STANDING COMMITTEE ON LAWYERS’ PROFESSIONAL LIABILITY
COMMITTEE MEETING
Roosevelt New Orleans Waldorf Astoria
New Orleans, LA
Wednesday, April 27, 2016

Chamber I, Mayor’s Suite Level I (from the lobby go to escalator near the bar and go up)
Buffet Lunch is at Noon – Meeting Starts at 12:30
Meeting ends when the business is concluded.

AGENDA

Action Items

1. **Welcome** (Brown)
   - Roster
   - Committee Mandate

2. **Approval of Minutes** (Brown)

3. **Conferences**
   - 16 Spring Conference – Roosevelt New Orleans (4/27-29)
     - Conference Activity Review
   - 16 Fall Conference – Chicago Swissotel (9/21-23)
     - Planning Discussion

4. **Web-Based Communications**
   - LPL e-Advisory – (Nosbisch)
     - December 2015 LPL eAdvisory
     - February 2016 LPL eAdvisory
     - March 2016 LPL eAdvisory
   - Tail Coverage Explainer Video

5. **State Bar Outreach**
   - State Bar Database (Vail)
     - Survey Questions
     - Selected Survey Results To date

6. **Young Professionals Outreach** (Dudgeon)
   - IN PERSON IN NYC June 2016

7. **Mendrzycki Essay Competition**
   - 2016 Competition Winner and Essay

8. **Publications**
   - Profile of Legal Malpractice Claims – 2012 - 2015 (Vail)
   - Evaluating Cyber Liability Insurance Policies (Garczynski)
     - Marketing Plan
9. **LPL Insurance Issues**
   - Discussion of State of the Marketplace (All)

10. **Media Activity**
    - Discussion of Topics for ABA Journal

**Status Reports**

11. **Chair Report** (Brown)
    - ABA Insurance Talking Points
    - Client Protection Cmte Proposal re Financial Responsibility Task Force

12. **Liaison Activities with Other Entities**
    - Board of Governors (Large)
    - Young Lawyers (Dudgeon)
    - Tort and Insurance Practice Section (Kingma)
    - NABRICO (Zureich)

**Other Business**

13. **Future Meetings**
    - September 21-23, 2016 Swissotel Chicago
    - April 19-21, 2017 Westin Copley Place, Boston, MA
    - September 13-15, 2017 Broadmoor, Colorado Springs
    - NOTE --- The Committee meets only once/year as a stand-alone meeting. That meeting is on the first Friday in the week after Thanksgiving week

**Adjourn**
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American Bar Association
Standing Committee on Lawyers’ Professional Liability

Committee Mandate

The Standing Committee on Lawyers’ Professional Liability shall:

(a) Study and keep the Association and state and local bar associations informed about (1) developments in the professional liability of lawyers and (2) the availability, coverage, and the cost of liability insurance and the feasibility of self-insurance;

(b) work with such bar association and the insurance industry to develop programs to assist lawyers in avoiding or dealing with professional liability claims; and

(c) make appropriate recommendations concerning Association sponsorship of lawyers’ professional liability programs.
ATTENDING:
James Brown (Chair)
Michael Furman
Eileen Garczynski
Shari Klevins
Karen Randall
Shauna Reeder
Will Shih
Rick Simpson
Daniel Zureich

Liaisons
Joe Kingma, TIPS
Melissa Lessell, YLD
Chuck Lundberg, APRL
Wendell Large, BOG
Joseph Shores, Special Advisor

Guests
Logan Murphy
Larry Orlansky

Staff
Jane Nosbisch, LPL Staff Counsel
Jason Vail, LPL Assistant Staff Counsel

Welcome
James Brown called the meeting to order. All other members introduced themselves. James reviewed the committee mandate.

Approval of Minutes
The minutes of the September 16, 2015, meeting in Scottsdale, AZ, were approved with one date correction.

Fall 2015 Conference
James and Jane led a discussion of the wrapup of the fall conference. Reviews were generally positive overall. Conferences should continue to aim for “practical” and “hard-hitting” sessions; these will be featured in the upcoming spring conference. “Interactive” sessions are also important. The committee discussed how to achieve these goals. More audience engagement like the “theming” workshop should be pursued. There was also discussion of the value of “philosophical” panels, like the Future of the Legal Profession.
Spring 2016 Conference

The committee then turned its attention to the next conference, which will occur in New Orleans in April. Planning for this conference has been ongoing via conference call, and a draft of program sessions was provided. The sessions and draft schedule were reviewed and the committee engaged in a discussion about session titles, potential speakers, volunteers to conduct outreach to speakers, and the like. There was also conversation about other events at the conference, including the idea of including Mardi Gras Indians at the luncheon and securing the “Victory Belles” to sing at the museum.

Planning for the conference is well on track and the final conference brochure should be out in the coming weeks.

Communications

Webinars: A program on trust and estate claims is in the works for production, and a concept for a “prosecuting legal malpractice claims” session is also under development. The committee discussed this concept, raising issues and concerns around a plaintiff-focused curriculum; this may be perceived as teaching plaintiffs’ lawyers how to sue lawyers successfully. The committee agreed that any session on this topic will have to have a title and description that is carefully crafted to avoid this outcome.

E-Advisory: Overview of E-Advisory status was given and discussion of topics ensued. Karen is lead editor on this subcommittee.

ABA Everyday: Jane presented on a project that she is developing with Dan Pinnington on the topic of phishing/scams as a part of this initiative.

Adobe Voice: Logan is still working on this project. A consultant has been acquired to assist him. He will share the work completed so far, and the next topic up will be on tail coverage. He welcomes comments on the draft script.

Bar Outreach: Jason gave an update on this. State-by-state contact list is nearly complete. A survey should be sent by the first of the year. Melissa volunteered to find a contact in Mississippi.

Profile of Malpractice Claims: Jason gave an overview on this project, which will get underway in 2016, for publication in September 2016. A “hit list” of potential contacts was provided. James will make a decision about who should chair this project.

ABA Journal: Discussion of possible topics, perhaps something on aging and coverages. Jane will investigate.

Cyber-insurance Book: Eileen gives a report on her progress in authoring this new publication. A draft has been completed, she is collecting comments. The goal is to publish by the Spring Conference.

Young Professionals
Melissa gave a report on planning for another “In Person” event, based on the success of June’s event in Chicago, to be held in New York City in June 2016. The group discussed the programming and plans for the event.

**LPL Essay Competition**

Information about the Ed Mendrzycki Essay Competition was provided. Will continues as chair of this subcommittee; he gave an explanation of the hypo. The competition materials have been distributed to the law schools and through the Law Student and Young Lawyer Divisions’ communications channels.

**LPL Issues**

The committee discussed the state of the market. Consolidation is ongoing, but NABRICO programs are generally in good shape.

**Liaison Reports**

The liaisons delivered their reports.

