, Herb (D – WI), Kennedy, Edward (D – MA), Kyl, Jon (R – AZ), Feingold, Diane (D – CA), Grassley, Chuck (R – IA), McConnell, Mitch (R – KY), Sessions, Jeff (R – AL), Schumer, Charles (D – NY). The House Conferees are: Sensenbrenner, F. James, Jr. (R – WI), Hyde, Henry (R – IL), Gekas, George (R – PA), Smith, Lamar (R – TX), Barr, Bob (R – GA), Conyers, John Jr. (D – MI) Boucher, Rick (D – VA) Nadler, Jerrold (D – NY), Watt, Melvin (D – NC), Oxley, Michael (R – OH), Bachus, Spencer (R – AL), LaFalce, John (S – NY), Tauzin, W. J. (R – LA), Barton, Joe (R – TX), Dingell, John (D – MI) Boehner, John (R – OH), Castle, Michael (R – DE) and Kildee, Dale (D – MI).

Levit Essay Call for Papers—Golden Opportunity for Young Lawyers

Submissions are now being accepted for the 2002 Levit Essay Contest on Lawyers' Professional Liability. The competition, only open to law students and young lawyers, encourages innovative and original research and writing in the field of lawyers' professional liability. As in previous years, this year's format asks the contest applicant to render a judicial opinion. The complete hypothetical and contest rules are available at www.abanet.org/legalservices/levit.html

The winner of the annual award receives a cash prize of \$5,000 and an all-expense paid trip to the ABA Spring National Legal Malpractice Conference in Charleston, SC on April 10-12, 2002. The deadline for submissions is January 14, 2002.

This annual competition is co-sponsored by the ABA Standing Committee on Lawyers' Professional Liability and the San Francisco firm of Long & Levit LLP.

Fond Farewell to Sheree Swetin

After 19 years of service to the Standing Committee on Lawyers' Professional Liability, Sheree Swetin will be leaving on October 1 to become the executive director of the San Diego County Bar Association.

Sheree began serving the lawyer professional liability community only six years after the establishment of this ABA entity. As part of her initial duties, she and Bill Gates Sr. (a former Committee chair) conducted the inaugural study of professional liability claims that resulted in the publication of *Characteristics of Legal Malpractice* in 1989, and she directed the successor claims studies in 1996 and 2000. She has overseen the publication of every

Committee publication, guided the development of the National Legal Malpractice Data Center to an annual membership of more than 275, and has seen the twice-annual educational conferences grow from a handful of attendees to 400.

Sheree's guidance and insight on countless issues, her ability to bridge the multiple interests in this complex industry, and her unflinching good humor will be greatly missed.

At the same time, we are heartened that she is moving on to new professional challenges and life adventures. We ask all of you to join us in wishing her well in her new endeavors.

Loss Prevention for AnyLawFirm.com

By Jett Hanna

Software commonly in use at law offices will prompt a trained legal assistant to insert names and alternative phrases at appropriate places in documents. The next step in automation has the client respond to questions online, and then simplifies or fully automates document generation (see www.premack.com and www.legaladvice.com). Automated legal services such as these have the potential to either enhance loss prevention efforts or create new ways to incur claims. Some of the possibilities are detailed below.

Client Screening

The ability of the client to pay is confirmed by use of online credit card payment, thus avoiding a later fee suit. In some types of practice, questions answered on a web form can give the attorney sufficient information to judge whether the person seeking legal advice is an appropriate client. As the complexity of proposed legal services grows, however, client screening is better accomplished by meeting the potential client.

Documentation of Disclaimers

In software installation, it has long been a common practice to have a licensing agreement show on the screen that the purchaser must agree to before using the software. Failure to click on an "I agree" button prevents use of the software. It is just as easy to provide caveats regarding key issues of representation.

The downside of documenting items such as these through web-based applications is that some clients will not read the disclaimers, and as a result may not ask questions that they would in person. Nonetheless, the attorney should be protected against many unwarranted claims if disclaimers are well drafted.

Errors in programming

With automated legal services, programming bugs will occur. When those bugs cause

the program to halt the downside may be an unhappy non-client. Substantive errors that result in incorrect documents cause more serious problems. The possibility exists that the error will be multiplied many times.

Simple legal services are easier to program, and therefore less subject to programming error. As the complexity of a legal service increases, attorneys can review the documents generated and call the client if there are questions rather than automatically making the document available once sufficient information to create the document has been received.

What was the service provided?

A website designed to provide legal services directly should consider the possibility of later litigation over the exact legal service provided. Client responses should be stored so that a computer expert can testify as to exactly what answers were given. The database supporting the website should keep information showing the date of the last change to the record for each client. Without this information, the attorney could face a claim that the client provided correct information but someone changed the information when a defect was discovered.

