lpl Advisory

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

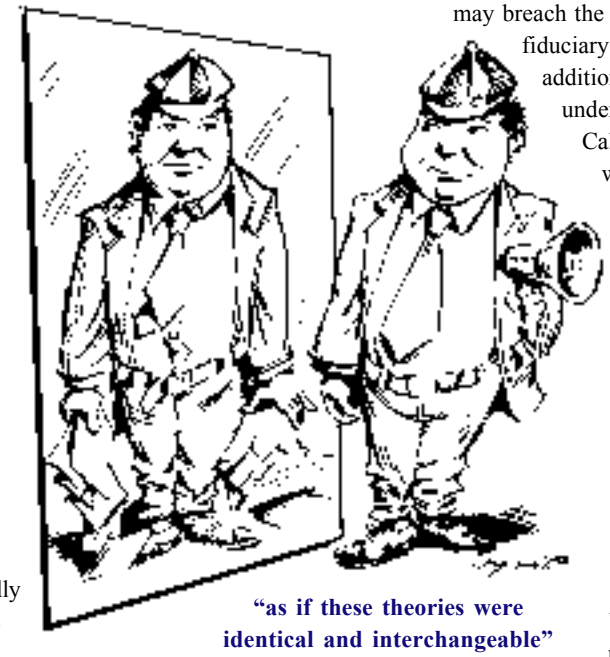
Breach of Fiduciary Duty: A Misunderstood Tort

by John H. Quinn

Plaintiffs in legal malpractice actions routinely allege both professional negligence and breach of fiduciary duty as if these theories were identical and interchangeable. Unfortunately some recent appellate decisions have indirectly aided this misunderstanding by using broad language that blurs the fundamental distinctions between these two very different torts. This growing trend toward combining these torts is a clear departure from the theoretical, historical, and pragmatic lines that separate professional negligence and breach of fiduciary duty.

The broad, catch-all tort of professional negligence applies in all cases in which the plaintiff alleges that the attorney breached his duty to "use such skill, prudence, and diligence as other members of his [or her] profession commonly possess and exercise."[1] Accordingly, professional negligence would include virtually all professional errors and omissions.

Breach of fiduciary duty is much narrower than professional negligence. This tort can be used correctly in only two basic situations. First, there may be a breach of fiduciary duty when an attorney discloses information obtained from the client in confidence.[2] Second, there may be a breach of fiduciary duty if an attorney fails to give his "undivided loyalty" to the client, whether because he has placed his own financial interests above the client's interests or because he has become embroiled in a conflict of interest between present and/or former clients. In this vein, courts have held that conduct amounting to a conflict of interest between present and/or former clients may breach the attorney's fiduciary duty.[3] In addition, at least under current California law, when an attorney enters into an advantageous transaction with a client during the course of representation, there is a rebuttable presumption affecting the burden of proof that the transaction violated the attorney's fiduciary duty, was not supported by



"as if these theories were identical and interchangeable"

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Mark Your Calendar

April 14-16, 1999
Spring National Legal Malpractice Conference
Fairmont Hotel
New Orleans, LA

April 16-17, 1999
Trying a Legal Malpractice Action
ABA Standing Committee on Lawyers Professional Liability and the Defense Research Institute

September 22-24, 1999
Fall National Legal Malpractice Conference
ANA Hotel
San Francisco, CA

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

Breach of Fiduciary Duty

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adequate consideration, and was procured through undue influence.[4] Although there are many debatable conclusions reached in each of the decisions that support these propositions, they are correct to the extent that they hold that a breach of fiduciary duty may occur by virtue of such a conflict of interest or breach of confidence.

Unless liability is based on one of these two basic theories, a client should be permitted to sue solely for professional negligence. However, it is easy to understand why plaintiffs have attempted to expand the tort of breach of fiduciary duty beyond its proper bounds. For example, although a plaintiff generally cannot recover emotional distress damages for professional negligence, there is authority for the proposition that such damages are recoverable for breach of fiduciary duty.[5] Also, plaintiffs often contend that the breach of virtually any of the rules of professional conduct amounts to breach of fiduciary duty, because, if the trial court accepts this argument, the plaintiff is allowed to argue those asserted ethical violations to the jury. Such evidence and argument can be very powerful at trial.

For these and other reasons, the time is ripe for courts to conduct an extensive review of the tort of breach of fiduciary duty and to return that tort to its historical, theoretical, and pragmatic roots. Until the courts do so, the line between breach of fiduciary duty and professional negligence will continue to blur, and attorneys may be found liable more often and for more damages that would be proper under a correct interpretation of their fiduciary duties.

