The American Bar Association
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Present

Controlling Legal Malpractice Insurance Cost and Availability in a Changing Marketplace

Law Firm Loss Prevention Systems and Procedures

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LAW FIRM LOSS PREVENTION SYSTEMS AND PROCEDURES

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1. LAW FIRM LOSS PREVENTION SYSTEMS & PROCEDURES

A. Docket and Calendar Control

Docket and calendar control was one of the first risk management issues identified by the insurance industry. Today, some form of calendaring system is standard fare for law firms of all sizes. The insurance industry's emphasis on adequate docket and calendar controls is the result of claims experience directly related to missed deadlines by practising lawyers. Recent American Bar Association statistics indicate that more than 26% of all claims made against lawyers are administrative in nature. Of the administrative errors, 19% are directly related to calendaring mistakes; 11% are the result of the failure to make a docket control or calendaring entry; 4% are due to a subsequent failure to file and 4% are the result of a failure to react to a deadline once entered. St Paul experience tracks with the national figures; 22% of our lawyers claims are the result of calendaring errors with 5% specifically attributable to a failure to make a calendar entry. Missed dates and other administrative errors associated with docket and calendar control remain a significant cause of loss. Although a comprehensive docket and calendar system will not completely eliminate these losses, it will significantly reduce a law firm's exposure.

There are a variety of docket and calendar systems available and the following descriptions are generic. However, practically all systems fall somewhere within these general descriptions.

1. Computerised Systems

Software companies are marketing literally dozens of automated docket and calendaring systems. The systems are typically centralised with data entry performed by a designated staff member. Commonly, docket or calendar sheets are filled out by the lawyers or their staff and submitted to the docket entry clerk. The central system is then able to issue a series of reminders to lawyers and staff as the important dates approach.

2. Perpetual Calendar Systems

A perpetual calendar system is basically a series of index cards filed by day, month and year with a cross-reference capability (e.g. colour codes) for items with the greatest priority. In this system, the lawyer or designated staff member records pertinent dates and time frames on individual cards which are then filed according to date with the additional reminder cards filed prior to the ultimate due date.

3. Dual Calendar Systems

This system is simply two calendars or diary books to record future actions. Typically, one calendar is kept by the lawyer and another by an assistant. Problems inherent in this format include capacity and lack of reliability.

4. Single Calendar Systems

This system is extremely vulnerable to error and is an unacceptable format from an insurance perspective. Even sole practitioners should use a system where they are required to make more than one entry in recognition of an upcoming event.

THE ST PAUL'S RECOMMENDATIONS

1. Your firm's docket and calendar system should be at least a dual entry system.

2. Your system should include both litigation and non-litigation items.

3. Firm policy and guidelines on docket and calendar control should be in writing and made available to all of the firm's employees.

4. Centralised docket systems should be controlled by more than one person and have adequate backup in the event of computer failure. Your firm's system should record more than final due dates.

5. Docket and calendar reminders should be sent to at least two persons, e.g., a lawyer and his/her assistant.

B. Mail Handling

As mundane as the subject of mail handling is, a surprising number of law firms have no policy or procedure whatever for the routine distribution, opening, date stamping and delivery of mail. Since the majority of time deadlines faced by a lawyer are contained within documents sent through the mail, a few brief recommendations are in order.

THE ST PAUL'S RECOMMENDATIONS

1. Your law firm should adopt a policy requiring mail to be sorted and delivered within a specified time period after its arrival.

2. The mail should be opened and date stamped prior to delivery to the individual lawyers.

3. When necessary, docket and calendar entries should be performed prior to delivery of the mail to the individual lawyers.

4. Your law firm should adopt written policies and guidelines on mail handling.

C. Conflict of Interest Avoidance

A law firm must be sensitive to potential conflict situations. The Model Rules and the Model Code spell out tests determining whether an impermissible multiple representation exists. In addition, an increasingly large number of legal periodicals address current lawyer conflict scenarios. Law firms should, therefore, be familiar with not only the provisions of the Model Rules and Model Code, they should also stay abreast of recent case law which interprets the precepts set forth in the Model Rules and Model Code.

