lplAdvisory

Volume 8 Number 1 • Spring 2004

It's What They Don't Know That Can Hurt Them

by Glenn Fischer, Assistant Staff Counsel
ABA Standing Committee on Lawyers' Professional Liability

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

Mark Your Calendar

September 8-10, 2004
Fall 2004 National Legal Malpractice Conference
Palace Hotel
San Francisco, CA

April 20-22, 2005
Spring 2005 National Legal Malpractice Conference
Fairmont Copley Plaza
Boston, MA

www.abalegalservices.org/lpl

Defending Liberty
Pursuing Justice

Lawyers routinely advise their clients to obtain insurance of all kinds. It is advice that lawyers give naturally and liberally, because we learn early on that insurance is an integral part of protecting things of value: lives, homes, businesses, automobiles, art, jewelry, and any number of things in which we invest. Of course, the practice of law is rife with risk and smart, responsible lawyers heed their own advice.

The purchase of consistent and sufficient lawyers' professional liability insurance is, undeniably, a sound business practice. But, shall we shift the focus of liability coverage to clients rather than the lawyers who purchase it? The ABA Standing Committee on Client Protection has offered a model rule mandating disclosure of coverage that seems to offer such a solution. It plans to submit its proposal to the ABA House of Delegates at the 2004 Annual Meeting in Atlanta.

The proposed rule is designed to "facilitate the client's ability to determine whether a lawyer is insured." The purpose of the rule "is to provide a potential client with access to relevant information related to a lawyer's representation in order to make an informed decision about whether to hire a particular lawyer." Citing examples of such rules in Michigan, Nebraska, North Carolina, and Virginia, the Client Protection Committee wants lawyers to disclose their insured status at the time of bar registration, on their registration form. Additionally, the rule requires a supplemental disclosure to the jurisdiction's highest court if a lawyer's insurance policy lapses.

Mandatory disclosure rules like these sound really good at first. They sound so good that those who think they could present a problem seem like they have something to hide, or do not have their clients' best

interests at heart. But, disclosures without effective means of public education are of little substance when it comes to the type of client protection the proposed rule seems to want to provide.

Neither insurance nor disclosure of insurance coverage alone is effective client protection. The reason is simple and fundamental: insurance is *not* designed to protect clients, it is designed to protect the people who purchase it. Trying to package and sell insurance coverage as client protection can be perilous for lawyers, clients, and insurers alike, because it leads to an atmosphere of misinformation and misunderstanding.

This is because no disclosure rule in existence addresses the vital but too-often overlooked point; that lawyers' liability insurance is fundamentally different than the types that dominate the personal lines insurance market and that are familiar to

(continued on page 2)

It's What They Don't Know

(continued from page 1)

most non-lawyers. Most consumers of legal services likely presume that insurance coverage for lawyers works in the same way as insurance coverage for other types of everyday risks. But it doesn't, and this will not change. Who will take responsibility for explaining the differences between claims-made and occurrence-based policy forms? In what context, if any, will this discussion occur? It is a fair bet that most clients have never heard of claims-made coverage and do not understand how it works.

We must ask in earnest, how do disclosure rules provide useful information to clients? In its current state, the model rule proposed by the Client Protection Committee provides, "[t]he information submitted pursuant to this Rule will be made available to the public by such means as may be designated by the [highest court of the jurisdiction]." Some jurisdictions, like Virginia, allow the public to call the bar association to determine whether a lawyer disclosed coverage. But such a system lacks any real educational benefit. Even if people become aware they can inquire about insurance, all they learn is that a lawyer might have coverage now, or had coverage in place at the time of bar registration. It is unlikely that they will continue to inquire on a regular basis (if ever again) to determine whether the coverage they learned about when they first hired the lawyer is indeed still there.

Because of the nature of claims-made coverage, by the time aggrieved clients discover that professional negligence and damage occurred, the coverage they were told about when they first hired the lawyer may be long gone. Lawyer's E&O policies have, typically, only a one-year term. This leaves considerable uncertainty about whether claims could be covered by a currently existing policy (provided the lawyer consistently purchased continuing coverage from year to year); or, whether claims could be excluded (depending on whether subsequently purchased policies include prior acts coverage); or whether claims are completely uncovered (if the lawyer let coverage lapse altogether).

Even disclosure rules that require a lawyer to notify clients about coverage lapses have problems. Although they eliminate the need to consistently check if a lawyer has renewed coverage, if a client discovers coverage is no longer in place, do we expect that clients will gladly switch lawyers midstream? Do we want clients to infer that they *should* switch lawyers, when there may be absolutely no reason to? If the point of a disclosure rule is to protect clients at the time they make the decision to hire a lawyer, what happens afterwards?

Disclosure rules only advise potential clients that a lawyer has purchased an insurance policy. They say nothing about having insurance *coverage*, or sufficient coverage based upon the number, nature and size of claims, and the type of alleged malfeasance. The client who learns that a lawyer may have purchased a certain minimum amount of coverage knows little about the size and types of claims covered (or excluded) by the policy. Intentional acts of malpractice like dishonesty and fraud, for example (i.e. the types of claims client protection funds typically address), are generally *not* covered by professional liability insurance. And, although some disclosure rules attempt to capture a notion of "adequate financial responsibility," they cannot ensure that there will be sufficient coverage available to make a client whole even if a claim is covered. Claims come in just too many different shapes and sizes, and lawyers' policies often include defense costs within the limits of coverage.

