

Up Advisory

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

Mark Your Calendar

September 22-24, 1999

Fall National Legal
Malpractice Conference
Argent Hotel
San Francisco, CA

March 8-10, 2000

Trying a Legal
Malpractice Action
ABA Standing Committee
on Lawyers Professional
Liability and the Defense
Research Institute
Fairmont Hotel
New Orleans, LA

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

PUNITIVE PERILS What makes juries mad today?

By George M. Kryder

Alarms scream wildly when two of the ten largest jury verdicts in 1998 involved legal malpractice claims with huge punitive damages awards. And according to *The National Law Journal's* February 22, 1999 survey, juries punished lawyers with large verdicts in at least three other major cases last year.

Lawyer bashing has been popular at least since Shakespeare urged "let's kill all the lawyers." But what makes juries mad *today*? And since punitive damages claims ordinarily are not covered by attorneys' professional liability insurance policies, what can lawyers do to avoid the perils of punitive damages?

A look at the continuum of recent cases suggests the cognitive map juries follow in judging—and sometimes punishing—the accused lawyer. Juries seldom punish simple errors. Ignorance starts to get their attention; but when the conduct includes real or perceived conflicts, tempers start to boil. When those conflicts involve self interest or greed, the mixture becomes volatile with punitive damages increasingly likely.

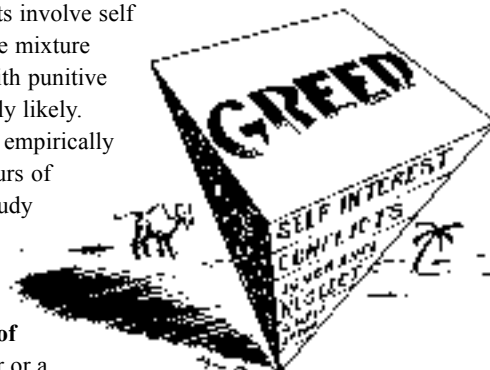
A recent survey empirically identifies the contours of the problem. The study finds that "there appears to be an **increase in claims alleging a conflict of interest** by a lawyer or a firm at the time of representation. Many of these claims involve complex relationships over an extended period, and

the **lack of clarity concerning just who is a lawyer's client and the actual scope of the engagement**. In other cases the alleged conflict is strained or far-fetched, but becomes a jury issue nonetheless. Law firms and insurers should focus greater loss prevention efforts in this area, as such claims can be very hard to defend before a jury." ABA-NABRICO National Legal Malpractice Data Study (1996), at 15. (emphasis added). In short, what you don't find out and get straight—up front, *today* at the inception of the engagement—could get you sued tomorrow.

"What do you mean you weren't my lawyer?"

The allegations against the lawyers in last year's largest—\$1.2 billion—verdict illustrate the dangers of alleged undisclosed conflicts and uncertainty about who is—and is not—the client. In *Sverdlin v. Automated Marine Propulsion Systems, Inc.*, (215th Judicial District Court, Harris County, Texas), an inventor, Sverdlin, and his company, AMPS, assigned certain process patent rights and transferred or pledged stock and voting rights to a group of investors who raised money to market the technology.

(continued on page 2)



Lawyers Professional Liability Insurance

The following article is excerpted from a larger piece, "The Hard Market: Will It Return," which appeared in the Fall 1998 Quality Assurance Review, produced by the Aon Risk Services Professional Services Group. This excerpt is reprinted here with the permission of AON and the article's author, Richard B. Hall, Senior Vice President, AON Risk Services.

Certain segments of any financial market will experience specific disruptions that will cause them to act differently from the market as a whole. During the late 1980's and early 1990's, the savings and loan (S&L) crisis had a significant adverse impact on the lawyers professional liability sector of the insurance market. The soft market that began during the late 1980's for most insurance buyers did not arrive until 1993-94 for large law firms. During the successive five-year period, commercial professional liability premium rates have been reduced by 40% to 60% for most major law firms.

The hard versus soft market discussion from the previous section must be tempered somewhat when reviewing professional liability insurance. As mentioned above, the previous hard market for lawyers was longer than that of the general insurance market because of S&L losses experienced by large law firms. Additionally, when the market began to harden there was only a handful of insurers heavily involved in writing this line of business. As losses and premium rates increased during the late 1980's and early 1990's, there was very limited commercial

market competition to help mitigate increases.

