

Lawyers Professional Liability Insurance – 2018 Update

By Christopher Buckman, MBA and Michael McCormick, Esq.

Douglas-Elbert County Bar Association Meeting

Tuesday April 17, 2018

Social Hour 5:30 p.m.

Meeting and Presentation 6 p.m.

Siena at the Courtyard (downtown Castle Rock)

333 Perry Street

Castle Rock, CO

One general/ethics CLE credit is anticipated for this presentation.

Westport Insurance Corporation Policy Holders can receive a **5% Risk Management Credit at their lpl policy renewal/new policy**; if 50% of the firm's attorneys completed the CLE.

What You Will Learn:

- Why You Need Lawyers Professional Liability Insurance (LPLI)
- Trends in the LPLI Market
- Coverage and Deductibles
- Cyberliability Coverage
- How & When to Report Claims
- Client Considerations
- Conflict Issues
- Risk Management Tips

Please go to the DEBA website (douglaselbertbar.org) for “**meetings and events**” for more information and to register.

Cost: DEBA Members: \$25; Non-Members: \$35.

Cost of dinner is included in the registration fee.



Christopher Buckman, MBA, RPA Insurance Services

Chris holds a B.A. in Economics and Management from DePauw University and a M.B.A. from University of Colorado. For more than 20 years, Chris oversaw the Colorado Bar Association's endorsed Lawyers Professional Liability Program, several other non-sponsored lawyers' professional liability programs and Schwab's I-A-Solutions Investment Advisor Errors and Omission Program. He has created and implemented marketing plans with various underwriting partners to achieve profitable premium growth.



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Michael McCormick defends professionals including attorneys, appraisers, and real estate brokers against professional liability, malpractice, and disciplinary actions in state and federal courts. Michael is a member of the Douglas-Elbert County Bar Association and a member of the Colorado Bar Association's Professional Liability Committee.



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Legal Malpractice Insurance 2018 Update

Chris Buckman

Michael McCormick

Douglas-Elbert County Bar Association CLE

April 17, 2018

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- Legal Malpractice Insurance (LPLI)
- Trends in the LPLI market
- Coverage and deductibles
- Cyberliability coverage
- How & when to report claims
- Client considerations
- Conflict issues
- Risk management tips