Insurance is not, and never will be, equivalent to client protection and perhaps we should stop trying to make it so. There is a fundamental flaw in trying to sell slices of bread as sandwiches, and, in a way, disclosure rules send a message that could be interpreted as the "doubletalk" for which lawyers have earned an undeserved reputation. The relatively unique nature of lawyers professional liability insurance makes for unique opportunities for miscommunication between parties who mistakenly presume that each understands what the other is talking about. Inevitably, when clients' expectations are not met, they will be left dissatisfied, lawyers' reputations will be tarnished, and there will be yet another obstacle to renewing faith in the legal profession—one of our own making.

Are You a Member of the National Legal Malpractice Data Center?

The National Legal Malpractice Center provides lawyers, insurers, and risk management professionals with the tools and information necessary to help eliminate both the incidence and impact of professional liability claims in the legal profession. It concentrates its efforts toward research, data collection, outreach, and dissemination of information. The primary vehicle used to communicate the results of these efforts is the publication of statistical analyses like the most recent *Profile of Legal Malpractice Claims 1996-1999*, a unique source of statistical data and analysis helpful to successful risk and claims management. The Standing Committee is beginning work on updating the *Profile* study for 2000-2003, a project made possible through the financial and logistical support NLMDC memberships provide.

Watch your mail for additional information on becoming a member of the NLMDC, or renewing your existing membership. Also, consider subscribing to eMemberships for those in your firm who do not take advantage of the conference attendance savings that a typical Individual, Site or Institutional Membership provides. eMembership is a great way to stay connected and stay involved. Get more information on the Web by visiting www.abalegalservices.org/lpl/associatesubscription.html

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.

Supervising New Hires for Risk Management

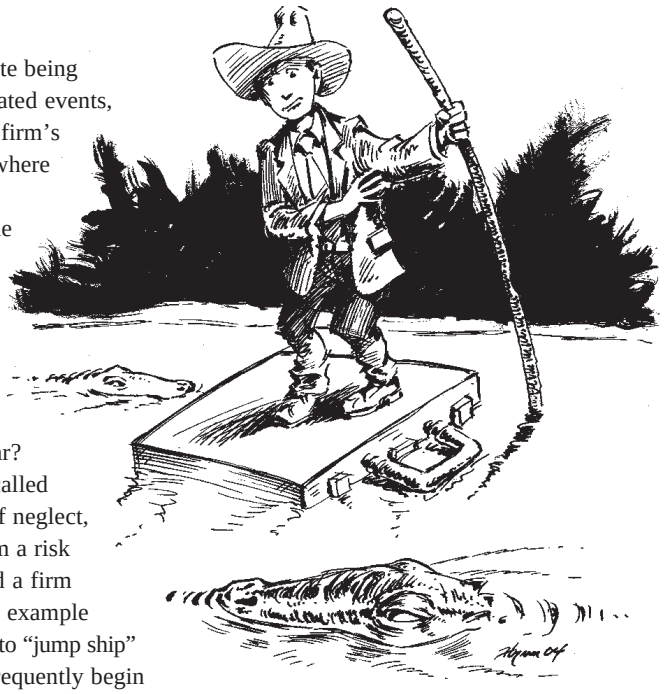
by Terri Olson

In many firms, few risk management resources exist for newer attorneys. Even in larger firms, sink or swim is still frequently the rule. But the single most effective thing that the supervising attorney can do to ensure that new hires don't run a risk for malpractice claims and Bar complaints is to see to it that there is a general orientation program in place. Habits—good or bad—will be made in the first few weeks and months the new attorney is on board. One must ask, "what programs are in place to introduce the new hire to the way things are done around here (which hopefully are good)?"

Remember your first weeks at a new law firm? The last thing you wanted to do was reveal ignorance. What you must offer to the new hire, through orientation and beyond, are practical up-front discussions of the nuts-and-bolts aspects of firm life so the associate is not forced to ask questions at a time when he or she may be reluctant to appear less than omniscient. Ideally, an orientation program should cover all routine administrative procedures the attorney may participate in: opening and closing files, requesting checks, scheduling appointments, handling client money and the like. If the firm has a policies and procedures manual, it should be given to the new hire and reviewed in detail. Orientation should be provided by the staff responsible for that area: financial orientation by the bookkeeping staff; filing procedures by the file room staff, and so on. Doing so prevents old mistakes from being handed down to new employees.

It's especially important that new hires be trained in basic file opening and closing procedures, even if attorneys don't open their own files. Many new associates don't have the exclusive support of a secretary; they may rely on several secretaries or file clerks to help them as time permits, and while one secretary may open the file correctly, another may not. Reviewing the firm's policies for file opening with the attorney at the onset of employment acts as an additional check on the administrative staff.

