lpAdvisory

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

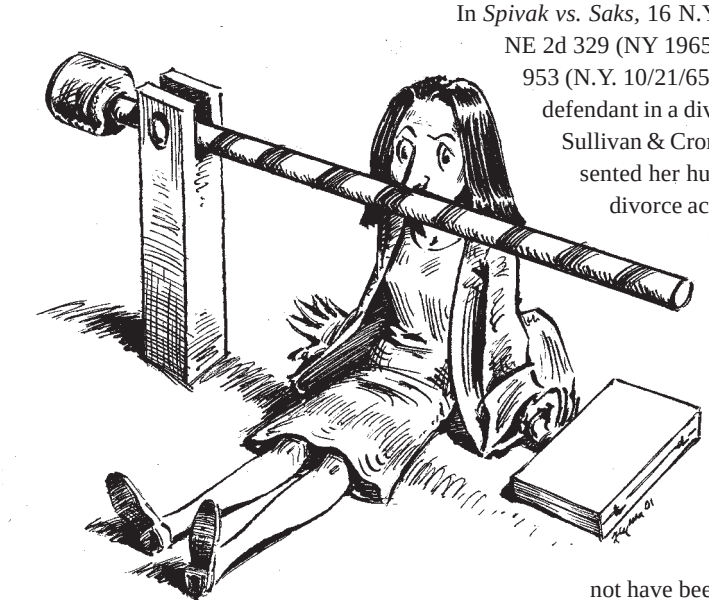
# Lurking Perils of Multi-Jurisdictional Practice

**by Nancy J. Marshall**

Have you ever thought twice about taking a deposition in another state? Advising a local company on the law affecting it in another state? Met with an out of state client in that state, advising the client on a matter in that state? Negotiating a deal in a state other than the one you are licensed in? If so, you may be guilty of the unauthorized practice of law.

These are not academic questions. Discussed below are two cases that have put this matter directly before the Courts, with far-reaching results.

In *Spivak vs. Saks*, 16 N.Y. 2d 162, 211 NE 2d 329 (NY 1965), 263 N.Y. 2d 953 (N.Y. 10/21/65). Saks was the defendant in a divorce action. Sullivan & Cromwell represented her husband. The divorce action was filed in Connecticut. After her husband had gained custody of one of the children, she was asked to consider a property settlement that would not have been in her interest. She called upon a social acquaintance, a California lawyer, Spivak, and asked him to come to New York to advise her. Significantly, he told her that he was not a member of the New York bar, and that the most he could do was to advise her and recommend other New York lawyers. Spivak spent 14 days in New York reviewing the case, drafts of settlement agreements proposed by her Connecticut lawyer, discussing various financial arrangements, and jurisdictional and custody questions.



She subsequently refused to pay his bill. When he sued, New York's highest court denied him relief on the grounds that his activities in New York constituted the unauthorized practice of law.

The second, and more recent case, is *Birbrower, Montalbano, Condon & Frank, P.C. vs. The Superior Court of Santa Clara County*, 17 Cal. 4th 119; 949 P. 2d 1; 1998 Cal. Lexis 2; 70 Cal. Rep. 2d 304 (Cal. 01/05/98) (NO. S057125). In that case, the California courts determined that the New York law firm could not recover its fee for giving advice on a contract dispute governed by California law to a California resident client, ESQ. The Birbrower firm had represented the ESQ.-NY, and its sole shareholder, Sandhu, since 1986. In 1990, they had reviewed the proposed software development and marketing agreement between ESQ.-NY and Tandem which had worldwide distribution rights for ESQ.'s software. Thereafter, a second corporation ESQ.-CAL was incorporated in California, run by another member of the Sandhu family. In 1991, ESQ.-CAL consulted Birbrower lawyers concerning Tandem's performance under the agreement, and in 1992, retained them to represent them in the dispute.

The client and the Birbrower attorney

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## Lurking Perils

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negotiated and executed a fee agreement in New York for the representation of the California corporation, ESQ.-CAL in the dispute with Tandem.

