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Risk Management for Lawyers

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RISK MANAGEMENT FOR LAWYERS

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DULANEY O'ROARK**

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I. INTRODUCTION

Lawyers are under siege. We have become objects of scorn, ridicule, and occasional hatred. If you take your child to the Stephen Spielberg movie *Jurassic Park*,¹ be prepared for the cheers when the cloned Tyrannosaurus Rex gobbles the lawyer — not a bad guy at all — cowering in the outhouse.² In San Francisco a client burst into a California law firm and killed eight and wounded six persons before taking his own life.³ In response, the president of the California bar linked lawyer-bashing to hate crimes and prevailed on the Miller Brewing Company to withdraw a television commercial depicting a “lawyer-roping rodeo” in which a cowboy ropes an overweight tax lawyer playing the role of a calf — to the cheers of the Miller Lite crowd.⁴ Bizarre lawyer behavior, such as microwaving cats,⁵ adds to the problem, as does the perception that lawyers are drawn like vultures to the sites of mass disasters⁶ and are responsible for baseless law suits that drive up insurance costs.⁷

In such a climate, lawyers should recognize that every client is a potential adversary and manage the risk by practicing defensive law. This risk management does not mean that lawyers should put their own interests ahead of their client’s interests. To the contrary, the client and lawyer both benefit from defensive lawyering because the heart of the concept is accountability. Lawyers who run conflict checks, use engagement and non-engagement letters, keep their clients informed, are diligent with respect to law and fact, and refer matters beyond their competence to specialists serve both themselves and their clients well.⁸

1. JURASSIC PARK (Universal, 1993).

2. See Desmond Ryan, *Still Sleazy After All These Films*, LEXINGTON HERALD-LEADER (Ky.), July 12, 1993, at B3 (discussing movies that “take swipe[s] at the legal profession”). *The New York Times* spoofed *Jurassic Park* with a story in which DNA from lawyer hair was implanted in the eggs of hagfish — also known as slime eels — to produce objects of ridicule such as an Alan Dershowitz clone with “hair on permanent alert” who “logged a cool billion in civil suits” before the day was out. See James Gorman, *Juristic Park*, N.Y. TIMES, July 12, 1993, at A17.

3. Stephanie B. Goldberg, *Lawyers Debate Tragedy’s Lessons*, A.B.A. J., Sept. 1993, at 20.

4. Victoria Slind-Flor, *A City’s ‘Week of Darkness’*, NAT’L L.J., July 19, 1993, at 1.

5. Attorney Grievance Comm’n v. Protokowicz, 619 A.2d 100 (Md. 1993). The lawyer helped a former client break into and ransack the home of the former client’s estranged wife, clog her toilet, and steal her personal property. The trial judge rejected the lawyer’s explanation that they had accidentally killed the wife’s family cat in the microwave. *Id.* at 102.

6. See, e.g., *Bi v. Union Carbide Chem. & Plastics Co.*, 984 F.2d 582, 583 (2d Cir.) (noting that within one month of a deadly gas escaping from a Union Carbide plant in Bhopal, India, where thousands of people were killed, at least 145 class action lawsuits had been filed in federal district courts across the United States), *cert. denied*, 114 S. Ct. 179 (1993).

7. See, e.g., George J. Church, *Sorry, Your Policy is Cancelled*, TIME, Mar. 24, 1986, at 16, 16.

8. See Stewart I. Edelstein, *How Best to Deal with Clients*, TRIAL, June 1993, at 63.

This article suggests that law schools and bar associations should teach professional responsibility by teaching malpractice prevention and risk management. We start with a brief overview of lawyer malpractice, then move to principles of proactive risk management, and conclude with principles of loss minimization. Special attention is given to the bar-related insurance movement and the relationship between the malpractice carrier and insured lawyer. Two appendices are provided with this article: Appendix A, a checklist for preventing legal malpractice,⁹ and Appendix B, a risk management self-assessment questionnaire.¹⁰

II. LEGAL MALPRACTICE

Whether the theory of liability is tort or contract, all courts seem to agree that a plaintiff must prove each of the following elements in a legal malpractice suit:

1. An attorney-client relationship existed that gave rise to a duty owed by the attorney to the client¹¹ or to one intended to be benefitted by the services, or in some jurisdictions, to one who reasonably and foreseeably relied on the attorney's work product.¹²
2. The attorney committed a breach of the duty by an act or omission.¹³
3. The attorney's breach of duty proximately caused injury to the client.¹⁴

These elements are discussed more fully in the following subsections.

A. *The Attorney-Client Relationship*

An attorney-client relationship is created when an attorney undertakes the performance of legal services for the client with the client's consent.¹⁵

9. This checklist was adapted from STEPHEN M. BLUMBERG & WILLIS S. BAUGHMAN, PREVENTING LEGAL MALPRACTICE: CALIFORNIA CASE STUDIES 151 (1989).

10. This questionnaire was adapted from LAWYERS MUT. INS. CO. OF KY., RISK MANAGEMENT & PROFESSIONAL RESPONSIBILITY LAW PRACTICE ASSESSMENT (Deborah J. Dorman & Dulaney L. O'Roark, Jr. eds., 1993).

11. Laws. Man. on Prof. Conduct (ABA/BNA) 301:101 (1984) [hereinafter Laws. Man.].

12. See *id.* at 301:608 (1990).

13. *Id.* at 301:101. Depending on the circumstances, the breach may be intentional or non-intentional with regard to result. Non-intentional breaches are most often characterized as negligent, though it is possible that a breach may be described as a breach of contract or fiduciary duty.

14. *Id.* In many cases the injury will be loss of a cause of action, and it will be necessary for the client to prove the value of the lost expectancy of recovery.

15. See 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.2, at 404

Ordinarily, no uncertainty exists regarding the scope of the representation, the persons to be benefitted, or who may legitimately rely on the attorney's work product. The attorney may, however, have unintentionally assumed duties. The following situations are illustrative:

1. *Preliminary consultations not resulting in a formal attorney-client relationship.* The attorney may unintentionally accept responsibility during preliminary consultations. For example, in *Togstad v. Vesely, Otto, Miller & Keefe*¹⁶, a lawyer told a woman that he did not think she had a claim for medical malpractice, but he would check with another attorney. He never got back in touch with the woman or billed her for the consultation. The woman did not consult with another attorney until a year later, by which time the statute of limitations had expired on her claim. The court upheld the jury's finding that the lawyer negligently rendered advice regarding her potential claim.¹⁷

2. *Confusion over the scope of the engagement.* As a result of poor communication, the lawyer may fail to pursue a matter that the client, but not the lawyer, believed the lawyer was going to pursue.¹⁸

3. *Pro bono work.* Many lawyers occasionally work without expectation of compensation as either part of a formal pro bono program or as an ad hoc service to help a needy person.¹⁹ Lawyers may mistakenly assume that they are not potentially liable for mistakes made when rendering pro bono service or that the standard of care is lower when the recipient of the service is not a paying client. No fee is necessary, however, to create an attorney-client relationship, and an attorney who renders pro bono service will be held to the

(3d ed. 1989) [hereinafter MALLEN & SMITH]. Now in its third edition and supplemented yearly with pocket parts, this treatise is an excellent two volume work on the subject of legal malpractice. The authors have reprinted portions of the treatise in a single volume. See JEFFREY M. SMITH & RONALD E. MALLEN, PREVENTING LEGAL MALPRACTICE (1989). Other works discussing legal malpractice include the following: LAWS, MAN., *supra* note 11 (regularly supplemented); DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE (1980) (annually supplemented with a pocket part); DUKE N. STERN & JO ANN FELIX-RETZKE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE (1983) (annually supplemented with a pocket part).

16. 291 N.W.2d 686 (Minn. 1980) (per curiam).

17. *Id.* at 693.

18. See, e.g., *Daugherty v. Runner*, 581 S.W.2d 12, 17 (Ky. Ct. App. 1978) (holding that an attorney who entered into a standard contract with a client to "institute a claim for damages against any and all responsible parties as a result of injuries [sustained in an automobile accident]" was negligent in failing to file a timely medical malpractice claim against the hospital which treated the client's spouse injured in the accident, despite the fact that the client had subsequently obtained a second attorney to pursue the medical malpractice claim).

19. In fact, the model rules state that lawyers should render pro bono, public interest legal services. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1992) [hereinafter MODEL RULES].

same standard of reasonable care.²⁰

4. *Language that the client reasonably interprets as guaranteeing a result rather than only promising to diligently and competently attempt to obtain a result.* Ordinarily, a lawyer's contractual obligation to a client will be considered an implied promise of diligence and competence. In some instances, however, a lawyer's words may be reasonably interpreted as guaranteeing a result; for example, "Don't worry, we'll get your child back." If so, the lawyer may be held liable for breach of an express promise.²¹

5. *Foreseeable consequences to non-clients.* Lawyers may create an attorney-client relationship with third-party beneficiaries. The beneficiary test states that "[r]egardless of whether the legal theory is based upon an express or implied contract, the determinative question is, did both the attorney and the client intend the plaintiff to be the beneficiary of legal services?"²² Some courts, however, have gone beyond the privity requirement and imposed liability on an attorney for non-client third parties injured by the foreseeable consequences of the attorney's negligence.²³ An example of this third party relationship involves the intended beneficiaries of a will, who may sue a lawyer that fails to prepare a will in accordance with the testator's wishes because the testator clearly intended to benefit them.²⁴

6. *Business relations with clients.* Attorneys are fiduciaries and cannot enjoy arms-length business relationships with clients. If a client alleges that an attorney gained an unfair advantage in a business arrangement, there is a presumption that the attorney's gain resulted from undue influence.²⁵ An attorney's best advice is "to avoid becoming involved in any business, personal or financial transactions with [a] client"²⁶ because "[b]usiness transactions between lawyers and clients are greatly disfavored."²⁷

7. *Failure to withdraw or otherwise disengage.* Attorneys who finish working on a case without notifying the client or fail to clearly define the scope of the representation run the risk that the client will think the representa-

20. See, e.g., *Franko v. Mitchell*, 762 P.2d 1345, 1351 (Ariz. Ct. App. 1988).

21. See, e.g., *Laws. Man.*, *supra* note 11, at 301:109 ("An attorney should avoid making specific promises to a client regarding the methods to be employed or the result to be achieved in handling the client's legal matters.").