John H. Quinn is a partner at Long & Levit LLP in San Francisco.

1. **Budd v. Nixen** (1971) 6 Cal.3d 195, 200, 98 Cal.Rptr. 849, 491 P.2d 433.

2. Bus. & Prof. Code, § 6068, subd. (e); **Anderson v. Eaton** (1931) 211 Cal. 113, 293 P. 788; **Pierce v. Lyman** (1991) 1 Cal.App.4th 1093, 1102, 3 Cal.Rptr.2d 236.

3. **Lysick v. Walcom** (1968) 258 Cal.App.2d 136, 65 Cal.Rptr. 406.

4. See, e.g., **Lewin v. Anselmo** (1997) 56 Cal.App.4th 694, 701, 65 Cal.Rptr.2d 682; **Ramirez v. Sturdevant** (1994) 21 Cal.App.4th 904, 917, 26 Cal.Rptr.2d 554.

5. Compare **Camerisch v. Superior Court** (1996) 44 Cal.App.4th 1689, 52 Cal.Rptr.2d 450 (no emotional distress damages for professional negligence) and **Stanley v. Richmond** (1995) 35 Cal.App.4th 1070, 1097, 41 Cal.Rptr.2d 7681 (emotional distress damages recoverable for breach of fiduciary duty).

Opportunity for Education, Travel and Fortune Awaits -

1999 LEVIT ESSAY CALL FOR PAPERS

Submissions are now being accepted for the 1999 Levit Essay Contest on Lawyers' Professional Liability. This year's topic on attorney malpractice and breach of fiduciary duty continues the competition goal of encouraging original and innovative research and writing in the area of legal malpractice law for law students and young lawyers. 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 Orleans on April 14-16, 1999.

The deadline for submissions is January 15, 1999. The competition is only open to law students and young lawyers and the complete contest rules are available at www.abanet.org/legalserv/levit.html or by contacting Jane Nosbisch, 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.

Attorney Malpractice and Breach of Fiduciary Duty

Topic: What is the current state of the law concerning claims for breach of fiduciary duty against an attorney in connection with a claim for legal malpractice? What are the trends and practical implications for both attorneys and clients? To what extent *should* claims for breach of fiduciary duty be allowed in addition to traditional negligence claims?

Every attorney-client relationship involves a set of duties running from the attorney to the client. A breach of those duties can serve as the basis for a claim of legal malpractice. Plaintiffs are increasingly attempting to include a claim for breach of fiduciary duty against an attorney in addition to a traditional negligence claim, even when the attorney was not acting in a named fiduciary capacity. See article elsewhere in this newsletter by John H. Quinn. See also discussion at Chapter 14, Mallen and Smith, Legal Malpractice (West, 4th edition).

In preparing the essay, first priority should go to a succinct and accurate statement of the current state of the law, latest trends, and practical implications. Any discussion of social policy and the law should be a second priority.

Managing Unique Issues with Multiple Clients - *ENGAGEMENT LETTERS DEFINE CRITICAL DUTIES AND RELATIONSHIPS*

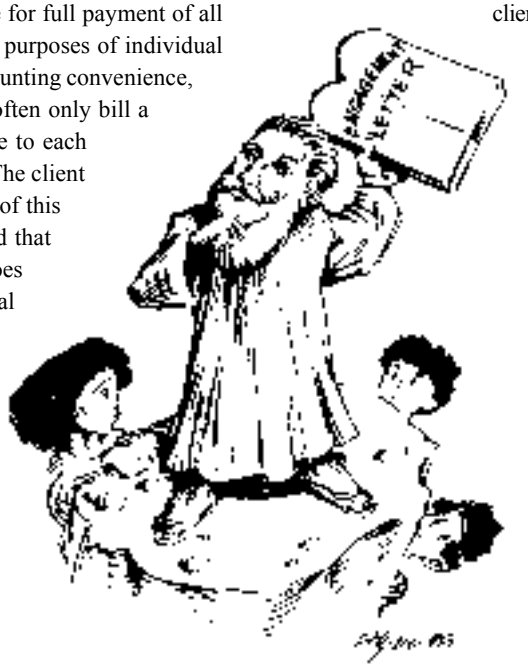
by Guy Calladine

Engagement letters are a significant risk management tool for clarifing and confirming the most important aspects of the attorney-client relationship, and certain key issues must be addressed when an attorney represents multiple clients.