There being no further business, the meeting was ADJOURNED
ABA Spring 2016 National Legal Malpractice Conference
Program Schedule with Committee Member Assignments

Wednesday, April 27, 2016
3:00 – 7:00 p.m. Registration (Roosevelt Foyer)
4:30 – 5:30 p.m. Young Professionals Happy Hour
5:30 – 6:00 p.m. Newcomer and Sponsor Reception (Waldorf Astoria Ballroom, Mezzanine Level)
6:00 – 7:30 p.m. All Attendee Welcome Reception (Waldorf Astoria)
8:00 p.m. Dinner Dine-Out (This is not a hosted event)

Thursday, April 28, 2016
7:00 – 8:00 a.m. Yoga (Rooftop Pool)
7:30 – 8:30 a.m. Open 12-Step Support Group Meeting (Napoleon, Mezzanine Level)
7:30 – 8:45 a.m. Continental Breakfast (Waldorf Astoria)
7:30 – 4:00 p.m. Registration (Roosevelt Foyer)
8:00 – 8:30 a.m. Young Professionals Breakfast with Experience (Waldorf Astoria)
8:30 – 8:45 a.m. Introduction and Program Overview
8:45 – 9:45 a.m. Plenary Session 1 (Crescent City Ballroom, Mezzanine Level)

9:45 – 10:00 a.m. Refreshment Break (Waldorf Astoria)
10:00 – 11:00 a.m. Breakout Sessions
   • Breakout 1 - Case Law Developments (Chambers 1 & 3, Mayor’s Suite Level) - Heather
   • Breakout 2 - Who is this Lloyd Bloke? Demystifying Lloyd’s of London (Roosevelt Salons 4 & 5, Mezzanine Level) - Eileen
   • Breakout 3 - Ethics Gumbo: First You Make a Roux (Crescent City) - Rick
11:00 – 11:15 a.m. Refreshment Break (Waldorf Astoria)
11:15 – 12:15 p.m. Breakout Sessions
   • Breakout 4 - Young Professionals Roundtable: Back to the Future – Grooming the Next Generation of LPL Leaders (Orpheum, Second Level) - Mandi
   • Breakout 5 - When Does Zealous Advocacy Go Too Far: Handling Defamation Cases Against Lawyers (Chambers 1 & 3) - Larry
   • Breakout 6 – State of Insurance Market (Roosevelt Salons 2 & 3, Mezzanine Level) - Joe
12:15 – 1:30 p.m. Lunch - Program with a Surprise (Waldorf Astoria)
1:30 – 2:30 p.m. Breakout Sessions
   • Breakout 7 - Legal Project Management: A Simple Concept Based on Common Sense (Crescent City) - Karen
   • Breakout 8 - Effective Impeachment and Rehabilitation in High Stakes Legal Malpractice Cases (Roosevelt Salons 2 & 3) - Will Shih
   • Breakout 9 – 50 States of Grey: Protect Yourself From the Lash of Elder Financial Abuse Statutes (Roosevelt Salons 4 & 5) - Shauna
2:30 – 2:45 p.m. Refreshment Break (Waldorf Astoria)
2:45 – 4:00 p.m. Plenary Session 2 (Crescent City)

5:30 – 7:30 p.m. Thursday Evening Reception – The National World War II Museum

Friday April 29, 2016
7:00 – 8:00 a.m. Yoga (Rooftop Pool)
7:30 – 8:30 a.m. Open 12-Step Support Group Meeting (Napoleon)
7:30 – 9:00 a.m. Continental Breakfast (Waldorf Astoria)
7:30 – 11:15 a.m. Registration (Roosevelt Foyer)
9:00 – 10:00 a.m. Plenary Session 3 (Crescent City)

5:30 – 7:30 p.m. Thursday Evening Reception – The National World War II Museum

10:00 – 10:15 a.m. Refreshment Break (Waldorf Astoria)
10:15 – 11:15 a.m. Plenary Session 4 (Crescent City)

Handling the Hostile Forum - Pam B
General Notes about the conference:
1. Speakers shall not have spoken in the past three years (can be bent for spectacular exceptions)
2. **Must have topics and speakers ALL COPY wrapped up by May 27**
3. Speakers must have gender, racial and regional diversity and NABRICO
4. Blurbs for each topic must be developed and given to proposed speakers for comment and agreement
5. Need not cling to prior format. If appropriate ABA is up for anything new. Goal is a terrific conference.
6. Must have all speakers vetted by Chair of the committee before any invitations are issued
7. Amount of sessions at Prior Conferences:
   - 3-2014 - 4 Plenaries, 9 breakouts – no repeats – plenary at beginning and end of Thursday, two plenaries on Friday
   - 9-2013 – 5 plenaries- 5 breakouts – no repeats
   - 4-2013 – 13 programs with 3 concurrent “clinics” – 4 plenaries
   - 9-2011 – 9 programs with Case Law Dev repeated;
   - 4-11 Pre- conference session, 12 programs with Case Law Dev repeated;
   - 9-10 – 10 programs with 1 breakout duplicated