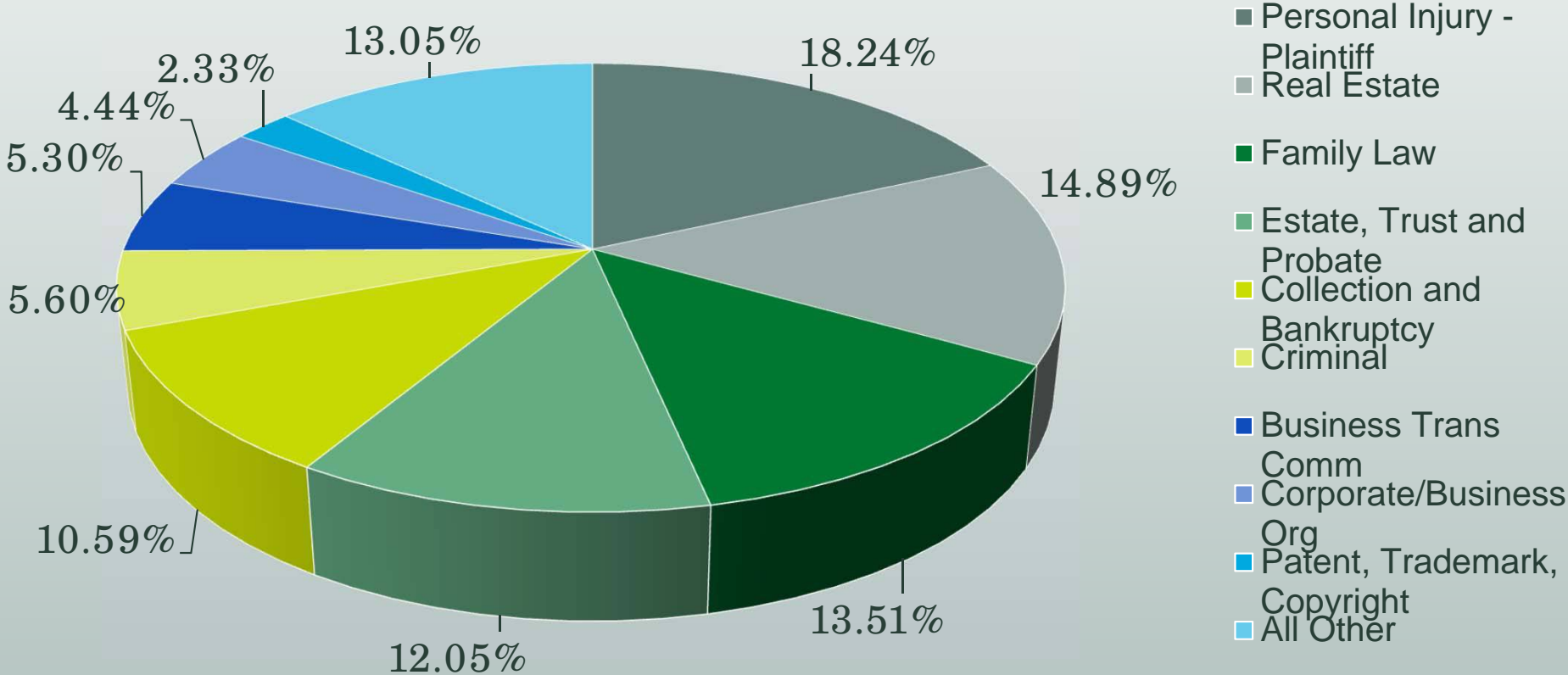
Trends in the lawyers' professional liability market

ABA Standing Committee on Lawyers' Professional Liability Study

Profile of Legal Malpractice Claims 2012 - 2015



Percent of all claims by area of law in 2015 ABA study



Profile of Legal Malpractice Claims: 2012 - 2015. ABA Standing Committee

70% of claims come from 5 areas of law

Ames & Gough Insurer Survey 2017

Professional Liability

- Business transactions experiencing the most claims.
- Other practice areas seeing significant claim activity.

Practice Areas Generating Largest Number of LPL Claims*

Area of Practice	Responses (by percentage)						
	2016	2015	2014	2013	2012	2011	2010
Trusts & Estates	56	56	67	50	57	0	33
Corporate & Securities	56	33	56	63	57	67	33
Business Transactions - Commercial Law	67	67	56	50	43	67	50
Real Estate	44	56	44	63	86	67	67
Collection & Bankruptcy	11	0	11	0	14	33	33
General Litigation	11	11	11	0	0	17	0
Taxation	0	11	0	25	14	0	0
Personal Injury Plaintiff	22	22	0	13	14	33	17
IP	0	0	0	13	0	0	17
Family Law	0	0	0	0	0	17	0
Litigation Defense	11	11	0	0	0	0	17

*Note: Survey participants provided multiple responses, so the totals sum above 100 percent. The survey also inquired about LPL claim activity in several other practice areas, but received no responses in each of the past seven years. These areas include: Labor & Employment, Insurance Defense, Criminal/White Collar, International Law, and Personal Injury Defense.