The conflict of interest issue is one of increasing complexity and concern. The information that follows is intended merely to highlight practical steps a law firm can take to help address this potential malpractice area.

Assuming some degree of sensitivity and education, law firms must have a system in place to assist lawyers in determining whether a conflict exists. Essentially, conflict avoidance systems fit into three broad categories:

1. Oral/Memory – This is typically the least reliable conflict avoidance control. It refers to a process wherein firm members rely on individual recall or memory of other firm members to assess conflict potential.

2. Single Index System – A single index system refers to file cards describing either client, subject matter or both with no built in capability to cross-reference within the system or between multiple law firm locations.

3. Multiple Index System – As the name suggests, this system provides users with the capability of cross-referencing clients based on various menu items. Multiple index systems may or may not be computerised.

Obviously, even the most sophisticated conflict avoidance system is only as good as the information that has been entered into it. Without strong law firm commitment to the development and maintenance of such a system, its benefits will be only marginal.

THE ST PAUL'S RECOMMENDATIONS

1. Your law firm should have an established programme for continuing education related to conflict of interest matters.

2. Your firm should have a conflict avoidance system in place and should have written policies and guidelines concerning its use.

3. Firm members should not be permitted to enter into business transactions with clients without approval from firm management.

D. Serving as Corporate Director or Officer

(Source: Smith, Jeffrey M. and Mallen, Ronald E., Preventing Legal Malpractice, 1989, West Publishing, pp. 242-253.)

Lawyers have historically accepted the role of director or officer for a variety of reasons:

- Their presence adds a unique dimension to the composition of the board.

- They believe that their presence on the board will enhance their ability to serve the client.

- Board members will more readily accept legal advice if a member of the firm is also a director.

- They believe that serving as an officer or director is necessary to obtain or retain the corporation as a client.

Underlying all of these reasons is a simple belief that if a board position is not accepted, it will be filled by a member of another firm with the corresponding risk that a corporate client will be lost. However, with the increasing tendency of corporations and shareholders to file claims against board members, law firms must understand the malpractice exposure associated with assuming these corporate roles.

Consider that:

- A lawyer/director has an increased chance of being sued under the Racketeer Influenced and Corrupt Organisations Act (RICO). To violate RICO, a defendant must conduct or participate in the affairs of an enterprise through a pattern of racketeering. Although directors may delegate the task of overseeing the day to day operations of the corporation to others, they are still required to supervise and oversee the actions of their subordinates and, accordingly, conduct the affairs of a corporation. If the lawyer is not a director, it is far more difficult to prove that he or she participated in the conduct of the corporation.

- In tender offers, directors are increasingly exposed to shareholder suits because of possible accusations that their opposition to a change in control was motivated by self-interest. In addition, a lawyer/director may have an increased exposure because of the perceived conflict of advising the corporation regarding its options while serving on the board. That conflict, whether perceived or real, compromises potential defences.

- Directors are also frequently called as witnesses in corporate litigation, even when they are not actually participants. This may lead to the disqualification of the lawyer as well as the firm with a general prohibition of a lawyer also acting as a witness. Disqualification, whether for this reason or another, results in a loss of revenue for the firm and the terrible inconvenience of retaining outside counsel. It also means that the outside firm will have to become more familiar itself with the case and the corporate client, a result which the lawyer hoped to avoid to begin with. It also serves as an incentive for naming the lawyer/director in the suit so plaintiff's counsel can oppose a less qualified law firm.

- Increasingly, directors and officers liability insurance policies provide coverage only if an insured is acting solely in his/her capacity as a director or officer.