Groundrules for the Representation and Client Duties: The client should always be advised in writing of the full extent of his or her duties and responsibilities, including the need to abide by the fee agreement, pay bills on time, be truthful, provide necessary assistance, fully cooperate and keep the lawyer fully advised of all developments which impact the representation. Because multiple client situations are fraught with the potential for one client to later claim favoritism has been displayed to another client, it is essential that the attorney document the ground rules for communications with each client and confirm the decision-making process. The engagement letter should contain a full discussion of the attorney's policies regarding joint and separate meetings with clients, how copies of correspondence and other documents will be disseminated and to whom, and the extent of the attorney's duty to keep each client advised of the other's communications and activities. Document how the attorney will solicit from, and respond to, client input regarding significant decisions. The clients should be advised that although the lawyer can act as a facilitator, the clients must independently resolve disputes over decisions.

In some multiple client situations, the clients may designate one or more of their group to serve as the "point person" for mutual transmittal of information and/or decision making. Such arrangements are fraught with potential for later secondguessing, they should be approached with caution and clearly documented in the engagement letter.

Payment Of Fees And Costs By Multiple Clients: In multiple client situations, each client is interested in how much he or she will owe. Significant problems can arise when one client fails to pay their agreed upon share. The lawyer should clarify and document at the start of the representation, whether each client is jointly and severally liable for all fees and costs incurred, or whether each is liable only for a certain percentage or pro rata share, and if the later, what that figure is based upon. Even where clients are each legally responsible for full payment of all fees and costs, for purposes of individual cash flow and accounting convenience, the attorney may often only bill a proportionate share to each individual client. The client should be advised of this process and alerted that such a courtesy does not modify the legal obligations to pay all bills. Further, if each client is jointly and severally liable for all fees and costs incurred, the engagement letter should confirm whether individual clients will be apprised of the status of payment by all other clients as the representation proceeds. It is also essential that the potential for issues arising from non-payment, or disagreement over expenditures of fees or costs, be disclosed in the conflicts of interest section.



" client should always be advised in writing of the full extent of his or her duties and responsibilities"

Conflicts of Interest: While every lawyer knows the theory that the engagement letter address potential conflicts arising from multiple representation, many fall short in the implementation. The document on its face should reflect full disclosure and confirm the client's informed consent, thus minimizing any opportunity for a later change of opinion over whether the client should have secured separate counsel and/or the client understood that option. To achieve this objective, the engagement letter must: (1) confirm each client's awareness of the potential for conflicts that may impair counsel's ability to serve each individual client with undivided loyalty; (2) identify each reasonably foreseeable area where a potential conflict could arise; and (3) confirm the need to withdraw if a conflict does arise that the clients cannot resolve.

To reduce the opportunity for argument that the waiver is not informed, the lawyer should identify each potential area where he or she perceives a conflict of interest could arise, with as much specificity as possible. Although the nature of this disclosure will vary depending on the representation, there are certain constants: there is always a potential for later disagreement over goals and strategies; methods of accomplishing those

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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.

Comments and proposed articles should be directed to jnosbisch@staff.abanet.org. Views expressed are those of the authors and do not necessarily represent the policies of the American Bar Association. ISSN Pending.

Engagement Letters

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objects; timing and manner of resolution of litigation; sharing of recoveries; instructions to counsel; expenditure of fees and costs (both incurring and payment); and disclosure of confidential communications. Each of those potential problems should be identified.

Do not, however, limit the recitation of potential conflicts that could arise to those specifically listed in the letter; acknowledge there may later be additional unanticipated conflicts. Each client should also be advised that each agrees to raise the issue of separate representation in the future should the client develop different interest or goals.

Often clients will agree that in the event an actual or potential conflict arises which one or more of the clients declines to waive, thereby requiring separate representation, the original attorney is permitted to continue to represent less than all of the clients. In these instances, those clients who intend to seek separate counsel will not move to disqualify the lawyer based on the prior representation. Clearly document any such agreement.

Independent Counsel: The agreement should also confirm that not only does each client understand the right to obtain, at his or her own expense, independent legal counsel regarding the representation, it should confirm that counsel has recommended each client see independent counsel, if so desired.

Recognizing these unique issues that arise from multiple representation and insuring documentation in the engagement letter will reduce your potential exposure to later malpractice claims.

Guy Calladine is a partner at Long & Levit LLP in San Francisco.

Comings, Goings and Rare Stayings

by G. Michael Bourgeois

This column periodically appears in order to update the comings and goings in our common communities of law and insurance. During the last several months, there has been little activity.

