Law Firm Risk Management and Peer Review

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I. Introduction—Why Law Firms Should Consider Risk Management

Imagine that an officer of a bank client tells you that the bank's vice-presidents and managers operate independently and "do their own thing." You would probably express concern and recommend that the bank implement some compliance program to determine if bank officers are following government regulations and internal bank policies and procedures. As the attorney for the bank you appreciate the importance of compliance programs in protecting the bank, and its officers, directors and shareholders.[1]

Now imagine the management and operations of a typical law firm. In most law firms, principals generally function independently. Monitoring attorney conduct largely stops when an associate "makes partner." When firm principals practice autonomously, with limited firm-wide controls, they operate as a confederation of attorneys practicing under a collective umbrella.[2] This autonomy of firm principals has contributed to multi-million dollar legal malpractice claims against firms and their partners.[3]

Attorneys cannot ignore the shocking legal malpractice statistics. According to Ronald E. Mallen, the dean of legal malpractice, the "statistical reality of being the subject of a legal malpractice claim is a virtual certainty."[4] The statistics indicate that a law school graduate can anticipate being the subject of three or more malpractice claims before finishing a career.[5] According to figures from the Attorney's Liability Assurance Society (ALAS), a captive liability insurer which covers the nation's largest firms, a firm of 250 attorneys should expect roughly three allegations of attorney malpractice per year.[6] Although statistics on current claims frequency and severity cannot be readily obtained, the available statistics and information indicate that claims frequency is not significantly increasing, but severity, *i.e.* the size of the loss, continues to increase.[7]

Firms have responded to the increase in the size and frequency of malpractice claims. Many firm principals have reorganized their firms as limited liability companies (LLCs) or limited liability partnerships (LLPs) in an attempt to limit partners' vicarious liability for the acts or omissions of other firm partners. Recognizing that the LLC and LLP shield does not protect individual tortfeasors or the firm's assets and reputation, other firms have implemented malpractice prevention measures as part of a risk management program.

This article will discuss risk management measures, focusing on peer review as an important aspect of meaningful risk management. In considering the risk management measures recommended in this article, remember that "more than 50% of malpractice claims are a result of deficiencies not in the practice of law, but rather from defective law office management."[8]

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1. A bank's compliance program should include training, procedures, monitoring and reporting. JOSEPH G. BECKFORD, BANK HOLDING COMPANY COMPLIANCE MANUAL § 9.01[2] (1987).

2. As described by one law firm risk management expert, firm partners who practice in "cottage industries" under a collective umbrella jealously guard their independence from control by the firm or other partners. Anthony E. Davis, *The Long-Term Implications of the Kaye Scholer Case for Law Firm Management—Risk Management Comes of Age*, 35 S. Tex. L. Rev. 677, 680 (1991).

3. The widely publicized case brought by the federal government against the New York-based firm of Kaye, Scholer, Fierman, Hays & Handler (Kaye, Scholer) illustrates how partner independence can give rise to malpractice claims. For an excellent discussion of how partner autonomy and lack of practice management led to the government's malpractice claims against Kaye, Scholer, *see id.* at 687-97 (using the facts of the Kaye, Scholer case to illustrate how firms can prevent malpractice through client-intake policies and procedures, peer review of partners, and firm management).

4. Ronald E. Mallen, *How to Avoid Becoming a Legal Malpractice Statistic*, 1 Legal Malpractice Rep., 1989, at 1.

5. Larry Bodine, *Average Lawyer Sued Three Times—How to Avoid Trouble*, Law. Weekly USA, Apr. 22, 1996, at D33 (quoting legal malpractice expert, Ronald E. Mallen).

6. *Risk Management*, Partner's Rep., July, 1994, at 8. The Lawyer's Mutual Liability Co. of North Carolina, which insures about 75% of North Carolina attorneys, projected a "barrage" of about eight claims a year against a firm of 250 attorneys, based on the fact that in 1993, 30% of their insured attorneys were sued for malpractice. *Id.*

7. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1.6, at 20 (4th ed. 1996) (referring to the claim history reported by the Oregon Professional Liability Fund). The authors suggest that an aggressive loss prevention program could have attributed to the "apparent leveling off of new claims" reported to the Oregon Professional Liability Fund (PLF). *Id.* at 20-21 n.10.

8. Robert B. Yegge, *Risk Management in Law Practice*, 7 Practical Law., Oct. 1993, at 25 (quoting Edward J. Searns, *Proper Management of Practice Risks*, Lawyer/Manager, Sept./Oct., 1990, at 32).

II. What is Law Practice Risk Management?

"Risk management" has been defined as a method of reducing the possibility of a loss occurring and if a loss does occur, to reduce the severity of that loss.[9] This definition suggests that law firm risk management goes beyond instituting malpractice prevention measures. Although malpractice prevention measures may serve as the cornerstone of a risk management program, risk management also includes avoiding other types of claims, such as employment claims, and responding to any claims that are made against the firm and its agents. In this sense, risk management can be viewed as the loss prevention and damage repair aspect of office management.[10]

The Lawyer's Desk Guide to Legal Malpractice (Desk Guide),[11] available from the American Bar Association (ABA) publications office, provides guidance for developing a risk management program which includes loss control, reduction, and repair. The *Desk Guide* explains that loss control involves the following three-stage process:

> **Malpractice avoidance:** covering steps taken to evaluate substantive areas of practice or methods of practice and to make decisions about whether to avoid or eliminate certain areas of law because of the malpractice risks and exposure involved.
>
> **Malpractice prevention:** covering the development and implementation of effective systems, procedures and techniques to manage the risks involved in law practice.
>
> **Loss reduction and repair:** covering methods used by insurers and insureds to mitigate or remedy individual losses.[12]

During each stage, all firm leaders, attorneys and employees must be committed to effective risk management.

In order for risk management programs to be successful, firm leaders must initiate and demonstrate their support for risk management efforts.[13] They could appoint a committee to oversee a risk management program. Such a committee should be led by a senior member of the firm and should include a representative cross section of firm members, including a member of the firm's management committee.[14]

Once appointed, the risk management committee should identify risks and then identity management measures and systems that the firm is currently using and additional ones that the firm should implement to address the risk.[15] In making this evaluation, the committee can use materials and checklists prepared by experts. Anthony E. Davis, a practicing attorney and adjunct law professor who specializes in law firm risk management, has published a series of checklists in his book, *Risk Management, Survival Tools for Law Firms.*[16] Other resources are described in Appendix A.

The committee can also obtain additional assistance from private consultants or the firm's legal malpractice carriers.[17] Any outside professional consulted should be an attorney so that the firm could assert that the attorney-client privilege protects communications between the outside attorney and the firm. Recently, the Ninth Circuit, in *United States v. Rowe*,[18] recognized that the attorney-client privilege existed between a managing attorney for a firm and firm associates asked to conduct an investigation into suspected embezzlement of client funds by another partner. This case could be used to support an argument that the attorney-client privilege extends to in-house attorneys providing legal services to other firm members. Arguably, a risk assessment analysis conducted by an in-house attorney should qualify as legal services and should be protected from discovery. Because most courts have not addressed this privilege issue,[19] a firm will have more assurance of confidentiality if the firm retains an outside attorney for the purpose of providing legal services in the form of risk management advice. Whether the firm uses in-house attorneys or retains outside counsel to conduct the risk assessment, the evaluation process should be conducted in a way to afford confidentiality and tailored to the particular firm and its attorneys.

