



Strategies to Manage Your Law Firm's Professional Liability Exposures

MSP PL -01/2010 "Keeping Problems Simple—Managing Perceived Problems and Potential Claims"

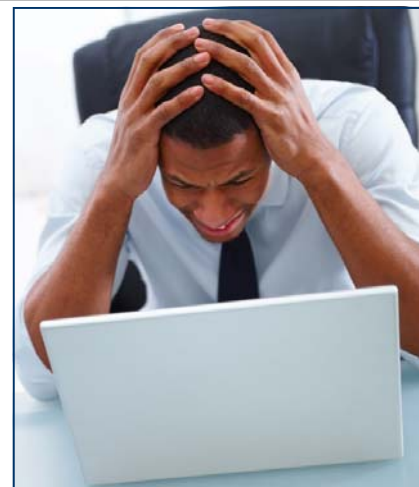
January 2010

Lawyers *Perspectives* Newsletter

© 2010 Cavnac & Associates — All Rights Reserved

Keeping Problems Simple Managing Perceived Problems and Potential Claims

*Article provided by
Travelers Risk Management PLUS+ Online®
A Service of Travelers Bond & Financial Products*



Lawyers manage problems for their clients every day. But they're not always sure how to manage situations that might turn into malpractice claims against themselves. Here are thoughts, based on our experience, which may lower the risk that potential claims will ripen into lawsuits, and help you sleep better at night if they do.

First, most problems don't turn into malpractice claims. But over the course of your career, no matter how excellent the quality of your lawyering, you (and staff for whom you're vicariously liable) likely will face at least one malpractice claim. In a generation, claims for legal malpractice have gone from something of an anomaly to a virtual subspecialty of the practice of law.

Mallen & Smith observe that, while the 1977 first edition of their *Legal Malpractice* treatise covered about 800 cases (many of which applied to legal malpractice by analogy), the 2007 edition reports over 17,000 published legal malpractice decisions. They further state that today's law school graduate has a statistical likelihood of facing at least three claims of malpractice in his or her career.

The prospect of a malpractice claim can arise from, among other things, a question from a client or other party, a threatening letter or phone call, a response to an invoice for legal fees, or even simply the unilateral belief that a mistake has been made. The potential claim may or may not have merit. But whether or not the concern is well founded, the situation generally calls for action of some sort.

The circumstances sometimes give rise to an ethical obligation of disclosure toward your client. And in any event, failing to act or hoping problems will go away can, and too often does, turn innocent and curable issues into more complicated claims to defend.

If a lawyer anticipates a claim, the law firm should determine whether it has a contractual obligation to place its liability insurer on notice. Because policy forms vary, the law firm should review the specific terms of the policy, which govern its rights and obligations. Failure to abide by notice requirements can result in the loss of otherwise available coverage.

In addition, strategies for resolving problems early and appropriately tend to evolve out of the interplay between the insurer's experience with legal malpractice matters and the law firm's expertise in its chosen substantive field of law. Our group at Travelers is in the business of handling claims against lawyers and in helping you navigate the pitfalls inherent in such claims. That includes an ability to recognize when practice area, law firm size, or other variables generate special considerations and when they do not. When appropriate, working with your insurance carrier early on can and often does prevent claims from ripening into full-blown lawsuits.

Problems (continued on page 2)

In this issue ...

| | |
|---|-----|
| Keeping Problems Simple | 1-2 |
| Choosing the Right Clients | 2-3 |
| 2009 Risk Management Seminar Series | 3 |

The law firm's initial communication to the carrier is ordinarily a concise, written statement containing information required to satisfy the insurance policy's notice provisions. Well written notice letters present the information objectively and without unnecessary editorializing. When appropriate, they may refer to brief self-explanatory attachments, such as a demand letter from a client or other party criticizing how a matter was handled. A notice letter will often indicate that it is being provided in an abundance of caution, to satisfy the insurance policy's notice provisions.

The carrier typically will acknowledge receipt of the law firm's notice in writing. The claim handler, who may be a lawyer with relevant background in private practice, will contact the firm and, if appropriate under the terms of the policy, will discuss the notice and determine whether and to whom the matter should be referred for assistance or defense.

It may be that no action is called for at this stage, and the matter will simply remain on file. Or, if action is called for, the law firm and the insurer will discuss the approach and the wisdom of obtaining outside counsel.

Sometimes, the plan may be to do nothing, unless and until the matter ripens. This approach is often taken after some due diligence regarding other options. Alternatively, the plan may be to "repair" the claim, if an opportunity exists to cure or reduce the impact of the perceived harm that may have been caused. If so, early action may eliminate or reduce the risk of the matter ripening, or at least prevent the harm from escalating.

If it is appropriate to settle the matter, an early understanding of the issues can lead to better and more flexible prospects for negotiation, before the parties' positions have become entrenched or the procedures governed by court rules. And for those potential matters that ultimately do result in formal litigation, the early preparation can pay off in the form of a better considered defense and a better night's sleep.✧

Disclaimer:

Perspectives is published as a service to lawyers. While the information contained herein is believed to be reliable, readers are advised to consult their own legal and insurance counsel for assistance in applying it to their unique situations.

