

ABA Advisory

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

Mark Your Calendar

April 23-25, 2003

Spring National Legal
Malpractice Conference
Astor Crowne Plaza
New Orleans, LA

September 3-5, 2003

Fall National Legal
Malpractice Conference
Hilton LaJolla Torrey Pines
LaJolla, CA



Professional Liability Insurance Coverage— Viable Form of Self-Regulation or Simply Another Business Decision?

by Glenn Fischer

The Preamble to the Model Rules of Professional Conduct states that a lawyer has a special responsibility for the quality of justice, and that a lawyer should help the bar regulate itself in the public interest. These tenets help frame a debate that, while not new, is gaining significant prominence of late—whether to require proof of financial responsibility and/or disclosure of the lack of professional liability insurance coverage.

The Model Rules usually provide guidance, but they can also be a source of tension. On one hand, how does the legal profession subject itself to increased outside influence and yet remain independent and self-regulating? On the other hand, does the legal profession have an obligation to sacrifice some of its independence for the sake of better protecting the constituency it serves? These questions arise at a time when the economy and consumer confidence are shaken by corporate scandal. So what can, or should, lawyers do in order to reassure a dubious public, and bring greater stability to the legal business climate?

Recently, several state and local bar associations have responded by considering mandatory legal malpractice coverage and mandatory disclosure of the lack of professional liability insurance.

Some argue that mandatory coverage disclosure takes independence and self-regulation away from lawyers and puts it in the hands of professional liability insurers.

Since lawyers who choose not to carry insurance fear losing “market share” to those who do, insurance companies now have a say in who can compete in the legal marketplace. As for mandatory insurance coverage, opponents claim that insurance companies ought not decide whether an individual lawyer gets to practice.

As of this writing, only Oregon has rules requiring attorneys to carry malpractice insurance.

Alaska, Ohio and South Dakota have rules that require a lawyer to disclose to a client that the lawyer lacks professional liability insurance. Several other states are now actively considering whether either scheme is appropriate; some are debating the issues and gauging opinions, while others have pending proposed

rule changes. Illinois, for example, is considering a rule requiring financial responsibility. Other states like Pennsylvania and New Hampshire have pending proposals suggesting a mandatory disclosure rule similar to Ohio’s and South Dakota’s.

Like any other topic dealing with lawyer regulation, there are strong opinions both for and against using insurance as a client protection mechanism. Opponents maintain that lawyers, not government or insurance companies, should regulate lawyers, and that

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Insurance coverage

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insurance coverage is simply too expensive for many. They claim that making coverage mandatory for client protection frustrates the fundamental purpose of insurance, which is to protect the covered lawyer, not the client.

With regard to the self-regulation issue, proponents of mandatory coverage/disclosure argue that most practicing lawyers carry insurance anyway, and claim that most lawyers favor either mandatory disclosure or mandatory coverage. This, they argue, is lawyers regulating lawyers in its purest form, even though it involves participation by the insurance industry. With regard to cost, they counter that insurance is simply another business expense, and it is less expensive to the profession than clients damaged by legal malpractice going uncompensated because their lawyers had no insurance coverage and no assets.

On the national level, the Client Protection Committee of the ABA's Center for Professional Responsibility is formulating a proposal for presentation at the ABA's mid-year meeting in February, 2003. This proposal seeks a modification to the Model Rules of Professional Conduct, and would require lawyers to disclose to clients if they lack of malpractice coverage.

The proposed modification (in bold) adds two new subsections and a Comment to Rule 1.4:

Rule 1.4 Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent,

as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and,

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform new and existing clients, in writing, if the lawyer does not have malpractice insurance. A lawyer shall inform the client, in writing, any time the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for five years from the conclusion of the client's representation.

(d) The requirements in (c) do not apply to full-time members of the judiciary or full-time, in-house counsel or government lawyers when representing the entity by whom they are employed.

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Comment

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Disclosure of Lack of Malpractice Insurance

[8] Lawyers are not required to maintain professional liability insurance, but if they choose not to, that fact shall be disclosed to a client. Lawyers' funds for client protection (clients' security funds) are designed to reimburse clients only in the event of their lawyer's dishonesty. See Rule 1.15, Comment [5]. The absence of professional liability insurance is a material fact that may bear upon a client's decision to hire a lawyer.