At a minimum, the evaluation should include the following categories:

- Client management including client intake, communication, billing procedures, and client funds;
- Human resource management including hiring new attorneys, training and peer review;

9. Timothy J. Gephart, Risk Management and Quality Assurance: The Key to Reducing the Costs of Loss 12 (guide published by the Minnesota Lawyers Mutual Insurance Company, available from author) (undated).

10. William H. Fortune & Duleny O'Roark, *Risk Management for Lawyers*, 45 S.C. L. Rev. 671, 631 (1994).

11. ABA Standing Committee on Lawyers' Professional Liability, The Lawyer's Desk Guide to Legal Malpractice 14 (1992) [hereinafter *Desk Guide*]. This book includes a number of helpful checklists with commentary.

12. *Id.* at 14.

13. *See* Anthony E. Davis, Risk Management—Survival Tools for Law Firms 23 (1995) (explaining that an effective risk management program requires that firm partners give firm management sufficient authority to control the practice of all partners and that the firm management must communicate its commitment to risk management).

14. Gephart, *supra* note 9, at 3.

15. For each risk identified during the self-examination process, the following question should be asked: "What realistic risk management tool could be put in place that would effectively and efficiently control that risk?" Anthony E. Davis, *How to Achieve Effective Risk Management*, Tex. Law., March 18, 1996, at 30.

16. This 1995 book, published jointly by the ABA Section of Law Practice Management and Center for Professional Responsibility, can be obtained from the ABA publications department. The book provides excellent guidance in using and analyzing self-assessment questionnaires in a risk management audit. The questionnaires are also available on a disk which accompanies the book.

17. Some legal malpractice carriers will provide a consultant to conduct a risk management audit as a condition of coverage. Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 Fordham L. Rev. 209, 221 (1996).

18. 96 F.3d 1294 (1996).

19. *See* Thomas G. Bousquet, *Plaintiffs Suffer Setback in 9th Circuit Ruling*, Tex. Law., Dec. 9, 1996, at 22 (criticizing the *Rowe* opinion from the perspective of a plaintiff's legal malpractice attorney).

- Office systems and procedures relating to client work; and
- Handling potential problems and claims.[20]

The following sections briefly discuss why firms should adopt policies and procedures in each of these categories.

III. Why Risk Management Requires Client Management Procedures

One commentator concisely answers this question by explaining that the "best risk of all" is "happy clients."[21] Cultivating "happy clients" and avoiding malpractice starts with the implementation of client intake measures.

A. Implement Client Intake Procedures

1. Screen Prospective Clients

Studies of legal malpractice claims reveal that one of the primary sources of legal malpractice claims is poor client screening.[22] These studies underscore the importance of firms implementing client screening procedures. These procedures should provide guidance in accepting representation. For example, the firm could establish a client screening committee to approve all new representation.[23] The committee could then evaluate the particular representation to determine who, if anyone, in the firm is competent to handle the matter.[24] Understanding that fee disputes often lead to legal malpractice claims, another step in client screening is evaluating prospective clients' ability to pay fees.[25] The client screening committee can also identify other potential problems before the firm agrees to handle a particular matter. Attorneys removed from the prospective representation may sit in the best position to spot and to address warning signs, such as a client changing law firms or troublesome clients.[26]

2. Conduct Thorough Conflicts Checks

Any risk prevention system must include an effective system to check actual and potential conflicts of interests. Annual malpractice insurance applications require that a firm describe its conflicts system. Still, the number of malpractice cases asserting conflicts of interest indicates that conflicts problems continue to plague firms.[27] To avoid such claims, the firm should not only implement a comprehensive conflicts system with safeguards, but should focus on adherence to the established procedures. For example, one compliance procedure would require that a conflicts check be completed before the bookkeeping department assigns a billing number to the matter. To help attorneys remember the importance of on-going conflicts analyses, a firm could also require attorneys to complete a conflicts check before the accounting or bookkeeping department issues a check for fees to be paid when a new defendant is added and served. In addition to such "self-enforcing" procedures, the firm should designate an ethics partner or conflicts committee to monitor the conflicts system and to handle conflicts questions that arise, such as disclosure that should be made anytime the firm accepts dual representation.[28]

3. Use Non-Engagement Letters

If the preliminary screening indicates that the firm has a conflict or should decline representation for another reason, that decision should be communicated to the prospective client in a written non-engagement letter. The non-engagement letter should be sent certified mail, return receipt requested, and then filed in permanent firm records.[29] Such a communication protects the firm by documenting that the firm eliminated any perception that its attorneys had agreed to handle a particular matter.[30] This is important to enable the prospective client to find other representation and to help the firm avoid a malpractice claim. If the non-client

20. *See* Davis, *supra* note 2, at 683-85 (suggesting "practice risk categories").

21. *Risk Management Can Maximize Profits, Too,* Law Off. Mgmt. & Admin., Aug. 1994, at 12.

22. David A. Schaefer, *Avoiding Malpractice Claims: Help Yourself Because Juries Won't,* 60 Defense Counsel J. 584 (1993).

23. A firm's quality control committee could also handle client screening. For a description of various client screening and other functions that a quality control committee can handle, *see* Mallen & Smith, *supra* note 7, § 2.4, at 55-57.

24. For example, commentators have suggested that the banking regulator's claims against the New York based firm of Kaye, Scholer, Fierman, Hayes & Handler, could have been avoided if a banking regulatory lawyer had participated in the firm's representation of Lincoln Savings and Loan Association. *See, e.g.*, Michael Orey, *The Lessons of Kaye, Scholer*, Am. Law., May 1992, at 3. Rather, Peter Fishbein, a senior litigator with no financial institution legal experience, handled the regulatory examination of Lincoln Savings. Mr. Fishbein's combative approach and unfamiliarity with regulatory matters resulted in the government claims which cost the firm $41 million dollars to settle the government's legal malpractice claim. *See* Susan Beck & Michael Orey, *They Got What They Deserved*, Am. Law, May 1992, at 68,69 (arguing that Peter Fishbein "turned a routine examination of Lincoln into a contentious brawl").

25. In some states like Texas, the law treats a legal malpractice claim as a mandatory counterclaim when attorneys sue for legal fees. Therefore, legal malpractice carriers and experts warn attorneys against suing former clients to collect fees. "Even if the counterclaim is without merit, it costs an attorney money, time and embarrassment in defending it." Bodine, *supra* note 5, at D47 (quoting Nancy Byerly Jones, Loss Prevention Counsel of the Lawyers Mutual Liability Insurance Company of North Carolina). To avoid having to make the choice of suing a client or writing off fees, attorneys should not accept representation until the attorney evaluates the prospective client's ability and willingness to pay fees.