22. 1 MALLEN & SMITH, *supra* note 15, § 7.11, at 385 (footnote omitted) (emphasis in original).

23. 1 *Id.* § 7.11, at 382. California is the leading jurisdiction. See, e.g., *Fox v. Pollack*, 226 Cal. Rptr. 532, 535 (Ct. App. 1986).

24. See 2 MALLEN & SMITH, *supra* note 15, § 26.4, at 595 n.9 (citing cases).

25. 1 *Id.* § 11.19, at 680; see also MODEL RULES, *supra* note 19, Rule 1.8(a) (stating that a lawyer shall not enter a business transaction with a client unless certain specified conditions are satisfied).

26. BLUMBERG & BAUGHMAN, *supra* note 9, at 101.

27. *Laws. Man.*, *supra* note 11, at 51:501 (1988).

tion is continuing. For example, in a child custody case the client may assume that the lawyer will be available if disputes over enforcement later arise. Disengagement letters are strongly recommended in all cases in which disputes may arise.²⁸ Such letters will protect the lawyer against liability and prevent a former client from asserting a present-client relationship if the lawyer attempts to represent someone against the former client.²⁹

B. *An Act or Omission in Breach of the Duty*

1. *The Standard by Which the Attorney Is Judged*

Whether the cause of action is cast as one in tort or in contract, the attorney is held to a standard of reasonable diligence and competence.³⁰ The Kentucky Court of Appeals defined the standard as follows:

[T]he standard of care is generally composed of two elements — care and skill. The first has to do with care and diligence which the attorney must exercise. The second is concerned with the minimum degree of skill and knowledge which the attorney must display.

. . . [T]he attorney's act, or failure to act, is judged by the degree of its departure from the quality of professional conduct customarily provided by members of the legal profession.³¹

The courts — though perhaps not clients — are forgiving of lawyers whose tactical decisions turn out badly because “an attorney is not to be faulted for an improvident decision if that decision was made after an intelligent, informed, and good faith assessment of all relevant factors.”³²

A lawyer is “under a duty to represent the client with undivided loyalty, to preserve the client's confidences, and to disclose any material matters bearing upon the representation of these obligations.”³³ Breaches of these

28. See 1 MALLEN & SMITH, *supra* note 15, § 2.8, at 77.

29. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 358 (1986) (noting that the conflict rules are much stricter in the present-client situation than in the former-client situation).

30. See *Laws. Man.*, *supra* note 11, at 301:107-108.

31. *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978) (citing WILLIAM L. PROSSER, *LAW OF TORTS* § 32, at 161-66 (4th ed. 1971); John W. Wade, *The Attorney's Liability for Negligence*, 12 *VAND. L. REV.* 755, 762 (1959)).

32. *Laws. Man.*, *supra* note 11, at 301:123. Of course, some tactical decisions are so bizarre they “fall outside the realm of professional competence.” RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, *TRIAL ETHICS* § 14.2.3, at 388 (1988); see also *Wiley v. Sowders*, 647 F.2d 642 (6th Cir.) (holding that the defendant had a valid claim for ineffective assistance of legal counsel when his attorney argued to the jury that the defendant was proven guilty beyond a reasonable doubt and asked the jury to be merciful), *cert. denied*, 454 U.S. 1091 (1981).

33. 1 MALLEN & SMITH, *supra* note 15, § 11.1, at 631.

fiduciary obligations are usually not deliberate and may result from a lack of understanding of the duties imposed on attorneys by the *Model Rules of Professional Conduct*³⁴ and the law of fiduciaries. While the model rules generally correspond to principles of fiduciary responsibility, it is important to note that there are differences. For example, Rule 1.8(b) makes it unethical for a lawyer to use confidential information for the lawyer's own advantage without the client's consent, but only if the client was disadvantaged as a result.³⁵ Fiduciary principles, however, make the attorney liable to the client for any advantage the lawyer gained as a result of the unauthorized use of confidential information, regardless of whether the client suffered harm.³⁶

Although the introductions to both the old *Model Code of Professional Responsibility* and the new *Model Rules of Professional Conduct* state that violation of a rule should not give rise to a cause of action nor create a presumption that a legal duty has been breached,³⁷ some courts will treat a rule violation as either a breach of a duty or at least evidence of a breach.³⁸ The *Model Rules of Professional Conduct* that are most likely to stand alone as a basis for a malpractice claim include the following:

- Rule 1.5 *Fees* (particularly Rule 1.5(c), requiring contingent fees be in writing);
- Rule 1.7 *Conflict of Interest: General Rule*;
- Rule 1.8 *Conflict of Interest: Prohibited Transactions* (particularly Rule 1.8(a), governing business relations with clients);
- Rule 1.9 *Conflict of Interest: Former Client*;
- Rule 1.13 *Organization as Client*; and
- Rule 1.15 *Safekeeping [Client's] Property*.³⁹

2. Acts Constituting Breach of Duty

The most comprehensive study of lawyer malpractice was conducted by the National Legal Malpractice Data Center of the American Bar Association. The study surveyed approximately 30,000 claims over a two-year period.⁴⁰

34. In some states lawyers are still subject to either the old *Model Code of Professional Responsibility* or an ethical code unique to that state (notably California).

35. MODEL RULES, *supra* note 19, Rule 1.8(b); accord WOLFRAM, *supra* note 29, at 305.

36. RESTATEMENT (SECOND) OF AGENCY § 388 cmt. c (1957).

37. See MODEL RULES, *supra* note 19, Scope; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1983).

38. ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIAB., THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE 8 (1992).

39. See MODEL RULES, *supra* note 19, Rules 1.5-.9, 1.13, 1.15. These rules are, in co-author O'Roark's experience, most often relied on as a basis for a malpractice claim.

40. The complete results are published in ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIAB., CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL

It included claims based on both negligence and breach of fiduciary duty. The data was generated from reports submitted by professional liability insurers. The following should be noted about the study: (1) Claims against uninsured attorneys are not reflected; (2) the degree of cooperation by insurers varied;⁴¹ and (3) professional liability policies generally do not cover liability for intentional misconduct.

The study showed that 25% of all legal malpractice claims arose out of the plaintiff's personal injury practice and 23% arose out of the real estate practice, and no other practice area accounted for more than 10% of the claims.⁴² Functionally, the alleged attorney errors were grouped as follows:

- administrative errors — 26%
- client relations errors — 16%
- intentional wrongs — 12%
- substantive errors — 44%⁴³

Missed deadlines were a very serious problem, accounting for 21% of the administrative errors group.⁴⁴

The study also showed that the following activities generated malpractice claims:

- commencement of an action — 25%
- preparation of documents — 21%
- consultation and advice — 11%
- pre-trial, pre-hearing work — 8%
- settlement and negotiation — 8%
- trial or hearing — 7%
- title opinions — 5%⁴⁵

C. Proximate Cause and Injury to the Client

It is axiomatic that the attorney's breach of duty must be the legal cause of the injury alleged in the client's complaint:

Proof of a "proximate cause" relationship between an attorney's breach

MALPRACTICE DATA CENTER (1989). The results are summarized in ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIAB., PROFILE OF LEGAL MALPRACTICE (1986), and in THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE, *supra* note 38, at 15-26.

41. See PROFILE OF LEGAL MALPRACTICE, *supra* note 40, at 4.

42. *Id.* at 8.

43. *Id.* at 6-7.

44. See *id.*

45. See *id.* at 10.

of duty and an injury suffered by a client requires a showing that "but for" the attorney's misconduct the injury would not have been suffered. Such a showing is more easily made in cases alleging a breach of duty in the preparation of documents or furnishing of advice than it is in cases involving the mishandling of litigation. In the latter type of case, the burden is on the client to conduct a "trial within a trial" to show that had the attorney not breached the duty owed to the client, the result in the underlying litigation would have been different.⁴⁶

An attorney who misses a statute of limitations might thus wish to concede a breach of duty and attempt to prove that the underlying claim lacked merit.⁴⁷ This tactic, however, puts the attorney in the uncomfortable position of arguing that a claim the attorney once judged to have merit would not have resulted in a verdict for the client. The attorney may even be forced to seek assistance from the former adversary.

The client must show injury, in excess of nominal damage, because "[t]he mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm — not yet realized — does not suffice to create a cause of action for negligence."⁴⁸ A cause of action thus does not accrue until the client suffers actual damage, whether the cause of action is in tort or in contract.⁴⁹ Therefore, a lawyer who acts quickly to "repair the claim" — insurance terminology for rectifying error — may prevent actionable damage to the client.

