



Strategies to Manage Your Law Firm's Professional Liability Exposures

MSP PL - 11/2009 "The Changing Risk Climate for Defense Lawyers"

November 2009

Lawyers' *Perspectives* Newsletter

© 2009 Cavignac & Associates — All Rights Reserved

The Changing Risk Climate for Defense Lawyers

By Joseph W.E. Schmitt, Senior Claims Counsel, Travelers

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

© 2009 The Travelers Companies, Inc. — All Rights Reserved.

The defense bar, until fairly recently, had a modest share of the legal malpractice pie. But the most recent survey of legal malpractice claims (2005), compiled by the American Bar Association, malpractice claims against defense attorneys were up 6%, greater than any other practice area, and now account for about 10% of all claims.

What Are the Risks?

- **Missed deadlines** – Defense lawyers don't suffer the same "blown statute of limitations" risk as plaintiffs' attorneys, but missed deadlines do turn into claims. Default judgments and delay in moving to vacate are prime examples. Other examples include failure to timely respond to requests to admit, missed appeal deadlines, and failure to timely name expert witnesses.
- **Errors in substantive legal advice** – Mistaken legal advice, particularly as it relates to settlement decisions, is a recurring theme in malpractice claims. While claims based solely on poor predictions generally are without merit, defense lawyers have been sued by clients who refused to settle in reliance on faulty legal opinions as to liability and damages.
- **Failure to communicate settlement demands** – Failure or delay in communicating settlement demands – particularly those involving policy limits – is a growing source of claims.
- **Inadequate preparation, pretrial jitters and substitution of counsel** – The eve of trial is often a volatile time in the life of a lawsuit. Rapid developments, overwork, and increased pressures

are part the process. But it is also when poor preparation comes home to roost. Failure to subpoena witnesses, to obtain otherwise available evidence to support key defenses, and to have adequately advised the client on liability and damages can cause claims following an adverse verdict.

In some cases, poor preparation or other factors can lead to a pretrial substitution of defense counsel. While factors other than malpractice often cause or contribute to this event, successor counsel sometimes writes to the client advising of all the risks it perceives upon inheriting the file. When these perceived risks differ

Defense Climate (continued on page 2)



In this issue ...

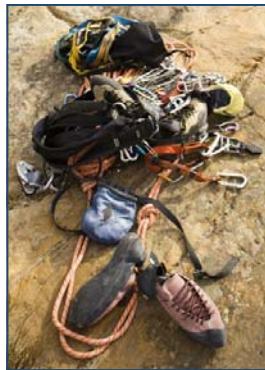
Changing Risk Climate for Defense Lawyers	1-3
2009 Risk Management Seminar Series	2
Handling a Client's Request for the File	3-4
Live Well, Work Well	4

from prior counsel's advice, subsequent claims are possible.

- **Poor client communication/failure to manage expectations** – It is never easy for a client to accept an adverse result, but when it comes as a shock, the odds of a malpractice claim go up. Even when trial preparation is excellent, a client who isn't fully informed of the weaknesses of the case may be unrealistically optimistic.
- **Managing the tripartite relationship** – When there is a perceived or real conflict between insurer and insured in regard to the defense or settlement of a case, defense counsel's loyalty is sometimes called into question. While the loyalty issue itself does not ordinarily result in a malpractice claim, it can have an impact on other theories advanced.
- **Practicing outside area of expertise** – A significant number of claims against defense attorneys do not arise from defense work, but rather from taking on work in areas outside of the lawyer's realm of expertise. Defense attorneys who take on a plaintiff's case seem especially vulnerable to statute of limitations claims and other procedural errors. Also notorious are seemingly simple favors for friends, family and staff – drafting wills, providing tax advice, forming a small business entity, weighing in on property disputes – all of which can result in experienced and sophisticated defense lawyers making elementary mistakes to the detriment of their clients.

Tips for Minimizing Risks

- **Keep the client informed and communicate realistic expectations** – The client and carrier will see that you care about the case, win or lose. They'll better understand the risks and are more likely to share responsibility for decisions to proceed.



Stakeholders who are part of a team are less likely to turn on the attorney following an adverse result. When members of a team disagree as to



Risk Management Seminars 2009 Series

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

- **Sexual Harassment Prevention Training**
Meets AB1825 requirements
Friday, December 4, 2009 — 8:00 -10:30 a.m.

All training sessions available to our clients
Reserve early / seating is limited! *

For more information about upcoming seminars

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

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

how to proceed, early communication of the issue creates a better chance of resolving it in a sensible and appropriate way.

- **Immediately communicate settlement demands, and confirm the communication in writing** – This is obvious, but it also a source of claims. Less obvious is that even a delay in relaying a significant settlement demand can result in a claim based on insufficient time to evaluate. Confirming in writing creates a good paper trail.
- **Be clear on who your client is, and confirm the scope of representation in writing** – Clearly explain, in writing, who you represent and, as importantly, who you do *not* represent. Identify the scope of the representation and its limits.

This document, when well written, can make the difference between a case that goes to a jury and one dismissed on summary judgment or vetted out before suit is even filed.