26. As described by one commentator, a "bitter and prejudiced client is an accident just waiting to happen." Nolan B. Harmon, *Protect Yourself! Develop a Malpractice Prevention Program for Your Law Practice*, 6 Legal Econ. 20, 23 (1987). For a description of clients who firms should avoid, *see* Bodine, *supra* note 5, at D47 (noting that "low quality" clients and deals frequently cause severe malpractice claims).

27. Forty percent of all legal malpractice cases contain conflicts of interest allegations. *See* Bodine, *supra* note 5, at D33 (quoting Ronald E. Mallen).

28. Even when the applicable ethics rules do not require that clients or former clients consent in writing, a dual representation or consent letter should be signed by the clients with potentially conflicting interests. Dual representation letters can be used by the firm to document that it disclosed potential conflicts to the clients and that the clients provided informed consent to continued representation. For specimen dual representation and consent letters, *see* Mallen & Smith, *supra* note 7, at § 2.9, at 106-114, Appendix I-J.

29. If the return receipt does not arrive within ten days of mailing, one commentator recommends that a messenger deliver another copy of the letter, obtaining a signed receipt from the recipient. Schaefer, *supra* note 22, at 587.

30. "An attorney-client relationship can be based on the express intent of a prospective client to seek legal services if that client reasonably believes he or she is consulting a lawyer in his or her capacity as a lawyer." Mallen & Smith, *supra* note 7, § 2.11, at 133.

sues, the non-engagement letter should defeat the plaintiff's claim.[31]

4. Obtain Signed Engagement Agreements

In the event that the firm agrees to accept representation, the scope and terms of the representation should be clearly communicated to the prospective client in a formal agreement signed by prospective clients or in an engagement letter.[32] If the firm uses engagement letters, the client acknowledges its acceptance of the terms of the representation by signing and returning a copy of the engagement letter. If the firm requires that an engagement letter be sent anytime that an attorney agrees to handle a new matter, it avoids misunderstandings that can lead to malpractice claims and fee disputes. By carefully defining and documenting the scope of the representation, counsel should be able to prevail in a malpractice case based on negligence in handling matters outside the defined scope of representation. For example, if an engagement letter specifically identifies loan closings that bank counsel will handle, the financial institution or the government should not be able to maintain that counsel was retained to provide advice on a broader range of issues, such as regulatory compliance.[33] By using engagement letters or agreements which limit the scope of representation, the firm also eliminates the appearance that the firm was effectively acting as general counsel for the financial institution.

B. Cement Client Relationships in Regular Communications, Billing and Handling of Client Funds

Various studies and malpractice experts have emphasized the importance of developing and maintaining a good client relations program as a way to prevent malpractice claims.[34] Good client relations starts with a commitment to clear and regular client communications. One way firms can help maintain good communications with clients is to adopt firm procedures such as requiring that copies of all correspondence and filings made in connection with a client matter be sent to the client. Another procedure to help avoid leaving clients in the dark is for the attorney to "tickle" the file within some period of time, so that the file is pulled for the attorney to determine if a written report should be sent to apprise the client of the status of the matter. Clear, detailed monthly billings can also be used to help keep clients informed. To help assure that clients' calls and correspondence are promptly responded to, the firm could adopt a policy requiring that attorneys respond within some period of time. Any procedures that help keep the client informed will help cement client relationships, thus reducing the likelihood that clients will bring malpractice claims or grievances.[35]

Understanding the importance of client satisfaction and service, many firms have implemented Total Quality Management (TQM) programs. Such programs can minimize "the downside" of liability exposure, while increasing "the upside" by giving the firm a competitive advantage over other firms.[36] Because TQM programs focus on client needs and expectations, client audits are typically used to formally solicit client feedback. In client audits, independent consultants or firm attorneys contact firm clients to elicit clients' candid evaluations of the firm's legal services. In improving client relations and detecting problems, such audits assist a firm in client development, as well as loss prevention. Once again, satisfied clients are less likely to bring claims.

Any client relations program should devote attention to improving billing practices, including the form and content of client bills. Billing practices can sabotage a client relationship and lead to grievances and malpractice claims. For example, if a firm is representing an entity, such as a corporation, the bill should be addressed to the corporation and directed to the attention of an individual. This approach helps document that the firm is representing the entity and not individuals connected to the entity.

The firm should also evaluate the manner in which client funds are handled. This assessment includes the procedures for depositing and withdrawing funds from various accounts. In particular, a risk self-evaluation should scrutinize the operation of the firm's trust accounts. To avoid misapplication of client funds, the firm can require that any withdrawal from a trust account requires two firm principals. Another safeguard would be to prohibit the use of a firm's trust account for entrepreneurial ventures of firm attorneys. Such a policy can help a firm avoid malpractice claims that the attorney-venturer was acting on behalf of the firm.[37]

31. *See id.* at 138 (including a specimen non-engagement letter as Appendix R).

32. Because numerous claims have arisen because of disputes over what task or tasks the firm was retained to perform, engagement letters should describe in detail the work to be performed and the basis for compensation. Schaefer, *supra* note 22, at 586. The letter should also state that the firm reserves the right to withdraw from the engagement if the client does not comply with the terms of the agreement. Such a provision will help the firm obtain a court's approval of withdrawal when the client fails to pay fees or to comply with other terms of the agreement. *Id.*

33. *See* John Villa, *Emerging Theories of Liability for Lending Counsel*, in THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER 112 (PLI Corp. Law & Practice Course Handbook Series No.779, 1992) (emphasizing the value of documenting the limited scope of representation).

34. For example, the ABA study indicated a clear relationship between failure in client relations and malpractice claims. Harmon, *supra* note 26, at 23.

35. *See* Gerry Malone, *The Malpractice Crisis: Parts 1-4, in* LAW OFFICE MANAGEMENT at 381 (PLI Commercial Law & Prac. Course Handbook Series No. 440, 1987) (describing additional procedures that can be used to develop good client relations).

36. *See* John F. Walker, Jr. & Brian G. Cartwright, *Total Quality Management: The Law Firm Perspective*, in TOTAL QUALITY MANAGEMENT IN LAW FIRMS 289, 249 (PLI Commercial L. and Practice Course Handbook Series No. 636, 1992) (defining

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TQM as an approach to institutional management which "embodies a systematic, firm-wide attitude and exertion, which strives continuously to improve the quality of an institution's overall service product by assessing and satisfying each client's needs, by constantly changing work processes to make them more efficient, by averting errors before they happen, and by forming teams to identify and solve problems in the workplace." For an application of TQM principles to law practice, *see* John Mixon & Gordon Otto, *Continuous Quality Improvement, Law, and Legal Education*, 43 Emory L. J. 393 (1994). One Detroit law firm's TQM program is described in the ABA handbook, ONE FIRM'S JOURNEY TOWARD QUALITY AND EXCELLENCE (1994) by Joseph V. Walker and Barbara L. Ciaramitaro.