The rule does not provide for alternate means of proving financial responsibility, such as a letter of credit, security bond, or funds in escrow. In effect, the rule obviates the ability for a lawyer to be "self-insured," although in theory, some lawyers could afford to provide security in excess of some policies currently offered in the insurance market. Also of note is that no particular amount of insurance is required or suggested. Some may question whether a low limit policy would provide any real protection to a client whose lawyer failed to competently handle a multi-million dollar wrongful death case.

To be sure, the arguments presented above are not exhaustive, and merely illustrate the nature of the ongoing debate. It is very likely, however, that the Client Protection Committee can expect both strong support and some vocal opposition to their proposal. One way to stay informed about the issue in your area is to check with your state or local bar association to determine if there is a similar effort underway in your jurisdiction. Also, watch future issues of *lpl Advisory* for more information.

Glenn Fischer is Assistant Staff Counsel for the Standing Committee on Lawyers' Professional Liability.

Attention Young Lawyers And Law Students The Levit Essay Contest Is Now Accepting Entries!

The 2003 Levit Essay Contest, co-sponsored by the ABA Standing Committee on Lawyers' Professional Liability and the San Francisco law firm of Long & Levit, LLP, is now accepting entries. The contest, open only to law students and young lawyers, offers a \$5,000.00 cash prize and an all-expense paid trip to the ABA Spring National Legal Malpractice Conference to be held in New Orleans, LA on April 23-25, 2003. The deadline for entries is January 15, 2003.

This year's Contest asks contestants to draft a judicial opinion, and encourages original thought, innovative approach, and quality research and writing.

Complete details are available on the Web at www.abanet.org/legalservices/lpl/levit.html, or by contacting Glenn Fischer, Assistant Staff Counsel, 541 North Fairbanks Court, Chicago, Illinois 60611, (312) 988-5755, fischerg@staff.abanet.org

More Bread, Fewer Claims*

by Karen Dilibert

The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client.

—Abraham Lincoln¹

Sometime around 1850, Abraham Lincoln drafted his *Notes for a Law Lecture*, which included advice to lawyers about setting and collecting fees. This topic seems even more relevant today than it was 152 years ago. Effective management of client payment issues not only keeps lawyers in bread and butter, but also results in more satisfied clients and fewer malpractice claims.

Now, How Much Would You Pay?

Your first meeting with a new client should include a discussion of fees. Clients can be reluctant to initiate this discussion, but that doesn't mean they don't want to know. In *How to Draft Bills Clients Rush to Pay*, J. Harris Morgan cites a study indicating that 80% of clients want their lawyer to discuss fees in the first interview, and 92% of clients do not want their lawyer to wait until services are completed to discuss fees.² Indeed, Model Rule 1.5(b) requires you to communicate "the basis or rate" of your fee to a new client "before or within a reasonable time after commencing the representation."

Your discussion will either reassure your client that you are businesslike about all aspects of your practice, including payment—or it will flush out a client who is unlikely to pay you. Beware of the client who is unhappy with your fee from the start. Be even more wary of the client who waves aside your fee discussion, saying, "Whatever it takes." This attitude will evaporate upon receipt of your first bill.

Getting Down Payments and Getting It Down On Paper

Where appropriate, consider taking an



advance fee payment. An advance not only assures you that your client can pay, but assures your client that she has hired a lawyer—you're on the case.³

Now that you've discussed your fee and taken an advance, memorialize it in your engagement letter or written fee agreement. If you bill by the hour, set forth the hourly rates for the lawyers who will handle the matter. Explain that those rates can change, but if they do, you will let the client know right away. Spell out the out-of-pocket costs for which you charge, e.g., postage, photocopying, filing fees, travel expenses. If you don't, your client may think of these items as your overhead and hit the ceiling when she receives your bill.

Fighting Irregularity

Bill your client regularly—monthly—even if you are not being paid. There are many good reasons to do this.

First, and most obvious: Your bill makes your client aware of the fact that you are performing services for which you expect to be paid. Indeed, for some clients, the bill is the only "status report" they will ever read. Proofread it just as you would any other important correspondence.