The New York lawyers traveled to California met with the ESQ. in California, made recommendations there and met with the ESQ Tandem. The New York lawyers then requested arbitration in California, and while interviewing possible arbitrators in California, meet with Tandem to discuss settlement. They gave ESQ advice during this trip regarding the proposed settlement. Ultimately the matter was settled prior to arbitration. The court found that the above-described actions constituted the practice of law in California, without a finding of inadequately performed work. The Court distinguished practice in several other areas that are exempted from the California statute on unauthorized practice of law.

Why do these results present problems for both the lawyer and the client? Obviously, the lawyer did not receive a fee for the work. While the particular clients in these decisions triumphed, the end result may have a detrimental impact on future clients. These decisions enforce the traditional concepts of the practice of law that are tied to the licensing powers in the jurisdiction. These powers rest partly on the premise that the attorney licensure restrictions create a pool of attorneys familiar with state law, procedures and ethics rules, and most importantly, attorneys who are subject to the disciplinary authority of the state's attorney regulatory agency.

Others argue that these decisions exercise a chilling effect on lawyers considering whether to represent their clients outside of the narrow confines of work done in the particular state. The attorney's willingness to consult with in-state clients about multi-jurisdictional matters ultimately creates a financial burden for clients forced to employ dual representation. Unarguably, these decisions provide a strong tool for a client to use to prevent payment, and they raise the specter of disciplinary enforcement and possible sanctions. Despite the fact that some states make certain distinctions as those recognized in *Birbrower* as to in-house lawyers or as to practicing before federal courts, some still do not.

These issues are the focus of a newly-appointed ABA Commission on Multijurisdictional Practice that is holding a series of public hearings throughout the country in preparation for submitting a report to the ABA House of Delegates at its 2002 Annual Meeting. Developments in this area can be tracked at www.abanet.org/cpr/mjp-home.html This national debate, irregardless of the respective characteristics of our current client base, bears watching for the future of the profession.
*Caveat Advocatus!*

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# Update on the Ethics 2000 Project

**by Lorrie A. Vick**

In Spring, 1997 the ABA established the Ethics 2000 Commission ("Commission") to undertake an overall review of the ABA Model Rules of Professional Conduct in place since 1983. After extensive research, drafting and public hearings, the Commission circulated proposed changes to certain of the Model Rules. Last fall, the Standing Committee formed a Sub Committee to evaluate and comment on the recommended changes to the Model Rules as proposed by the Commission.

The members of the Sub Committee were R. Bertram Greener, Fredrikson & Byron; Pamela Bresnahan, Vorys, Sater, Seymour & Pease; Meredith Stoma, Morgan, Melhuish, Monaghan, Arbutyn; Christopher B. Little, Montgomery, Little & McGrew; Dulaney L. O'Roark, Jr. Past Executive Vice-President of Lawyers Mutual Insurance of Kentucky; Patrick Voke, Adler, Pollock, Sheehan PC; G. Michael Bourgeois, Chairman of the Standing Committee on Lawyers' Professional Liability; John Beard, President of Lawyers Mutual Liability Insurance Company of North Carolina; Richard Hoffman, Lillick & Charles; Robert Fiebach, Cozen & O'Connor; and Patrick W. Kennison and Kevin Hartzell with Kutak, Rock.

The Sub Committee members reviewed the proposed changes to determine whether they significantly increased the lawyer's exposure to professional liability claims. The Standing Committee submission to the Ethics 2000 Commission focused on changes impacting Model Rules 5.1, 5.2, 5.3, 1.18, 4.4, 1.5 and 1.15 that treat relationships with prospective clients, client fee agreements, and settlement of attorney fees. A copy of the Committee's submission is available by contacting staff noted in this newsletter's editorial box.

A complete set of the Commission's proposed changes to the Model Rules of Professional Conduct is available by accessing the Commision's website at www.abanet.org/cpr/ethics2K.htm. It is expected that the proposed changes will be submitted to the ABA House of Delegates in August 2001 for consideration.

