RISK AND OFFICE MANAGEMENT SUGGESTIONS FOR SOLE AND SMALL GROUP PRACTITIONERS

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Lawyers practicing as sole practitioners or in small groups encounter a situation much different from those practicing in larger groups or firms. In a word, this is called isolation.

For all lawyers, the practice of law has undergone fundamental and remarkable changes over the past quarter of a century. Some have praised and others deeply regret what a legal career has become. In many respects, it is much less a professional practice and much more a business venture. It has opened the doors to great economic wealth for a few, and economic and emotional disaster for many others.

The practice of law for big and small alike has been fundamentally changed by the availability of advertising, the impact of technology, and the complexity of subject matter. Now national law firms, with international presence, are commonplace. Yellow pages, sign boards and placards invite client patronage with all manner of enticements, and law firms are now ranked by billings with the recognition accorded the Fortune 500. Competition and economic demands are fierce and can be overwhelming. And perhaps saddest to say, professionalism is waning and attorney/client loyalties are vanishing.

All this suggests that the sole or small group practice of law requires even more careful and thoughtful administration and risk management practices. No longer is it feasible to simply find some space, hang a shingle, line up the old law school books, and wait for the clients to appear. Now the right space must be selected, the shingle is impacted by media advertising, law books are multi-media technology, and one literally must go out and hustle the clients.

Superimposed on all of this is the increasing threat of malpractice or grievance actions for even the least mistake. Cynical or not, this is reality.

There are more complexities and changes in the practice of law today than ever before. State and national legislators and regulatory agencies promulgate new rules and laws on a day-to-day basis. All of this is compounded by the massive number of decisions issued by appellate courts in all jurisdictions, including administrative tribunals, special courts, and the traditional state and federal systems.

A practitioner specializing in real estate development can be confronted with all manner of regulatory requirements on commercial development, environmental impacts, zoning processes, trade practices, and any number of different considerations.[i] All this in addition to having to appreciate the latest developments in leasing phraseology, document composition and perhaps even negotiating tactics.[ii]

Litigators must not only know the time bars or limitations of actions, but must appreciate as well all of the developments and potential claims and defenses, potential defendants, potential experts, and all of the other things one must consider in handling a lawsuit.[iii]

The divorce lawyer not only must appreciate the nuances of property, asset and business evaluation, but must be versed in pension and deferred compensation practices, regulations on distributing retirement benefits, the psychology of custody matters - all this in addition to simply knowing how to file and present a decent petition for dissolution.[iv]

All this suggests that no lawyer can or should practice in isolation. Collegiality is absolutely essential to the practice of law. The inherent isolation of the sole practitioner is the

converse of collegial communication. This severely limits the small group and sole practitioners compared to members of large firms.

Large firms have built-in support systems - or should have. Within the large law firm there is or should be someone with whom to confer. Within most large firms there will be a collection of people who are generally familiar with the same area of practice or subject matter. The synergism that develops from general discussions about the field of law and from specific evaluation of particular cases is invaluable. It is not readily available to the sole practitioner.

The sole practitioner may spend the entire day without seeing or talking to another lawyer. The lawyer may make a number of significant decisions about client matters without ever having the benefit of a devil's advocate or a second guess. A cold review which should be so readily available in large firms is almost never available to the individual practitioner.

Another and perhaps less obvious distinction between small group or sole practice and the larger firm environment is the difference in day-to-day fiscal and business management. Very large firms have business managers; the smaller firms have managing partners; and the small groups or sole practitioners often seem to manage by the seat of their pants.

The sole practitioner must take time away from productive work to make sure that rent is paid, payroll is completed, supplies are purchased, and, most important of all, bills are sent out. Unfortunately, no one is there to make up for time lost doing this work. To be sure, the sole practitioner or small group designate is not as inundated with the detail and the sheer numbers as might be the managing partner or business manager. Nonetheless, the distraction from client assignments can be terribly disruptive.

More than a few disciplinary counsel around the country have expressed the importance of good business practices. The incidence of problems associated with improper use of client funds is frequently associated with poor billing practices and economic management. Most lawyers are not thieves. They don't dip into the client trust fund with the idea of permanent misappropriation. In virtually every case, the intention is there to put the money back just as soon as the next fee comes in. Robbing Peter to pay Paul is always justified with the good intention of paying Peter just as soon as it is feasible.