In June of this year, I retired from the active fray. After fifteen years of practicing law in Louisiana and the last fifteen in the frozen tundra of the North managing lawyer malpractice claims, I decided that it was time for me to get some health issues in order and to reassess priorities. It turns out that the reassessment of priorities included playing more golf which happily coincided with getting the health issues in order. Walking 18 holes a day for the past three months has accomplished something wonderful. I got the needed exercise and stopped sweating the small stuff, i.e., anything that couldn't lower my artificially high handicap. There was one more benefit, uncontemplated, to golfing; Abbey, who says that she married me for better or worse but not for lunch, gained some valuable breathing room. Golf's benefits are endless.

But summer is now over and I'm contemplating how to stay involved in the industry without the awesome time and energy demands of active day to day management. I suspect that I'll end up as "of counsel" to a wonderful law firm and spend the rest of my days trying to slow down from there.

In the vineyard where last I labored, Lucille Sgaglione has taken over the senior claims officer position for lawyer malpractice claims. As you all know, she's a first rate lawyer and a better person. Lucille and I worked together for ten years between the Home (now REM) and Reliance National. She has done and will continue to do a wonderful job for Reliance National.

Speaking of REM, Cheryl Gartland set a new course record at Forsgate Country Club during a recent PLUS outing. She, Bill Suda and Tom Kober are building a new business out of the old Home. Also spotted at the PLUS outing were Mike Walsh of Walsh & Sheehan, Tony Spain of Mendes & Mount, John McCarrick of McCarrick & Mayer, Chris Dupuy of CNA, Paul Calamari of Interstate Insurance Company and John Suen of Zurich American.

Fred Fontein, EVP of Westport Insurance Company, has alphabetically collected in your conference materials the list of insurance companies writing LPL business in the U.S. To think that ten years ago there were just a handful of players in the lawyer malpractice insurance industry. And in ten more years, there may just be a handful again.

We hear from the left coast and north of the border that Anne Marie Hammond left the insurance directorship of the Law Society of British Columbia to be replaced by Sue Forbes. We welcome Sue to the fray and remind her that a reserve is not the sixth man on a basketball team. Ciao

Plan Now for 1999 Spring Training Double-Header

The 1999 Spring LPL Conference in New Orleans will feature a double-header training program. A program entitled "Trying a Legal Malpractice Action" will be paired with the traditional Spring LPL Conference and will be a jointly produced with the Defense Research Institute. The "Trying a Legal Malpractice Action" program will start at the close of the Spring LPL Conference at approximately 1:00 p.m. on Friday, April 16 and run through Saturday, April 17 at 4:00 p.m.

"Trying a Legal Malpractice Action" will include sessions on:

- Opening Statements
- Direct and Cross-Examination of the Attorney Expert
- Direct and Cross-Examination of the Attorney Defendant
- Voir Dire
- The Trial Within the Trial
- The Causation Defense
- Negotiating the Settlement

A separate conference registration fee will be charged for the "Trying a Legal Malpractice Action," and Associate Members of the National Legal Malpractice Center will receive a reduced registration fee for this program. Watch your mail in January for further details on this program.

Claims Arising from Intellectual Property Practice

by Mark E. Gralen

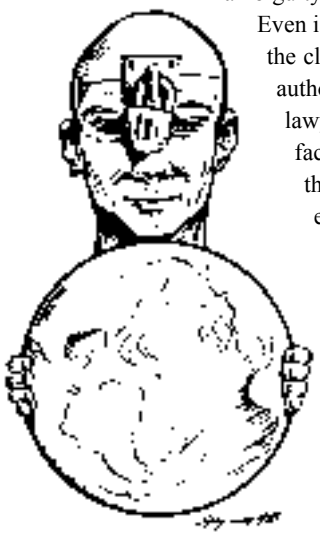
In recent years, intellectual property has become a specialty in great demand from clients, and a source of more professional liability claims against lawyers. This article discusses some of the claims against lawyers that have arisen from intellectual property practice, and outlines steps law firms can take to avoid losses. The article concentrates on the patent practice, which in our experience has generated more significant claims than copyright or trademark practice.

Failure to Perfect Patent Rights

Law firms increasingly face claims arising from failure to file patent applications on a timely basis. Many of these claims arise under the Patent Cooperation Treaty ("PCT"), which establishes deadlines for obtaining foreign patent protection based on patent applications initially filed in the United States. In many cases, PCT filings, if missed, cannot be cured.