THE ST PAUL'S RECOMMENDATIONS

1. Do not accept officer or director positions, particularly if the corporation is a client of the law firm.

2. Serve as outside counsel to the corporation.

3. If the dual role of lawyer/director cannot be avoided, consider the following recommendations:

    a. If significant corporate activity clearly involves conduct by a lawyer both as director and lawyer, participation should be limited to one role. This decision should be reduced to writing and, where possible, approved by a board or committee.

    b. Where the lawyer/director performs both roles on an ongoing basis, there should be, to the extent possible, a clear delineation of roles. Steps that might be taken include:

        i. Separate files for each role should be maintained.

        ii. Separate stationary should be used. Law firm bills should be sent directly to the corporation and payment made to the law firm accounting department.

        iii. Firms should never share in directors' fees.

        iv. The lawyer should abstain from board votes which will directly or indirectly affect the firm.

        v. The lawyer/director should be aware that conversations involving both capacities may threaten the lawyer/client privilege.

    c. Your law firm should have written policies and guidelines concerning the ability of firm members to serve a directors or officers of corporations.

E. File Opening Procedure

The file opening procedures not only signal the beginning of the lawyer/client relationship, it is also the point at which most of the firm's loss prevention techniques are co-ordinated. Without dictating a specific form or process, we believe that your firm's file opening procedure should include the following:

THE ST PAUL'S RECOMMENDATION

1. A client or case acceptance designation.

2. A conflict of interest check.

3. An initial docket or calendar entry as needed.

4. A fee approval (retainer agreement, engagement letter) designation.

5. Your firm's policy and guidelines on file opening should be in writing and made available to all firm employees.

F. Fees and Billing Practices

THE ST PAUL'S RECOMMENDATIONS

1. Use engagement letters or retainer agreements for all new clients and for new matters for existing clients.

    a. Confirm existence of lawyer – client relationship.

    b. Confirm and outline the agreed upon course of action.

    c. Confirm and outline fee arrangement.

    d. Identify those issues or obligations for which the lawyer will not be responsible.

2. Use non-engagement letters for all representation which has been declined by the law firm.

3. Bill on a frequent, consistent basis.

4. Use disengagement letters upon termination of representation.

    a. Confirm completion of work.
    b. Indicate termination of representation.
    c. Direct client to follow-up on matters not completed.

5. Consider adopting a law firm policy against suing clients for unpaid legal fees.

6. Your firm's policy and guidelines on billing should be in writing and made available to all firm employees.

G. Work Product Control/Peer Review

(Source: American Bar Association Standing Committee on Lawyers' Professional Liability, Partner Peer Review: An Idea Whose Time has Come, Seminar Given April 19-20, 1990.)

Law firms throughout the country have, traditionally, utilised some method of associate review for monitoring the quantity and quality of work performed by junior members of the firm. Unlike a number of other professions, however, lawyers have not yet fully embraced the idea of peer review.
Doctors and accountants, for example, have developed fairly extensive peer review programmes. In the case of the medical profession, quality peer review is considered significant enough in some states to merit legislative support granting varying degrees of immunity for doctors involved in the process. The legal profession on the other hand, has made a number of "false starts" in its effort to develop some form of a model peer review system. As early as 1980, the American Law Institute – American Bar Association (ALI-ABA) developed a model peer review system intended to serve as a guide for law firms choosing to pursue that form of self regulation. That initial effort was not, unfortunately, received with a great deal of enthusiasm within the legal community. Some of the scepticism was well founded and highlighted concerns by lawyers regarding whether anybody or any group was capable of regulating the substantive manner in which an individual lawyer practised his or her craft.

The scepticism that greeted the initial ALI-ABA model has diminished. Members of the Bar now recognise the need for some form of self-assessment and this form of risk management is also being promoted within the insurance industry. The information that follows attempts to explain the various methods of conducting peer review programmes within the legal community. These are not intended to serve as "all encompassing" examples of peer review, but will provide some practical working models for developing such systems on a voluntary basis in law firms. Please note that while the emphasis of the article is on partner peer review, that phrase should not be interpreted as meaning that only partners can adequately review other partners. The material that follows highlights the fact that lawyers at any level within a firm can be reviewed in a variety of ways.

At the outset, it is important to note that there are a wide variety of peer review programmes. These programmes range from relatively simple "lawyer to lawyer" assistance to formal referral programmes developed with a particular firm.