Thursday Night Attendee Reception: Field Museum

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<th>Topic</th>
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<th>Blurb</th>
<th>Speaker Suggestions</th>
<th>Moderator/ Comments</th>
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<tr>
<td>Opening Plenary</td>
<td>Cmte</td>
<td>Get a “name” speaker who will be a draw</td>
<td>David Axelrod</td>
<td>We have a soft hold on Axelrod calendar. Awaiting ABA senior staff approval to spend money and his personal calendar review</td>
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<tr>
<td>(Plenary 1)</td>
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<td>Possible sub-text- is lack of civility in political campaigning merely a mirror of society. Is lawyer misconduct also deteriorating concurrently.</td>
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<td>2012-2015 Claims Study</td>
<td>Cmte</td>
<td>Representatives from Milliman, NABRICO,</td>
<td>Representatives from Milliman, NABRICO, commercial</td>
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<td>Release (Plenary 2 – on Th a.m. also)</td>
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<td>Use and defense of experts in legal malpractice cases (Breakout 1)</td>
<td>Rob Klein and Mark Sullivan from Klein Glasser Park &amp; Lowe, Miami FL</td>
<td>The latitude with which an opposing expert is permitted to testify at trial can have a potentially significant impact on your case. Many legal malpractice plaintiff lawyers are unfamiliar with the limitations that may constrain their experts, and proceed to trial with the often false confidence that their theories will be strongly backed up by expert testimony. A meaningful understanding of the most effective attacks on legal malpractice expert testimony will put you in the best position to frustrate those expectations, and also make your own use of experts more effective and less subject to challenge. The importance of limiting the scope and strength of the other side’s opinions is obvious, but timing may not be. Is it better to save your challenges for trial when they can be used most effectively with some level of surprise, or raise them earlier to use as settlement leverage? Is it better to let a “bad” expert stay on the other side rather than seeking an exclusion that may simply force the other side to retain a better expert? These are some of the issues that would be addressed by this panel.</td>
<td>Dan Atkinson, Gunster (per james)</td>
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Daubert Challenges
Conclusory Testimony
Speculative
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<td>Advanced Strategies for Case within a Case litigation</td>
<td>Rob Klein and Mark Sullivan</td>
<td>It is common knowledge to most in the specialty that legal malpractice cases are tried with a “case within a case” mechanic. But beyond the general requirement there are various sub-issues that may complicate the procedure, such as how extensively the underlying matter should be re-litigated, what issues should be subject to judicial versus jury determination, and the difficulties posed by convincing a court that may be inclined to view all malpractice cases as proverbial “battles of the experts” that it must essentially try two matters. In the same vein, what is the most effective way to convince a Court that certain issues that may appear to have been previously resolved in the underlying matter can (and perhaps must) be re-visited as part of the malpractice case? Perhaps most challenging – how do you convince a Court or jury that a prior judge was wrong relationship between the case within a case and res judicata Judicial error and res judicata Judge v. Jury</td>
<td>Plaintiff Defense Counsel Coverage Counsel who have observed several trials Possible: Marjorie Thompson, Allied World (has it been lpl cases she has observed?)</td>
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<td>Prior Knowledge Issues</td>
<td>Eileen G.</td>
<td>Eileen G. to develop key points or blurb by 4/21 Finding Coverage or Finding Exclusions? Key policy provisions tied to cases litigated would be take-away and possible program format</td>
<td>Litigator Claims Underwriting Possible: Kim Ashmore, Wiley Rein</td>
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<td>Spoliation: New Law, New</td>
<td>HEATHER K. KELLY</td>
<td>New amendments regarding preservation of evidence, their application and how it can</td>
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<td>Dangers (Breakout 4)</td>
<td>GORDON &amp; REES SCULLY MANSUKHANI</td>
<td>Create (or avoid) professional liability exposure for failing to advise clients on reasonable steps for preservation.</td>
<td>David Atkins – vetted by C. Lundberg</td>
<td>Mandi has approved topic</td>
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<td>Approved for development</td>
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<td>Possible: Jocelin Singer, Esq. Claims Consultant CNA Lawyers Professional Liability Claims 125 Broad Street, 7th Floor New York, New York 10004 212-440-2483 (bio available)</td>
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<td>Young Professionals Program Deflecting The Blame: The Basics of Contributory And Comparative Negligence And Apportionment In Legal Malpractice Actions (Breakout 5)</td>
<td>David P. Atkins PULLMAN &amp; COMLEY LLC Bridgeport, CT 203 330 2103 datkins@pul lcom.com</td>
<td>Lawyers and law firms facing professional liability claims frequently urge defense counsel to &quot;point the finger&quot; at others including the plaintiff. In most jurisdictions customary tort law principles authorize the defense of contributory negligence in legal malpractice actions. Depending on the jurisdiction, the trier's finding that the plaintiff was more than 50% at fault may be a complete defense. Similarly, a law firm defendant may be permitted, through a cross-claim or third-party claim, to allocate or apportion fault to another party, including predecessor or successor counsel. And a verdict allocating different percentages of fault among two or more tortfeasors typically means the damages liability for each for collection purposes is &quot;several&quot; (proportional) rather than &quot;joint and several.&quot; The panel for this session will outline the basic legal and strategic considerations in fault allocation - limiting or possibly precluding the law firm's exposure either where the plaintiff's wounds were &quot;self-inflicted&quot; or where responsibility for causing the plaintiff's claimed injury can be laid at the feet of others.</td>
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<td>The Case Handling Experience</td>
<td>David P. Atkins</td>
<td>Plenary with jury. Try alternative approaches and get feedback from jurors.</td>
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<td>Deflecting The Blame: Contributory And Comparative Negligence And Apportionment In Legal Malpractice Actions</td>
<td>Pullman &amp; Comley LLC</td>
<td>Do unto others or pay the piper? The increased frequency and severity of sanction awards against lawyers who don't play nice. Could use short hypos to guide discussion and keep it interesting. Discuss rise of sanctions (and severity of sanctions) that we have seen in recent years Discuss reasons why lawyers are being sanctioned, and the rise of different forms of sanctions, including non-monetary sanctions</td>
<td>Potential Speakers: Kim Ashmore Types of Speakers: Counsel with experience in defending sanctions claims Someone who can speak to civility angle/ reason we are seeing increase in sanctions and/or speak to the different kinds of sanctions we are seeing beyond just $ Insurance professional and/or coverage counsel who can discuss the coverage issues involved with sanctions awards or defending</td>
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<td>Plenary 3</td>
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<td>Are Sanctions Evolving?</td>
<td>Kim Ashmore &amp; Rick Simpson</td>
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<td>Breakout 6</td>
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| Conduct seen as “uncivil” in the past may now be viewed as sanctionable – examples and explanation as to why | James Brown and Joe K, *James to draft a blurb* | Discuss actions at the state bar level to put in place codes of civility (e.g., CA) and at the ABA level (book on civility)  
Where is the line between zealous advocacy vs. sanctionable conduct?  
How to best protect against sanctions awards and how can sanctions awards can be challenged if awarded?  
Link between sanctions awards and subsequent legal malpractices actions  
Coverage for sanctions? There are a number of tricky coverage questions raised by sanctions award.  
---  
Check w ABA Client Discipline committee re monitoring of sanctions (JAN to do)  
-James has an update on Sanctions in Federal and State Courts | sanctions motions  
Judge type who can speak to issues would be great if we could get one. Kim could see if Judge Chasanow (D Md) would have any interest? Rick could ask Denny Chin if he would have any interest. |                    |
<p>| Representing the Fractured and Imploding Entity | Shari Klevins | Long-standing corporate entities are fracturing. Bank and bank-bank-holding companies. How does the lawyer avoid being a middle man? What are the lawyers responsibilities, ethical and practical? |                                                                                       |                    |</p>
<table>
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<tr>
<th>Topic</th>
<th>Suggested By</th>
<th>Blurb</th>
<th>Speaker Suggestions</th>
<th>Moderator/ Comments</th>
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<td>A Comparative Guide to Selecting a Venue</td>
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<tr>
<td>Best Practices in Setting Reserves</td>
<td>Shari Klevins</td>
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</table>

The following speakers are from the Spring 2016 Conference Planner.

Robert Klein of Klein Glasser Park & Lowe P.L. (wants to speak again, last spoke in 2009 on Trial of a legal malpractice case – got 4.4 on 5 point scale)

Nicholas Chrysanthem --- feel free to speak with either Marian Rice or Mike Furman as to my bona fides. I am presently on the Law Practice Management Committee of the New York State Bar Association (which Marian co-chairs). I also lecture every year at Brooklyn Law School, on legal malpractice trends and issues, to Professor David Paul Horowitz’s solo practice seminar class. Feel free to contact Professor Horowitz email: david@newyorkpractice.org or telephone 914-424-1113.

David Atkins, Pullman Connelly, Bridgeport, CT

Jocelyn Singer, Esq.
Claims Consultant
CNA Lawyers Professional Liability Claims
125 Broad Street, 7th Floor
New York, New York 10004
212-440-2483
(bio available)
In The News

Bickel & Brewer disqualification rejected by Texas Supreme Court

*In re RSR Corp.*, No. 13-0499 (Texas December 4, 2015)

By Kelli Hinson, Carrington Coleman, Dallas, TX

The Texas Supreme Court conditionally granted mandamus in this closely-watched case from the Dallas Court of Appeals. Disagreeing with the Dallas Court, the Supreme Court held the trial court abused its discretion in disqualifying plaintiffs’ counsel, Bickel & Brewer, because the lower court improperly analyzed the lawyers’ conduct under the construct of a side-switching paralegal rather than the more flexible analysis for former employees found in *In re Meador*. Read More...
In The News

Significant Implications for Law Firms on Advance Waivers, Enforceability of Arbitration Awards, and Payment and Disgorgement of Fees
By Allison Lane, Duane Morris LLP, San Francisco, CA

Sheppard Mullin initiated arbitration proceedings to recover unpaid fees from its former client, J-M. J-M contended that it owed no fees because Sheppard Mullin had been disqualified for a conflict of interest, and that in fact, Sheppard Mullin should disgorge fees that J-M had paid. The arbitrators ruled in Sheppard Mullin’s favor and awarded it unpaid fees and other damages. J-M then sought to invalidate the award in the Superior Court, which affirmed it. Read More...

