

# LPLI Advisory

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

## Multidisciplinary Practice: Malpractice Minefield or a Walk in the Park?

**Robert W. Minto, Jr.**

### Mark Your Calendar

**March 8-10, 2000**

Trying a Legal Malpractice  
Action  
ABA Standing Committee  
on Lawyers Professional  
Liability and Defense  
Research Institute  
Fairmont Hotel  
New Orleans, LA

**April 5-8, 2000**

Spring National Legal  
Malpractice Conference  
Mariott Marquis  
New York, NY

**September 6-8, 2000**

Fall National Legal  
Malpractice Conference  
Loews Ventana Resort  
Tucson, AZ

Shortly after the ABA issued its Commission report and recommendation on Multidisciplinary Practice (MDP), I was thinking about the effect MDP would have on Lawyers Professional Liability Insurance (LPLI). LPLI policies with their myriad of exclusions related to outside business interests and dealing with family members seemed to present a vast array of issues and related problems and pitfalls.

On further reflection, it occurred to me that it might not really make much difference. MDP has been a reality in many respects in small town America for years. Lawyers have held multiple professional licenses and owned separate businesses such as title companies, insurance agencies, real estate offices, and even accounting practices. The economics of small towns have required it. The only difference is, at least de jure, they have been separate businesses with separate structures. In many cases, these businesses share office space, telephone lines, post office boxes, and staff, while, de facto, only being separated by a series of different signs on the door, professional licenses, ethical rules, a separate (hopefully) set of books and

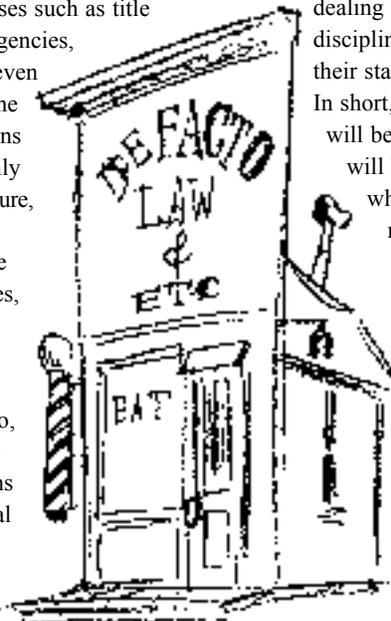
most importantly multiple professional liability policies.

The proposed rules make it clear that in an MDP everybody has to live up to the ethical standards set by the Bar. If the quality of the work done by the non-lawyer members of the MDP doesn't rise to the competency standards of the rules or the standard of care in the community for work done by lawyers, the waters can get a little murky. Is this really any different than the exposure we now face for work done by our law office staff? In principal no, but in practice and perhaps more significantly, yes. At present our office staff is clearly subject to our rules. When

dealing with other professional disciplines, we will need to understand their standards and rules and they ours. In short, I think that the toughest rule will become the standards that MDPs will have to live by, regardless of what the ABA proposed rule might infer to the contrary.

Will current LPLI policies cover work done by other professionals in an MDP, or the vicarious liability a lawyer might have for being a part of the MDP? Most (if not all) current LPLI policies contain an insuring agreement that only covers the practice of law and in fact excludes coverage for other

*(continued on page 2)*



## Multidisciplinary Practice

(continued from page 1)

business ventures owned by or in any way controlled by a lawyer or his immediate family members. Taken to its logical conclusion, there would be no coverage for either circumstance under current policies. The current solution is to make sure that all licensed professionals have professional liability policies in place to cover each of the professional aspects of the MDP. Just imagine the coverage issues professional liability insurers will have to sort out in a case involving a multitude of disciplines. This will not be a problem for long as I suspect that the insurance industry will soon modify their policy forms to accommodate all the licensed professionals within a single professional liability form. In the end, coverage may even improve as competition increases for the now combined risks of an MDP.

As we consider the viability of MDP in our lives and its impact on the way we currently do business, what should we be thinking about? The list is not yet fully defined, but for the time being here are a few simple questions to ponder:

1. What are the ethical rules that all of us in the MDP have to live by?
2. What professional liability insurance coverage is available to each participant and employee of the MDP?
3. What systems (forms and procedures) do we need to make sure that the various professional tasks are being handled by the right licensed professional or a person supervised by a licensed professional?
4. What disclosures might be appropriate to inform the clients of the various standards and professions involved in their project?
5. What communication systems need to be in place to make sure that confidences can be protected (mental health professionals may have obligations to report that which a lawyer cannot disclose)?