D. *Special Defenses*

Traditional defenses such as contributory negligence and assumption of the risk are theoretically available, but rarely successful in legal malpractice cases.⁵⁰ One aspect of risk management involves establishing and following procedures to preserve evidence of client fault for use if matters turn out badly. For example, the lawyer should carefully document instances in which the client fails to follow instructions or acts contrary to the lawyer's advice. "A written memorandum protects the attorney from the client who contends that he was ill-advised or uninformed."⁵¹ The wise lawyer will document all communications with clients because even the most seemingly insignificant

46. *Laws. Man.*, *supra* note 11, at 301:103.

47. *See, e.g.*, *Cook v. Gould*, 440 N.E.2d 448 (Ill. App. Ct. 1982).

48. *Northwestern Nat'l Ins. Co. v. Osborne*, 573 F. Supp. 1045, 1049 (E.D. Ky. 1983) (quoting *Budd v. Nixen*, 491 P.2d 433, 436 (Cal. 1971) (en banc), *superseded by statute as stated in Laird v. Blacker*, 279 Cal. Rptr. 700 (Ct. App. 1991)).

49. *Laws. Man.*, *supra* note 11, at 301:131.

50. *See* 2 MALLEN & SMITH, *supra* note 15, § 17.1, at 2.

51. UNDERWOOD & FORTUNE, *supra* note 32, § 14.2.3, at 388.

telephone call may be an important point of contention years later.

The statute of limitations defense is also available, but it raises a number of questions: What statute is applicable? When did the cause of action accrue? Did the statute run while the lawyer represented the client? While the answers to these questions are complex and vary from state to state, the judicial trend is to protect the client by holding the following: (1) that a cause of action does not accrue until there has been actual injury;⁵² (2) that a cause of action does not accrue — or that the statute is tolled — during the time of representation;⁵³ and (3) that a cause of action does not accrue until discovered.⁵⁴

III. PROACTIVE RISK MANAGEMENT

Lawyers and law schools should recognize the need to learn and apply sound management principles to the practice of law. One of the most important principles is to minimize the risk of loss — managing risk proactively.

A. Starting with the Law Schools

The obligatory professional responsibilities course in most law schools concentrates on the old *Model Code of Professional Responsibility* and the new *Model Rules of Professional Conduct*. The course is typically billed as one of lawyer *ethics*, rather than lawyer *liability*.⁵⁵ The casebooks commonly in use typically delegate the topic of legal malpractice to a chapter or less, which law schools are apt to omit in a two or three credit hour course.⁵⁶ Mallen and

52. 2 MALLEN & SMITH, *supra* note 15, § 18.11, at 100.

53. *Id.* § 18.12, at 115.

54. *Id.* § 18.14, at 128-32.

55. None of the speakers at the 1991 symposium *Teaching Legal Ethics*, held at the 1990 annual meeting of the Association of American Law Schools, focused on lawyer liability to clients and third parties. The presentations appear as a series of essays in *Teaching Legal Ethics: A Symposium*, 41 J. LEGAL EDUC. 1 (1991).

56. The professional responsibility texts include the following: VERN COUNTRYMAN ET AL., *THE LAWYER IN MODERN SOCIETY* (2d ed. 1976) (devoting 20 of 978 pages to malpractice); STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* (3d ed. 1992) (devoting 54 of 900 pages to malpractice); GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* (2d ed. 1994) (devoting 119 out of 1171 pages to malpractice); DAVID MELLINKOFF, *LAWYERS AND THE SYSTEM OF JUSTICE* (1976) (devoting 34 out of 983 pages to malpractice); THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (5th ed. 1991) (paying little attention to malpractice issues); L. RAY PATTERSON & THOMAS B. METZLOFF, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* (3d ed. 1989) (devoting 68 out of 822 pages to malpractice); MAYNARD E. PIRSIG & KENNETH F. KIRWIN, *CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (1984) (devoting 18 out of 603 pages to malpractice); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (1992) (devoting 15 out of 1040 pages to malpractice); MORTIMER D. SCHWARTZ

Smith note that “[v]ery few law schools . . . have created courses directed at educating law students on the substantive legal errors which most often result in legal malpractice claims, the cause of those errors, or an appropriate methodology for preventing these errors.”⁵⁷ They then provide a syllabus for a proposed course in “Understanding and Preventing Legal Malpractice.” The syllabus includes coverage of the following:

- Theories of liability:
 - a) duty and causation
 - b) express/implied contracts
 - c) fraud or negligent misrepresentation
 - d) negligence
 - e) informed consent
 - f) constructive fraud
 - g) warranty/guaranty
 - h) deceptive trade practices
 - i) contribution/indemnity

- Fiduciary obligations:
 - a) attorney-client relationships
 - b) corporate attorney as director
 - c) disclosure and consent
 - d) confidentiality
 - e) adverse interests
 - f) conflicting interests
 - 1) divorce
 - 2) business relationships with client
 - 3) representing both buyer and seller
 - 4) insurance counsel

- Liability to the nonclient:
 - a) fraud/malice
 - b) malicious prosecution
 - c) abuse of process
 - d) interference with advantageous relationships
 - e) negligence

ET AL., PROBLEMS IN LEGAL ETHICS (3d ed. 1992) (devoting 17 out of 402 pages to malpractice); MURRAY L. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION (2d ed. 1979) (devoting 8 out of 702 pages to malpractice); JOHN F. SUTTON, JR. & JOHN S. DZIENKOWSKI, CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS (1989) (devoting 34 out of 839 pages to malpractice).

The above authors typically scatter cases involving lawyers' liability to clients and non-clients throughout their books. Books authored by Gillers and Hazard provide the best discussions of lawyer liability.

57. 1 MALLEN & SMITH, *supra* note 15, § 3.2, at 215.

- Standard of care and errors of judgment:
 - a) definition
 - b) specialization
 - c) local considerations and custom
 - d) client's instructions

- Litigation of the legal malpractice claim:
 - a) pleadings
 - b) burden of proof
 - c) degree of proof
 - d) selection of theory
 - e) defenses
 - f) damages
 - g) statute of limitation

- Preventing legal malpractice claims and litigation:
 - a) client relationship
 - b) judicial intervention
 - c) administrative intervention
 - d) arbitration
 - e) Continuing Legal Education
 - f) office procedures
 - 1) retainer agreement
 - 2) file organization and maintenance
 - 3) work control
 - a) master case summaries
 - b) status reports
 - c) conflict of interests systems

- Attorney's professional liability insurance:
 - 1) comparing policies
 - 2) the insuring agreement - what is covered
 - 3) exclusions⁵⁸

Students would relate well to a course emphasizing lawyer liability for malpractice for several reasons:

1. It is meaningful to see that bad practice can lead to pecuniary liability.
2. This type of a course (like conflicts and remedies) would cut across doctrinal lines. Students would revisit principles first learned in such fundamental courses as torts, contracts, agency, and civil procedure.
3. The subject matter — primarily cases — would seem more substantive than an "ethics" course, which is primarily readings and problems. Obvious-

58. *Id.* at 217-19.

ly, the *Model Rules of Professional Conduct* would be referenced because malpractice claims are often based on rules violations, but lawyer discipline would not be central either to the materials or the methodology. Students concerned about the Multistate Professional Responsibility Examination (MPRE) could learn the particulars of the *Model Rules of Professional Conduct* and the *Code of Judicial Conduct* on their own.

4. This type of a course would be on the cutting edge of developments in matters of professional responsibility. As Professor Stephen Gillers wrote, "If the size of our research files is any indication, no subject in this book has seen more change in the last 10 years than a lawyer's liability to clients and third parties, whether based on traditional malpractice rules or on new theories establishing new responsibilities to nonclients"⁵⁹

B. Bar Admission

Forty-four states and the District of Columbia now require a passing score on the Multistate Professional Responsibility Examination (MPRE) as partial requirement for application for bar admission.⁶⁰ The MPRE tests applicants' knowledge of the *Model Code of Professional Responsibility*, the *Model Rules of Professional Conduct*, and the 1990 version of the *Model Code of Judicial Conduct*.⁶¹ The format is multiple choice and the answers are worded as follows: "Is the Attorney *subject to discipline* [for the described activity]?" or "Is it *proper* for Attorney [to perform the described act]?"⁶² The test requires familiarity with the disciplinary codes, but does not deal with the bases for lawyer liability to clients and non-clients.

The examiners might consider restructuring the examination to cover basic materials on malpractice and third party liability. For example, questions could be framed to test students' knowledge on the following: (1) whether expert testimony is needed to establish a malpractice claim; (2) whether violation of an ethical rule is negligence per se; (3) whether a non-client relying on a lawyer's work product can sue the lawyer for losses caused by the lawyer's mistakes; and (4) whether depositors in a savings and loan have a cause of action against a law firm which helped a CEO misrepresent the S&L's investments to a regulatory agency. Restructuring the test to emphasize lawyer liability, rather than lawyer discipline, would better prepare students entering the profession for the risks that frequently arise in daily practice.

59. GILLERS, *supra* note 56, at 611.

60. National Conference of Bar Examiners, Multistate Professional Responsibility Examination Information Booklet 1 (1994).

61. *Id.* at 28-29. The questions are designed so that the answer is the same under both the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct*. *Id.* at 28.

62. *Id.* at 31-48 (providing sample questions).