New Jersey Supreme Court May Force Law Firms To Extend Insurance Coverage
By Karen Painter Randall, Connell Foley, Roseland, NJ

The New Jersey Supreme Court is considering whether attorneys in a limited liability partnership can lose their protections from being sued individually if the firm fails to maintain professional liability insurance. The decision will likely have implications on whether or not a law firm in the process of winding-down must extend insurance coverage, especially given New Jersey’s six-year statute of limitations for bringing malpractice claims. Read More...

In Pari Delicto Defense Alive and Well in California
By Allison Lane, Duane Morris LLP, San Francisco, CA

The in pari delicto defense is a potentially powerful weapon against claims made against lawyers by the trustee appointed for a bankrupt entity. The defense denies recovery where a participant in illegal or inequitable conduct seeks to collect damages from another participant in the same conduct, on the equitable basis that the law should aid neither. In the case of a bankrupt entity, this means that if officers, directors, or managers of the company participated in the illegal or inequitable conduct, their actions are imputed to the company, and then to the trustee, to preclude recovery by the trustee on behalf of the estate against joint tortfeasors. Read More...
In The News

New Jersey Appellate Panel declines subject matter jurisdiction over malpractice claim
By Karen Painter Randall, Connell Foley, Roseland, NJ

A two-judge New Jersey Appellate Division panel reversed a lower court’s denial of a motion to dismiss a legal malpractice claim based on an underlying securities class action. The Appellate Division dismissed the claim without prejudice for want of subject matter jurisdiction and stated that Plaintiff could refile the malpractice claim in state court if the federal court declined to exercise jurisdiction. Read More...

Rhode Island Supreme Court rejects continuing representation doctrine and reaffirms need for expert testimony in legal malpractice action
By Matthew R. Watson, Hinshaw & Culbertson, LLP, Providence, RI

The Rhode Island Supreme Court recently addressed a number of issues surrounding the timeliness and viability of a legal malpractice action. In Behroozi, the plaintiff filed suit against her former attorney arising out of advice that was rendered in connection with recovering arrearages in alimony payments. The plaintiff asserted claims against the attorney sounding in negligence, fraud, and breach of fiduciary duty. Read More...

Attorney for trustee does not owe duty of care to trust beneficiary in light of conflicts of interest between trustee and beneficiary
By Matthew R. Watson, Hinshaw & Culbertson, LLP, Providence, RI

The Rhode Island Supreme Court was recently called upon to consider an issue of first impression regarding whether an attorney for a trustee owes a duty of care to a trust beneficiary. In Audette, the beneficiary filed claims against the trustee’s attorney sounding in negligence and breach of fiduciary duty arising out of advice that the attorney provided to the trustee regarding the administration of the trust and ongoing disputes (including litigation) with the beneficiary. Read More...
Link to view the updated Tail Coverage video:

https://vimeo.com/freshmindmedia/review/152343737/bba31ffadb
State Bar Survey on Lawyers’ Professional Liability

1) Does your Bar Association have an entity (committee or section) that focuses on issues of lawyers’ professional liability and/or legal malpractice?
2) Name of the entity chair
3) Email and/or phone number for entity chair
4) What is the term of office for the chair?
5) How often does the entity meet?
6) Are meeting minutes publically available?
7) Is there a webpage for the entity? If so, what is it?
8) Does your Bar Association have a staff person involved with your Bar’s malpractice insurance activities, such as the selection of a Bar-sponsored carrier?
9) What is that staff person’s name, and email and/or phone number?
10) Does your Bar Association produce a Deskguide or similar resource for lawyers’ professional liability?
11) Is there a link to obtain this resource? If so, what is it?
12) Does your Bar Association have online resources on issues of lawyers’ professional liability and/or malpractice insurance?
13) What is the link for such resources?
14) Does your Bar Association sponsor CLEs, conferences, or other educational events on issues of lawyers’ professional liability?
15) What are these events and what is their frequency?
16) Where can more information be found about these events?
17) What are the top three projects of your Bar Association related to lawyers’ professional liability (e.g., selection of Bar-sponsored carrier)?
18) Does your Bar Association have a malpractice insurance disclosure rule?
19) Where can this rule be found (i.e., citation)?
20) What percentage of your members report having malpractice insurance coverage?
21) Has your Bar Association surveyed its members about any issues related to professional liability and/or malpractice insurance?
22) What issues did these surveys cover, and what were their results?
23) Please click THIS LINK to confirm the accuracy of your Bar Association sponsored carrier. Is it correct?
24) What is the name of the current sponsored carrier?
25) Your name
26) Your title
27) Your email address
## State Bar Survey Outreach Results

<table>
<thead>
<tr>
<th>State</th>
<th>Entity Focus on LPL</th>
<th>Webpage</th>
<th>Deskguide for LPL</th>
<th>Online Resources</th>
<th>Sponsor LPL Education</th>
<th>Malpractice Insurance Disclosure Rule</th>
<th>Percentage of Members Reporting LPL Coverage</th>
<th>Has Bar Surveyed Members About LPL Issues</th>
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<td>44.40% - Maintain malpractice insurance either individually or through firm. 39.19% - Do not maintain malpractice insurance because employed in an area of the law (or in a non-law area) without any private clients. 12.34% - Have private clients but choose not to maintain malpractice insurance 2.40% - Do not maintain malpractice insurance because employed by a company that provides legal services to third parties and assumes liability for malpractice committee by its attorney/employees 1.67% - Did not respond (no bar card issued) 100.00%</td>
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<td>9.94% of those in private practice report that they do not have malpractice insurance as of 3/8/2016, 12:50 pm</td>
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You are general counsel to the law firm of Bigger, Means and Better, P.A. (“BMB”), one of the oldest and most venerable U.S. firms in the State of Progress (which has adopted the ABA Model Rules of Professional Conduct), and one that for decades has represented many of its largest corporations. BMB’s client base focused exclusively on the domestic market when the firm was first established in the 1900s, but it is now the norm for those clients to have investments, products and services, and even personnel move across borders. In an effort to serve this increasingly global marketplace, BBL’s management committee recognizes that it too must globalize.

Management has concluded the best way to reach the global market is to acquire existing practices abroad. It seeks to target firms located in the European market (preferably the United Kingdom or Germany) and the East Asian market (preferably China or South Korea). Management believes such acquisitions would be attractive to its existing client base that already does business in those areas, while at the same time allowing it to market to foreign companies. (In addition, management is considering a smaller acquisition in a developing market with no established legal system, with the thought that having such a presence would be attractive when big business enters that market.) Almost every member of BMB’s management committee supports these goals, believing that the only assurance that the firm will continue to thrive will be if it wins the “race to the top.”

Knowing it would be foolhardy not to consider the legal ramifications of this potential strategy, management invited you into its most recent meeting. You were pleased to receive this invitation, as you know that BMB has always complied with the Model Rules of Professional Conduct, as its attorneys pride themselves on adhering to their ethical obligations. Issues raised during the meeting include the following: (1) conflicts of interest – how different jurisdictions treat those conflicts, circumstances in which conflicts may arise, and whether and how they can be overcome, (2) the attorney-client privilege – again, whether and how different jurisdictions treat the attorney-client privilege, its impact on your communications with clients, and how best to preserve the privilege, and (3) the unauthorized practice of law – concerns if a potential acquisition target is owned by non-lawyers or if non-lawyers are involved in rendering advice. You may identify additional professional responsibility issues after the meeting. At the conclusion of the meeting, management asked you to prepare a memorandum to address concerns that may arise from the potential acquisitions.