For more information on the impact of proposed changes on the practice of law, please see the Spring 2001 National Legal Malpractice Conference Proceedings, "Changes in the Model Rules and Promulgation of the *Restatement Third, The Law Governing Lawyers*: How They Affect the Standard of Care.

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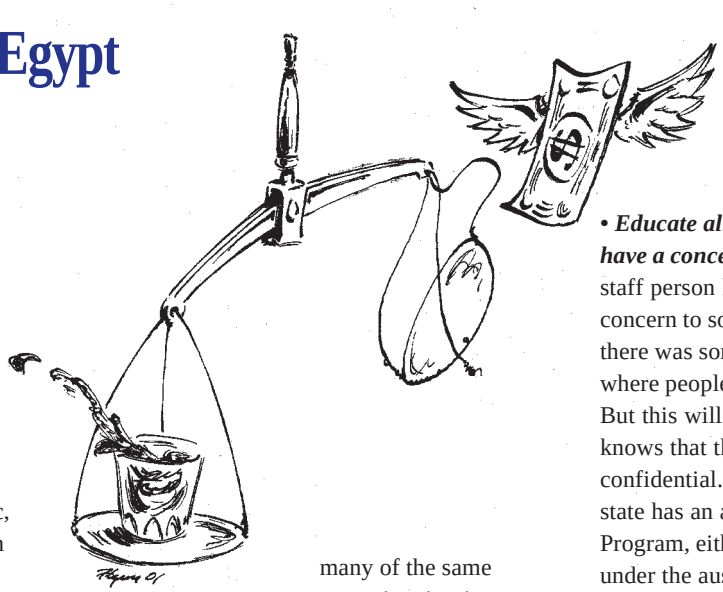
# Denial Is a River in Egypt

**by Briggs F. Cheney**



"Denial is a river in Egypt" doesn't make any sense, but then again, how law firms address alcoholism and substance abuse within their firms often does not make much sense either.

If you have suffered from alcoholism or substance abuse and spent time in recovery, you're familiar with the phrase "DENIAL is not a river in Egypt." It's a cute phrase and for this recovering alcoholic, the first time I heard it, I laughed along with everyone else. But, as the years have gone by, the significance of denial in the disease process has become no laughing matter. But denial is not limited just to the suffering alcoholic or addict; it impacts the family and friends of the addict—and with the suffering lawyer—his or her law firm.

I kid folks from outside New Mexico's "Land of Enchantment," as we call it here, by saying, "we're still waiting for *Gone With the Wind* to come to our local movie house." While generally said tongue-in-cheek, for purposes of these comments, it probably has far greater meaning. This is *down and dirty*—let's talk money. In New Mexico, when it comes to dollars and cents, we are waiting for *Gone With the Wind* to make it to the Land of Enchantment. The bottom line of the money invested in training and compensating a lawyer in New Mexico is probably tripled and quadrupled in major metropolitan areas. The point being—to have a suffering lawyer suffer very long—converts in law firm talk to money. A suffering lawyer who puts the firm at risk with clients, both from a business standpoint and from a potential legal malpractice claim perspective, means money. But that is exactly what law firms do, in the name of denial, they throw money away and, more importantly, place their firm's clients at risk.

How does this happen? How can denial have this grip on the law firm too? This phenomenon probably exists in a firm for many of the same reasons it exists in a family that enables a suffering alcoholic or addict. For the family it is love; they don't want to think their family member suffers from this disease. For the law firm, it is friendship, collegiality, and loyalty. And if it is not in the name of friendship in the law firm setting, often it is due to ignorance. Ignorance of the disease or of what to do in the face of the disease can be an insidious crippler. Raise your hand! - "do you want to rat on your fellow lawyer," "do you want to be responsible for someone losing their job when that lawyer's child just started college," and "are you even sure if your law firm pal is really an alcoholic or addict." If you are being honest, and letting DENIAL do its thing, you raised your hand.