The underlying reasons for the current five-year soft market for lawyers professional liability, and the prospects for its continuation, are similar to those for the general insurance market. The number of insurers offering this coverage has more than trebled during the 1990's. The amount of capacity has more than quadrupled during that period. Additionally, the insurers who have entered the lawyers professional liability market in recent years are primarily large multi-line insurance companies that have done so to balance their underwrit-



ing portfolios. This reasoning allows for short-term adverse swings from market segments to be offset by positive results from other segments. The long-term effect of these additional insurers will be maintenance of a stable competitive environment.

In addition to the commercial insurance market, there are a number of alternative

insurance vehicles that have evolved since the mid-1980's that also underwrite lawyers professional liability insurance. The largest of these facilities is ALAS, which insures almost half of the large law firms in the United States. ALAS was launched in the late 1970s by several dozen firms, but grew to a peak size of 374 firms, providing an excellent buffer against the hard commercial insurance market in the late 1980's and early 1990's. Other vehicles, such as Managing Partners Council (MPC), a group of large California-based law firms, and Attorney's Insurance Mutual (AIM), a group of mid-sized California-based law firms, have provided a similar service. Such alternative insurance vehicles can always be expected to provide needed capacity in the event of a dramatic change in the commercial insurance environment.

In summary, a crisis that generates losses on a scale similar to those of the S&L debacle would almost certainly have an adverse impact on insurance rates for lawyers in both the commercial market and the alternative insurance market (although most likely with less impact because of increased competition). Without such an occurrence, there is little reason to anticipate premium increases or coverage contractions from the commercial market in the foreseeable future.

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PUNITIVE PERILS

(continued from page 1)

The parties had a falling out, fired Sverdlin, and litigation erupted over who should control the company and its patents. Sverdlin sued the investors for a variety of allegedly wrongful conduct and joined legal malpractice claims against the firm he had engaged to document the underlying transaction. Among other allegations, Sverdlin accused the attorneys of having undisclosed conflicts of interest, failing to protect his interests, and of not specifically disclaiming an attorney-client relationship. The attorneys argued that they had represented AMPS—not Sverdlin, individually—and noted that their engagement letter specifically urged Sverdlin and

two other individuals to "consult your own lawyers." Sverdlin claimed that he never received the letter, which in any event, he claimed inadequately dealt with conflicts and non-representation. A Houston jury returned a \$1.2 billion verdict against the defendants of which they assessed \$59.5 million against the attorneys. The jury allocated \$8.5 million in actual damages and \$25.5 million punitive damages to the law firm and \$8.5 million actual damages and \$17 million punitive damages against the individual attorney. The attorneys reportedly settled the claim thereafter.

"You should have gotten me more."

A San Diego, California jury made another eye-popping award last November against an

attorney who allegedly failed to opt his client out of a class action, thereby supposedly barring his recovery in separate proceedings. In *Piscitelli v. Friedenber*, (Superior Court, San Diego County, California), the jury returned a verdict awarding nearly \$2.5 million actual damages and over \$221 million in punitive damages which the jury reportedly concluded plaintiff would have received had his claims not been barred by the attorney's alleged conduct. See *Margaret Cronin Fisk*, "Verdicts Are Very High But Also Very Volatile," *The National Law Journal*, February 22, 1999, at C3, C5. The Court reportedly rejected the punitive award as "the result of prejudice and passion." *Id.* Similarly in another case, the jury awarded

(continued on page 3)

Excess Professional Liability Insurance in Canada: What a Difference a Decade Made

By Susan Forbes

In the mid 1980's, Canadian law firms were experiencing difficulties in finding sufficient and affordable excess professional liability insurance, much like their counterparts south of the border. All Canadian lawyers in private practice were required to purchase compulsory primary professional liability through their provincial Law Societies, but limits were quite low - \$200,000 to \$500,000 per claim - and excess cover was a major concern for many firms. At that time there was only one commercial insurer willing to underwrite the first excess layer and not surprisingly, premiums were steep and surcharges were common. Capacity was limited and many large Canadian law firms instructed their brokers to "place as much as you can get". Total capacity often topped out at \$35 million to \$40 million, insufficient coverage for many firms' major exposures. In response to these problems, two developments occurred:

First, the Canadian Bar Insurance Association formed a reciprocal insurance exchange, The Canadian Lawyers Insurance Association ("CLIA"), to self insure the professional liability risk of Canadian lawyers. CLIA offers two distinct programs, the first being the compulsory coverage (\$1 million per claim and \$2 million in annual aggregate) for lawyers in Alberta, Saskatchewan, Manitoba, the Maritime

provinces and the Yukon and Northwest Territories. CLIA's second program provides first layer excess coverage for Canadian law firms through its subscriber Law Societies and through the Canadian Bar Excess Liability Association ("CBELA") in British Columbia, Ontario and Newfoundland. The excess program in these latter provinces is distributed through a strategic alliance with major brokers and offers limits ranging from \$1 million to \$4 million excess of the underlying compulsory limit. This layer is no longer required in Quebec where the compulsory limits were increased to \$5 million in 1998.

The second development was the formation of another reciprocal insurance exchange, the Canadian Lawyers Liability Assurance Society ("CLLAS"). Similar to ALAS in the U.S., CLLAS was formed by 12 major law firms centered in Ontario whose partners perceived the need to maintain higher limits than the market could provide. Now with 13 member firms, CLLAS members are able to arrange significant limits at reasonable cost.

In stark contrast to the 1980's, Canadian law firms now enjoy substantial capacity and very competitive pricing above the CBELA



sponsored program. Zurich, Reliance, Liberty Mutual, Chubb and London Guarantee all participate in the higher layers up to \$100 million.

The "insurance crisis" of the 1980's is now long past and the harsh realities experienced by law firms attempting to purchase excess professional liability insurance at that time have faded in most memories. There seems little to worry about the near future for Canadian law firms as industry experts predict continued competitive pricing and substantial capacity in the foreseeable future.

Susan Forbes is the Director of Insurance for the Lawyers Insurance Fund of The Law Society of British Columbia.

PUNITIVE PERILS

(continued from page 2)

punitive damages against an attorney who allegedly overlooked a husband's assets and failed to secure a larger divorce settlement.

"You paid yourself, not me."

In *Streber v. Hunter*, (U.S. District Court,

W.D. Tex), an Austin, Texas jury last year awarded two sisters over \$2 million actual and levied approximately \$16.4 million in punitive damages against attorneys who allegedly advised plaintiffs that they owed no taxes. After years of battling the IRS, the plaintiffs had each paid the IRS over \$1.6 million, while paying their attorneys over \$300,000 to defend them. The Court reportedly reduced the award to \$3.3

million, and defendants have appealed.

Other recent verdicts have included punitive awards based on allegations of over billing, abandonment, self interest, and greed.

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Message From the Chair

I hope that you are able to attend our Spring Conference in New Orleans. Our Committee has accomplished more this year than in any other year. The work of this Committee is amazing considering that there are only eight of us. The reason that we are able to complete so many of our goals is because we partner with many of you that assist the Committee.



This past year we published our first insurance coverage guide "*selecting legal malpractice insurance - 1999*" which received tremendous exposure within the legal profession. The California lawyers know it was reproduced in our monthly magazine that

all 150,000 lawyers in the state receive. More importantly, we now are in a position to publish this helpful guide every year.

As many of you know we are in the final stages of publishing a new edition of the Committee's 1993 *Lawyer's Desk Guide to Preventing Legal Malpractice*. Many of you have contributed articles to this work and we look forward to a fall publication of this book.

At our Spring 1999 meeting we will present the Committee's annual Levit Writing Award on the subject of "Legal Malpractice and Breach of Fiduciary Duty: Same Tort, Different Flavors?". We are pleased to announce that Jendi Reiter, law clerk to Justice Rosenberger, in New York will be



awarded the \$5,000 prize and a trip to our Spring 1999 Conference. Please welcome her to our conference and congratulate her on an outstanding article. When you return from New Orleans make it a point to encourage a new lawyer in your midst to submit an article next year.

Finally, we will begin the data collection project this fall and you will receive on a regular basis legal malpractice claims statistics for your use in designing loss prevention efforts to prevent legal malpractice. Hopefully, this long awaited project will assist the legal profession in raising the quality of legal services that we provide to the public.

Stop me in the hall, tell me what you think, and join us in the good work of the Committee.

—Joseph P. McMonigle

Change is Good!

Look for a mailing in **June** on the new - improved Associate program for the National Legal Malpractice Data Center.

—Announcing—

New edition of *Lawyer's Desk Guide to Preventing Legal Malpractice* to be released soon. Look for a notice in the mail.

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