In a private moment after the meeting, BMB’s managing partner approached you and in no uncertain terms told you that the memorandum had better bless the firm’s strategy, “or else….” You took this to mean that if you raised any ethical concerns in the memorandum, then you must provide a solution such that the firm’s plans would not be derailed.

Further, BMB’s managing partner also told you that the firm has significant influence over the State of Progress’ regulators, and that it has the ability to propose a reasonable change or two to the Model Rules of Professional Conduct to accommodate international practice. Should you deem such a change warranted, please make the recommendation and explain why.
Please prepare the requested memorandum.
Ethical Obligations for a Global Firm

Nora Wong
MEMORANDUM

To: Bigger, Means and Better, P.A. Management Committee
From: General Counsel
Date: March 4, 2016
Re: The Ethical Obligations We Incur from Foreign Acquisitions

INTRODUCTION

As discussed in a previous management meeting, Bigger, Means and Better, P.A. (BMB) is preparing to expand its operations by acquiring existing practices abroad. Management predicts the expansion will increase BMB's value to U.S. corporations that are current clients and attract foreign corporations as new clients. BMB is particularly interested in acquisitions in the United Kingdom (U.K.), Germany, China, South Korea, and an unspecified developing country.

This Memorandum explains how BMB’s acquisitions may incur ethical obligations. Part I identifies potential sources of BMB’s ethical obligations under foreign legal traditions and regimes, as well as intergovernmental organizations. Parts II, III, and IV discuss how to manage risks involving conflicts of interest, different doctrines of attorney-client privilege, and unauthorized practice of law. Part V further discusses strategies to meet BMB’s duties of competence, communication, and compliance with local rules in foreign countries. All of these ethical issues lead to the conclusion that BMB’s expansion will impact operations at every level, from who BMB hires to who owns BMB. However, successfully navigating the issues will provide BMB with international experience that is becoming ever more important as corporations continue globalizing.

I. SOURCES OF ETHICAL OBLIGATIONS

In addition to the Model Rules, BMB should be aware of potential obligations from foreign legal traditions, civil law regimes, and intergovernmental organizations.

A. Legal Traditions

In the State of Progress, the Model Rules are public laws that have been published in written form. See generally Model Rules of Prof’l Conduct (2013) [hereinafter Model Rules]. In that sense,
Ethical Obligations for a Global Firm

Progress is different from many foreign jurisdictions. Outside of the U.S., legal ethics may be set forth in a country’s oral traditions, and may not carry the force of law. Mary C. Daly, The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel, 46 Emory L. J. 1057, 1091 (1997). In the U.K., barristers “thought it quaint that American lawyers felt in need of legal rules for their governance.” Id. Although there is a written code of English legal ethics, many ethical standards remain unarticulated and are not formally expressed. Id.

B. Civil Law Regimes

China, South Korea, and Germany have civil law regimes. Lusina Ho & Rebecca Lee, Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis 11 (Cambridge Univ. Press 2013). In civil law countries, a lawyer’s ethical obligations are directed to society as a whole, and are less focused on individual clients than the Model Rules. See Lauren R. Frank, Ethical Responsibilities and the International Lawyer: Mind the Gaps, 2000 U. Ill. L. Rev. 957, 966–68 (2000).

C. The Council of Bars and Law Societies of Europe (CCBE)

The CCBE acts as liaison between the European Union (EU) and the bars and law societies in Europe, including those in the U.K. and Germany. Council of Bars & Law Soc’ys of Eur., About Us, http://www.ccbe.eu/index.php?id=375&L=0; Frank, supra, at 963 n.38. The CCBE’s primary task was to draft a legal ethics code for European lawyers. Frank, supra, at 962. The CCBE does not have binding legislative authority, but EU member states defer to its recommendations. Id.

II. CONFLICTS OF INTEREST

BMB should caution its solicitors in the U.K. that some of the Model Rules define conflicts of interest more broadly than the U.K.’s Code of Conduct. For example, the U.K. rules do not recognize a conflict in representations directly adverse to a current client in unrelated matters, but Model Rule 1.7(a)(1) does, so BMB’s solicitors could not undertake such representations without obtaining informed consent and meeting other criteria in Model Rule 1.7(b). See Janine Griffiths-Baker & Nancy J. Moore, Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?
80 Fordham L. Rev. 2541, 2558 (2012). Furthermore, the U.K. rules do not impute conflicts, but Model Rule 1.10 does, so BMB’s solicitors face the risk of disqualification through the screening process in Model Rule 1.10(a)(2)(i). See id. at 2553.

In civil law countries, BMB should be aware that its ability to enforce rules on conflicts of interest may be limited to moral authority. For example, the CCBE does not require lawyers to obtain waivers for conflicts of interest, but instead relies on them to voluntarily decline a representation when they have a conflict. Mary C. Daly, The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century, 21 Fordham Int'l L.J. 1239, 1289 (1998). Generally, “[i]n most civil law countries, conflicts are a matter of personal ethics, not law.” Daly, General Counsel, supra, at 1093 (quotation marks omitted). Thus, enforcement is the responsibility of bar association presidents acting on moral authority, not judges acting on legal authority. Id. at 1094.

Because conflicts of interest pose many risks for a global law firm, BMB should invest in strengthening its conflict-checking system to keep pace with the firm’s expansion. A sophisticated system reduces the risks that BMB’s foreign lawyers fail to perceive a conflict or perceive it late enough that the client would have difficulty procuring new counsel. See id. at 1095. BMB should also invest in providing ethics education to its foreign lawyers, because neither the U.K. nor civil law countries have the equivalent of the U.S. ethics accrediting requirement, course of study, and examination. See id. at 1090.

An additional way to reduce risk is for Progress to narrow the definition of an imputed conflict. BMB could propose amending Model Rule 1.10 such that neither current or former client conflicts would be imputed when the representations involve lawyers in separate countries, so long as the law firm implements effective screening devices. See Griffiths-Baker & Moore, supra, at 2561. There are many arguments to support such a proposal. First, the current rule does not reflect the likelihood that information would be passed between lawyers in a firm, especially one with international
offices. Id. at 2552. Second, the current rule burdens firms with obtaining client consent for imputed conflicts even when the matters are unrelated or confidential information is not at stake. Id. Finally, there is anecdotal evidence that the current rule can lead to strategic behavior by clients, such as when a large corporation spreads insignificant business around to prevent firms from acting against it in another matter. Id. at 2553 n.68.

III. ATTORNEY-CLIENT PRIVILEGE

Availability of the attorney-client privilege in the EU depends on where the attorney is licensed and employed. In the EU, it is well-settled that the privilege protects a client corporation’s communications with outside counsel who is admitted to practice in an EU member state. Daly, General Counsel, supra, at 1108. It does not protect communications with in-house counsel and attorneys whose professional status is not recognized by the EU, such as attorneys admitted to practice law only in the U.S. Daly, Teaching, supra, at 1278–79. To preserve privilege in the EU, BMB’s EU lawyers should communicate directly with clients, and BMB’s offices outside the EU should communicate with clients through BMB’s EU lawyers. If BMB’s EU lawyers must relay advice to a client through in-house counsel, the BMB lawyers should caution the client that their advice is discoverable through the communications between the client and in-house counsel. See Daly, General Counsel, supra, at 1105.