37. In a recent malpractice case against the Richmond-based firm of Hunton & Williams, 120 plaintiffs have alleged that a

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C. Use Care in Closing Client Files

The last aspect of client management involves the closing of client files. The firm should adopt procedures relating to the termination of client representation and the final billing. For example, no file should be sent to the closed files, without a closing letter which clearly communicates that no further work will be completed. Closing letters can be used by firms in defending against claims that a client understood that firm was continuing to handle a particular matter.[38]

Finally, firms should adopt some document management and destruction policy.[39] Such policies can lower storage and retrieval costs. If a firm destroys documents under a genuine document destruction policy, it also reduces the likelihood of sanctions for destruction of evidence.[40]

IV. Why Risk Management Requires Administrative Systems

The ABA's statistics on malpractice claims reveals administrative errors cause 26% of the reported claims.[41] Of those administrative errors 40% are due to the failure to calendar properly.[42] Most firms understand the importance of calendar and docket control systems to avoid administrative errors.[43] Some firms use more comprehensive case management programs which go beyond traditional docketing. These case management programs are designed to assist attorneys in everyday activities including tracking contact information for all players in a case, maintaining factual data, tracking the historical status of cases, facilitating document generation and driving ongoing case activities such as research and witness preparation to drafting documents and advising clients of case status.[44] Depending on the circumstances and needs of firm attorneys, firms can purchase sophisticated software programs or adopt manual systems. Still, the most comprehensive systems and procedures are worthless unless attorneys and staff members diligently adhere to the systems. "The key to an effective system is not so much the one selected, but rather the diligence with which the selected system is adhered to."[45] Therefore, firms must not only adopt administrative systems and procedures, but must take steps to assure compliance by all firm personnel. For example, a section leader or the risk management partner could periodically pull client files to determine if the systems and procedures are being followed. As explained by one professional liability risk manager, the time devoted to evaluating compliance will be less than the time and financial drain that will result from responding to claims and loss of profitability due to inefficient and ineffective practices.[46]

V. Why Risk Management Requires Human Resource Management

Given that the quality of legal services largely turns on the attorneys and staff involved, risk management requires good personnel management. Personnel management includes systems related to hiring, training, evaluation, supervision, promotion, and termination of individuals. By evaluating and revising personnel policies, firms may identify problems that could lead to malpractice or employment claims, such as claims alleging sexual harassment[47] or violations of the Americans with Disability Act (ADA). Although firm managers may understand that the ADA applies to firm employees including associates, they might not realize that the ADA might also apply to firm principals, depending on the structure and circumstances of the firm. For example, principals in a professional corporation function as employees of the firm. Depending on the degree of control a partner exercises, courts may treat the partner as an employee for ADA purposes.[48] As illustrated by recent cases, law firms are particularly vulnerable to large damage awards for such claims.[49] There-

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Hunton partner funnelled investors', including clients' money, into a $40 to $100 million liquor-sales Ponzi scheme. In asserting that the firm should known about the partner's investment activities, some plaintiffs allege that monies from a Hunton client escrow account were commingled with investment funds. *See* Ann Davis, *Scandal Embarrasses Virginia's Hunton*, Nat'l L. J., May, 13, 1996, at A1, A23.

38. For example, a closing letter could have helped Shearman & Sterling in defending a $33 million law suit brought by investors who claimed that the firm failed to inform them of certain tax law changes. *See* Grace M. Kang, *Suit Tests Duty of Law Firms to Clients*, Wall St. J., July 20, 1992, at B6.

39. A new alternative to destroying documents is to record archival documents on CD-ROMS. *See* George E. Darby, *Suggestions for the Seamless Office, New PCs, New OSS, New Acronyms*, Haw. B. J., June, 1994, at 30, 33 (describing economical approaches to using CD-ROMs for storage).

40. *See* Lawrence B. Solum & Stephen J. Marzen, *Destruction of Evidence*, Litigation, Fall, 1989, at 11, 64 (explaining that most courts have refused to impose sanctions for destruction of evidence under a genuine document destruction policy).

41. Harmon, *supra* note 26, at 20 (referring to the Profile of Legal Malpractice, published by the ABA Standing Committee on Lawyers Professional Liability).

42. *Id.*

43. A firm should determine whether its system requires the following: (1) immediate calendaring of items, (2) double-checking of entries to ensure accuracy, (3) procedures allowing for sufficient lead time for performing the work, and (4) reminders to ensure that the work is actually completed prior to the deadline. *Id.* at 22 (describing the features of a "good docket control system").

44. Kenneth M. Alwin, *The CLS Summit System for Case Management*, Lawyer's PC, Jan 15, 1996, at 4 (providing information of the SUMMIT case management system available from Computer Law Systems in Prairie, Minnesota, (612) 941-3801).

45. Harmon, *supra* note 26, at 3 (quoting Duke Nordlinger Stern, a risk management expert).

46. Duke Nordlinger Stern, *Proper Use of Proven Management Techniques Can Reduce the Risk of Legal Malpractice*, Ver-

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dicts, Settlements & Tactics, Mar. 1990, at 81. Mr. Stern serves as risk manager for ten state bar associations.

47. As illustrated by the $7.1 million punitive damage verdict awarded to a former Baker & McKenzie secretary, juries will severely punish firms who allow partners to engage in sexual harassment. Commentators have suggested that the award was justified because Baker & McKenzie ratified the misconduct by failing to investigate the alleged harassment by one of its partners. *E.g.* Nancy Erika Smith, *Discrimination in Law Firm: Women are not Going to Take It Anymore*, N. Jersey Law., Aug./Sept. 1995, at 8. Worker complaints against law firms have increased 58% during the first half of the 1990s. *See* Richard C. Reuben, *Statistics Show Substantial Leap in Gender, Age and Disability Claims*, A.B.A. J., Dec. 1995, at 12 (relying on statistics reported by the U.S. Equal Employment Opportunity Commission).

48. David Rapaport, *Avoid the Pitfalls of the ADA*, Tex. Law., Dec. 11, 1995, at 24 (referring to recent decisions that give partners the right to bring ADA claims under certain circumstances). For a practical guide on handling the problem of impaired attorneys and avoiding employment claims, *see* Paula A. Barron, *Professional Responsibility and Law Firm Management; Managing Lawyer Impairment*, ABA 22nd National Conference on Professional Responsibility, May 30-June 1, 1996, at Tab 2.

49. One author identifies the following reasons for attorneys being vulnerable to large jury verdicts for discrimination claims: (1) attorneys are expected to know the law, (2) the negative image of the legal profession, and (3) law firms don't think of themselves as businesses or employers that are subject to discrimination suits. Rapaport, *supra* note 48, at 24.

fore, experts recommend that firms adopt policies to deal with impaired and disabled personnel.[50] If a firm does not have employment law expertise, it should hire an employment specialist to review any firm policies and manuals.

As indicated above, risk management only works if all firm attorneys, including principals, support and comply with firm policies and procedures. To encourage compliance with firm polices and procedures, risk management measures should be as "self-executing " as possible. "Self-executing means that the control works as an automatic alert, and that if the automatic control fails, then the activity being controlled cannot proceed until the control procedure is complied with."[51] For example, a self-executing client-intake procedure prevents personnel from entering time on a client matter until all conflicts checks and engagement letters are completed.[52] Such self-executing measures provide an incentive for attorneys and staff to quickly and efficiently comply with firm procedures and policies and minimize the need for firm managers to monitor daily activities of firm personnel.[53] In addition to self-executing measures, a risk management program should identity mechanisms for determining whether firm employees and principals are complying with firm policies and procedures.

