

YOUR LAW PRACTICE 2006:
MAXIMIZING PERFORMANCE &
MINIMIZING RISK

JoAnn L. Hathaway

INTRODUCTION

The cornerstone to keeping clients happy and maintaining a healthy, efficient, profitable practice is to implement effective Practice Management procedures within your practice. By doing so, you have a good foundation for a successful law practice. Good Practice Management equates to good Risk Management; the benefits are limitless.

In addition, while in many states not mandatory, an attorney can only benefit from having a legal malpractice policy in place. To ensure you are purchasing the best insurance coverage available, it is essential to understand the nuances of available coverage and know how to evaluate an insurance carrier.

MALPRACTICE INSURANCE BASICS

- What is covered?
 - Professional services as a lawyer, mediator, arbitrator, title insurance agent, notary public, administrator, conservator, receiver, executor, guardian, trustee, or in any similar fiduciary capacity
 - Claims must be first made during the policy period
 - Claims must be first reported during the policy period
 - Acts or omissions must have occurred on or after the retroactive date and prior to the policy expiration
 - No knowledge of facts or claim prior to the policy effective date.

- Who is covered?
 - The named insured firm
 - Current members of the firm
 - acts on behalf of the firm
 - Former members of the firm
 - limitations on continuing in practice
 - Non-lawyer employees
 - Of counsel, independent contractors

- What is not covered?
 - Uninsurable exposures
 - Dishonest, criminal, fraudulent, intentional acts
 - Covered elsewhere
 - Bodily injury, property damage, workers comp
 - Directors & officers, bonds
 - Business risk
 - Ownership in, management of, other entities

CHOOSING MALPRACTICE INSURANCE

- Coverage Options
 - How much insurance do I need?
 - What is the right deductible?
 - Prior Acts, or what is “career” coverage?
 - Do I need First Dollar Defense?
 - Do I need Claims Expense Outside Limits?
- 2003 ABA Claims Study
 - Of 30,369 claims,
 - 59% closed without expense payment
 - Of 12,571 with expense paid,
 - 46% closed with expenses paid of \$5,000 or less
 - 35% closed with expenses paid of between \$5,000 and \$10,000
 - Only 482, or 3.8%, had claims expense above \$100,000
- Should price be a factor?
 - Best Rating of Carrier should be at least A- (Excellent)
 - Look at Policyholders Surplus
 - Premium to PHS Ratio should be close to 1:1
 - Beware Ratios above 2:1
 - How are claims handled?
 - Claim repair
 - Defense philosophy
- Changing Insurance Carriers
 - Prior Acts Coverage
 - Reporting Potential Claims
 - Extended Reporting Period Options
 - Former Firm Members
 - Bells & Whistles
- Reporting Claims

- To report or not to report, that is the question
- If I report a potential claim, how will it affect my premium?
- Choosing Defense Counsel
 - Can you request specific counsel?
- Consent to Settle
 - “Insured shall not unreasonably withhold...”

MALPRACTICE CLAIMS STATISTICS

- ABA Standing Committee on Lawyers Professional Liability Profile of Legal Malpractice Claims 2000 – 2003
- Survey of 18 Companies in the U.S. and Canada
- Analysis of just over 30,000 claims
- 2003 Claims by Area of Law
 - 20% PI – Plaintiff (down 19% from 2000)
 - 16% Real Estate (down 3%)
 - 10% PI – Defense (up 143%)
 - 10% Family Law (down 5%)
 - 09% Estate/Probate/Trust (unchanged)
 - 08% Collection (unchanged)
 - 06% Corporate Formation (down 26%)
 - 04% Criminal (unchanged)
 - 02% Patent (up 71%)
- 2003 Claims by Type of Alleged Error
 - 47% Substantive Errors (down 16% from 2000)
 - 28% Administrative Errors (up 73%)
 - 15% Client Relations (down 12%)
 - 10% Intentional Wrongs (up 15%)
- Substantive Errors
 - 11% of all claims involve failure to know/properly apply law (down 50% from

2000)

- 10% of all claims involve inadequate discovery/investigation (up 69%)
- 8% involve planning errors (up 140%)
- 7% involve failure to know/ascertain deadline (down 53%)
- 6% involve conflict of interest (up 23%)

- **Administrative Errors**
 - 9% involve procrastination in performance/follow-up (up 91% from 2000)
 - 5% failure to calendar properly (down 16%)
 - 5% involve clerical errors (up 279%)
 - 4% failure to react to calendar (up 242%)
 - 4% failure to file document – no deadline (up 177%)

- **Client Relations**
 - 7% failure to follow client instruction (up 71% from 2000)
 - 6% failure to obtain consent/inform client (down 52%)
 - 2% improper withdrawal of representation (down 28%)

RISK MANAGEMENT

- **Know Your Client**
 - Evaluate the client
 - Is the story credible?
 - Any past legal representation?
 - Does the case have merit?
 - Does it make financial sense?
 - Any statute of limitations problems?
 - Gather facts, especially the bad ones
 - What do your instincts tell you?