C. Continuing Legal Education

Currently thirty-nine states require Continuing Legal Education (CLE) as a condition of licensure to practice law.⁶³ Some states have a separate “ethics” or “professionalism” requirement.⁶⁴ Mallen and Smith note that “[n]ational statistics do not demonstrate that the implementation of mandatory continuing legal education in some states has led to dramatically decreased frequency of claims as compared to states without such mandatory requirements.”⁶⁵ Therefore, they suggest that CLE programs should teach the following:

- how lawyers may avoid administrative errors with calendaring, time limitations,⁶⁶ etc.
- client relations, documentation, engagement letters, withdrawal, maintenance of files, etc.
- substantive presentations, which include “express warning of the types of errors commonly committed in the field of practice.”⁶⁷

Like many other things, if mandatory continuing legal education is worth doing, it’s worth doing correctly. A national standard of accountability for CLE programs could be created by the American Bar Association and implemented by the states. In addition, by requiring practitioners to have completed certified CLE training, federal courts and agencies could influence states to require CLE and to adopt uniform national certification standards.

D. Within the Firm

Lawyers should recognize that law office management is as much a part of the practice as how one performs in the courtroom or boardroom. Law office management includes not only risk management but also billing and

63. NEW YORK STATE BAR ASS’N, COMPARISON OF THE FEATURES OF MANDATORY CONTINUING LEGAL EDUCATION RULES IN EFFECT AS OF JULY 1993 iv-vi (1993). All states except Alaska, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nebraska, New Jersey, New York, South Dakota, and the District of Columbia require mandatory CLE. *Id.*

64. The states include the following: Colorado, Florida, Georgia, Louisiana, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Virginia, and West Virginia. *Id.* at 58-65.

65. 1 MALLEN & SMITH, *supra* note 15, § 3.4, at 221.

66. The University of Kentucky has published an excellent handbook for Kentucky lawyers on “Time Limitations” — the time within which action of some kind must be taken. *See* OFFICE OF CONTINUING LEGAL EDUC., UNIVERSITY OF KY. COLLEGE OF LAW, KENTUCKY TIME LIMITATIONS (1989). Besides statutes of limitation, the book includes time periods for notices, appeals and the like. *See id.*

67. 1 MALLEN & SMITH, *supra* note 15, § 3.4, at 222.

collections, employee relations, and practice development. Risk management is the loss prevention and damage repair aspect of office management. Within each firm a person or persons should be responsible for establishing procedures designed to develop and maximize good client relations and minimize lawyer liability. A number of excellent books are available, among them books by Mallen & Smith⁶⁸ and *A Practical Guide to Achieving Excellence in the Practice of Law*.⁶⁹ Another ABA publication⁷⁰ described the steps in "loss control" risk management as follows:

1. *Malpractice Avoidance*: to evaluate existing or potential practice areas and decide which should be avoided or eliminated because of the malpractice risks involved;
2. *Malpractice Prevention*: to develop and implement systems, procedures, and techniques to minimize and manage risks; and
3. *Loss Reduction and Repair*: to develop procedures to mitigate or cure losses — the damage control aspect of risk management.⁷¹

The proactive aspect of risk management implements both malpractice avoidance and malpractice prevention. Firms and individual lawyers should limit their practice to what is relatively pleasant, profitable, and within their competence. In doing so, they should plan and implement the following:

1. *Training for new lawyers*. Training should be planned and implemented by a person thoroughly familiar with firm procedures; this person should be given "firm credit" for training new lawyers. Billable hours expectations should be reduced for a new lawyer's time in training, and to the extent possible, the training should be interactive.⁷²

2. *Continuing Legal Education within the firm*. Firm CLEs should be regular, well-planned and well-attended. Outside consultants may help with its design. The following tips can be used to ensure that a firm's CLEs are taken seriously: advanced planning, programs announced well in advance, strict adherence to the schedule, use of printed materials, mandatory attendance, and program evaluation by attenders.⁷³

3. *Documentation of files/engagement letters*. Since malpractice claims often arise out of misunderstandings with clients, lawyers should be required to always document the relationship (or lack thereof) by letters of engagement,

68. See *supra* note 15.

69. COMMITTEE ON CONTINUING PROFESSIONAL EDUC., ALLI-ABA, *A PRACTICAL GUIDE TO ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW* (1992).

70. THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE, *supra* note 38.

71. *Id.* at 14.

72. See 1 MALLEN & SMITH, *supra* note 15, § 3.5, at 222-24. The ABA, among others, provides excellent training videos.

73. 1 *Id.* § 3.8, at 227-30.

non-engagement, and disengagement.⁷⁴

4. *Client screening.* As noted in the checklist appended to this article, some prospective clients should cause "red flag warnings" to flutter. Those clients who change lawyers frequently, for whom the "principle is the thing," and who seem irrational—represent potential malpractice claimants.⁷⁵ The wise attorney will proceed carefully with these clients.

5. *Conflicts checks.* A firm must have an efficient and accurate means of checking for conflicts, indexed by subject as well as by client name. Manual systems should be computerized if possible. To avoid possible disqualification as a result of confidential information obtained from prospective clients, attorneys should not conduct in-depth interviews before checking for conflicts.⁷⁶

6. *Malpractice insurance.* Every attorney engaged in the practice of law should have insurance and should treat the insurance company as an active partner in risk management. The positive role of the insurance company, particularly bar-related insurers, is discussed in the next section.

E. The Insurance Company

Until approximately thirty years ago malpractice insurance was rare. Most lawyers went "bare"⁷⁷ because there was no perceived need for malpractice insurance. Claims against lawyers were rare, in part because clients were often unable to find attorneys willing to sue, or testify against, other members of the bar. However, beginning in the 1970s, claims increased dramatically and steadily. Mallen and Smith reported four times as many appellate malpractice decisions in the 1970s as in the 1960s.⁷⁸ Though there is some evidence that claims have peaked,⁷⁹ today's clients demand service and value and will not hesitate to sue when dissatisfied. The need for malpractice insurance is obvious.

Historically, malpractice insurance was provided as an ancillary service

74. 1 *Id.* §§ 2.8-.12, at 77-120 (including several forms).

75. See *infra* app. B, at 7.

76. See UNDERWOOD & FORTUNE, *supra* note 32, § 3.6.3, at 71 (Supp. 1993) (footnotes omitted). An attorney may either continue to represent or undertake representation of a would-be client in the same or related matter only if the lawyer had taken precautionary steps to limit the information disclosed by another would-be client during the initial interview. However, if the information disclosed is critical to the representation, a waiver of confidentiality needs to be obtained from the would-be client. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 358 (1990).

77. Insurance jargon for uninsured.

78. 1 MALLEN & SMITH, *supra* note 15, § 1.7, at 19.

79. See Rita H. Jensen, *Malpractice Rates May Level Off*, NAT'L L.J., July 19, 1993, at 1 (discussing a report that the frequency of claims may have decreased).

by property and casualty insurers. These carriers varied in quality. Some were outstanding companies with strong management and sound financial base. Others were poorly operated, gave substandard claims service, and were financially unstable. In hard-market cycles it was not unusual for commercial carriers to limit or discontinue writing new policies or renewing old ones.⁸⁰ Management decisions were driven by overall profitability, loss experience, and the cost of reinsurance.⁸¹

The "insurance crisis"⁸² of the mid-1980s caused premiums charged by property and casualty carriers to double and redouble for no apparent reason. A Kentucky lawyer told one of the authors that the annual malpractice premium for his four-member firm increased from \$2000 to \$16,000 in a four-year period with no increase in lawyers or number of malpractice claims. This experience was common across the country, and lawyers demanded to know why. Lawyers felt that they were paying for the companies' losses in other lines of insurance or that they were forced to pay for the cost of insuring high-risk practices in a few major cities.

It was in this context that the bar-related insurance movement began. Dissatisfied with commercial carriers and following the example of the medical profession, several bar associations started captive companies to serve their members. A "captive" company is "[a]n insurance company that is wholly owned by an entity or group and whose primary function is to underwrite the insurance of that entity or group."⁸³

In 1978, California and North Carolina formed the first two "bar-related" insurance companies. Since then, bar-related companies have been established in twenty-five states.⁸⁴ Oregon requires malpractice insurance and has established a state bar association insurance company.⁸⁵ Bar-related companies are developed by bar leadership, capitalized by the insured lawyers, and owned and governed by the insured lawyers.

80. ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIAB., ISSUES IN FORMING A BAR-RELATED PROFESSIONAL LIABILITY INSURANCE COMPANY 13 (1989) [hereinafter ISSUES IN FORMING].

81. Reinsurance is the term used to describe the process by which an insurance company hedges its risk for extraordinary losses by insuring a portion of that risk. Reinsurance companies provide this service to insurance companies for a price which varies with the loss experience. It is only through reinsurance that small casualty insurance companies can achieve the financial capacity to serve their markets.

82. See Church, *supra* note 7, at 16.

83. ISSUES IN FORMING, *supra* note 80, at 126.

84. Member states of the National Association of Bar-Related Insurance Companies include the following: Alabama, Alaska, California, Delaware, Florida, Idaho, Illinois, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Vermont, West Virginia, Wisconsin, and Wyoming.