In the final analysis, these are probably all questions that we should be addressing within a traditional practice of law as we interact with our own staffs and consulting professionals in a traditional law practice. When all the dust settles, MDPs will probably not increase a lawyer's malpractice risk. However, in the short term, we need to think about what new exposures other professionals might bring to the practice, and make sure that all appropriate coverage is in place before any new entities are formed. If in doubt, consult with your carrier or agent and get their input.

*Robert W. Minto, Jr. is the President & CEO of Attorneys Liability Protection Society (ALPS), A Mutual Risk Retention Group*

## Levit Essay Call for Papers – Golden Opportunity for Young Lawyers

Submissions are now being accepted for the 2000 Levit Essay Contest on Lawyers' Professional Liability. This year's format places the contest applicant as a judge on the trial court in a state court system. The writing submission is the majority opinion for the two-judge majority in a three judge court ruling on a motion for summary judgment.

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 New York City on April 5-8, 2000. The deadline for submissions is January 17, 2000. The competition is only open to law students and young lawyers and the complete hypothetical and contest rules are available at [www.abanet.org/legalservices/levit.html](http://www.abanet.org/legalservices/levit.html) or by contacting Edna Driver, ABA StC on Lawyers' Professional Liability, 541 N. Fairbanks Court, Chicago IL 60611.

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

### *You are the Judge...*

### *An Excerpt from the 2000 Levit Essay Hypothetical*

*[Following is an excerpt from the 2000 Levit Essay Competition. Space does not permit inclusion of the complete text. For the complete hypothetical and the set of contest rules see [www.abanet.org/legalservices/levit.html](http://www.abanet.org/legalservices/levit.html) or contact Edna Driver, ABA StC. on Lawyers' Professional Liability, 541 N. Fairbanks Court, Chicago IL 60611]*

You are a judge on the trial court in a state court system. There is pending before your court a motion for summary judgment filed by the defendant. The motion will be decided by a three judge court. You have been asked to write the opinion for the two judge majority. (You can decide the case either way you want to.) However, you should anticipate a strong dissent from the other judge so that you should anticipate the arguments that will be asserted against your position by the dissent.

This is an action brought by Excess Insurance Company against John Lawless, Esquire. Excess has sued Lawless for lawyer malpractice. The uncontroverted facts for purposes of the summary judgment are as follows:

Lawless was engaged by the Reliable Insurance Company to defend its insured, the Great Supermarket Chain, in a slip and fall accident which occurred inside the premises of one of the Great Supermarket Chain's stores. Reliable Insurance Company had issued a policy of insurance to Great Supermarkets in the amount of \$500,000. Excess Insurance Company had issued a policy of excess insurance over the Reliance policy and in addition to the \$500,000 of insurance issued by Reliable with a policy limit of \$5 million.

Lawless had never been retained by Excess Insurance Company to represent it in connection with the slip and fall and Lawless never agreed to provide legal services to Excess Insurance Company. Lawless evaluated the case as an exposure of under \$250,000. The claims adjuster at Reliable agreed with that assessment. . .

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# It's Just My Opinion

## Protect Yourself When Opining On An Issue Where There Is No Precedential Authority

By David A. Grossbaum

Lawyers are often asked to give a legal opinion where there is no statute and or caselaw upon which to rely. Where a lawyer is giving an opinion without any guidance from the courts or legislatures, the liability exposure is significant. The good news is courts recognize that, under certain circumstances, if an attorney offers an opinion on an issue before the highest court of the jurisdiction has done so, he or she will have no liability if the opinion turns out to be wrong.

The scenario often unfolds like this: the lawyer gives an opinion on a legal question where the law of the jurisdiction provides no strong guidance. The appellate court later determines, in that case or another case like it, that the law is contrary to what the lawyer said it was. In so doing, courts rarely admit that they are "making new law," but rather couch the decision in terms of merely "finding" or "pronouncing" what the law has always been. With such a decision on the books, a legal malpractice case against the lawyer is almost guaranteed.

In most all jurisdictions, attorneys are entitled to "judgmental immunity" from liability where they give an opinion on a point of law that is unsettled. "Unsettled" usually means that there has been no decision from the highest court in that jurisdiction. This is consistent with the notion that an attorney is only liable for failing to exercise that degree of care expected from the ordinary prudent and fallible lawyer. Lawyers are not held to a standard of perfection nor are they insurers as to their opinions. As one court stated, "a lawyer would need a crystal ball, along with his library, to be able to guarantee that no judge, any time, anywhere, would disagree with his judgment or evaluation

of a situation."

