crowell moring

District of Columbia Professional Responsibility Highlights

May – June 2005

A summary of important recent developments in laws affecting lawyers and law firms in the District of Columbia.

Why Are Your Malpractice Insurance Rates Continually Increasing?

Insurance brokers continue to report that the market for lawyers professional liability (LPL) insurance continues to be a "hard" one, meaning that premiums are increasing. Factors influencing the market are claims activity, the amount of capital devoted to underwriting and reinsurance costs.

While current information indicates that LPL claims frequency is flattening or even declining slightly, claim severity is increasing. The class action settlement recently approved for at least $85 million between Jenkens & Gilchrist and 1100 of its former clients has set a new record for publicly disclosed LPL settlements, replacing LeBoeuf Lamb Greene & MacRae settling the Orange County bankruptcy claim for $65 million in 1998. According to AON Risk Services, a major LPL broker, the pivotal issue determining whether rates increase over the coming years will be the extent to which there is or isn't an increased frequency of these severe claims.

While law firms cannot influence the macro-economic factors affecting LPL rates, they can improve their individual underwriting risk profile (and thereby qualify for lower rates) by instituting effective risk management procedures and improving those already in place. Client quality screening for new clients, effective conflicts of interest checking, rigorous lateral partner due diligence, and oversight of current client relationships are all measures which can reduce the risk of client malpractice claims.

While law firms cannot influence the macro-economic factors affecting LPL rates, they can improve their individual underwriting risk profile by instituting effective risk management procedures and improving those already in place.

Malpractice Liability to Insurers of Counsel Retained to Represent Insureds: An Update

Yet another case, this one in our neighborhood, supports malpractice actions by insurers against the lawyers they hire to represent their insureds. In a recent case before the U.S. District Court for the Eastern District of Virginia, an insurer sought damages from the law firm it hired to represent an insured in a personal injury lawsuit. In that suit, a default judgment of $500,000 was entered against the insured, allegedly because of defective legal advice given by the lawyer.

In denying the lawyer's motion to dismiss for failure to state a claim. the District court held that, while there was no definitive Virginia law on the subject, the Virginia Supreme Court would likely hold that the insurer, while not a client of the lawyer, was a third party beneficiary of the lawyer's services and so could maintain an action for

malpractice on that basis. *General Security Ins. Co. v. Jordan, Coyne & Savits LLP*, 357 F. Supp. 2d 951 (E.D. Va. 2005).

Courts in other jurisdiction have reached similar results, but on different theories. Some hold that the insurer is a client of the law firm to the extent that the insurer's interests are not at odds with those of the insured, and some hold that the insurer is subrogated to the insured's malpractice claim against the lawyer.

Outsourcing of Legal Services – Some Tips to Avoid Ethical Problems

Are you thinking of following the path followed by much of American industry and outsourcing some of your firm's work to locations with lower labor and occupancy costs? Outsourcing of so-called back office work (such as accounting and records management) has been occurring for some time and presents no serious ethical issues for lawyers. But law firms are now looking at outsourcing certain types of legal work – such as legal research (for example, a 50 state review of the law of usury), patent searches and document reviews – to legal service organizations located elsewhere in the United States and, in some cases, to India (a common law country where a graduate lawyer may be paid about $20 per hour for legal research and writing).

There is nothing inherently unethical about such outsourcing, but it does raise some issues that the law firm considering such a practice should consider. One issue is whether the client must be informed of the outsourcing. Probably so. A client's reasonable assumption in hiring a law firm is that its legal work will be performed by law firm personnel. So long as outsourcing is an unconventional practice, Rules of Professional Conduct 1.2 and 1.4 may obligate the firm to inform the client of the firm's outsourcing plans.

How to bill for the outsourced work – pass on the expense as billed to the firm, or mark it up in some manner? District of Columbia Legal Ethics Opinion 284 states that the expenses of a temporary lawyer hired by a firm may be billed to a client with a mark-up, but that disbursements related to the hiring of such lawyers must be billed as a cost without a mark-up. ABA Legal Ethics Opinion _____.

The firm must also take steps to protect the confidentiality of information provided to the outsourcing company, which likely requires an examination of the company's confidentiality policies and practices, and the inclusion of suitable contractual assurances in the business arrangement between the law firm and the outsourcing company.

Is the work of the outsourcing company the "practice of law"? Most of these companies contend that they are not practicing law, as it is defined in state unauthorized practice laws. If they are wrong about this, the firm sending legal work to them is likely facilitating the unauthorized practice of law. If the outsourcing company is not practicing law, then it does not have professional conflict of interest obligations, but the law firm will nevertheless need to include assurances in the business arrangement that the outsourcing company will not also perform work for the adverse party of the firm's client in the same or a related matter.

For more information contact:
Barry Cohen (202.624.2977, bcohen@crowell.com) or Andy Marks (202.624.2920, amarks@crowell.com)