85. See ISSUES IN FORMING, *supra* note 80, at 137.

Bar-related companies, on the whole, are doing well. Most are past the period of vulnerability to large claims that every start-up company faces; lawyer governance is working; policy terms and rates are comparable to those of commercial carriers; underwriting is skillful; and bar-related companies are leading the way in loss prevention. Ironically, the issue of dependence on a single line of insurance has proved to be a strength, not a weakness. By focusing on a single line of insurance, the companies have become proficient at underwriting, preventing loss, handling of claims, and marketing themselves. Prominent reinsurers have concluded that bar-related companies are the most effective way to underwrite malpractice insurance. They like the emphasis on one line of insurance, the depth of the underwriter's knowledge of the bar, and the innovative loss prevention programs provided by bar-related companies. Backing from reinsurers has enabled bar-related companies to increase their capacity to meet virtually all demand for lawyer liability insurance in the states they serve.

Malpractice insurers, especially bar-related insurers, have an important role in risk management. The self-assessment questionnaire (Appendix B) is typical of the instruments available to identify and eliminate unnecessary risks. By insisting that a prospective insured honestly and thoroughly complete this instrument, an agent can play an instrumental role in preventing claims. Bar-related insurers are creatures of bar associations and have an obvious role in bar sponsored CLE programs. All insurers have an interest in minimizing risk. To that end, they should insist on periodic meetings with their insureds to review procedures, personnel, types of practice, as well as other factors that are relevant in determining their liability exposure.

IV. REACTIVE RISK MANAGEMENT (CLAIMS REPAIR)

As a publisher recently stated, "You can write all the rules you want, you can make all the pronouncements you want, you can set all the examples you want, you can hold all the seminars you want . . . but there's no way you can totally keep folks from doing dumb things."⁸⁶ Unfortunately "dumb things" may harm clients and lead to malpractice claims. Both firms and solo practitioners should establish written procedures for handling situations in which professional negligence (or breach of fiduciary duty) is alleged, or is believed by the lawyer to have occurred.

As suggested by the assessment questionnaire,⁸⁷ a firm's written procedure should *require* all lawyers to report to a designated "Loss Prevention Partner" all instances in which misconduct is alleged or in which

86. Michael Gartner, *THE COURIER-JOURNAL* (Louisville, Ky.), May 19, 1993, at A9 (speaking to Southern publishers).

87. *See app. B*, at 17.

it might reasonably be alleged if the facts were known.⁸⁸ The Loss Prevention Partner and the reporting lawyer should then decide what steps to take to prevent or mitigate damage. This procedure is not to suggest a cover-up. To the contrary, if it might reasonably be contended that malpractice has been committed — that is the facts might support a finding of duty, breach, causation, and damage — the attorneys must fully inform the client and suggest that the client confer with independent counsel.⁸⁹

Simple cases of misunderstanding — when the facts do not support a malpractice claim — can and should be resolved by the client and lawyer. If more is involved, the following should be done:

1. The client file should be preserved in its current posture. Further work on the client's case should be carefully documented.

2. The malpractice insurer should be notified. Early reporting facilitates claims repair. The claims counsel can assist in assessing the claim, notifying the client, and mitigating damage. Lawyers who delay in reporting claims or incidents risk loss of coverage. The "Claims Made" provision insures against loss as a result of claims made during the term of the policy. Furthermore, the reporting provision requires claims to be reported within a certain number of days.⁹⁰ Thus, the lawyer may lose coverage if the claim is not made within the policy period and timely reported.⁹¹ It is in the attorney's best interest to bring the company in at the earliest possible point and cooperate fully thereafter.

3. Both the lawyer and the Loss Prevention Partner (or perhaps the claims counsel for the insurer) should meet with the client, at which time the problem is fully explained. No attempt to settle the matter should be made at this point and there should be no representation that the insurance company will pay. Although there is a duty of candor to the client, at the same time the attorney should not make concessions of fault, such as, "I shouldn't have done"

V. CONCLUSION

The legal profession should emphasize lawyer accountability and risk

88. Solo practitioners should establish a "consultation arrangement" *in advance* with a trusted fellow lawyer.

89. Anything less would violate the attorney's obligation to deal with clients honestly and fairly and would be "conduct involving dishonesty, fraud, deceit or misrepresentation." See MODEL RULES, *supra* note 19, Rule 8.4(c). The *Model Rules of Professional Conduct* further require that clients be advised in writing to seek independent counsel before settling a malpractice claim. *Id.* Rule 1.8(h); *cf.* 1 MALLEN & SMITH, *supra* note 15, § 2.39, at 210-11 (noting possible permissible self-help options).

90. See 2 MALLEN & SMITH, *supra* note 15, § 28.11, at 742-43.

91. See, e.g., *National Union Fire Ins. Co. v. Baker & McKenzie*, 997 F.2d 305 (7th Cir. 1993).

management, starting with law schools' curricula and bar examinations. Lawyers should not only have malpractice insurance but also should use the insurer to identify and eliminate unnecessary risks and assist in claims repair. Insurers could use the self-assessment form to review compliance by their insureds with risk management principles. Based on actuarial principles, the premium could be raised or lowered according to the score on the assessment form. Insurers and insureds would thus particularize risk and increase the incentive to prevent loss.

As an alternative to compulsory malpractice insurance,⁹² states could require uninsured attorneys to periodically take and pass a "malpractice" examination. Coverage of these examinations could include not only the ethical rules (as the MPRE now does) but also the attorneys' knowledge of principles of attorney liability and risk management. These tests would serve to provide some assurance that attorneys "going bare" are less likely to injure their clients.

In the final analysis every lawyer must appreciate the responsibilities and risks of providing legal services to the public. Failure to manage risk through malpractice prevention and avoidance programs may result in civil liability and damage to not only their personal reputation but to that of the entire profession.

92. As of this writing, only Oregon has made malpractice insurance compulsory.

APPENDIX A

LEGAL MALPRACTICE AVOIDANCE CHECKLIST

1. Proper calendaring
2. Non-engagement and disengagement
3. Avoid suing clients for fees
4. Inadequate knowledge of law or facts of the case
5. A good client relationship is imperative
6. Personal involvement with clients
7. Conflicts of interest
8. Malicious prosecution
9. Financial matters
10. Documentation or leaving a paper trail
11. Rejecting certain clients and cases
12. What to do upon receipt of a malpractice claim
13. Client consultations
14. Miscellaneous malpractice avoidance techniques

The following checklists summarize our practical suggestions to lawyers on how to conduct their practice so as to avoid claims against them for legal malpractice.

1. Proper Calendaring

Failure to properly calendar matters is the leading cause of legal malpractice throughout the United States. Liability is usually clear and the extent of the damages is the major remaining issue. There is little excuse for this type of malpractice to heed the following suggestions.

- A. Calendar every case, not just those in litigation.
- B. Make or obtain a list of all the critical litigation dates in your jurisdiction and dual calendar them together with adequate lead times.
- C. Have at least a dual calendaring system with your secretary keeping a matched calendar.
- D. Provide a third party tickler system as an additional safeguard.
- E. Calendar all due dates and adequate lead times.
- F. Conduct a personal, monthly hands-on review of all cases in your charge to be sure that each one is up to date.

2. Non-Engagement and Disengagement

Non-engagement is refusing to accept a case in the first instance, and

disengagement is removing yourself from the case after having once accepted it. Horrendous claims have arisen because attorneys did not properly exit from a case. In rejecting a case or withdrawing consider each of the following points:

- A. The attorney's withdrawal should be confirmed by a certified letter to the client return receipt requested.
- B. The letter should state in no uncertain terms that the law firm is not taking or going to continue representing the client in that case.
- C. The client should be advised that there are critical time limits that must be adhered to in order to keep a claim viable.
- D. The client should be advised to seek other legal counsel as soon as possible to pursue his rights.
- E. Avoid stating the exact legal reason for rejection of the claim.
- F. Avoid stating why, in your opinion, the case lacks merit.
- G. Avoid stating why, in your opinion, certain defendants are not liable.
- H. If you have become attorney-of-record in the case, then a substitution of attorneys must be obtained by client consent or a court order releasing you from the case.

3. *Avoid Suing Clients for Fees*

Experience has shown that a great many legal malpractice cross-complaints are filed in response to the attorney's suit for unpaid fees. Often, the fees were not properly established, billed, or collected prior to the litigation. Heed the following warnings:

- A. As a general rule, avoid suing clients for fees.
- B. The preventive fee arrangement: By carefully handling your fees from the outset of a new case, the need to sue a client can often be avoided.
 - (1) Enter into a written fee agreement early in the course of representation.
 - (2) In the fee arrangement, clearly spell out the method of billing and the scope of engagement.
 - (3) Use itemized billings so that the client can tell what is being done on his behalf.
 - (4) Bill periodically, preferably monthly.
 - (5) Keep an accurate time log reflecting daily efforts expended on behalf of the client.
 - (6) Do not attempt to change your method of compensation in the middle of the case.
- C. If you are determined to sue a client for fees, first consider the following checklist:

- (1) Is a substantial amount of money involved insofar as your law firm is concerned?
- (2) Was a good result obtained in the underlying case?
- (3) Has an uninvolved attorney of experience reviewed the file for possible malpractice?
- (4) Does your state have statutory arbitration requirements that must precede litigation?
- (5) Will any judgment obtained be collectible?

4. Inadequate Knowledge of Law or Facts of the Case

Attorneys who take on a new matter in which they lack experience are generally held to the standard of care practiced by those attorneys who practice in that area of law as one of their specialties. With that in mind, attorneys should move into new areas of legal practice with caution. Some helpful suggestions follow:

- A. Refer to or associate an expert if you lack the necessary expertise.
- B. Attend continuing education law courses in your fields of practice.
- C. Keep current with the changes in the law.
- D. Make a thorough independent investigation of the facts, do not rely solely on the client's version.
- E. Conduct reasonable legal research on all of the pertinent issues.