VI. Why Risk Management Requires Procedures for Handling Problems and Claims

Despite a firm's best efforts, malpractice problems will inevitably arise. Understanding this, firms should establish procedures for handling problems and actual claims. The appointment of an in-house ethics committee or partner provides a good starting point.[54]

Firm management must also evaluate the firm's malpractice exposure and professional liability insurance. This means that firm managers must analyze both the adequacy and limits of their malpractice coverage.[55] In doing so, managers will see that different carriers' policies vary in the coverage provided.[56] The evaluation of policies also helps firms in identifying types of activities which will not be covered in the event of a claim.[57] For example, banking attorneys would want to avoid insurance policies excluding claims by any government regulator acting as receiver for a failed financial institution.[58] An evaluation enables management to determine if other measures should be taken to avoid those activities which could give rise to claims not covered under the firm's malpractice policy. For example, the insurance policy might exclude claims arising from attorneys' activities as a trustee or ERISA fiduciary. In that event, the firm could prohibit firm attorneys from serving in those roles or could arrange for separate insurance to cover those risks. Finally, firm management should evaluate other types of insurance to cover other risks which are excluded under the firm's legal malpractice and general liability insurance policies.

VII. Why Risk Management Must Include Peer Review

Peer review can be defined as the process in which law firm partners or principals monitor and evaluate the job performance of their colleagues.[59] Law practice peer review covers a spectrum of approaches ranging from the adoption of standard policies and procedures which apply to all firm attorneys to more subjective programs for reviewing the manner in which principals handle client matters and firm business.[60]

Traditionally, firms have restricted partner review to an assessment of partners' productivity and contributions for compensation purposes. In recommending that firms implement peer review which goes beyond compensation review, malpractice experts refer to statistics indicating that senior attorneys more than junior attorneys expose firms to malpractice.[61] According to an ABA study, the majority of malpractice claims against law firms relate to the conduct of attorneys with ten or more years of legal experience.[62] Therefore, a meaningful risk management program must include

50. Following a $600,000 verdict awarded to the estate of a Baker & McKenzie associate who died of AIDS, experts recommended that firms protect themselves by adopting policies covering employees with disabilities. *See, e.g.*, Jerome Cramer, *Award a Lesson for Firms*, A.B.A.J., Apr. 1994, at 23 (referring to an employment law specialist who recommends that the policies provide for reasonable accommodations for employees with disabilities, and restrictions on disclosure of their illnesses).

51. Davis, *supra* note 13, at 38-39 (emphasizing the value of self-executing risk management controls).

52. *See id.* at 38 (suggesting that the self-executing control also include the assignment of staff decisions and processes).

53. *Id.*

54. *See* Jonathan M. Epstein, *Comment, The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 Geo. J. Legal Ethics 1011, 1013-1038 (1994) (discussing additional reasons for appointing ethics committees).

55. For guidance in evaluating the adequacy of coverage limits, *see* Duke Nordlinger Stern, *The Right Amount of Coverage*, A.B.A.J., Jan. 1996, at 84.

56. *Desk Guide, supra* note 11, at 167-204, provides excellent guidance in assessing and purchasing malpractice insurance. For checklists for purchasing malpractice insurance, *see id.* at 194-204, and Ronald E. Mallen, ed., Legal Malpractice: The Law Office Guide To Purchasing Legal Malpractice Insurance (1997) available from West Pub. Co.

57. For an overview of the potential pitfalls that attorney-insureds should beware of in purchasing insurance, *see* A. Craig Fleishman, *Potential Perils of the Professional Insurance Policy*, 24 Colo. Law 299 (1995) and John Randolph, *Cost v. Coverage: Eight Critical Legal Malpractice Insurance Policy Provisions*, 3 Texas Lawyers' Insurance Exchange Legal Malpractice 1, 4 (1995).

58. *See* Daniel E. Rhynhart, Note, *After the S & L Crisis: The Future of Regulatory Exclusions in Bank Directors' and Officers' Insurance and Professional Liability Insurance Polices*, 15 Ann. Rev. Banking L 537, 553, 560 (1996) (noting that "affordable malpractice insurance without regulatory exclusions is not readily available to attorneys").

59. Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. Colo. L. Rev. 329, 344 (1995) (discussing the concept of peer review).

60. The Model Peer Review System (Discussion Draft Apr. 15, 1980), published by the American Law Institute-American Bar Association (ALI-ABA) Committee on Continuing Professional Education, proposed a type of law practice peer review, as well as disciplinary and referral peer review. Unlike referral and disciplinary peer review which are triggered by third parties who accuse the attorney of misconduct, attorneys can voluntarily participate in law practice peer review by requesting that an independent review team audit the attorney's conduct and practice. *See id.* at 41-44.

61. For example, in a speech at the Eighth Annual Judicial Conference of the United Stated Court of Appeals for the Federal Circuit, Robert O'Malley, a founder of ALAS, urged firms to implement peer review because serious malpractice problems relate to the conduct of senior partners. O'Malley indicated that of 300 malpractice claims seeking one million dollars or more in damages, not one claim arose out of the acts or omissions of an associate or young partner. 133 F.R.D. 245, 287 (1990).

62. ABA statistics confirm that attorneys with ten or more years of practice generate 66% of all claims and attorneys with four to ten years of experience generate 30% of the claims. The least experienced attorneys with less than four years of experience account for only 4% of all claims reported to the ABA. *See Desk Guide, supra* note 11, at 31 (reporting on the findings of the 1983-85 ABA study of nearly 30,000 legal malpractice claims).

peer review measures. In addition to reducing their malpractice exposure, peer review can also improve client relationships and client development.[63] Peer review also boosts intra-firm communication and helps cultivate a firm commitment to the delivery of quality legal services.

Regardless of the advantages or benefits of peer review, law firm partners will tend to resist bureaucratic measures that encroach on their independence to represent "their" clients. Partners may also express concern over the time and expense involved in implementing peer review measures. This means that the risk manager should try to minimize the time and effort involved in peer review and should be able to demonstrate to firm partners why the "upside" of peer review, outweighs the possible "downside." The following summarizes some peer review measures and the reasons for implementing the measures.

A. Peer Review Measures Related to Opinion and Audit Response Letters

Liability for opinion letters has captured the attention of large and small firms alike. In an attempt to prevent malpractice claims for improvidently issued opinions, many firms have implemented opinion letter procedures.[64] Such measures may help the firm avoid civil and criminal liability and avoid disciplinary and regulatory actions.[65]

A firm should implement procedures suitable to the firm's size and circumstances. Smaller firms might adopt a standard approach to opinion letters and require that all opinion letters be reviewed by two principals.[66] Larger firms might require that opinion letters be reviewed by an opinion letter committee or the section leader.[67] Regardless of the actual measures adopted, the objective of the measures is to improve quality and reduce liability exposure by providing assistance to the attorney drafting the opinion.