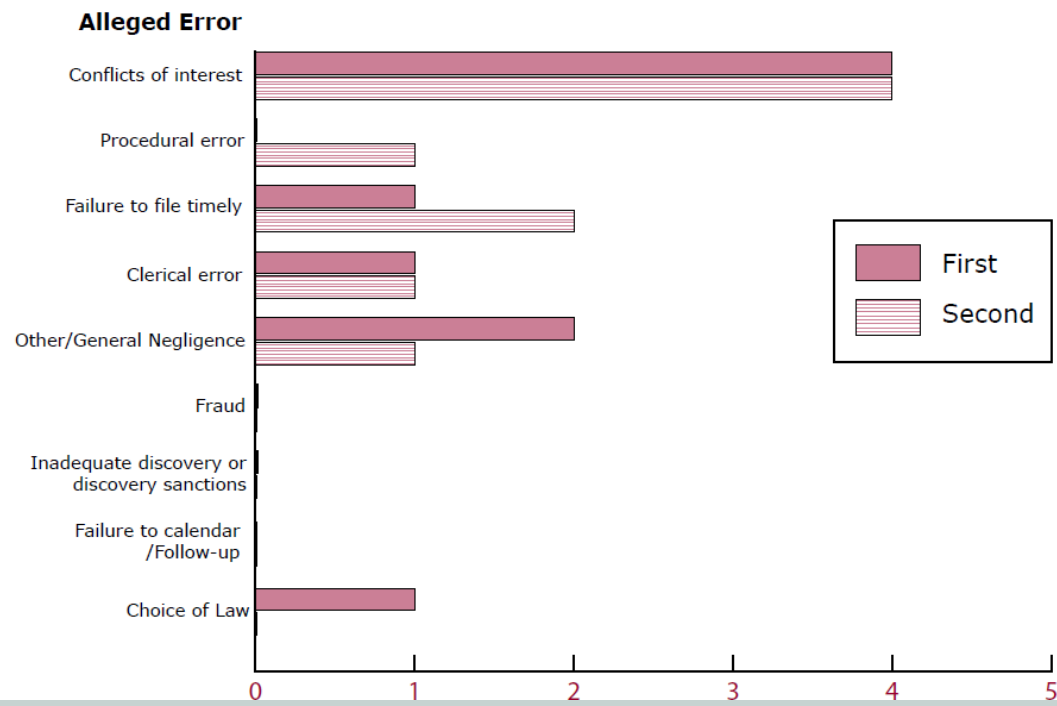
Ames & Gough Insurer Survey 2017

Frequency Claims frequency remained constant in 2016, albeit higher than pre-recession years.

Severity Legal malpractice claim severity remains high.
Nine insurers surveyed had claims with reserves over \$500,000.