5. A Good Client Relationship Is Imperative

Every attorney will make mistakes, but not all will be sued. Often, the difference has to do with the strength of the attorney-client relationship that has been developed. Experience has shown that the checklist items set forth herein are important considerations in establishing the appropriate attorney-client relationship.

- A. Execute a clear and fair fee agreement at an early stage of each case.
- B. Within the fee agreement or by separate document, spell out the scope of engagement.
- C. Bill on a periodic, preferably monthly basis.
- D. Encourage realistic expectations in the client.
- E. Show an interest in the client as a person.
- F. Return phone calls promptly.
- G. Be on time for appointments.
- H. Avoid taking telephone calls during office conferences.
- I. Copy your client with your work product.
- J. Share the decision making process in the case with your client.

6. *Personal or Financial Involvement with Clients*

When something goes wrong with a business investment in which the attorney is a partner very often the attorney gets brought into the litigation on a legal malpractice cause of action. A sexual involvement during representation aggravates any type of malpractice case.

- A. Do not encourage clients to invest in projects.
- B. Do not accept stock in lieu of fees.
- C. Do not personally guarantee client's obligations or have the client personally guarantee yours.
- D. Avoid advancing costs where possible.
- E. Avoid dating or having an intimate relationship with a client during the course of your representation.

7. *Conflict of Interest*

Many problems arise out of the discovery of a conflict of interest after a case has been commenced. One of the consequences of continuing the representation is that the attorney may have to return all fees received and incur responsibility for the client's other damages.

- A. Establish a fail safe conflict system within the office.
- B. Avoid suing prior clients even when allowed under the rules of professional responsibility.
- C. Take only one side in a dispute.
- D. Receive your compensation in a transaction from only one side.
- E. Avoid being both a director and an attorney for the corporation at the same time.
- F. Where allowed, consider written waiver of conflict by the parties affected.
- G. Do not represent a buyer and seller, landlord and tenant, or trustor and beneficiary at the same time.
- H. Set forth who you represent in any document that you draft, and where appropriate, indicate that the other party has been advised to seek independent counsel.
- I. Do not act as an escrow agent in connection with the sale of real estate or a business.
- J. Do not accept employment from more than one client seeking to sue and collect from a single source, without a specific written agreement from all plaintiffs as to how the proceeds are to be divided.
- K. Having acted as an attorney for partners or co-owners in a real estate or business acquisition, do not attempt to represent one partner or co-owner against the other in subsequent litigation.

- L. Do not act as both an attorney and real estate broker in the same transaction.

8. Malicious Prosecution

Malicious prosecution is not malpractice per se because it involves an intentional tort brought by a third party, not by the client. At the same time, being sued for malicious prosecution has the same emotional and financial impact on the attorney as a pure legal malpractice claim. Consider the practical suggestions set forth herein to avoid finding yourself to be the defendant in such a case.

- A. Do not name parties as defendants without reasonable research.
- B. Do not name parties as defendants without reasonable investigation.
- C. Reject grudge lawsuits.
- D. Avoid where possible suing other attorneys.

9. Financial Matters

Many large claims are appearing because attorneys are not watching out for the financial protection of their clients.

- A. Recommend adequate security where appropriate.
- B. Properly perfect any security document given to your client.
- C. Provide protection of cash payments through an escrow account where appropriate.
- D. If your client is sued in a liability case, make sure that all of the client's insurance policies are considered in providing defense and/or indemnity protection.

10. Documentation or Leaving a Paper Trail

Lack of documentation may give rise to a claim that would otherwise never exist. Often, after things go bad, the client will remember advice given or not given in a different way than will the attorney.

- A. All important advice to the client should be confirmed in writing.
- B. It is critical to write to the client when the client is proceeding contrary to the lawyer's advice.
- C. Matters of less importance may be covered by memorandums to the file.
- D. It is important to document all settlements offered and rejected and to have them signed by the client.

11. Rejecting Certain Clients and Cases

As attorneys gain experience, they learn that certain clients and certain cases are better off rejected at the outset. Some red flag warnings follow:

- A. Beware of the client who is changing attorneys.
- B. Look out for the case that has already been rejected by one or more other firms.
- C. Avoid the case that has an element of avoidable urgency.
- D. Beware of the client who has already contacted multiple government representatives to plead his case.
- E. Beware of the client who wants to proceed with his case because of principle and regardless of cost.
- F. Beware of a client who has done considerable legal research in propria persona on his case.
- G. If your first impression of the client or his course of action is unfavorable, think twice before accepting the case.
- H. If you and your client cannot easily agree on the fee and retainer, you may be dealing with a difficult client.

12. What to Do Upon Receipt of a Malpractice Claim

Attorneys, upon receiving a malpractice claim from a client, sometimes go into a state of shock but should try and follow the suggestions that follow.

- A. Report the claim to your insurance carrier in a timely manner.
- B. Do not attempt to represent yourself.
- C. Discuss the case with an experienced attorney whom you respect.
- D. If it is a relatively small claim, try and have it settled quickly within the amount of your insurance deductible.
- E. Try and resolve the claim by settlement rather than by trial.
- F. If the case proceeds to litigation, try every method of winning the case, the jury trial being a last resort.
- G. Consider having the case litigated in a county other than your own to avoid unnecessary publicity, if that possibility exists.
- H. Be completely honest and cooperative with your defense counsel.
- I. Explore whether or not the alleged mistake can be corrected by any means.

13. Client Consultation

Failure to obtain client consent endangers the harmonious client-attorney relationship. If the client becomes angry with the attorney or feels that the attorney is proceeding without his consultation that client is much more apt to

become dissatisfied and to consider suing if he does not obtain the case result he desires. Do not proceed in any vital area of a case, including the following, without your client's express permission:

- A. Extending to the other side additional time in which to respond to a pleading.
- B. Stipulating to a given item of testimony or evidence.
- C. Settling a case.
- D. Suggesting a settlement figure to the other side.
- E. Rejecting a settlement offer.
- F. Agreeing to a continuance.
- G. Concluding your client's testimony in a litigation matter without checking with the client to see if he has additional testimony to impart.

14. Miscellaneous Malpractice Avoidance Techniques

In addition to the foregoing, there are some practical suggestions that do not fit into any of the preceding categories, but are nevertheless extremely important.

- A. In drafting legal documents, use a comprehensive up-to-date checklist as a guideline to your own document whenever possible.
- B. Do not accept cases for which you do not have either adequate time or capital to take the case to its completion.
- C. Screen out cases with poor liability early because those tend to be the ones where a statute of limitations is missed.
- D. If you are a new attorney, arrange to have access to an experienced attorney with whom you can talk over new legal and practical case control problems.
- E. If you are not practicing in partnership form, make your independent status clear to your clients, and make sure that your associates also do so to avoid liability on the theory of a "defacto partnership."
- F. If you suspect that you or a legal associate has a drinking or drug problem, get professional help at once.
- G. Any error that you wish to argue on appeal must be properly presented and preserved in the record of the trial court proceedings.

CAUTION

The information contained herein is intended solely as general loss prevention advice and not as legal advice for dealing with any specific legal problem.

APPENDIX B

RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

I. LAWYER/STAFF CONSIDERATIONS

A. Practice Planning:

1. Do you have a formal business plan with short and long range goals and objectives?
2. If yes, do you set time aside to periodically evaluate the plan?
3. Do you establish an annual budget and is the budget reviewed during the year?
4. Are key people or a committee involved in setting goals and objectives?
5. Do you get advice from outside professionals, (e.g., auditors, accountants, law firm consultants, bankers)?
6. Does your firm have a written partnership or office sharing agreement?
7. Do you keep abreast of law office technology development which could improve the quality of your work?
8. Do you make Risk Management a part of your practice planning?

B. Hiring Lawyers:

1. Does your firm have a well articulated policy on hiring to include qualifications, experience, integrity, motivation, and character?
2. Do you always talk to a prospect's former associates, partners, and senior lawyers?
3. Do you go beyond references given by the prospect?
4. Do you inquire about the past malpractice history of the prospect and any firms with which he may have been affiliated?
5. Do you inquire about the prospect's current and past professional liability insurance coverage?
6. Do you compare the prospect's insurance coverage with your firm's coverage for an informed decision whether to accept the prospect's prior acts for protection under your policy?
7. Do you check the prospects current and former clients and past law firm affiliation for conflicts with your existing clients or *clients you would like to have in the future?*
8. Do you review and monitor the status of all carryover matters the new hire will bring to your firm?

9. Do you have a system to monitor and supervise newly hired associates to assure that they understand your firm's practice procedures?
10. Do new associates understand they may not obligate the firm to new matters without coordination, and they must insert carryover matters into your work control and case management systems?
11. Do you have parallel procedures to those listed above for hiring paralegals and administrative staff?