Where there is no clear answer to a legal question, it would seem logical that lawyers should have no liability regardless of what they did or did not do in giving their opinion; even endless research would not have turned up any "right" answer. Some courts agree and have found that "regardless of the type of research or investigation conducted, the law firm was insulated from liability for not discovering the relatively obscure legal principle." *Jones, Day, Reavis & Pogue v. American Envirecycle*, 217 Ga. App. 80, 456 S.E.2d 264 (1995).

Other courts have been loathe to confer judicial immunity on attorneys who cannot show that they undertook a diligent and good faith effort to come to the right conclusion, regardless of how futile that effort may have been. As one court put it, "an attorney's immunity from judgmental liability is conditioned upon reasonable research undertaken to ascertain relevant legal principles and to make an informed judgment." *Halvorsen v. Ferguson*, 56 Wash. App. 708, 718, 735 P. 2d 675, 681-682 (1986).

Some courts also place importance on whether the lawyer told the client that the legal issue was unsettled and sought the client's input. Other others feel that this would mire the client in decision-making on fine points of the law that the clients cannot be expected to understand. A common formulation is that, if the lawyer has a sound basis for coming to an opinion, he or she need not tell the client all the ways in which the opinion could be wrong. Where an attorney has significant doubt about the correctness of the opinion, informing the client of this is advisable.

A number of useful risk management steps can be gleaned from these cases. To



begin with, even if you think that there is no binding precedent on a legal issue, you should do thorough research of cases and statutes and look at the law in other jurisdictions. Because the court decision that later determines your opinion was erroneous may not be rendered for years or even decades, it is very important to record and preserve the results of the research. Most states have statutes of limitations that permit legal malpractice cases to be filed years and even decades after the legal opinion was issued.

Additionally, if you are asked to give an opinion and you do not believe that the law is settled on the point, it would be best to inform the client that you are making a judgment and that the law is unsettled on the issue. Although there may be a fine line between throwing this dilemma into your client's lap, thereby abdicating your role as advisor, and making reasonable judgments about the state of the law, if you have serious doubts, share them with the client.

There are, of course, no easy rules to follow to avoid a lawsuit when you have given a legal opinion that is later determined to be wrong by the highest court of your jurisdiction. However, taking these steps will make it easier to defend the inevitable malpractice action.

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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

Welcome to San Francisco. I am pleased to have the honor of serving as your Chair for another year. The upcoming year promises to be a busy one.

Not only will we sponsor our two traditional conferences this year in San Francisco and New York, we also will present "The Trial Of The Legal Malpractice Action" in New Orleans in March of 2000. The program will involve a mock trial of a legal malpractice witnesses and a jury deliberation. It promises to be an outstanding program from which we all can learn from each other. We hope you can attend.



During the upcoming year, the Committee will publish its annual Legal Malpractice Insurance Guide. In addition, the new Desk Guide to Preventing Legal Malpractice will be completed by the Committee and published at the end of the year. Many of you contributed articles and helped us with this endeavor. Thank you for your effort. We will also complete the data collection project which will allow us to compile legal malpractice claims statistics every other year. This publication will assist all of us in our prevention efforts.

The Third Annual Levit essay contest is underway.



The subcommittee designed an innovative way to challenge young lawyers to consider legal malpractice issues. The contest requires participants to write an opinion as if they were a judge deciding issues concerning an attorney's duty to an insurance company. Look for details on this contest in an article in this newsletter. We look forward to announcing the winner at our Spring 2000 Conference.

In addition to all of the above, we hope to continue to provide a comfortable forum for all of our members in which to exchange ideas and renew friendships. Stop by and say hello. We welcome your suggestions. We really do listen.

### —Announcing—

New 2nd edition of *Lawyer's Desk Guide to Preventing Legal Malpractice* now available.

Copies are available by calling ABA Order Fulfillment at 1-800-285-2221.

Mention product code number (PC 4140034) \$75.00 and shipping & handling.

***Selecting Legal Malpractice Insurance 2000*** - A user-friendly guide for practitioners wanting to compare key policy features of insurance carrier policies. The publication features a quick reference comparison chart, listings of carriers by state, and phone numbers for all insurers along with law practice management articles about insurance. This publication is also available at [www.abanet.org/legalservices/lpl.html](http://www.abanet.org/legalservices/lpl.html)

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