Choosing the Right Clients Good Business and Risk Management

Article provided by
Travelers Risk Management PLUS+ Online®
A Service of Travelers Bond & Financial Products

Poor client selection is a recurring source of legal malpractice claims – and one you can control. This article offers tips for developing the right business while minimizing malpractice risk.

Before we review these tips, it's important to understand **what you can't control** – No matter how good you are at lawyering, a disappointed client may one day sue you for malpractice, whether the action is merited or not.

These tips have everything to do with **what you can control**. Among the most important risk variables within an attorney's control is the decision to accept or decline the representation of a new client. Done right, it can also be a sound risk management approach that is good for the firm's bottom line.

The key to making the right client selection decision is to **develop and adhere to an effective client screening policy**. In designing the policy, consider the factors below and any others you feel are important, and which are in keeping with the nature of your practice, desired clientele, and business goals. Unless you are a solo practitioner, the policy should include some form of peer review.

Here are some specific questions to consider, based in part on the ABA's *Desk Guide to Preventing Legal Malpractice*, as well as our independent claims experience.

- 1. Has the potential client gone through previous lawyers?** Clients who come to you dissatisfied with more than one set of attorneys may be the cause of their own problems. Perhaps the clients don't pay bills, or aren't straightforward with their attorney. Expectations on the merits of their position may be unrealistic. When clients who go through multiple attorneys on the same matter bring suit, they frequently include all of the lawyers in the chain. The last one in line sometimes bears the brunt for what has come before.

Client Choice (continued on page 3)

Published by

Cavignac & Associates

INSURANCE BROKERS

License No. 0A99520

450 B Street, Suite 1800 San Diego, CA 92101-8005

Phone 619-234-6848 Fax 619-234-8601

Web Site www.cavignac.com

2. **Are you dealing with a reasonable potential client?** Unreasonable and unduly litigious individuals, who act on impulse or for vengeful motives, have a certain “cash-cow” attraction if you are hungry for business. Often their adversaries are those with whom they once enjoyed productive relationships. If the results of your representation are not to their liking, do you have reason to believe that they will behave differently toward you?
3. **Does the potential client have a difficult background?** Learn what you can about the potential client’s background: financial problems, serious legal problems, chemical or gambling issues, etc. Pay attention to factors that may indicate instability or obsessiveness.
4. **Does the potential client require immediate action?** Beware of the intake interview that occurs at the last minute. If a pleading has to be filed before you have a chance to get up to speed on a case, any omission or error may in hindsight seem frighteningly obvious. The lawyer who fails to timely identify a potential source of offset, misses a critical appellate issue within a jurisdictional deadline, or who substitutes in on the eve of trial without time to thoroughly prepare, runs significant risk. Even if excusable, these are just the sort of standard-of-care issues that can turn into “battle of experts” malpractice litigation.
5. **Does the potential client expect more than legal advice?** Business clients, especially the promoters of closely held corporations, may select a firm believing that the firm’s contacts will be good for business. Networking is good, and you want to help. Be aware that fact-driven claims arise when, for example, clients think you actually undertook to arrange financing for them. The lawyer who, in the eyes of the client, wears more than one hat in regard to a transaction greatly increases the risk of a thorny claim.
6. **Is this a personal favor?** Your qualifications and obligations as an attorney don’t change when the client, or the person referring the client, is someone close to you. Sadly, kind-spirited lawyers who do “favors” outside their area of expertise do get sued, even when the disgruntled client suing them is a friend or relative. And the personal relationship tends to sour as well.
7. **What does your gut tell you?** Trust your instincts. If something doesn’t seem right, the best time to avoid a bad surprise is before you undertake an attorney-client relationship. ✂

Disclaimer:

Perspectives is published as a service to lawyers. While the information contained herein is believed to be reliable, readers are advised to consult their own legal and insurance counsel for assistance in applying it to their unique situations.



2010 Risk Management Series

- 2010 Cal/OSHA — New Laws and Rules
Thursday, January 21, 2010
Registration: 7:30 am
Program: 8:00 am - 10:00 am
- Important SDI, PFL and UI Information You Can Use in 2010
Wednesday, February 10, 2010
Registration: 11:30 am
Program: Noon - 2:00 pm
- Employment Investigations: When to and How to
Friday, February 19, 2010
Registration: 7:30 am
Program: 8:00 am - 10:00 am
- Sexual Harassment Prevention Training Satisfies AB1825 Requirements
Friday, March 5, 2010
Registration: 7:30 am
Program: 8:00 am - 10:00 am
- How to Become a Corporate Safety Officer
Friday, April 16, 2010
Registration: 7:30 am
Program: 8:00—10:00 am
- 7 Steps to Avoid Costly Employee Lawsuits
Friday, May 21, 2010
Registration: 7:30 am
Program: 8:00 am - 10:00 am

All training sessions available to our clients

* Reserve early / seating is limited!

Register for upcoming seminars

Contact **Darcee Nichols** at dnichols@cavignac.com or call **619-744-0596**.

* NOTE: Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than **72 hours advance** notice of cancellation.