Internal firm procedures also help firms follow the guidelines and format for audit response letters set forth in the ABA Statement of Policy Regarding Lawyers' Response to Auditors's Request for Information. (ABA Statement of Policy).[68] For example, the firm could require that an audit response letter be approved by a principal not involved in the representation of the client to whom the letter applies. The reviewing principal can scrutinize the response letter to insure that it follows the ABA Statement of Policy.[69]

B. Peer Review Measures Related to Attorneys' Entrepreneurial and Outside Activities

For years malpractice experts have warned attorneys against engaging in certain entrepreneurial and outside activities.[70] Specifically, the experts caution attorneys against "wearing two hats" and exposing the firm to conflicts of interest and other malpractice claims.[71]

Attorneys "wear two hats" when they act as counsel and sit on a client's board of directors. As illustrated by various malpractice actions filed by banking regulators, attorneys acting as directors make their firms more vulnerable to legal malpractice claims.[72] Attorney-directors continue to be popular targets.[73] To avoid inviting malpractice claims related to attorney service as directors, firms can prohibit attorneys from serving as directors or can strictly monitor such activities.

Attorneys also "wear two hats" when they enter into business transactions with clients or take stock or other interests in lieu of fees. Such activities can lead to malpractice claims which may not be covered by the firms' malpractice insurance policy.[74] As explained in a recent commentary, "lawyers who start out as investors in clients' businesses could find

63. In implementing peer review as part of a Total Quality Management program, firms may attract corporate clients with TQM programs. According to a survey of general counsels of Fortune 500 companies, 71% of the attorneys polled reported that their selection of outside counsel would be influenced by the outside firm's implementation of a TQM program. Nancy Blodgett, *More and More Law Firms Take the TQM Plunge*, Legal Mgmt., May–June 1993, at 25.

64. A survey of Texas law firms with ten or more attorneys revealed that 20.5% (38 firms) require committee approval of all written opinions and 36.1% (66 firms) require second partner approval of all written opinions. For an analysis of the survey results, *see* Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, Georgetown J. Legal Ethics (forthcoming Winter 1997).

65. Opinion letters can lead to various claims including claims based on malpractice, negligent misrepresentation, common law fraud, statutory fraud, securities law violations, civil con-

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65. *(Continued from previous column)*

spiracy, breach of fiduciary duty, aiding and abetting a breach of duty, and actions under the Racketeer Influenced Corrupt Organizations statute, and Internal Revenue Code penalties. For a discussion of law firm exposure for improvidently rendered opinions, *see* John P. Freeman, *Current Trends in Legal Opinion Liability*, 1989 Colum. Bus. L. Rev. 235, (1989). *See also* Richard R. Rowe, *The Duties and Liabilities of Attorneys in Rendering Legal Opinions*, 1989 Colum. Bus. L. Rev. 283 (1989).

66. If the firm is charging the client on an hourly basis, the firm should be able to bill the client for review time. To avoid misunderstandings with the client over fees, the firm should explain to the client that the firm requires second partner review before the firm issues an opinion.

67. Review by a committee or section leader promotes consistency and enables the reviewers to develop expertise in issuing opinions. ARNOLD S. JACOBS, INTRODUCTION TO SECURITIES LAW § 11 (1993).

68. The ABA STATEMENT OF POLICY APPEARS IN THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW, COMMITTEE ON AUDIT INQUIRY RESPONSES, AUDITOR'S LETTER HANDBOOK (1976) and is reprinted at 31 Bus. Law. 1709 (1976). For a description of a reasonably priced ($125) document assembly system designed to assist firms in responding to auditor letters in accordance with ABA polices, *see* Barry D. Bayer & Benjamin H. Cohen, *An Auditor Response Expert System for Lexis*, Tex. Law., Dec. 2, 1996, at 28.

69. For a summary of the benefits to second-partner-review, *see* Richard Rowe, *Attorney's Responses to Auditor's Requests for Information*, in OPINIONS IN SEC TRANSACTIONS 1991, at Appendix B (PLI Corp. Law & Practice Course Handbook Series No. 725, 1991).

70. *See, e.g.*, Jett Hanna, *Business Ties with Clients Still Perilous*, Tex. Lawyers' Insurance Exchange Legal Malpractice Advisory, No. 2, 1995, at 2.

71. In identifying the top ten malpractice traps, the *Desk Guide*, lists conflicts of interest as trap number four. Potentially dangerous conflicts of interest arise when attorneys are personally involved in clients' businesses or serve as directors or officers of client corporations. *Desk Guide, supra* note 11, at 38-39.

72. Paul Grace, former Associate General Counsel and Director, admitted that the federal banking regulators targeted firms whose attorneys served as members of board of directors of failed financial institutions. Villa, *supra* note 33, at 483.

73. Because attorney-directors appear to be increasingly popular targets of lawsuits, the ABA has considered prohibiting the dual role. Gail Diane Cox, *For Lawyers, Lure of the Boardroom Has Its Perils: Serving on a Clients' Board Can Lead to Conflicts that Could Get an Attorney Fired or Sued. Will the ABA Ban the Role?*, Nat'l L. J., Mar. 25, 1996, at A21, A22.

74. Although the scope of business pursuits exclusions vary from policy to policy, malpractice policies typically include a business pursuits exclusion. Some policies exclude claims related to the business activity. Other policies may exclude claims related to legal services rendered in connection with a business in which firm attorneys have some pecuniary interest.

themselves winding up as insurers."[75] This risk can be eliminated if the firm strictly prohibits attorneys from investing in client businesses.

C. Institutionalized Peer Review Programs

Recognizing the importance of peer review, a few firms have implemented formal peer review programs. Although the approaches vary in their emphasis, they share the common objective of gaining information in an effort to improve the quality of legal services and to lower malpractice exposure.

1. Technical Standards Reviews

One approach to peer review gathers information on principals through reviewing principals compliance with firm procedures. Such reviews can be conducted by firm personnel or can be conducted by outsiders such as risk management consultants or loss prevention experts connected to the firm's malpractice carrier. A malpractice carrier or self-insurance group, such as ALAS, may require that member firms adhere to performance review procedures.[76] Firms implement a formal peer program when they audit compliance with established procedures or policies.

The Denver based firm of Rothgerber, Appel, Powers & Johnson conducts such a program referred to as "technical standards review."[77] The technical standards review process is designed to improve the overall quality of the firm's work product, its delivery of services, and its profitability by developing and reviewing compliance with certain procedural standards.[78] Annually, a team of two partners completes a technical standards review checklist after meeting with and obtaining information from the reviewed partner.[79] As part of the process the two-partner team reviews selected files for general organization, existence of executed fee agreements, frequency of client communication, involvement of others in the firm, delegation of duties, supervision, training of associates, existence of conflicts information, evidence of research, timeliness of performance, recent activity, existence of discovery and other factors set forth on the checklist.[80] The *Desk Guide* includes a checklist for evaluation of partners by partners.[81] Any checklist can be tailored to firm policies and procedures to minimize the time and administrative burden involved in the review. Malpractice experts insist that the time and effort devoted will pay dividends in providing valuable information and helping the firm prevent losses.[82]

2. Client Audits

A firm can also obtain information on partners' performance by asking clients for feedback on services provided to them. A great deal of information can be obtained by asking clients specific questions about how well the firm provides timely, cost-effective service.[83] This process of formally soliciting information from clients is commonly referred to as a "client audit." In the context of risk management and quality control, such audits can help the firm in detecting potential problems and in addressing concerns identified by clients. As discussed above, client audits may help firms by cultivating satisfied clients who are unlikely to file claims.