C. Professional Development:

1. Firm Policy:
 - a. Does the firm have a well articulated policy on its objectives for lawyers and staff for professional development and continuing legal education?
 - b. Is a lawyer in the firm designated specific responsibility for oversight of the professional development program?
 - c. Does the firm encourage professional development by:
 - (1) financing attendance?
 - (2) encouraging teaching?
 - d. Does the firm measure professional development efforts by firm members to include the Kentucky Bar requirement for lawyers of 15 hours annual CLE which must include at least two hours of ethics instruction?
2. Professional Development Programs:
 - a. Does the firm subscribe to publications focusing on Risk Management and Loss Prevention for both lawyers and staff?
 - b. Does the firm give a thorough orientation on firm practices to new lawyers and staff members?
 - c. Does the orientation include professional responsibility considerations such as:
 - (1) The Kentucky Rules of Professional Conduct?
 - (2) Client confidentiality?
 - (3) Safeguarding client funds and property?
 - (4) Conflicts of interest?
 - (5) What to do upon receipt of a malpractice claim?
 - (6) What to do if a question of professional ethics arises?
 - (7) What to do if the member has a personal problem affecting work performance?
 - d. Does the firm conduct regular in-house CLE programs for lawyers?
 - e. Does the firm have in the office audio-visual equipment for CLE and professional development programs?

3. Special Considerations for Staff:
 - a. Does the firm have a meeting with paralegals and administrative employees to discuss professional responsibility, Risk Management, and issues of concern to the staff?
 - b. Is each staff member given specific training on:
 - (1) Firm practice procedures and office rules?
 - (2) Job knowledge and skills required for successful work performance?
 - (3) Use of office equipment and facilities?
 - (4) Unique aspects of a lawyer's professional responsibility and the role staff plays in meeting this responsibility?
 - c. Does the firm have an ongoing program for developing staff skills in office technology and regularly send staff to work skill improvement courses?

D. Lawyer/Staff Relations:

1. Does the firm have and distribute to each member an office practice manual or operating procedure guide?
2. Does the firm have regular lawyer/staff meetings at which staff participation is encouraged?
3. Do you review case status at the staff meeting?
4. Do lawyers introduce staff to clients and explain the staffs' non-lawyer, but essential role as part of the client's legal team?
5. Do you provide time for staff training and continuing education?
6. Do you require every employee to take an annual vacation?
7. Do you regularly evaluate personnel needs?

E. Stress and Dependency Issues:

1. Do you know of someone in your office who is dealing with:
 - a. the death of a spouse or close family member?
 - b. personal injury to a family member?
 - c. marital separation or divorce?
2. Do you allow time off for counseling for any of these situations?
3. Do you know that the Bar Association offers confidential assistance through the Of Counsel Committee?
4. Do you suspect someone in your office of having a substance abuse problem?
5. Do you provide confidentiality to someone requesting help in finding a substance abuse program?
6. Do you know that chemical dependency is a treatable disease and dependency recovery is more likely when requested by employer

than when requested by family or friend?

7. Do you know that the Bar Association offers confidential assistance to someone in need of a substance abuse program?

II. CLIENT MANAGEMENT

A. *Client Intake Procedures:*

1. Does the firm have well understood screening criteria for new clients which take into consideration:
 - a. Whether the prospective client has changed lawyers or has been rejected by other lawyers?
 - b. Whether the firm and the prospective client are unable to easily reach an understanding on fees or the client appears to be price shopping?
 - c. Whether the prospective client has unrealistic expectations for the case?
 - d. Whether the prospective client has an unreasonable sense of urgency over the matter?
 - e. Whether the prospective client has done considerable personal legal research?
 - f. Whether the prospective client wants to proceed as a matter of principle regardless of cost?
2. Does the firm use an initial interview form for each new client or matter?
3. Based on the information on the initial interview form is the firm's conflicts of interest check system used to determine whether there:
 - a. Is a conflict with a current client?
 - b. Is a conflict with a former client?
 - c. Is a subject matter conflict resulting in the firm simultaneously taking opposite sides of the same issue?
 - d. Is a conflict with firm paralegals or administrative staff?
4. Do the firm's client intake procedures guard against receiving too much confidential information prior to making a conflict check?
5. Do the firm's conflict procedures include checking the firm's institutional memory by circulating new client matters to all firm members (lawyers and staff)?
6. Do all new clients receive an explanation of client confidentiality and any exceptions that might apply to their case?
7. Does the firm routinely use engagement letters to document the services to be rendered to include:
 - a. Scope of the engagement?
 - b. Nature of the services to be performed?
 - c. Any excluded items or areas related to the matter which the firm will not handle?

- d. Realistic estimate of fees and expenses?
- e. Billing and payment procedures?
- f. Copy of the initial interview form?
8. Does the firm send a certified mail non-engagement letter when declining a new client?
9. Does the non-engagement letter:
 - a. Provide clearly that the representation will not be undertaken?
 - b. Advise that there is always potential for a statute of limitation or notice requirement problem if the matter is not promptly pursued elsewhere?
 - c. Comply with the applicable standard of care if any legal advice or information, whatsoever, is given?
 - d. Advise that other legal advice be sought?
 - e. Avoid stating an exact legal reason for the declination, why the claim lacks merit, or why other parties are not liable?

B. Client Relations During the Course of Representation:

1. Is the client sent regular communications concerning the case even during inactive phases?
2. Is the client sent information copies of all appropriate documents and correspondence concerning the case.
3. Are client telephone calls returned within 24 hours?
4. Are client appointments scheduled in a manner not to involve long waits?
5. Is the client billed periodically, normally on a monthly basis?
6. Does the client know whom in the firm to contact if the primary lawyer is unavailable?
7. Is all important advice to the client confirmed in writing?
8. Is the client informed of all settlement offers?
9. Is the client's consent obtained before making settlement offers or accepting or rejecting offers?
10. Are all actions or decisions of the client contrary to the given legal advice documented with a copy provided to the client?
11. Is there a conflict check during periodic reviews of the case for conflicts arising over the course of representation?

C. Termination of Representation:

1. Upon completion of a matter is the client notified in writing that services are concluded?
2. Does the firm have file closure procedures to assure that papers and property are returned to the client upon completion of services?

3. Are lawyers familiar with the professional responsibility rules governing when a lawyer *may* or *must* withdraw from representation?
4. Is it understood that if a lawyer is lawyer-of-record in a matter in litigation the lawyer may not withdraw without the court's permission?
5. If a lawyer withdraws or is discharged, is this fact confirmed in writing to the client?
6. In the event of withdrawal or discharge, does the firm have procedures for orderly transfer of the file and notification in writing of other parties?
7. Does the firm maintain files on matters from which they have withdrawn or been discharged in the event of a malpractice claim?
8. Does the firm have procedures to manage situations in which either the lawyer or client dies, becomes incompetent, or is incapacitated?
9. Does the firm carefully review all new matters before acceptance in which another lawyer has withdrawn or been discharged in terms of client screening, statutes of limitation, and notice requirements?
10. Does the firm carefully review all new matters before acceptance in which another lawyer has withdrawn or been discharged in terms of client screening, statutes of limitation, and notice requirements?
11. Do lawyers understand former client conflicts of interest rule (Model Rule of Professional Conduct 1.9)?
12. Do lawyers understand the continuing requirement of maintaining confidentiality of former client matters?

III. OFFICE SYSTEMS AND PROCEDURES

A. Documentation:

1. Do firm files include letters of engagement signed by the client?
2. Does the firm send letters of non-engagement for every case declined?
3. Does the firm use letters of disengagement when withdrawing from a case?
4. Does the firm send letters of closing on the completion of a legal matter?
5. Does the firm confirm in writing a client's decision to disregard legal advice?
6. Do firm files include all documents prepared or received for that particular matter?
7. Do lawyers and staff document and file telephone conversations with clients?
8. Do firm files provide a detailed chronological record of the work done?

B. Telephone Procedures:

1. Are incoming calls answered professionally without delays?
2. Is the length of time a client is placed on hold closely monitored?
3. Are clients given some idea of when they can expect a return call if a lawyer is unavailable?
4. Do clients receive an explanation at the onset of the relationship of the firm's policy of returning their calls as soon as circumstances allow?
5. Do lawyers explain to the staff how to manage difficult, demanding clients?
6. Are all calls documented and placed in the client file?

C. Conflicts:

1. Do lawyers stay abreast of court decisions, the Model Rules of Professional Conduct, and ethical opinions which disqualify lawyers from representation?
2. Does the firm have a conflict of interest system which includes the following information:
 - a. Client?
 - b. Spouse of client?
 - c. Opposing party?
 - d. Spouse of opposing party?
 - e. Bank or accounting firm of clients?
 - f. Matter?
 - g. Corporation?
 - h. Principal corporate owners, officers, and directors?
 - i. Parent and subsidiary companies?
 - j. Formerly held businesses?
 - k. Other professionals serving a corporate client?
 - l. Business type?
 - m. Legal matter?
3. Is a conflict check made before receiving confidential details of a new matter?
4. Are new matters discussed with other lawyers in the office at least weekly to determine potential conflicts?
5. Are firm lawyers involved in the following risky arrangements:
 - a. Having a joint financial interest in client matter?
 - b. Engaging in business transactions with a client?
 - c. Serving as both counsel and officer or director for a client?
 - d. Accepting stock or an equity interest in lieu of legal fees?

6. Does the firm have a procedure to ensure that a lawyer cannot issue an opinion without review by another lawyer when the opinion giver has a personal and financial interest in the matter?
7. Are new hire candidates' previous employers and clients reviewed for potential conflicts?