- **Know Yourself**
 - Do you have time to take on the case?
 - 2003 ABA Claims study - 10% arise from inadequate discovery

- Do you know the subject matter?
 - 2003 ABA Claims Study shows 11% from failure to know/properly apply the law
- Do you have a conflict of interest?
- Client Relationship
 - 6% of claims arise from failure to obtain consent/inform client
 - 7% of claims arise from failure to follow client instructions
 - Never guarantee the outcome
 - Document all important events and discussions in writing
 - Suits to collect unpaid fees
- Office Sharing - Share expenses, not liability
 - Don't share letterhead, invoices, files, bank accounts, books or records
 - Don't answer phone in a misleading way
 - Don't show names on office suite in a misleading way
 - NEVER refer to office sharers as "partners"
 - DO disclose to clients that your relationship is limited to office sharing
 - Client perception is key
 - Partners have vicarious liability
 - Ethical considerations
- Support Staff
 - Legal support staff members are an extension of the lawyer in work product and ethical responsibility
 - Increasingly actions of legal support staff are being construed as actions of the attorney
 - Partners in a law firm have a duty to educate staff members about ethical responsibilities
- Client Confidentiality
 - Anything learned about a client is confidential
 - Identity of clients should be confidential

- Discussions in public places should be avoided
- Information should be dispensed on a “need to know” basis

Top Ten Malpractice Traps

Trap #1: Missing Deadlines

Calendaring errors remain a leading cause of malpractice claims. To avoid this trap a law firm should have a firm-wide calendar and practices in place regarding its use

Trap #2: Stress and Substance Abuse

It takes just one dysfunctional attorney to ruin a firm’s reputation and add significantly to its malpractice claims history. Often the problem is compounded by inaction on the part of the law firm. Certain practices can reduce the chances of encountering such a problem.

Improved Communications among Firm Members

Does your firm have an open door policy? Can problems be discussed confidentially within the confines of the firm? Too many attorneys today view partnership as an economic relationship and lack a sense of loyalty to one another.

Workloads

Stress can push attorneys into clinical depression or cause other mental health problems, including anxiety disorders. While it may be impossible to remove stress completely from the workplace, it can be managed and reduced.

Does the firm measure attorney worth solely on billable hours or the number of open files being handled? This system may be necessary to a degree, but it cannot and should not be the sole measure of one’s value.

Know the Signs of Substance Abuse and Depression

Symptoms of substance abuse may include frequent morning tardiness, missed deadlines, neglected mail, and missed appointments.

Seek Help from Professionals

Most attorneys acknowledge that substance abuse and mental health issues can greatly increase the risk of malpractice claims and can devastate families, professionals and entire social circles. It is unfortunate that few will take the risk to intervene and help a colleague.

Trap # 3: Poor Client Relations

Every malpractice claim begins with a dissatisfied client. Inadequate attorney-client communication is usually at the heart of the problem. Common mistakes include failure to obtain client consent, failure to inform a client of a case development, or failure to follow the client's instructions. Many of these errors can be avoided by adopting a common sense approach.

Trap #4: Ineffective Client Screening

After being served with a malpractice action, attorneys often express "I knew I shouldn't have taken on that client." Problem clients are often the result of ineffective client screening. With a standardized and effective screening process potential disaster clients may be identified and avoided.

Trap #5: Inadequate Research and Investigation

The ABA has reported that substantive errors account for 44% of malpractice claims. Common errors include failure to know or properly apply the law, failure to know or ascertain a deadline, inadequate discovery or investigation, and planning or procedural choice errors.

Many of these errors can be prevented through careful, methodical research and procedures keep abreast of new developments in the law.

Trap #6: Conflicts of Interest and Conflicts of Matter

Conflicts of interest and conflicts of matter can arise from a variety of situations. Each firm must establish procedures for identifying and resolving situations in which these unexpected conflicts may arise.

Memories alone are insufficient to check for potential conflicts of interest and matter. Law practices need systematized procedures for documenting and analyzing potential conflicts for every new client and matter accepted by the firm.

Trap #7: Inappropriate Involvement in Client Interests

A lawyer's involvement in a client's entrepreneurial interests raises conflict of interest issues and is increasingly a significant basis for legal malpractice. This involvement can take several forms. Examples of such involvement are:

- Acting as a director or officer of a client company
- Investing in client securities
- Becoming involved in one-to-one business deals with a client

Trap #8: Lack of Adequate Documentation of Work

Insufficient documentation of work accounts for many of the client relations and missed deadline errors associated with legal malpractice claims. Also, once a legal malpractice claim has been asserted or a lawsuit filed, lack of documentation makes it much harder to assert a strong defense. When a defendant-lawyer must rely upon memory to recite occurrences and conversations that occurred during representation of the plaintiff-client, a "credibility contest" is created; this is not the best defense scenario.

Trap #9: Zealous Efforts to Collect a Fee

A significant percentage of all legal malpractice claims brought against attorneys are those involving fee disputes. Typically, the attorney sues the client for unpaid fees, resulting in a counterclaim for legal malpractice. In order to avoid fee disputes, adhere to rules when billing and collecting fees for legal services.

Trap #10: Unwillingness to Believe You May be Sued for Malpractice

Claims of legal malpractice against lawyers continue to be on the rise. Regardless, many attorneys believe erroneously they will never be the target of a malpractice claim. Trends in the frequency and dollar value of claims suggest otherwise.

TRENDS

- 78% of claims close without indemnity payment (up 3% from 2000)
- Less than 4% of claims close with indemnity payments > \$100,000
- Less than 1% of claims close with indemnity payments > \$1,000,000
 - The number has increased by 1/3 from 2000
- Slightly more than half (53%) of all claims close within 24 months of being reported

- Areas to Watch

- Intellectual Property
- Mass tort/class action
- Complex Business and Litigation Matters
- Bankruptcy Law Changes
- Personal Injury Defense
- Real Estate
- 15% increase in claims activity for firms > 40 attorneys

CONCLUSION

The key to minimizing the risk of being the target of a malpractice claim is to be aware of the malpractice exposure of every matter you take on. By recognizing your risks and implementing effective practice and risk management procedures, you lessen the chances of becoming a malpractice statistic and greatly increase the probability your clients will be well-served thus happy, your practice will run efficiently which equates to greater profitability, and you will be happy in the practice of law.