Second, with regular bills, you avoid shocking your client with a huge, unexpected bill. Consider your reaction if your credit

card company suddenly billed you for nine months' worth of charges—all due within 30 days. You might not have enough cash to cover the bill. At a minimum, you'd be annoyed by the unprofessional way the company handled the billing.

Finally, your client's willingness to pay your bill is one measure of her satisfaction with your services. Donald Trump once said that he saw money as a "scorecard" that told him if he'd won, and by how much.⁴ Your bill works the same way. If your client is not paying, it may be because she is dissatisfied with your work or just plain mad at you. Regular billing gives you an opportunity to spot and fix problems—before you get fired, sued, or reported to your disciplinary body.

Keeping Your Eye on the Ball

For your scorecard to work, you have to be watching the game. Review the payment status of your matters on a monthly basis. If a client has a past due balance, schedule a meeting with her and explain that you cannot continue to represent her unless you are paid.

Timely identification of payment problems is critical to your ability to withdraw. The Model Rules permit withdrawal when the client "fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." Model Rule 1.16(b)(4). If, however, you wait until the eve of trial to discover that your client owes you big money, you may not be able to withdraw.

A Bad Idea Named Sue⁵

Think long and hard before suing your client for fees. The risk of a malpractice counterclaim is very real. It's not uncommon for the counterclaimed damages to far exceed the fee owed. Indeed, in recognition of that risk, a few malpractice insurers will not cover claims that arise out of fee suits. Even the carriers who do cover those claims consider lawyers who sue for fees a higher risk, and charge accordingly. And defending a malpractice claim will certainly divert your

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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

On behalf of the Standing Committee on Lawyers' Professional Liability, I want to welcome you to the Fall 2002 National Legal Malpractice Conference in the Windy City. The Conference, featuring a Trial of a Legal Malpractice Case, promises to be an educational and entertaining program that allows time for you to meet with other professionals and to enjoy beautiful historic Chicago.



I am honored and pleased to serve as the Committee's Chair for another year, and I look forward to working with all of you. We have two new members on the Committee—Dan Callaghan and Howard Halm who have

been appointed for three year terms. Katja Kunzke, who served as a Special Advisor to the Committee last year, has been appointed as a member of the Committee for a three year term.

I want to note the contributions of Briggs Cheney, Bob Minto and Lorrie Vick, whose terms on the Committee have expired. During the past three years, they have provided important insights to the work of the Committee and have worked actively on our conferences and other projects. On behalf of all of us, I thank them for their service.

For those of you who have not yet become an Associate Member of the National Legal Malpractice Data Center, I encourage you to stop by the registration desk for additional information on how membership

entitles you to substantial savings on the regular conference attendance rates.

I also want to call your attention to the Levit Essay contest described on page two.

I ask all of you to encourage young lawyers and law students to participate in this competition.

Finally, I ask you to mark your calendars for the Spring Conference which will be held at the Astor Crowne Plaza Hotel in New Orleans on April 23-25, 2003. The program, which is in the planning stage, promises to be another excellent one.

—Edward Mendrzycki



More Bread, Fewer Claims

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time and attention from your paying clients.

The Bottom Line

A businesslike approach to client payment matters maximizes your ability to make money, satisfy clients, and avoid claims.

¹ From Abraham Lincoln's Notes for a Law Lecture, *The Collected Works of Abraham Lincoln*, edited by Roy P. Basler, Rutgers

University Press, May 1990.

- ² J. Harris Morgan, *How to Draft Bills Clients Rush to Pay*, © 1995 American Bar Association, pp. 4-5.
- ³ In *How to Draft Bills Clients Rush to Pay*, Morgan observes, "Although the law office may not have a desperate need for the fee deposit, the client has an acute need to feel sure of the employment of the lawyer." Page 4.
- ⁴ See www.marketwatch.com, "Reaching New Heights: What money means to Donald Trump," by Thomas Kostigen, February 1, 2002.

⁵ "A Boy Named Sue," Shel Silverstein, © Evil Eye Music 1969, as performed by Johnny Cash, described the private hell of a boy with the unfortunate name of "Sue." Lawyers who embark upon fee suits may come to identify with him: "Seems I had to fight my whole life through... I tell ya, life ain't easy for a boy named Sue."

*(excerpted from an article previously published in 90 Ill. Bar J. 321 (June 2002))

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