These missed filings are not as inexplicable as they first appear. The responsibility for docketing and meeting filing deadlines often falls upon paralegals or clerks. Without proper lawyer supervision, they may not understand all of the deadlines for filing in multiple countries required by the PCT. In addition, a successful docketing system requires quality people, accurate information, and timely action. No docketing system can insulate a law firm from the greatly increased risks of human error arising from last-minute efforts to meet a filing deadline overseas.

Client indecision and miscommunication between lawyers and clients are also prominent sources of filing-related malpractice claims. For example, a cost-conscious client may decline initially to authorize foreign filings. A year later, the same client may decide that a product could only have been successful with worldwide patent protection, which the lawyer failed to obtain. In these situations, it is dangerous for a lawyer to rely on oral assurances that the client will handle deadlines, or to allow any ambiguity on the issue.



"obtaining foreign patent protection"

Even if it is clear that the client did not authorize the filings, lawyers can still face claims that they failed to explain the *significance* of the deadline.

From a claims perspective, matters involving missed patent filings share some common elements. If the claim involves a docketing error or similar mistake, negligence is not an issue. Instead, the firm must argue that the filing mistake did not cause damages because the technology had no value. If the technology has had no commercial success, and the inventor has no track record, this can be a powerful defense. As a result, many of these claims disappear or are resolved for a small fraction of the plaintiff's initial claimed damages.

In some cases, however, the value of the plaintiff's invention may be a hotly disputed issue, particularly if the technology has been licensed to a third party or the market for the end product has significant growth prospects. In these cases, plaintiffs often can find an expert to support a theory of millions of dollars in lost royalties from the loss of worldwide patent protection. Although the defense can produce its own expert report showing little if any damages due to the speculative nature of the technology, judges are reluctant to preclude juries from choosing between competing experts. Thus, even the most vigorous defense may not eliminate the possibility, however small, of a very large jury verdict.

The best defenses to these claims are a well-managed docketing system, proper supervision of non-lawyer personnel, and a clear written record of communications between lawyer and client. Law firms also need to recognize that most patent filing deadlines are no less jurisdictional than notices of appeal, and that the consequences of missing them may be no less draconian.

Conflicts of Interest

Plaintiffs' lawyers love to spice up a complex subject matter like intellectual property with allegations of conflict of interest. The patent practice provides some unique opportunities for these claims. For example, a patent application needs to list an inventor for the U.S. Patent Office to issue a patent. 35 U.S.C. Section 111(a)(1)(1998). Yet the law firm filing the application often represents the inventor's employer, not the inventor himself. If the invention rights are assigned to the employer, some courts hold that a lawyer can file a patent application for an employee

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In Memorium

M. R. "Dick" Brackin passed away May 6, 1998. Dick was one of the early leaders in both the NABRICO group and the state bar captive company movement. He helped start the Oklahoma Bar Company and served as its President from 1986 until 1993 and Vice-President/Treasurer from 1993-1998. Dick was well-known and respected by many in the industry and he will be missed at future ABA Standing Committee meetings.

Intellectual Property

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under a power of attorney and later represent the corporation in a dispute with the employee. *See*, *e.g.*, *Sun Studs, Inc. v. Applied Theory Associates*, 772 F.d 1557, 1567-69 (Fed. Cir. 1985). Without clear understandings in writing as to who owns the invention and whom the lawyer represents, however, conflict of interest claims can result.

Another potential problem can come up when the employer's lawyer agrees to file a patent application for an employee on an invention *not* assigned to the employer. The lawyer may view this as a minor accommodation to the employee. Unless the representation is carefully limited in scope and duration, however, this minor representation could become a serious problem if the lawyer represents the company in later matters that are arguably adverse to the employee's interests.

Conflict claims can also arise when a lawyer handles patent work for smaller, closely-held companies and non-corporate clients, such as partnerships or joint ventures. In these situations, a previously harmonious group of clients may become bitter enemies overnight, with disputes over who invented the technology and who owns it. Lawyers can easily find themselves in the crossfire.

Accordingly, it is particularly important for patent lawyers to take practical steps to avoid these problems. Patent lawyers should strive to make clear whom they represent and *don't* represent, get written consent for joint representations, and get a clear understanding, preferably in writing, about who the inventor is and who owns the rights before filing any patent application.