Whether a formal orientation program exists or not, the following is a checklist of some practical risk-management assistance that can be given to a new hire by his or her supervising attorney:



✓ Ensure that the associate being supervised puts all case-related events, to-do's, notes, etc. into the firm's case management system, where applicable. At least once a month, grab a handful of the associate's active files and begin checking. If there's a request for production in the file, is the deadline for this in the system? If there's an upcoming hearing, is it on the calendar? Very rarely are associates called on the carpet for this sort of neglect, yet it is important both from a risk management standpoint and a firm governance standpoint. For example associates who are planning to "jump ship" and take cases with them frequently begin setting cases up outside of the firm's existing systems. If the firm doesn't yet use computerized case management, ensure that, at a minimum, critical dates are put into the central docket system.

✓ Make sure associates are well grounded in the firm's financial policies by walking through proper procedure with them. Just because they don't set policy or participate in profit divisions doesn't mean they don't have to deal with firm money, and they frequently do so quite badly. Do your new hires know how your petty cash is used? Do they know whether it's ever permissible to put client expenses on a personal credit card? Do they know how to identify funds that are to be placed in trust? The first time you have an associate accept an expense advance from a client and direct the bookkeeper to deposit it in the wrong account, you will understand exactly the sort of misery that can be created by the financially uninformed lawyer.

✓ Do a spot check of the attorney's desk from time to time for file pile-up. This is difficult because it's highly subjective—how many files are too many, indicating over-work, poor organization, inability to keep up with deadlines, etc.? It's hard to say, and your own tolerance for clutter will be factored into your impressions. If you're the kind of lawyer who values a spotless desk, even a modest stack of file folders on someone else's desk may make you twitchy. But remember that it's not your job to make an attorney neat and tidy; just make sure that they don't lose track of files or the work that needs to be done on them. Focus on the practical and objective: have these files been properly checked out? Can other people in the firm who might need to consult the file find it here? How many of these files do you think you'll be able to work on this week? Phrased properly, these inquiries can be seen as an effort to make sure the new associate is not overburdened or lacking secretarial support.

Speaking of secretarial support, "file pile" can be an excellent warning sign of associates who are not working well as part of a team. Ideally (and assuming your firm has secretaries, paralegals, investigators, or the like) the attorney is the file's conductor—determining its path and setting the pace—but not its sole possessor. If files never leave the

(continued on page 4)

Message From the Chair

You may have noticed that the LPL Advisory is printed and distributed in conjunction with the two National Legal Malpractice Conferences the Committee produces each year. We think the Conferences and the Advisory are a great way to keep our colleagues aware of what's going on in the field. But, the LPL Committee is always looking for new ways to both expand our reach and connect more people and organizations to the important work relevant to helping lawyers manage risk, avoid loss and deal with claims. The power of the Web helps to make this task much easier.

The Committee maintains two websites, each containing valuable resources. The first site, of course, consists of the Standing Committee's public pages.

The second site houses the recently launched Members Only pages for Associates of the National Legal Malpractice Data Center (NLMDC). If you attended the last Conference in LaJolla, you had an opportunity to sample the pages, which integrate sources such as: up to date legal news (courtesy of Lawyers Weekly Publications); a searchable member directory; links to state law research materials (generously provided by LexisNexis); and past conference materials (including audio of popular conference sessions you can listen to at your desk). The Members Only site is also the home of the LPL eAdvisory, the NLMDC's electronic newsletter. If you're an Associate (Individual, Site or Institutional) of the NLMDC, you'll continue to have free access to the Member's Only pages (in addition to your free Conference attendance benefit) as part of your yearly membership. Those who are not Associate Members, but are enjoying the free inaugural year of access (until August 31, 2004) can become eMembers and continue to access the site and the eAdvisory for $25. It's a great resource for less than the cost of a magazine subscription. I encourage you to take a look at both sites and see how they can help enhance your practice. In fact, there will be a kiosk set up at the Registration Desk at the Miami Conference if you'd like to take a "test drive." Of course, if you have questions about these or any other Committee offerings, don't hesitate to ask the LPL Committee staff. Enjoy the Miami sun and surf!

Supervising New Hires

(continued from page 3)

attorney's desk, it may very well be that your associate does not make good use of the firm's support staff. If the associate responds to all suggestions that Janine, Carole or Carlos can handle this with "I really need to see to this myself"—nip that in the bud! Lawyers who refuse to delegate are a missed deadline waiting to happen.

✓ From time to time, throw out some hypotheticals to your associate that involve administrative or financial issues. Is it OK for your paralegal to take files home to work on them there? What do you do if the client gives you cash? What's the best procedure if you run into someone in the court hallway who wants to set up a meeting? Even if your firm has a good, solid orientation program, it is always helpful to take firm policies out of the realm of the abstract by providing "what if" scenarios to the associate.

Terri Olson is the president of Olson Legal Consulting, a Tallahassee-based firm providing management and technology assistance to the legal profession. She can be contacted at 850-445-8669 or at olsonlegal@comcast.net.

lpl Advisory
Standing Committee on
Lawyers' Professional Liability
American Bar Association
321 North Clark St.
Chicago, IL 60610

Non-Profit
Organization
U. S. Postage
PAID
American Bar
Association