Availability of the attorney-client privilege in the U.S. for communications with foreign counsel is decided by first applying a choice-of-law test. A U.S. district court would likely use a version of the “touch base” test that incorporates inquiries from the comity plus function test and the most direct and compelling interest test. Jennifer H. Roscetti & Anthony C. Tridico, Atty Privilege When U.S. Patent Case Involves Foreign Attys, Law360 (Oct. 31, 2013), http://www.law360.com/articles/484151/atty-privilege-when-us-patent-case-involves-foreign-attys. Accordingly, the court may look at where the professional relationship commenced and was centered at the time the communication
Ethical Obligations for a Global Firm

occurred, and whether the application of foreign privilege law would be inconsistent with important policies in U.S. law. Id.

If the court finds that the communication touches base with the U.S., the court would then analyze it for the elements of the U.S. doctrine of privilege: the attorney, the client, a communication, the confidentiality that was anticipated and preserved, and the legal advice or assistance that was the primary purpose of the communication. Id. If the communication does not touch base with the U.S., courts generally analyze whether the law of the foreign jurisdiction “provides a privilege comparable to the attorney-client privilege.” Id. (quoting Softview Computer Prods. Corp. v. Haworth Inc., No. 97 CIV. 8815 KMWHBP, 2000 WL 351411, at *11 (S.D.N.Y. Mar. 31, 2000)). For example, a court would likely find that German law is comparable, because courts consistently view the German privilege as robust. Id. (citing Golden Trade, S.r.l. v. Lee Apparel Co., 143 F.R.D. 514, 524 (S.D.N.Y. 1992)). In contrast, Korean law does not confer privilege on communications from attorneys to clients, although an unprotected communication may still be exempt from disclosure for procedural reasons. Id. (citing Astra Aktiebolag v. Andrex Pharms. Inc., 208 F.R.D. 92, 100–02 (S.D.N.Y. 2002)).

If BMB is aware that a client would want to preserve its claim of privilege in a U.S. court for communications from lawyers in BMB’s Korean office, they could try to maximize the likelihood that the court would find the communication to touch base with the U.S. This may involve commencing the professional relationship through a U.S. BMB office, and providing the Korean lawyers’ advice as a supplement to U.S. lawyers’ advice. Furthermore, the lawyers would need to ensure that the communication satisfies the elements of the U.S. doctrine of privilege if it touches base with the U.S. To successfully argue for comparable privilege if the communication does not touch base, it may be necessary for BMB to provide the U.S. court with expert testimony on the foreign jurisdiction’s privilege doctrine. See id. Not all U.S. courts consider case law citations alone to be sufficient evidence of a comparable privilege. Id.
IV. UNAUTHORIZED PRACTICE OF LAW

Generally, if BMB’s foreign lawyers advise on a matter pending before a U.S. tribunal, give advice in the U.S., or give advice that predominantly affects the U.S., the Model Rules apply to them. See Model Rule 8.5(b). The Model Rules prohibit unauthorized practice of law. Model Rule 5.5. If BMB’s foreign lawyers practice in a context where the Model Rules apply, they must therefore obtain authorization by license, court order, or any other legal basis available to them. See Model Rule 5.5 cmt. 1. The same conclusion applies to any non-lawyers who seek to render legal advice.


Non-lawyers must refrain from not only unauthorized practice of law, but also ownership of BMB. Essentially every U.S. jurisdiction has held that corporations owned or controlled in part by non-lawyers may not offer the services of lawyers to the public. Id. at 581. This position is vigorously defended by the ABA and other bar associations. Id. at 584. In deference to these authorities, BMB must restrict its ownership to lawyers. BMB could be disadvantaged if its non-lawyers who no longer have an ownership stake join a competing foreign firm, so BMB should consider negotiating a non-competition agreement with them, or helping them fulfill the requirements to become licensed so they can retain partial ownership of the practice. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 423 (2001) (allowing partnerships between U.S. lawyers and members of recognized legal professions in foreign countries).
V. OTHER ETHICAL ISSUES

Before making foreign acquisitions, BMB should consider how to meet its duties of competence, communication, and compliance with local rules in foreign countries. The duty of competence requires lawyers to provide “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rule 1.1. Among other requirements, the duty of communication requires lawyers to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Model Rule 1.4(b).

A. Duty of Competence

For financial and legal reasons, BMB’s foreign practices are likely to be small, which restricts their range of competencies. See Carole Silver, Globalization and the U.S. Market in Legal Services—Shifting Identities, 31 Law & Pol’y Int’l Bus. 1093, 1130–31 (2000). Firms tend to staff foreign offices leanly because of difficulty predicting clients’ needs for foreign services. See id. at 1131. Laws in some countries, such as France and Spain, restrict the number of attorneys permitted to join one firm. Frank, supra, at 968. Therefore, BMB should anticipate times when none of the lawyers in its foreign office have the expertise that a client needs in that country. To reduce the risk that BMB’s foreign lawyers will need to turn down work because they lack competence in the requisite foreign legal specialties, BMB should determine which specialties will be most useful and selectively acquire practices with those specialties. BMB could also mitigate potential financial losses by encouraging its foreign lawyers to market the firm’s broad range of U.S. legal specialties to foreign clients. Globalized U.S. firms have found that foreign clients are interested to know how transactions are conducted in countries other than their own, especially if their own laws are ambiguous or non-existent. Silver, supra, at 1134.

Rather than solely relying on one U.S. or foreign BMB office, however, some clients may want BMB’s U.S. and foreign lawyers to advise on a matter together. BMB’s U.S. lawyers need to inform their client if their advice incorporates a foreign lawyer’s opinion, lest a U.S. court hold the U.S.
lawyers responsible for the foreign lawyer’s opinion and find that they violated their duty of competence to the client. See Lutz, supra, at 82. U.S. lawyers may use the following disclaimer clause in their advice: “In rendering the opinions expressed in paragraphs —, we have relied [solely] on the opinion of — insofar as such opinions relate to — law, and we have made no independent examination of the laws of such jurisdiction.” Id. at 83.

B. Duty of Communication

BMB must enable its clients to make informed decisions about representation in foreign jurisdictions. See Model Rule 1.4(b). When deciding whether to accept the services of a BMB office, clients need to be aware of differences between legal services in their country and the country where the BMB office is located. BMB’s corporate clients likely have sufficient sophistication to know some differences already, so BMB should assess each client’s level of knowledge and provide explanations as needed.

C. Duty of Compliance with Local Rules

When BMB acquires a foreign practice, that office should have already developed best practices for complying with the local rules that govern its lawyers. BMB needs to ensure that these practices remain in place after the acquisition, even if some of them seem counterintuitive to management in the U.S. For example, contingent fee agreements are generally prohibited in civil law countries. Frank, supra, at 969. If the foreign practice is located in a jurisdiction that has not established laws to govern the practice of law, a possible strategy for BMB is to conduct background checks on the foreign lawyers. BMB should not only ascertain that they are free of ethical controversy, but also evaluate their knowledge of their country’s social and political systems. In countries where the legal system is largely undeveloped, lawyers derive their standards of conduct from cultural understandings. See Silver, supra, at 1104.
CONCLUSION

No matter where BMB ultimately acquires new practices, it will face ethical challenges that arise from becoming a larger firm. The more BMB expands, the more these challenges will intensify. Expansion pulls BMB into competition with other large firms over a select group of clients who can afford international services, and over the lawyers who attract such clients. See id., at 1093–94. To ensure that BMB acts ethically in the face of competition, management should treat compliance as an important measure of BMB’s success as an expanded firm. With each new practice that BMB acquires, more lawyers are exposed to risk from any potential lapse of compliance. To reap the benefits of expansion without falling victim to the risks, everyone at BMB should continue taking their compliance responsibilities seriously.