Isolation contributes to this situation. The busy sole practitioner may have to put off routine billing tasks. Or, if not busy enough, he may be more apt to lead a hand-to-mouth existence paying yesterday's bills with today's fee income. Busy or not, any disruption in the income stream is devastating to the economic stability of the sole practice - stability which will not be restored by fee collection actions.[v]

These problems, like all others which plague the small groups and sole practitioners, are part of the isolation predicament. While we can all envy the independence that sole practitioners have, we don't envy the special difficulties they face. These difficulties, I submit, can only be managed and avoided by strong disciplinary and risk management attitudes.

The sole practitioner must strive for the fiscal and business discipline which seems more natural to the large firm counterpart. In a sense, this practitioner must become part-time bookkeeper and manager along with being a full-time pupil. His or her practice must be conducted as any other successful business enterprise, but with the added consideration of professional competence. There are no shortcuts. Professional competence is as important as fiscal management. Both are equally essential to good risk management practices.

Small groups and sole practitioners have difficulty developing techniques for operating an efficient and competent business practice. I would like to suggest some general steps the sole or small group practitioners can take to perhaps reduce the occasion or severity of difficulties which are endemic in the small group practice. In other words, some considerations for risk management.

1. CONTROL AFFORDABLE FIXED OBLIGATIONS.

One of the major difficulties confronting both new and established practices is the economic consideration. The number of cases handled by the disciplinary counsel arising out of economic distress is appalling.[vi] Office space is expensive, technology equipment can be exorbitant, and the cost of competent assistants may be oppressive. Sensible planning and control of costs is essential.

In this regard, it would seem wise to consult some experts. Neither undergraduate college nor law school addresses the practicalities of office space selection, size, location, proximity, and so forth. And nothing can be worse then being tied to an unaffordable lease for inappropriate space with incurred obligations for electronic machines, furnishings and office fixtures.

Just the availability of research facilities can be overwhelming. Should one select Westlaw over Lexis, or purchase a used set of statutes, digests and reporters, instead of CD Rom, or instead make use of the local Bar Association or court libraries? These are all very important and expensive choices. We all have to appreciate the fact that those with whom we deal in the legal profession are obtaining more and more instantaneous and sophisticated information. This includes the availability of slip opinions and decisions from appellate courts within hours of

announcement. It also includes the vast information which is available through the legal service providers and through the Internet.

Certainly to be competitive and perhaps to simply meet the acceptable practice standards, the practitioner must have some level of this information readily available. How much one spends to do this involves some very serious evaluations and forecasts. Organizations such as the ABA Section of Law Practice Management and the ABA Young Lawyers Division are great resources for the management of law practices, and can suggest the kinds of consultants and information available to obtain advice.

2. ESTABLISH MANAGEABLE OFFICE PROCEDURES.

The practice of law is a discipline both intellectually and functionally. It is not enough to simply be learned in the law with a facility for legal analysis. All sorts of mischief follow when economic pressures interfere with legal judgment. Devotion to a client's cause will not be as keen if the rent is past due and there is not enough in the bank to pay salaries. Good economic practices require discipline and attention. This includes regular billing and collection practices, and control of operating expenses.

Establishing office routines is extremely important. Once established, they must become dynamic, ongoing exercises. They require constant thought, practice, and re-evaluation. They include such mundane considerations as procedures to promptly file papers under the proper label. They also include in-and-out baskets, inter-office communications, and perhaps most important of all, controls to insure client communication. How often should the file come back up on diary for review to see that no task remains to be done for which a deadline is approaching? How to make sure that the client is kept completely informed about what the lawyer is doing and how

much it costs? How do you insure that no telephone call remains unreturned at the end of the day?

On this last point, no amount of emphasis is sufficient. Client communication is absolutely essential. If the lawyer doesn't keep the client advised on all aspects of the case management, the client may get the idea nothing is being done. It is not enough for the lawyer to simply work diligently to get the best result for the client. The client wants and is entitled to know how the case is progressing and what is being done.

And don't forget the trust account. There are harsh, demanding rules pertaining to the way client funds are handled. The Supreme Court Disciplinary decisions are filled with examples of mishandling of client funds and failure to account.[vii] Any money which by any stretch of the imagination can be said to belong to the client can never under any circumstances be kept in the office operating account or the lawyer's personal account.[viii] There can be no exceptions and there are no excuses. Even inadvertent commingling will attract the attention of the Disciplinary Counsel if some problem arises. This means that the new lawyer must open at least two business bank accounts, and never, ever shall the funds mingle. This also means that every deposit and withdrawal from the trust account is documented and supported. Leave no room for any question. Even if one practices out of the corner in one's basement, produces work on an old Smith Corona, and makes calls from the corner convenience store pay phone, one still must have a trust bank account.