Conflicts Most frequent alleged malpractice error: **Conflicts of interest.**

First and second most frequently alleged malpractice errors



Ames & Gough Insurer Survey 2017

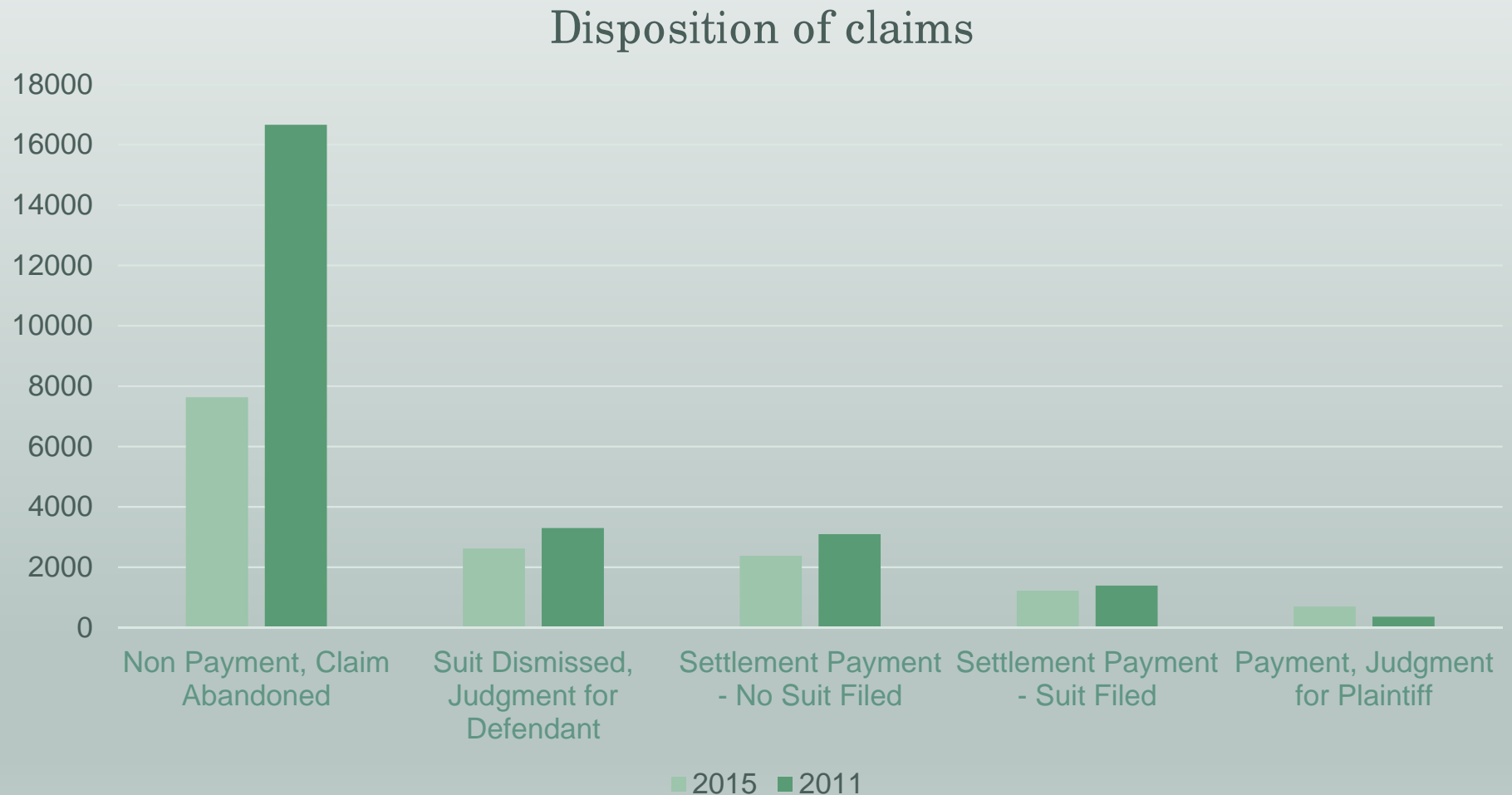
Laterals/ Conflicts

Lateral hires increase the risk of conflicts.

Tips for laterals

- *Avoid head hunters*
- *Carefully vet the lateral hire*
- *Firm should understand conflict rules; ABA Model Rule 1.10 can impute existing conflicts to new firm; check and disclose!*

Number of claims by disposition of claim



Profile of Legal Malpractice Claims: 2012- 2015. ABA Standing Committee

Common claims scenarios by type of error

- Missed statute of limitations /filing date
- Failure to know or properly apply the law
- Conflicts of interest
- Negligent advice
- Failure to obtain consent/follow instructions



Your lawyers malpractice policy



Why lawyers don't buy insurance: Some overheard excuses....

“I hear it is too expensive”

“I won't commit malpractice”

“It will suddenly make me a target”

“I will never get sued”



The truth about lawyers professional liability insurance:

Lawyers need it!



Duty to Disclose

C.R.C.P. 227(c)



Bar Association Survey



Most lawyers.....