Every law firm should have a plan of action in place and following are key components that should be every plan:

- ***Mandate an Annual Law Firm Awareness Programs*** - On an annual basis, require all firm employees to attend a program on alcoholism and substance abuse. This can be conducted at a firm lunch or at the end of a day or as part of an annual CLE of the firm. I strongly recommend a video vignette produced by the State Bar of Pennsylvania' Lawyers Concerned for Lawyers Committee entitled *No Immunity*. (800/335-2572 or lclpa@epix.net)

- ***Educate all staff on what to do if they have a concern*** - The concerned lawyer or staff person has to be able to express that concern to someone. It would be great if there was someone within every firm where people could go with concerns. But this will only work if the employee knows that the concern will be kept confidential. Beyond the firm, every state has an active Lawyer's Assistance Program, either voluntary or organized under the auspices of the State Bar. There is generally a confidential hot line where a concerned employee can call.

- ***Develop a program to assist the suffering lawyer or staff member*** - All of this works only if the firm recognizes that alcoholism and substance abuse are diseases of addiction which can be treated. If the law firm employee believes that raising concern will put someone's employment at risk, denial will continue to live and breathe in your law firm. The ABA's Commission on Lawyer Assistance Programs (COLAP) has developed a Model Program that is a starting point. (800/238-2667 ext. 5359 or www:abanet.org/Code of Professional Responsibility/colap/home.html).

Viewing this just from the standpoint of money—putting a pencil to the investment you have made in your professionals—you cannot ignore the bottom line. Even more importantly, your firm's ability to successfully address firm members suffering from this disease of addiction helps build a law firm culture that is both compassionate and forthright for all of its members.

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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.

# Message From the Chair

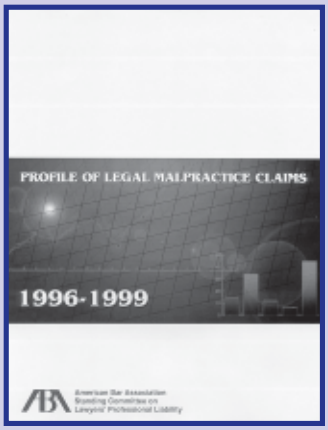
Welcome to the Spring 2001 National Lawyer Malpractice Conference. I know that you will enjoy the program. Having been honored to serve on the Committee for six years, and having been humbled by the opportunity to chair it for the past year, I am now constrained by term limits rules from further pontificating and this is my last program as your chair.

This has been an exciting year for the Committee. Thanks to the most generous efforts of Joe McMonigle, the former chair, the Data Collection Study is completed. The lingua franca of the malpractice world is its claims history and development. Looked at from the perspective of the last 17 years, I am pleased to say that lawyers today are more careful and more observant of the loss prevention techniques than they were when I first ventured into this wonderful playground.

Kristine M. Boylan, a young Minneapolis lawyer, is the winner of the 2001 Levit Essay Competition. She is an associate at Lockridge Grindal Nauen P.L.L.P. She joins us for the conference where she will be appropriately honored. Her winning essay addressed the fascinating question of whether the inadvertent disclosure of confidential information via e-mail constitutes a breach of the standard of care as a matter of law. Kristine's essay stood out above the competition.

I offer the following observations upon my departure from formal participation in the Committee. For those lawyers who support the Committee by regular attendance, consider volunteering for participation in programs. For those lawyers who support the Committee by participation in programs, consider volunteering for the Committee. I need offer no observations to those who serve on the Committee; they know that the reward of service is an unsurpassed honor.

*—G. Michael Bourgeois*




## New release…
## *Profile of Legal Malpractice Claims 1996-1999*

The newest study of national legal malpractice claims conducted by the ABA Standing Committee on Lawyers' Professional Liability is now available. The publication includes more than 30 charts and figures comparing the current data to the two previous studies. Order by calling ABA Order Fulfillment (800) 285-2221, mention PC#4140037, charge is $40.00 (plus S&H).

A Special Note to Associates of the National Legal Malpractice Data Center.
Your complimentary copy of this publication is in the mail, expect delivery by late-April.

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