The definitions below will briefly describe some of the peer review programmes within the legal profession. Following these brief descriptions, the article will focus on four different approaches to practice peer review that we believe are practical in their approach and provide a real opportunity for firms interested in managing the technical aspects of their practice. Please note that for purposes of this document, "peer review" and "practice peer review" are synonymous. It should be recognised, however, that peer review or practice peer review (here

referring to some form of formal partner evaluation) is just one method of providing assistance to lawyers by other lawyers.

- Lawyer To Lawyer Individual Help: Individual help programmes have developed mostly in the areas of substance abuse intervention and counselling. Most of the states currently have programmes that offer advice to a lawyer whose problems are personal and/or may be related to alcohol or drug abuse.

- "The Mentor" "Dutch Uncle" Approach: These approaches tend to focus more on the substantive areas of law and are intended to provide lawyers with a referral service to other lawyers with extensive experience or expertise in particular areas of the law. The state of Maine, for example, has utilised a programme of this nature for a number of years. Lawyers with a question having to do with some area of their practice can call a central telephone number and will be given the names of other, volunteer lawyers, who specialise in that particular area of practice. The novice can then speak with the expert and enhance his or her understanding of that particular area of the law.

- Informal Referral Peer Review: This refers to the fact that lawyers who have been sued for malpractice may be pressured to obtain help by their insurer if the cause of the claim seems remediable. The Oregon fund provides such feedback in specific cases. Informal help for lawyers has also been provided on a limited basis through Peer Assistance Committees adopted in nine pilot federal districts.

- Formal Referral Peer Review: Formal peer review models have, for the most part, failed to gain recognition or acceptance by the bar. Under this system, federal judges are encouraged to refer lawyers suspected of non-performance to a peer review committee. Judges have been, thus far, reluctant to make referrals under this pilot project and have preferred other, more formal types of sanctions which are designed to prevent frivolous lawsuits or abuse of discovery, including Rule 11 sanctions.

- Lawyer's Standard Boards: These boards are the ethical arms of the state judicial systems and are the more well known methods of providing lawyer discipline. Individual state boards are created and empowered to discipline lawyers for negligent or unethical behaviour in the course of their practice. Typically, referrals to the boards are brought by disgruntled clients or third party observers.

- Disciplinary Peer Review: Conceptually, this is similar to a peer review committee for a particular firm, only the idea is extended to all lawyers within a particular state. A group of lawyers are chosen to serve as a peer review committee and all disciplinary proceedings within that jurisdiction are referred to the committee for action.

THE ST PAUL'S RECOMMENDATIONS

1. All law firm members should have access to individual help programmes in the area of substance abuse intervention and counselling.

2. Law firms with five or more members should have a formal peer review programme for all member lawyers that is utilised on a regularly scheduled basis.

H. Client Selection

Over the past few years, insurance companies have begun to view the law firm's process of client selection as a key risk management opportunity. Given the effects of rising and falling economic cycles, many now engage in alternative business opportunities, some of which fall outside established areas of expertise. As these firms struggle to maintain their revenues, new engagements are often accepted without the requisite regard for the increased exposure represented by those engagements.

Today, good law practice management must include a careful review of all prospective clients as well as new matters for existing clients. With clients more willing than ever to bring suit against lawyers, new business should be carefully scrutinised. Consider the following questions:

- Does the prospective client insist upon proceeding on principle alone and without regard to the expected costs?

- Does the prospective client have unrealistic expectations, either about what is to be accomplished or the time it will take?

- Does the prospective client appear to be price shopping, or is he/she changing attorneys in the middle of a proceeding?

- Does the prospective client insist upon doing part of the work, because he or she "knows the law"?

- Are there unreasonable time constraints because the prospective client has waited until the last minute to consult a lawyer?

- Will the prospective client's problem demand too much of the firm's time and resources?

- Does the prospective client appear to be using the law firm's name and reputation to lend credibility to an otherwise questionable venture?

1. Your law firm should establish a committee for the acceptance of both new clients and new engagements for existing clients.

2. Your law firm should have written procedures and guidelines for client acceptance including:

   - The acceptance of contingency fee cases.

   - The acceptance of new clients by associates.

   - The acceptance of engagements outside of the firm's established areas of expertise.