Knew more about their auto policy

Were not aware what triggered coverage

Were not aware of beneficial coverages

Were not aware of exclusions & conditions

How to evaluate a carrier



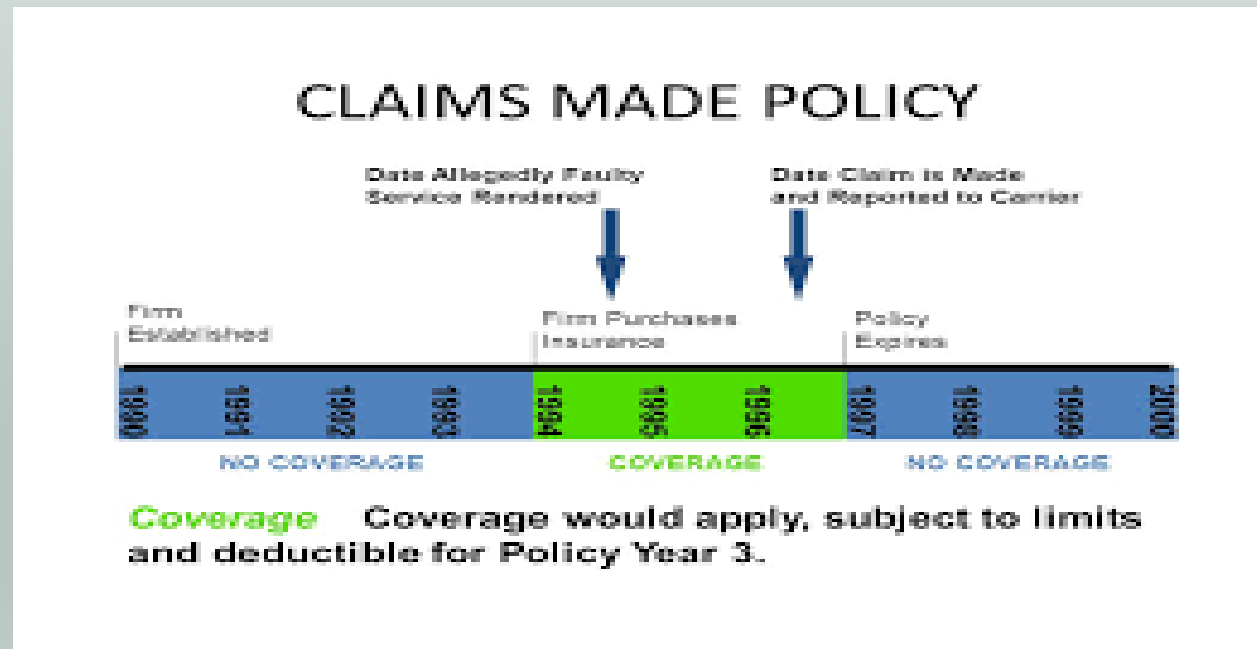
How to evaluate a carrier?

- ❖ Financial Strength Rating: Subjective rating by a reputable rating company (e.g. A.M. Best Company)
- ❖ Financial Size Rating/Surplus: Available money to pay claims.
- ❖ History: How long has the carrier been writing line of business?
- ❖ Trends: Research reputation of carrier; especially their claims department



General Features

- Claims made and reported policy
- Potential claims – report them!
- Standard exclusions:
 - Fraud, intentional or criminal acts, conversion
 - Punitive damages
 - Prior acts
 - Discrimination



Report potential & actual claims to carrier within policy period



Lawyer Malpractice Benefits

- Risk Management services
- Claims Commitment - providing outstanding service
- Free CLE
- 60 day mini tail
- Coverage for independent contractors; (some competitors may exclude)
- Disciplinary Coverage - \$20,000; (some competitors may provide less)
- Breach of Data supplemental coverage
- Crisis Event supplemental coverage
- Pre-claims mitigation
- Deductible reduction with broad time frame

Cyberliability Coverage

- Coverage is optional
- Prevention – Identification of Risks
- Protection – coverage for cyberliability incidents
- Remediation – incident response team

I made a mistake – what should I do?



Ethical Duty of Attorney to Disclose Errors to Client

- Ethical duty to make prompt and specific disclosure to a client of material error.
- A material error is one that will likely prejudice a client's right or claim.
- Lawyer should inform client of right to independent counsel.
- Lawyer need not inform client of legal malpractice claim against lawyer.
- Lawyer may continue to represent the client in certain circumstances.