Total words: 2917
Nora Wong is a litigator who served as Special Assistant Corporation Counsel at the New York City Law Department. She handled a diverse caseload of matters for the City, including torts, juvenile delinquency, and child protection. Her experience includes writing four winning briefs that were filed with New York’s intermediate appellate court, as well as taking and defending depositions in matters before New York’s trial courts.

Ms. Wong is a graduate of the University of Chicago Law School, where she was a team leader in the Corporate Lab clinic. At the clinic, she helped advise Fortune 500 companies on issues in intellectual property, torts, and privacy law. She also provided feedback on research papers from visiting scholars while she was one of the law school’s Olin Fellows in Law and Economics.

Ms. Wong did her undergraduate work at Williams College, where she double-majored in biology and political science and wrote her honors thesis on molecular genetics.
Profile of Legal Malpractice Claims: 2012-2015
Status update

Confirmed participating carriers:

Allied World
Aspen Specialty
AXIS
Brown & Brown
CNA
Endurance
Hanover
Swiss Re
Travelers
Zurich

ALPS
Bar Plan Mutual
Florida Lawyers MIC
Illinois State Bar Association Mutual Insurance Company
Lawyers Mutual Insurance Company of California- Standard Program
Lawyers Mutual Insurance Company of Kentucky
Lawyers Mutual Liability Insurance Company of North Carolina
Minnesota Lawyers Mutual Insurance Company
Ohio Bar Liability Company
Oklahoma Attorneys Mutual Insurance Company
Professional Liability Fund (Oregon)
Texas Lawyers’ Insurance Exchange
Wis Lawyers Mut Ins Co

Alberta Lawyers’ Insurance Association
Canadian Lawyers’ Insurance Association
Lawyers Insurance Fund Law Society of British Columbia
Lawyers Professional Indemnity Company
Professional Liability Insurance Fund of the Quebec Bar

Request still pending: Argo

Timeline:
Data collection complete, compiled data and charts returned from Milliman: By June 1
Copywriting complete: By July 15
Design layouts proofed and completed: By August 15
Delivery of final books: By September 1.
### Marketing Plan

**Protecting Against Cyber threats: A Lawyer’s Guide to Choosing A Cyber-Liability Insurance Policy**

Version as of April 18, 2016

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A. We are excited the ABA has begun to offer members affordable insurance options in many different lines of insurance.
   1. The ABA Insurance program began on April 4, 2016.
   2. The roll-out will be gradual, with a major announcement around the time of our Annual Meeting.
   3. Our initial products include: rapid decision life insurance, dental and vision insurance, individual disability insurance, travel insurance, and student loan refinancing. We will continue to add products as time goes on.

B. The ABA is very interested in exploring opportunities to collaborate with state and local bars on insurance matters.
   1. USI Affinity serves as our Third Party Administrator.
      i. USI has experience with state and local bar programs and strongly believes there are numerous areas for collaboration.
      ii. The ABA selected USI in part because of that experience, as well as a desire to find ways to partner with state and local bars as feasible.
   2. We will work with state and local bars to create “win-win-win” opportunities for members and our associations.
      i. We can begin conversations now.
      ii. We would look at opportunities to co-endorse products with the potential for revenue sharing as permitted by law and any agreements.
      iii. We hope the combined strengths of the ABA and state and local bars will enable us to provide members with better products at lower costs.
   3. We recognize many state and local bars may offer their members some types of insurance.
      i. The ABA will not be offering professional liability insurance at this time.
      ii. USI is developing products for the ABA program with an eye toward minimizing channel conflict. It is doing so in part by creating products unique to the ABA, in order to lessen overlap with existing products in the market.
   4. There are numerous areas of potential collaboration.
      i. Professional liability insurance is the most obvious (we are not offering that insurance at this time).
      ii. The ability to pool a greater number of participants and to offer new lines of insurance on a joint basis would apply to numerous lines of insurance that could be beneficial to both the ABA and the partnering state and local bars.
   5. Let's talk about how we can work together to benefit lawyers.

C. The ABA has supported insurance programs to its members since 1955.
1. Insurance was offered by the American Bar Endowment and later also through its subsidiary, American Bar Insurance Plans Consultants, Inc.
2. The new program reflects the ABA’s direct entry to providing an insurance program for ABA members in partnership with USI Affinity.
3. ABE will continue to offer the small number of insurance products that it currently makes available to ABA members.
4. ABA will offer a great variety of the products our members want.
Hi Jane:

Model ABA policies recommend jurisdictions require foreign lawyers and lawyers participating in referral services to maintain malpractice insurance. Oregon is the only U.S. jurisdiction that requires every lawyer in private practice to maintain insurance. All Canadian provinces have mandatory insurance requirements, as does Australian states and England. Washington requires its Limited Legal License Technicians to acquire malpractice insurance or maintain a minimum level of financial responsibility. Additionally, many U.S. jurisdictions require law firms organized as limited liability corporations or limited liability partnerships to maintain malpractice insurance.

The Standing Committee on Client Protection (“Client Protection”) is considering issues related to mandatory malpractice and other financial responsibility policies. I have attached for your information a memorandum previously circulated to Client Protection that outlines current policies requiring lawyers to acquire malpractice insurance. The rationale for each of these mandatory requirements is the protection of the public interest. Client Protection would like to form a Task Force on Lawyers’ Financial Responsibility with other interested ABA entities to determine if current mandatory policies should extend to all lawyers in private practice?

On behalf of Client Protection, I would like to reach out to the Chair of the Standing Committee on Professional Liability to request the appointment of two Committee members to serve on this task force. Do you have any objections to this approach or suggested appointments? I am also sending an invitation to the Chair of the Law Practice Division. I am open to suggestions for other participants.

I look forward to your response.

Best,

Selina

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Selina.Thomas@americanbar.org

Join us for the 32nd National Forum on Client Protection and the 42nd National Conference on Professional Responsibility, June 2-4, 2016 in Philadelphia, PA

Join us on Twitter and Facebook!
To: Standing Committee on Client Protection

From: Selina S. Thomas

Date: October 5, 2015

Re: Mandatory Malpractice Insurance Policies

The following information regarding mandatory malpractice is meant to supplement the information provided to you in the August 20, 2015 email. The goal of this memorandum is to better educate the Committee on the status of mandatory malpractice insurance in the U.S. and abroad, as well as provide information regarding current ABA policies requiring malpractice insurance.

