

PROFESSIONAL LIABILITY

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IN THIS ISSUE

Need a quick reference on conflicts and why you should be concerned? IADC member Carter Hampton refreshes you on the top ten causes of conflict problems and the six primary Model Rules of Professional Conduct that govern most conflict situations.

Conflicts

ABOUT THE AUTHOR



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ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves: (1) to update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership and the insurance industry.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Conflicts

The one word answer for why the firm made the headlines in the newspaper today. Yes, the most severe legal malpractice settlements and verdicts all come from conflict claims. Visualize the sting of seeing “Breach of Fiduciary Duty” and “Punitive Damage” when reading the demand letter or pleadings. While it’s true that conflicts are a complicated matter particularly in larger firms with thousands of clients, keep this short newsletter as a referral primer when a thought or concern arises. Remember the top ten causes of conflict problems and know the rules.

There are six primary Model Rules of Professional Conduct that govern most conflict situations as well as your own state code of professional conduct on rules to which lawyers should be familiar. These rules should be reviewed every time a conflict disclosure or waiver is prepared. Such time should be accounted for and may or may not be billed. Why do it and account for the time you ask? Draw near and I will tell you a horrifying tale.

Imagine you are in court defending the spurious claim, because it will not occur during your deposition. Plaintiff counsel has discovered all your time records prior to trial and now comes to the close of your direct examination. He finishes something like this. “Counselor prior to asking your ex-client to sign this conflicts waiver (better yet if there is no writing) did you have an occasion to refer to the State Rules of Professional Conduct on Conflicts?” Whether this line of questioning goes forward or not, the damage is done. Follow-up “Counselor prior to asking your ex-client to sign this conflict waiver did you review the case law in this great state, the

court decisions concerning conflicts?” Again, the damage is done.

Plaintiff’s counsel gleaned from your time records that you had not spent any time so she knew the answer or was prepared to impeach the answer. If your review had been time entered you would be defending the real facts.

The second thing to refer back to in this newsletter is the top ten problem areas and why, which came from real legal malpractice suits and claims.

10. Representing Multiple Plaintiffs – One is one. Two or more is never one. Always follow the one client one lawyer rule. We are all granted the same rights not the same results.

9. Representing multiple defendants – who is the client? Is the client the board, president, shareholders, general partner or limited partner, etc. Picture a mine field.

8. Agreeing to a matter that is adverse to a current client.

7. Agreeing to a matter that is adverse to a former client.

Both 7 & 8 run the risk of alleged misuse of information acquired in confidence.

6. Representing all the parties in a transaction. The “I was only the Scribner” defense never works and both sides can sue you for malpractice.

5. Insured vs. Insurer. You really do need the three legs to balance the stool of the tri-partied relationship.

4. Doing business with your clients. This creates the perception that the attorney has an advantage and that the dealings are unfairly weighted in your favor.

3. Changing the terms of your service (fee) agreement. Again the perception is that the client is at a disadvantage and you the attorney took advantage to line your pockets.

2. Prejudging the matter based upon a concern of not getting paid. Word to the wise, always place payment concerns in a separate letter that starts with the sentence: “Just a follow up on our conversation”

1. The continued representation after a conflict develops. This is number one because it is a sleeper issue. Conflicts are checked at the beginning of the representation but should be checked again when facts unfold by way of witness or documents and/or when parties are added or subtracted. Does the firm have a procedure in place to catch subsequent activity?

Now keep up the good work!

PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MAY 2009

Richard Neumeier Examines Selected Legal Malpractice Cases in the Last Year or So

FEBRUARY 2009

Professional Liability and Blogosphere: Perils of a 21st Century Digital Lawyer
Luanne Runge and Matt Whitehead

OCTOBER 2008

Developments in Professional Liability Case Law
George Ziser and Theresa Dillard

SEPTEMBER 2008

Buddy, Can You Spare a Federal Issue? Federal Jurisdiction in Certain Legal Malpractice Claims
Fields Alexander

AUGUST 2008

Assignability of Professional Negligence Claims: Look for Collusion
Samuel W. Outten and William J. Watkins, Jr.

JUNE 2008

Recent Developments in Professional Liability
Michael E. Brown

APRIL 2008

Successions Plans! Be Prepared for the Unexpected.
Michael D. Crim

MARCH 2008

Recent Developments in Legal Malpractice Cases
Richard L. Neumeier