Firms interested in client audits must decide who will conduct the audits. Firm insiders or outside consultants can conduct client audits. A firm might retain outside consultants to conduct the survey if it believes that clients will not speak openly with firm insiders.[84] Other firms may avoid consulting fees and use firm attorneys to conduct the audit. By using firm attorneys who are not directly involved in the representation of the client, the firm fortifies the client's relationship with the firm.

Firm managers must also determine the survey technique. The techniques include written questionnaires, telephone surveys and personal interviews.[85] With limited expenditure of attorney time, the firm can send the questionnaire to all clients. Provided that clients answer the questionnaire, the written survey may provide a more representative sample of clients than would be obtained through selective client interviews. Unfortunately, the written client responses may not reveal a problem that could be explored in an interactive, flexible personal interview.

Whatever method used, one commentator has described three basic requirements for a successful client audit program.[86] First, the procedure for selecting clients should be followed on a uniform and consistent basis.[87] Second, a questionnaire should act as the back-bone for interviews conducted.[88] Third, the firm must train the interviewers and foster cooperation among all firm attorneys.[89]

75. E. Gregory Martin & Michael G. Martin, *When Doing Deals is Risky*, A.B.A.J. July 1996, at 80.

76. ALAS members must adhere to stipulated performance review procedures, attend regular education session sponsored by ALAS, and designate a "loss control partner." Larry Smith, *Malpractice Update: Loss Control Not Always a Cure-all*, Of Counsel, Feb. 1, 1993, at 1.

77. For an introduction to technical standards review and other types of formal peer review programs, *see* Amy Bach, *Partners Succumb to Checkups from Peers*, Am. Law., May 1992, at 30.

78. *Technical Standards Checklist for Partner Review*, Of Counsel, Jan, 1990, at 11.

79. *Id.*

80. *Id.*

81. *Desk Guide, supra* note 11, at 67-71.

82. *E.g.*, Daniel W. Hager, *Measuring Quality*, 4 Legal Malpractice Rep. 30 (1994).

83. *Id.* (explaining that client feedback provides the firm with information on the client's perspective on billing practices, communication and overall client satisfaction).

84. Steven A. Meyerowitz, *Why You Should Avoid Client Surveys*, Pa. Law., Nov., 1994, at 17 (suggesting that the decision of whether to use outsiders to conduct the client audit depends on law firm culture).

85. For a comparison of the different techniques to be used in a client audit, *see* Barbara L. Morgenstern, *Surveying the Territory*, A.B.A.J., May, 1996 at 86. Specimen checklists for written client questionnaires and client interviews are published in the *Desk Guide*, *supra* note 11, at 75-79.

86. Merrilyn A. Tarlton, *Client Interviews*, The Quality Pursuit 175-77, app. (Robert Greene ed., 1989).

87. *Id.*

88. *Id.*

89. *Id.*

For the last ten years the Seattle-based firm of Perkins Coie has used client interviews to detect client relations problems and to assess the legal work performed by its principals and associates.[90] Annually, the billing partner asks clients to participate in the firm's client audit program.[91] After interviewing client representatives, a three-partner team evaluates the information obtained and attempts to identify ways in which the firm can address client criticisms and improve the delivery of legal services.[92]

3. Associate Reviews of Partners

Firm partners typically review the quality and volume of associates' work. Few firms have turned the tables to formally seek associates' feedback on the work of partners with whom the associates work. Associates who work closely with partners can provide valuable information on the manner in which a partner practices.[93] When firm managers formally ask associates to evaluate partners and the firm managers use the associates' comments in evaluating partners, the firm implements a type of partner review program.

The San Francisco based firm of Morrison & Foerster pioneered a firm-wide program of associates evaluating partners.[94] Annually, associates evaluate firm partners by completing a written evaluation.[95] An associate then uses all the written evaluations for a particular partner in preparing a single, integrated evaluation of the partner.[96] After reviewing the integrated evaluation for accuracy, the associates give the final written evaluations to the managing partner or department chair.[97] The managing partner or chair then discusses the evaluations with the individual partners.[98] The entire process is designed to afford the maximum confidentiality so that associates feel free to candidly comment without fear of repercussions from partners.[99]

Morrison & Forester recognizes various benefits to using associate evaluations of partners.[100] The evaluation program provides the individual attorney and firm management an opportunity to evaluate partners' strengths and weaknesses, while giving associates a "blind" channel thorough which they can communicate criticism as well as praise.[101] The evaluation process also enables the associates to work together and to learn from their common experiences.[102] Above all, the evaluation program evidences a firm-wide commitment to providing quality legal services by all firm attorneys.

VII. Conclusion—What Guidance is Available

In recommending peer review and other risk management measures, one commentator compares attorneys to restaurateurs who must produce, protect and satisfy.[103] As explained, "[t]he lawyer risk manager must *produce* (offer quality legal services that maximize profits), *protect* (avoid malpractice—provide services to clients that are not tainted), and *satisfy* (maintain and enhance the regular client base).[104] By producing, protecting and satisfying, firm attorneys can avoid being targets in lawsuits and can cultivate a healthy client base.

Firms interested in designing a risk management program can obtain guidance from various sources. The footnotes to this article and bibliography that follows as Appendix A identify articles and books discussing risk management and peer review. Malpractice insurance carriers and the ABA Center for Professional Responsibility can provide additional information. Firms interested in conducting a risk management self-audit can refer to the checklists in the *Desk Guide* cited at note 11 and the risk management book cited at note 13. Firms can also retain outside consultants and attorneys to handle a risk audit and to design a risk management program.

Attorneys who have been sued for malpractice and other firm-related claims will testify that the time and energy that you devote to risk management is worth it. The reputation and assets of you and your firm may depend on it.

90. For a discussion of the Perkins Coie program and client audits generally, *see* Harry H. Schneider, Jr., *One Approach to Partner Peer Review: The Client Audit*, Lawyers Liability Rev., Aug., 1987, at 1.

91. *Id.* at 3.

92. *Id.* at 3-4.

93. Harry H. Schneider, Jr., *Your Partner's Keeper*, A.B.A.J., Nov. 1993, at 104.

94. For a detailed description of the Morrison & Foerster approach to associates reviewing partners, *see* Richard D. Lee, *Evaluation of Partners by Association* (Apr. 19-20, 1990) (unpublished manuscript originally prepared for A.B.A. Standing Committee on Lawyers' Professional Liability Conference, *Partner Peer Review: An Idea Whose Time Has Come*) (available from your author).