ABA Policies on Mandatory Malpractice

In February 1989, the ABA convened the Commission on Evaluation of the Disciplinary Enforcement (the “McKay Commission”) to “conduct a nationwide evaluation of lawyer disciplinary enforcement.” Recommendation 18 of the McKay Commission Report recommended the ABA continue “studies to determine” if a model policy/rule requiring lawyers who represent clients to obtain mandatory malpractice insurance. To date, no such policy has been submitted for consideration to the ABA House of Delegates. See: http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html#36

In August 2004, the ABA House of Delegates adopted the Model Court Rule on Insurance Disclosure requiring lawyers to disclose on their annual registration forms if they maintain malpractice insurance. The goal of the Model Rule is to provide clients with access to relevant information related to the lawyer’s representation. However, there remains no requirement that lawyers, specifically those who represent clients directly, maintain a minimum level of malpractice coverage. See: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_court_rule_on_insurance_disclosure.authcheckdam.pdf

While the ABA has not adopted a requirement that every lawyer representing clients obtain malpractice insurance, there are ABA policies requiring malpractice insurance under certain circumstances:

1. Rule 4 of the ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services requires lawyers show proof of malpractice insurance or financial responsibility as a prerequisite for listing with a referral service. See: www.americanbar.org/groups/lawyer_referral/policy.html

   The commentary to Rule 4 states that “[o]nly by requiring such insurance, or a showing of financial responsibility, can a client’s needs best be satisfied.”

2. Section 6(ii)(B) of the ABA Model Rules for the Licensing and Practice of Foreign Legal Consultants requires foreign lawyers to file with the court, proof of insurance “to assure the
Oregon

In 1977, Oregon adopted the country’s only mandatory liability insurance rule. The provision of insurance to all practicing Oregon lawyers is accomplished through the Professional Liability Fund, a pooled insurance coverage plan that requires lawyers to pay into the fund for minimum insurance coverage. Lawyers engaged in high-risk practices do have the ability purchase higher coverage amounts through the fund up, but are not required to do so. The assessment is subject to change, and is currently set at $3500 annually per lawyer for $300K aggregate coverage with a $50K expense allowance. Lawyers can either pay in full at the beginning of the year, or in quarterly installments for $102 interest charge. For more information on Oregon’s Professional Liability Fund, see: https://www.osbplf.org/

Canada

Since the early 1970’s, each Canadian province required its lawyers to carry malpractice insurance. Early insurance programs involved a commercial insurance company issuing a master policy to the law society. The law societies then levied assessments on members, and issued individual policies. The law societies eventually became self-insurers by covering the risk through a group deductible on each claim. The excess liability was covered by the difference between the assessment on members and the premium paid to the commercial insurer. This method subjected the law societies to the fluctuations of the commercial insurance market, and thus fluctuations in the reserve necessary to cover the excess liability.

According to the Canadian Lawyer’s Insurance Association (CLIA), Canadian law societies were subject to commercial insurers that assessed risk of both U.S. and Canadian lawyers together, thus driving the cost of insurance for Canadian law societies as the holders of the master policy. In an effort to stabilize liability coverage, a number of law societies joined together to form the CLIA. The CLIA is a reciprocal insurance exchange that allows its member law societies to establish risk profiles based on the specific history of its member provinces. Their goals are to:

- to provide a reliable and permanent source of insurance on a non-profit basis
- to ensure the availability of reasonably priced and effective excess insurance
- to stabilize premiums in both mandatory and excess layers
- to ensure premium rates reflect the loss experience of Canadian lawyers

Member law societies include Nova Scotia, Prince Edward Island, New Brunswick, Manitoba, Saskatchewan, Alberta, Yukon, Nunavut, Newfoundland and Labrador and Northwest Territories. The participating societies agree on standard limits and policy terms, and then each member society retains coverage that is appropriate for their lawyer population and risk profile. CLIA issues a master policy to
each member society for the benefit of its practicing insured members. Most of the member societies manage their own programs, including claims management within their retained limits. CLIA administers claims that exceed the society deductibles.

Current agreed upon limits are $1,000,000 per occurrence, $2,000,000 in the annual aggregate. Lawyers may also purchase excess coverage of up to $9,000,000. Assessments vary annually and by law society. Because law societies manage their own programs, many include misappropriation as part of their overall coverage. See, for example, Law Society of British Columbia “2015 Lawyers’ Compulsory Professional Liability Insurance Policy” at:


You may view individual law society insurance rules at: http://www.clia.ca/eng/links.shtml

Australia

Lawyers in each Australian state are required to carry malpractice or professional indemnity coverage. Similar to the Canadian law societies, each Australian law society is required to make arrangements for practitioners to obtain professional liability insurance. Each law society has established a separate system or carrier to provide coverage, and each law society either administers or specifically contracts with a carrier to administer the program.

The Law Society of Western Australia, for example, has established Law Mutual (WA) to “to provide professional indemnity cover and effective risk and claims management solutions for the Western Australian legal profession while recognising the public interest.” The law society and Law Mutual are not themselves insurers, but instead contract with one or more insurers for the provision of professional indemnity insurance. The law society determines the amount of the assessment based on the Master policy terms. Practitioners/law firms are then charged deductible for each claim as follows (for 2014/2015):

1. **Firm Deductible**: Insured’s excess deductible is $7,500 for a sole practitioner or sole director of an ILP, and $5,000 per partner or director up to a maximum of $75,000 per claim. There are circumstances where this may double, triple or increase fivefold. The maximum deductible payable in any one year is five times the amount. The deductible is cost exclusive.

2. **Law Mutual (WA) Retention**: This layer of the scheme is funded by Law Mutual (WA) up to $250,000 for each and every claim (costs inclusive) in excess of the firm’s deductible. It is capped for the 2014/2015 year at $5m in the aggregate. The stop loss cover is in place for $6m in excess of the $5m aggregate.

3. **Insurer’s Component**: The excess policy with underwriters provides up to $1.75m for each and every claim in excess of $250,000. There is no aggregate limit on the number of claims that can be made during the year at this level.
Similar plans or “schemes” exist in the other Australian states. The Queensland Law Society has established Lexon as a wholly owned subsidiary to administer the program. See: http://www.qls.com.au/For_the_profession/Practice_support/Schemes_services/Professional_Indemnity_Insurance. An additional example is LawCover, a subsidiary of Law Society of New South Wales, see: http://www.lawcover.com.au/about-us/.

**England**

The Solicitors Regulation Authority requires each firm to carry professional indemnity insurance. The requirement is similar to a free market insurance model that allows firms to assess their coverage needs and purchase a policy accordingly. Current minimum coverage amounts for law firms is at least £2 million on any one claim (or £3 million in the case of a limited liability firm). This amount assumes a small to mid-sized firms. Large firms handling complex matters are expected to secure greater coverage. Firms must secure and maintain coverage to operate. If the firm loses coverage, the SRA grants a 90 day grace where coverage is provided. If the firm does not secure coverage within that time, the firm must close.

**Nonlawyers**

Washington, and presumably any jurisdiction that follows, requires LLLT’s to “show proof of ability to respond in damages” of financial responsibility as a condition of licensure. This may me an individual policy, a group policy, or an indemnification statement is employed by a government agency. See: http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=APR

As I stated in the August 20, 2015 email, it would seem that the time is ripe to continue the work of the McKay Commission and explore an ABA model policy that requires lawyers in private practice to maintain professional liability insurance. Such a policy is consistent with current ABA policy. Second, requiring foreign lawyers and LLLT’s to maintain liability insurance for the protection on the public or “to assure...proper professional conduct and responsibility” while not having the same requirement of U.S. licensed lawyers is inconsistent. And third, as barriers disappear and more lawyers engage in international practice, mandatory malpractice will better position U.S. lawyers to compete with lawyers from England, Australia, Canada, and beyond.