Other Claims

Other claims arising from intellectual property practice include allegedly erroneous opinions as to the validity of intellectual property rights; alleged failure to perfect security interests in intellectual property; and alleged mishandling of patent litigation. These claims share some common themes. First, they often arise when specialists venture outside their specialty, or generalists try to become specialists. These "crossover" risks are particularly acute in light of the complexity and high stakes involved in intellectual property matters. Second, these claims often involve a failure of appropriate partner-associate supervision, especially where the supervising partner does not have intellectual property expertise or assumes that an associate can handle jurisdictional deadlines. Finally, these claims often involve a lawyer who goes too far in trying to please a client. An example is giving a "clean" opinion to help the client in anticipated future litigation when the facts may suggest a more balanced approach.

Loss Prevention Steps

Law firms may wish to consider the following steps to minimize losses in the intellectual property area:

- Warn clients in writing about foreign patent filing deadlines. Some firms send out warning letters at nine months, six months, three months and one month prior to the filing deadline.
- Explain the consequences of failing to file in your warning letters to clients.
- Consider declining filing assignments shortly before filing deadlines. Many "failure to file" claims involve clients who wait until the last minute to "pull the trigger," and then blame the lawyer when it fails to get done. Lawyers should avoid putting themselves in this position.
- Don't wait until the last day to file a patent application here or overseas.
- Use a dual docketing system, *i.e.*, both the firm's central docketing system and the lawyer's individual calendar.

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Intellectual Property

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- Make sure your docketing system is "Year 2000"compliant.
- Focus on proper supervision of lawyers and non-lawyer personnel in the intellectual property area. Also make sure the supervising partner knows the area.
- Make sure patent lawyers understand who owns an invention and who the inventors are before filing a patent application.
- Be attentive to potential conflict of interest problems in the intellectual property area, especially in employer/inventor representations and when a "boutique" intellectual property firm merges into a full-service, general practice firm.

Conclusion

The stakes are high in claims arising from the intellectual property practice. To avoid getting caught in claims arising from this practice, law firms need to concentrate on understanding the practice, complying with filing deadlines, and pursuing active loss prevention efforts.

Mark E. Gralen is a senior claims attorney at Attorneys' Liability Assurance Society, Inc. (ALAS).

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selecting legal malpractice insurance 1999 - a user-friendly guide for practitioners wanting to compare key 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 on the web at www.abanet.org/legalserv/lpl.html $15 plus shipping and handling

Fall 1998 National Legal Malpractice Conference Proceedings - conference proceedings includes papers on Y2k procedures for firms, how-to's for handling of the initial stages of a claim, the role of mediation in legal malpractice actions, and the shifting exposures and trends in several selected areas amongst others. $75 plus shipping and handling

***LPL Review*, Number 4** - the 4th in the series of glossy reprints of ABA Journal articles on loss prevention and attorney liability. Six articles per edition, 4 editions now available. $1.00 each, bulk rates available.

Lawyers Professional Liability Update 1998 - articles on loss prevention, and information about recent developments in the law concerning professional liability. Please note that the legal malpractice insurer directory previously included in this publication is now available in the publication entitled *selecting legal malpractice insurance 1999.* $50 plus shipping and handling

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Message From the Chair

This is an exciting time for the Standing Committee on Lawyers' Professional Liability. The Committee continues to provide its members with outstanding educational conferences designed to appeal to the broad spectrum of our membership. We appreciate your active involvement in suggesting new topics, speakers and interesting venues for our conferences. We also will begin to plan another seminar on trying legal malpractice actions. We last presented this program in New Orleans in 1997.

Never before have we seen a more dramatic, diverse legal malpractice insurance market. The Committee provides a gathering place that allows all of us to follow the market and interact with representatives of all factions of this unique business. We will continue to provide a networking platform for insurance executives, claims professionals and producers, and for the commercial and NABRICO companies as well as domestic and international interests.

In the next six months the Committee will focus on two new publications. We are updating the ABA Legal Malpractice Desk Guide to replace our popular first edition. We will also provide a new user-friendly guide to selecting legal malpractice insurance for all ABA members through our website.

To our young lawyers, please remember the Levit Annual Writing Competition. Last year's winner, Robert Neff, received a prize of $5,000 and an all expense paid trip to our Spring Conference. The writing competition provides an opportunity for law firms to reward young legal malpractice lawyers. This year's topic is "Attorney Malpractice and Breach of Fiduciary Duty," a timely subject for all practitioners. An item on page 2 of this newsletter describes the competition in more detail.

Thanks for the opportunity to serve as your chair for another year. I appreciate your invaluable help over the last year and look forward to continuing to work with you in the future.

—Joseph P. McMonigle

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