95. *See id.* at 3. For a specimen evaluation form, *see Desk Guide*, *supra* note 11, at 72-74.

96. *Id.* at 6.

97. *Id.* at 7.

98. *Id.*

99. *See id.* at 8 (emphasizing the constructive and professional nature of the review process).

100. *See id.* at 5.

101. *Id.* at 5.

102. *Id.*

103. Robert B. Yegge, *Risk Management in Law Practice*, Practical Law., Oct. 1993, at 25, 26.

104. *Id.* at 34.

Appendix A

Additional Sources

A.B.A. Comm. on Lawyer's Professional Liability, THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE (1992) (available from the ABA Service Center 312-988-5522).

This book provides numerous checklists, including lists relating to malpractice prevention and insurance.

A.L.I.-A.B.A. Comm. on Continuing Professional Education, A PRACTICAL GUIDE TO ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW (1992).

This two-volume set includes a discussion of standards and checklists for self-evaluation.

CIARAMITARO, BARBARA AND JOSEPH V. WALKER, TOTAL QUALITY MANAGEMENT IN ACTION: ONE FIRM'S JOURNEY TOWARD QUALITY AND EXCELLENCE (1994) (available from the ABA Service Center 312-988-5522).

DAVIS, ANTHONY E., RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS (available from the ABA Service Center 312-988-5522). The checklists are designed to help a firm in conducting and evaluating a risk management self-audit.

EWALT, HENRY W., THROUGH THE CLIENT'S EYES: NEW APPROACHES TO GET CLIENTS TO HIRE YOU AGAIN AND AGAIN (1994) (available from the ABA Service Center 312-988-5522). This book provides guidance to firms interested in developing a client relations program and eliciting clients' opinions through client surveys.

FELIX-RETZKE, JO ANN, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE (1993) (available from Shepard's/ McGraw-Hill).

GREEN, ROBERT M., ed., THE QUALITY PURSUIT (1989) (available from the ABA Service Center 312-988-5522). This collection includes numerous articles dealing with law firm quality assurance programs.

MALLEN., RONALD., ed., LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE (1997) (available from West Pub. Co.).

MALLEN, RONALD E. AND JEFFREY M. SMITH, LEGAL MALPRACTICE (4th ed. 1996) (available from West Pub.). Part II. covers malpractice prevention, providing specimen forms.

MALLEN, RONALD E. AND JEFFREY M. SMITH, PREVENTING LEGAL MALPRACTICE (1989) (available from West Pub. Co.).

ROSS, EDWARD M., *Attorney Ethics and Liability In Lending Transactions,* in LENDER LIABILITY LITIGATION 1990: RECENT DEVELOPMENTS (PLI Com. Law & Practice Course Handbook No 551, 1990, at 523) (available in Westlaw at 551 PLI/ Comm 523).

Status Report: The Conference Article 9 Subcommittee and the Uniform Law Revision Process

(Continued from page 97)

few exceptions, this was consistent with the tradition of Article 9. However, the Drafting Committee has not been afforded the luxury of this option. Consumer groups apparently discovered the importance of the UCC revision process after the UCC Article 3 and 4 revisions were approved by the ALI and NCCUSL,[15] and have been very active participants in the Article 9 Drafting Committee meetings since the beginning.

As a result the Drafting Committee has been forced to confront a wide range of consumer protection issues throughout the Article 9 revision process, thus interjecting additional political and philosophical issues normally not addressed in this forum. At times the divergence of views on these issues has seemed to threaten disruption of the process,[16] and at this writing the result remains uncertain. Previous articles in this journal have described the perception of some observers that members of the Drafting Committee (who are not, for the most part, experienced in consumer lending transactions) may be inclined to accept proposals of the consumer advocates that would adversely affect consumer lenders, in order to obtain the acquiescence of the consumer advocates regarding improvements in the commercial law and to enhance the enactability of revised Article 9.[17]

The Drafting Committee formed a Consumer Issues Subcommittee in an effort to reach a compromise between the consumer and creditor positions, and the resulting report and recommendations offered some hope as a viable basis for compromise.[18] However, some of the recommendations were unacceptable to creditor representatives,[19] and the consumer representatives continued to press for additional consumer transaction rules. In November, 1996 the creditor representatives withdrew from the Consumer Issues Subcommittee and announced an inclination to oppose enactment of the revisions if the proposed consumer transaction rules are included.[20] Subsequently the Drafting Committee and its Consumer Issues Subcommittee rejected almost entirely a slate of creditor proposals and approved additional consumer advocacy proposals at the March, 1997 Drafting Committee meeting, widening somewhat the gap between the two sides.[21]

At this writing the consumer issues represent perhaps the most significant set of contentious and potentially unresolved issues in the Article 9 revision process. It seems

(Continued on page 157)

15. *See, e.g.,* Gail K. Hillebrand, *UCC Articles 3 and 4 in the California Legislature: A New Focus on Consumer Protection in Uniform Law Proposals,* 47 Consumer Fin. L.Q. Rep. 123 (1993).

16. *See* Harrell, *the Article 9 Revisions—What Should be Done?, supra* note 1. This divergence reflects what Professor William J. Woodward, Jr. has described as "a polarity in thinking that may echo the polar ideologies about contracting which have developed since the 1960s." William J. Woodward, Jr., *"Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC,* 75 Wash. Univ. L. Q. 243, 286-87 (1997).

17. *See, e.g.,* Alvin C. Harrell, *Article 9 Drafting Committee Considers Consumer Issues Subcommittee Report,* 50 Consumer Fin. L.Q. Rep 189, 195 (1996).

18. *See Report of the Consumer Issues Subcommittee of the UCC Article 9 Drafting Committee,* 50 Consumer Fin. L.Q. Rep. 332 (1996).

19. *E.g.,* a statutory penalty for even minor and harmless errors in combination with a reciprocal attorney fee provision for the prevailing party. *See, e.g.,* Harrell, *The Article 9 Revisions—What Should be Done?, supra* note 1; Alvin C. Harrell, Commentary: *Should the Statutory Penalty at UCC Section 9-507(1) be Combined With Prevailing Party Attorney Fees?,* 50 Consumer Fin. L.Q. Rep. 343 (1996).

20. At this writing the view of many consumer lenders is that the benefits of the proposed revisions are directed primarily at commercial transactions and offer little improvement for consumer lenders as compared to current Article 9, yet consumer lenders are being asked to pay the highest "price" in terms of increased complexity and more onerous statutory requirements for consumer loans. Consumer advocates seem to concede this point by responding that consumer lenders should agree to the proposed revisions because the lenders' commercial lending operations and affiliates will benefit from the revisions. Obviously this does nothing for the stand-alone consumer lender. As a result some consumer lenders apparently have concluded that they prefer current Article 9 to the revisions. For discussion of the countervailing considerations, *see* Harrell, *The Article 9 Revisions—What Should be Done?, supra* note 1.

21. *See, e.g.,* Harrell, *The March 1997 UCC Article 9 Drafting Committee Meeting: A Victory for Consumers?,* in this issue.