3. ESTABLISH ADMINISTRATIVE PROCEDURES.

Managing client intake and evaluation is the beginning of a good attorney/client relationship. Since time and advice are the only true products a lawyer has to offer, the time spent on non-productive engagements has to be evaluated and managed. No one needs unintended "pro bono" work. There's enough opportunity for that through the local bar association volunteer programs.

Initial client information can help disclose deadbeat clients. A deadbeat client is a double whammy because not only do you give away your time and advice for no compensation, you also lose the opportunity to profitably use that time and advice. Client intake also involves the required conflicts check, definition of engagement, identification of client interests, and limitation of client expectations. Don't be bashful about asking a potential client for personal and financial information. Who's going to pay your bill? How will costs be handled? What is the client's past experience with lawyers? Who else might be involved in the case?

No one of these suggestions is any more important than another. But administrative procedures might be the insurance for completion of office procedures. The administration of client intake is a case in point.

Once the system is in place for checking conflicts, opening files, getting engagement letters, and commencing the work, these systems have to be religiously implemented in every case. There must be procedures to insure the use of engagement letters and fee agreements in every case. Every case requires a conflicts check. Consider putting together a checklist for the client interview. Create a system to insure timely client reports and written confirmation of

decisions. Administrative procedures have to be established and followed so that these various office practices become routine. This is all part of the functional discipline of the practice of law.

4. ESTABLISHING PROFESSIONAL IDENTITY.

The complexity of development in our legal system is a severe threat to the sole, general practitioner. There are enough contemporaneous developments in virtually every field of law which render it very difficult and very risky to be a true general practitioner in sole practice. Eventually, every lawyer should and probably will find a particular, identifiable specialty or group of related specialties in order to competently handle client matters. Very often these special areas of practice are dictated by one's client base. Occasionally, specialization is the result of special experience or training and attraction to a particular client base. In any event, identification of and adherence to practice areas for professional competence is essential.

5. ESTABLISHING A SUPPORT SYSTEM.

One of the most significant and least recognized attributes of a successful law practice is a system of collegial support - a system to counteract the isolation. Lawyers are bombarded with the need for judgment calls, strategies, and evaluations in virtually every aspect of client engagement. Many strategy decisions are based upon experience, but even the veteran practitioner frequently needs critical consultation. The element of collegiality which is readily available in group practice is simply not available in the sole practice and is severely limited in small groups. It is essential to establish some sort of practice support availability: other practitioners that one can call upon to discuss potential choices of action or type of advice. And don't forget the review of work product. The cold review of document preparation can pay great dividends and minimize the number of sleepless nights.

I cannot emphasize enough how important it is to have someone to talk to. Someone to play the devil's advocate or to ask the critical question. Someone to debate whether an additional affirmative defense or a different cause of action should be stated. Someone to ask why a particular claim is included in the draft Complaint when that claim has recently been ruled out by an appellate court decision.

Establishing a peer support system not only helps insure good quality practice, it also provides great comfort and satisfaction. I suggest it is developed and available through Bar Association activities, school colleagues, former teachers, and any number of different sources. Strangely enough, it appears to me that even in our highly competitive law business, lawyers are still willing to share their counsel with others who have questions or need support. It may seem contradictory, but there is still a lot of professionalism left in today's business of law.

These general considerations suggest the following risk management activities which might help reduce exposure to liability and disciplinary claims.

1. Obtain space and location most conducive to the type of practice and compatible with manageable economics.

2. Open two bank accounts: Trust and Operating.

3. Obtain electronic or manual administration systems for conflicts, client intake routines, client engagement letters, rejection letters and standard fee agreements.

4. Establish client reporting and communication procedures, timekeeping procedures, and regular billing and collection practices. Never sue a client; don't ever have to!

5. Establish routines for mail handling and phone calls.

6. Join the local bar associations and get involved with committee work.

7. Establish technical and professional support systems.

8. Create primary and back-up systems for docket and calendar controls.

9. Establish disengagement and withdrawal procedures.

10. Select realistic and timely choice of CLE activities.

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i. Karno v. Biddle, 42 Cal. Rptr. 2d 318 (1995)

ii. Badik v. Murphy, 555 NYS2d 206 (1990)

iii. Bill Branch Chevrolet, Inc. v. Burnett, 555 So.2d 455 (Fla. App. 1990)

iv. Bross v. Denny, 791 SW2d 416 (Mo. App. 1990)

v. Legal Malpractice, 4th ed. Mallen & Smith § 2.15.

vi. People v. McIntyre, 942 P.2d 499, Colo. 1997.

vii. In the Matter of Stern, 725 NE2d 708 (Mass. 1997).

viii. ABA Model Rules 1.15(a) and (b).