D. Docket and Work Control:

1. Does the firm have a primary and secondary system of cross checking dates, typically a lawyer and assistant with dual cross-referencing?
2. Is there a central docket calendar with all firm lawyer activities by date and time?
3. Are changes or updates made on both the primary and secondary calendars then immediately forwarded to the person responsible for the central calendar?
4. Does the litigation docket system include:
 - a. Statutes of limitation?
 - b. Procedural deadline?
 - c. Trial and hearing dates?
 - d. Dates for document preparation, research, and commitments to clients?
5. Does the control system for non-litigation include:
 - a. Real estate closings?
 - b. Dates for estate planning, wills, and tax returns?
 - c. Renewal dates for copyrights, patents, or trademarks?
 - d. Filing and hearing dates for administrative agencies, commissions, or boards?
 - e. Corporate annual meetings, directors meetings, annual report filings, and tax dates?
6. Is the docket system designed to regularly remind everyone involved in an upcoming deadline with sufficient time to react and complete in a quality conscious manner?
7. Does the docket system have a procedure for verifying the completion of events or the appropriate rescheduling of events?
8. Do lawyers indicate on the docket personal appointments and commitments to keep the office informed of their whereabouts?
9. Are dates identified and entered into the system without delay?
10. Are there written docket system procedures?

E. File Maintenance:

1. Is a new file opened for each client matter?
2. Are all files kept in a central location?

3. Does the firm have procedures for removal and return of files so they can be immediately located?
4. Are active files regularly reviewed?
5. Are files taken out of the office?
6. Does the firm have specific procedures for file closing to include sending file closing letters to clients?
7. Are copies made of relevant file contents before releasing files to former clients, etc?
8. Are closed files stored separately from active files?
9. Are closed files reviewed with regard to new statutory and/or case law which could have an affect on the former matter?

F. Confidentiality/Office Security:

1. Does the staff avoid discussing client matters in the "public" areas of the office (e.g., reception, kitchen, elevators, restrooms, etc.)?
2. Is the visibility of legal documents controlled to avoid exposure to other clients or visitors?
3. Are client files returned to authorized personnel only?
4. Does the staff understand the importance of maintaining complete confidentiality of client information?
5. Are there safeguards to protect clients' files or their valuables from loss by hazard (e.g. fire, water damage, theft)?
6. Are fire extinguishers readily available and do all employees know where they are located and how to use them?
7. Are files secured in locked cabinets or drawers at the end of the day?
8. Are computer back-up systems stored at an off-site location?
9. Does the firm's commercial insurance policy include valuable papers and business interruption coverage?

G. Client Funds:

1. Are client funds segregated from personal and firm accounts?
2. Does the firm maintain accurate and up-to-date records of client fund transactions?
3. Is the client provided with a detailed accounting of the fund receipts and disbursements?
4. Do lawyers supervise the staff responsible for managing client funds?
5. Does an independent auditor review and reconcile client fund accounts?

H. Billing Procedures:

1. Does the firm communicate to the client verbally and in writing the fee or billing procedures?
2. Does the firm occasionally inquire about billing satisfaction during the progress of a case or other legal matter?
3. Are client statements itemized and set on a monthly basis?
4. Is enough detail provided so the billing can be justified if it is disputed?
5. Are internal time records submitted no less often than weekly?
6. Is a final statement prepared within 30 days of completing a matter?
7. Does the firm remain abreast of unpaid balances and send reminders?

IV. PRACTICE STANDARDS:

A. Accepting New Matters:

1. Has the firm identified the range of legal matters in which it has competence and expertise?
2. Prior to accepting new matters outside the normal areas of practice are the following factors considered:
 - a. Is the new matter so foreign to the firm's routine business that time and resources are not available within the firm to adequately provide the service required?
 - b. If the new matter requires an outside consultant lawyer, does the firm maintain a list of qualified lawyers or otherwise have the means of identifying a consultant with the requisite expertise?
 - c. What is the status of the lawyer to be assigned the matter in terms of subject matter knowledge, overall experience, and current workload?
 - d. What special resource requirements, to include staff support, consultants and travel, will accepting a non-routine matter entail?
 - e. Is the client prepared to pay for any extraordinary costs because the firm does not routinely work with this area of law?

B. Routine Practice Techniques:

1. Does the firm have adequate:
 - a. Record keeping?

- b. Mail procedures?
 - c. Accounting?
 - d. Billing?
 - e. Work and docket control systems?
 - f. Conflicts of interest check system?
 - g. Office equipment (automation, word processing, telephone, copying)?
2. Does the firm have routine document preparation procedures such as:
 - a. Form books?
 - b. Form files?
 - c. Brief banks?
 3. Does the firm use checklists routinely for such matters as:
 - a. Title search?
 - b. Real estate closing?
 - c. Will preparation?
 - d. Depositions?
 - e. Due diligence requirements?
 - f. Other routine matters?
 4. Does the firm plan to automate routine practice techniques and procedures?

C. Research Capability:

1. Does the firm have an adequate law library for its normal practice requirements?
2. Is there a readily available comprehensive law library?
3. Does the firm have access to electronic research?
4. Does the firm adequately budget for and routinely update the firm's library?

V. RISK MANAGEMENT:

A. Office Organization for Loss Prevention:

1. Does the firm have written procedures providing how the firm will manage risk and indicating the specific responsibilities of each lawyer and staff member for loss prevention?
2. Has a committee or lawyer been designated to supervise loss prevention, malpractice claims, and professional liability insurance for the firm?
3. Has a senior lawyer been designated an Ombudsman to discreetly receive and evaluate information from any members of the firm concerning potential ethical or malpractice issues?

B. Loss Prevention Training:

1. Does the firm have periodic ethics and loss prevention continuing legal education programs for lawyers and staff?
2. Are all new hires, lawyers, and staff given a formal orientation on office procedure with special emphasis on ethics and loss prevention principles?
3. Does the firm subscribe to periodicals or purchase library materials concerning ethical and loss prevention issues?

C. Professional Liability Insurance:

1. Does the firm have professional liability insurance?
2. Does the firm have faith in the financial strength of its insurance company?
3. Does the firm know the insurance company's claims service history?
4. Are the policy exclusions understood in terms of how they relate to the firm's practice?
5. Does the coverage include the non-lawyers on the staff?
6. Are policy limits and deductible regularly reviewed for adequacy?
7. Does the firm's insurance company offer claims avoidance assistance (e.g. seminars, claims repair hotline, malpractice prevention bulletins, etc.)?
8. Is the concept of "prior acts" coverage understood?
9. Is the "claims made" policy form understood?
10. Does another lawyer review the application for any misrepresentations before submission?
11. Is the firm's legal professional liability insurance explained to new hires?
12. Are all lawyers in the office familiar with the insurance company's claim reporting procedures?

D. Malpractice Claims Management:

1. Is every member of the firm instructed to report a malpractice claim or potential claim to a designated Loss Prevention Partner or other responsible lawyer in the firm?
2. Do office procedures require immediate reporting of a malpractice claim or potential claim to the firm's professional liability insurance company?
3. If the initial claim report is made telephonically, is it understood that an oral report should be immediately followed with a written report containing the information required by the professional

liability insurance policy?

4. Is it understood by all lawyers that the firm's representation for a malpractice claim must be coordinated with the insurance company?
5. Do the firm's lawyers understand the concept of claims repair and how the insurance company's claims counsel is able to assist in obviating or mitigating a claim with immediate assistance?
6. Do office Risk Management procedures provide for protecting and preserving without alteration the file for the matter in question?
7. Is it clear that documentation concerning the alleged malpractice would be maintained separate from the underlying matter?

E. Office Sharing:

1. Is there any aspect of your office sharing arrangement which could give clients reason to believe they are employing a partnership (i.e., with some or all of the lawyers sharing the office space with you)?
2. Do marquees, door signs, letterheads, business cards, pleading papers, "Of Counsel" designations or telephone listings potentially mislead clients into believing a partnership exists?
3. Do lawyers sharing offices refer to each other as partners, go into each others office at will, discuss business in front of clients or visitors, have mutual bank accounts, or file partnership tax returns?
4. Is there a written agreement setting forth all the terms and conditions of the shared office arrangement?
5. Does the written agreement contain a strict prohibition against any lawyer representing the shared office as a partnership (providing a basis for rebutting an alleged *de facto* partnership because any such representation was specifically unauthorized)?
6. Does the written agreement require that exceptions must be documented and explained to the client?
7. If another lawyer in the shared office is consulted, does the written agreement require that the client be informed and that fee division requirements of Model Rule of Professional Conduct 1.5, Fees, be scrupulously followed?
8. Does the written agreement require all lawyers to carry professional liability insurance with the same insurance company and with the same limits, deductible, and renewal date?
9. Does every lawyer sharing offices use client letters of engagement which include a clear explanation of the legal nature of the entity being retained and to what extent, if any, the client will receive services of other lawyers in the shared offices?

10. Is office space organized to the maximum extent feasible to make clear that the lawyers sharing offices are independent practitioners?
11. Do receptionists answer the telephone in such a way to avoid giving the impression of a law partnership?
12. Are telephone listings, mail and fax reception procedures, and filing systems clearly separate - guaranteeing complete client confidentiality?
13. Are temporary employees thoroughly oriented on the nature of the office sharing arrangement and the requirement of client confidentiality before being allowed to meet the public or process documents?

ENDNOTE BIBLIOGRAPHY

This Law Practice Assessment is the research product of numerous publications and articles. Given the nature of loss prevention techniques, redundancy and overlap are inherent in these authorities. This makes it difficult to credit any single source for a concept. Accordingly, this bibliography serves to credit all sources in one large endnote rather than attempt to cite in each part of this assessment numerous authorities.

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