- **Decline representation in writing** – If you decide not to take a matter after initial consultation, send out a letter specifically saying so. If there are critical deadlines, advise the non-client so that they may be met.
- **Identify potential conflicts early and continue to monitor the possibility of conflicts**

Published by

Cavnac & Associates

INSURANCE BROKERS

License No. OA99520

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

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

Web Site www.cavnac.com

throughout the representation. – Be careful when representing multiple parties. If you see a potential conflict, don't let the desire for business influence your analysis. Better to decline representation early on than to withdraw too late. When undertaking representation, obtain appropriate waivers in writing.

- **Adhere to a formal client-screening policy** – The more you know about your potential client before deciding to take on the representation, the lower the risk that you may later face a malpractice suit.

The policy should include some form of peer review. Too many of the unwise but avoidable decisions that lead to malpractice claims are attributable to lawyers acting alone.

- **Peer review** – Foster an environment where lawyers in the firm are comfortable seeking each other's views in situations where the answer isn't clear. Outside eyes are especially helpful when a lawyer senses that a desire for business may be clouding judgment. And the lawyer who discusses issues as they occur typically sleeps much better than the one who waits until after the problem has mushroomed. ✨

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.

Handling a Client's Request for the File

By Mary King, Senior Claims Counsel, Travelers Risk Management PLUS+ Online® for Legal Professionals

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

©2009 the Travelers Companies, inc. – All rights reserved



A client's request for his/her file is often – but not always – a precursor to a legal malpractice claim. Sometimes the reason for the request is wholly innocent, as when representation has ended relatively amicably, and new counsel needs the file to proceed. Sometimes the contents of the file are useful in other matters on which the client is engaged. Even when the client demands the file out of dissatisfaction, in many cases new counsel reviewing the file may find no basis for a claim.

When the client is dissatisfied, failing to turn over the complete file can and does exacerbate a soured client relationship, incites the client to pursue the malpractice claim, and may lead to professional discipline.

Whose File Is It?

Courts and ethics opinions have followed two basic approaches in categorizing client files for purposes of determining client rights of access or possession.

The majority rule is the "entire file" approach, which holds that a client is entitled to everything in the lawyer's file, including the work papers, notes and work product of the attorney. This approach is adopted by the Restatement (Third) of the Law Governing Lawyers, s. 46 (2)(2000). Even under the "entire file" rule, however, the client is typically not entitled to documents intended

solely for the firm's internal review, such as internal assignment documents, internal billing records and private impressions of counsel.

The minority rule is the "limited file" approach, which holds that the client is entitled to "core" materials, such as filed pleadings, correspondence and final, substantive memoranda. The remaining materials in the file are not the client's, absent a showing of need.

Practice Tips

- **Determine what, if any, ethical rule applies to access to and possession of client files in your state** – There may be a formal opinion on the topic by the state's professional responsibility board or pertinent case law.
- **Implement the rule by written firm policy and then incorporate the policy into the firm's standard engagement letters** – The policy should identify any documents that may be withheld from client inspection and possession as well as the cost for providing access or possession.

- **On closing the file, the closing letter should advise the client of the disposition of the file,** including document retention and destruction periods, and return the client's original documents.
- **Promptly comply with the client's request for the file** – Do not complicate matters by appearing to delay or adopt stalling tactics.
- **Keep files organized and neat in appearance** – First impressions count, and they sometimes factor

into the opinion of a plaintiff's attorney vetting a potential malpractice claim. An organized file may not prevent a malpractice claim, but a disorganized one may contribute to an impression of poor representation. ✂

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.

Traveling with Fido

It's the start of the holiday season, which often means traveling to places far away to see loved ones. If you plan on bringing your pet(s) along, ensure you have all your bases covered to make the trip as pleasant as possible:



- Before the trip, make a checklist of all the things your pet typically needs (such as a water bowl, medication or a favorite toy). Then use the checklist as you are packing for the getaway.
- Also before you leave, look up the nearest emergency centers along the route you are traveling, as well as at your final destination.
- Purchase a pet carrier that is large enough for your pet to stretch out and sleep. Label it with your name and contact information in several areas using permanent marker and waterproof labels.
- If traveling a long distance via car, bring cleaning materials and plastic bags in case he/she gets sick. It might be wise to avoid feeding your pet a full meal until you arrive at your destination (if it is a one-day trip.)
- Make sure your pet gets plenty of exercise before boarding a plane or getting in the car for a long trip. Also make sure to stop the car frequently to allow for bathroom breaks. ✂

LIVE WELL, WORK WELL.



Be Thankful for Family

Thanksgiving Day is National Family History Day! What does this mean? It's a reminder to ensure that you have a complete family medical history to provide in the unfortunate case of a family emergency. For example, if your child shows signs of a disorder, family medical history can help the doctor confirm a diagnosis.



Your Child's Family History

- Record the names of your child's close relatives from both sides of the family; include conditions each relative has/had and at what age the conditions were first diagnosed. If the relative is deceased, include cause of death and age of death.
- Use the U.S. Surgeon General's online tool for collecting family histories, called "My Family Health Portrait."
- Discuss family history concerns with your child's doctor.
- Update your child's family history information regularly, and share new information with your child's doctor. ✂

Article Courtesy of Employee Benefits Department

Happy Holidays!