Each version of automated software used by clients should be archived, and logs kept regarding time of deployment. Otherwise, there may be a claim that the program was altered after an error was discovered. Having logs of the site and storage of the responses allows computer experts to testify as to what web page or document would be produced by specific client actions.

Mistakes by the client

Clients will make mistakes when completing forms or providing information. When they do, they may claim that the attorney should have investigated further and realized the client's mistake. Screens that allow the client to review their answers before generating the

document can help solve such problems, as can review of documents by an attorney or paralegal.

Forcing answers to questions and creating routines that prevent document generation if incomplete information is provided also helps avoid such errors.

Changes in the law

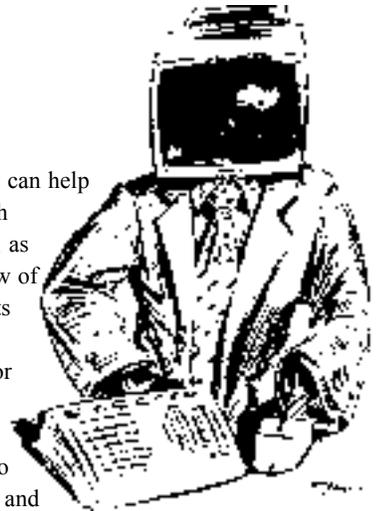
Attorneys have a duty to monitor changes in the law. Use of automated document generation requires reprogramming to meet such changes. When the law changes abruptly, it may be necessary to disable certain types of automatic document generation until the changes have been evaluated and factored into the program.

Confidentiality

A foundation of the attorney client relationship is confidentiality. Recent events demonstrate that some of the best web sites have had significant security problems. The design of web-based client information gathering and document generation systems must take into account the need for all information gathered and sent to remain confidential.

Security must be analyzed on several levels. Secure transmission from the client to the attorney's web server is required. Any information about the client that remains on the attorney's web server or on the attorney's computer system needs to be secure from hacking. The security issues for a web site and secure storage of client information are far more complex than those involved in transmission of email.

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LPL Advisory is a bi-annual newsletter published by the American Bar Association Standing Committee on Lawyers' Professional Liability for the news and information exchange needs of the lawyers' professional liability community.

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Message From the Chair

I am honored and pleased to have the opportunity to serve as chair of the Standing Committee on Lawyers' Professional Liability. I look forward to working with the members of the Committee, the lawyers and other professionals who attend the conferences and participate in the programs and the dedicated staff of the ABA who serve the committee so well.



On behalf of the Committee, I want to thank Mike Bourgeois for his six years of service as a member of the Committee and his leadership as chair during the past year. Under Mike's stewardship the Committee updated the National

Data Project for malpractice claims by publishing *Profiles of Legal Malpractice Claims, 1966-1999*, provided us with two excellent educational conferences, and began other projects that will be completed in the future. We wish Mike all the best and look forward to seeing his smiling face and hearing his wonderful stories at future conferences.

The fundamental purpose of the Committee is to assist lawyers in avoiding malpractice claims and to provide current information on the availability, coverage and cost of insurance. I believe the Committee has done an outstanding job in fulfilling this purpose, and my goal is to work with all of you—the Committee members, the associates of the National Legal Malpractice Data Center and all others who attend and participate in our

conferences—to see that we continue to do so.

Finally I want to call your attention to the Levit Essay Contest described in more detail on page two. This is a great opportunity provided by Joe McMonigle's firm for young lawyers and law students to use their legal and writing skills to contribute a service to the profession and to be awarded for their effort. I ask all of you to encourage young lawyers and law students to participate in this competition.

I look forward to seeing all of you at Torrey Pines in September.

—Ed Mendrzycki



Loss Prevention

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Conflicts of interest

Automated generation of legal documents can result in difficult conflict issues. Consider the following scenario: husband and wife decide to generate wills online, each working separately with the same automated system. The husband leaves his share to his girlfriend, while the unsuspecting wife leaves her share to her

husband. In the ordinary situation where the husband and wife both approach the same law firm, the recommended course of action is for the attorney to tell both the husband and wife that what either shared with the attorney must be shared with the other spouse.

A pure software solution is not satisfactory. Misspellings or changes of names might be missed. Some conflict issues require analysis of content, rather than simple consultation of a list. Performing human conflict analysis may still be a critical part of conflict avoid-

ance even if other aspects of legal service can be automated.

Conclusion

Technological sophistication does not guarantee quality of legal services, but can complement it. Legal services delivered by automated systems require the same careful attention to malpractice prevention that more traditional legal services demand.

Jett Hanna is a Senior Vice President for Texas Lawyers' Insurance Exchange.

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