Colorado Formal Ethics Opinion 113

Client considerations



Screening & accounts receivable

Screening checklist - clients

- ☑ Multiple previous attorneys & lawsuits
- ☑ Unrealistic or irrational expectations
- ☑ Impossible to define a “win”
- ☑ Personal vendetta or goal of harassment
- ☑ Veracity or credibility issues – including defensiveness
- ☑ Difficulty with following instructions or taking responsibility:
 - failure to return your calls
 - failure to respond to your document request
 - continues to insist on strategy that you have ruled out



Screening checklist - clients

- ☑ Controlled by a third party
- ☑ Rude to your staff
- ☑ Questionable social media presence – review!
- ☑ Financial responsibility issues
 - your bills are not paid
 - your bills are aggressively questioned
 - reasonable strategy is refused due to costs



Accounts receivables

- Do not allow AR to accumulate
- Obtain sufficient retainer / replenish
- Stay within budget / discuss with client
- Never let invoice be your only contact
- Lawyer should follow up if bill is not getting paid



Accounts receivable issues...

Could it be a communication issue?



Rule 1.4. Communication



(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Conflicts of Interest



Ethics

Berkshire can afford to lose money, even lots of money; it can't afford to lose reputation, even a shred of reputation....There is plenty of money to be made in the center court. There is no need to play around the edges

Warren Buffett

Conflict claims are problematic

- Juries have difficulty with causation even if conflict caused no damages.
- Juries are critical when lawyer appears to place own interests above client's.
- Juries hold lawyers to a very high standard.



Common scenarios that often lead to conflicts...

- An “agreed upon” plan; (for now...)
- Aligned interests; (for now...)
- Plan that just needs “papering”; (the scrivener defense)
- Lateral hire



Colo. RPC 1.7(2012) Conflict of Interest Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Colo. RPC 1.7(2012)

Continued

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

The conflict check list:

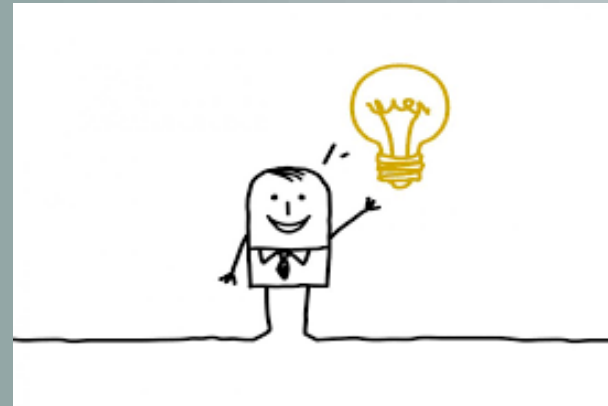
Resolution of a conflict of interest requires the lawyer to:

- 1) clearly identify the client or clients;
- 2) determine whether a conflict of interest exists;
- 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and
- 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

Colo. RPC 1.7(2012)

Comment 2

Top Risk Management Tips



Top tips!



Wire Transfers- use extreme caution

Hackers now intercept email exchange and send fraudulent wire instructions

VERIFY!

Telephone/obtain fax with letterhead



Document client's acceptance/rejection of advice

- confirming letters/emails
- detailed billing statements
- memos to file



Top Tips!



- Tip # 1: Screen clients
- Tip # 2: Define a win!
- Tip # 3 Know ethical rules
- Tip # 4: Know the law -don't dabble!
- Tip # 5: Document, document, document

Top
tips



- Tip #6: Keep client informed; return calls!
- Tip #7: Avoid fee disputes
- Tip #8: Control expectations
- Tip #9: Assume all emails will be read by jury
- Tip #10: Do not assume client satisfaction!

Chris Buckman - Presenter

- Chris holds a B.A. in Economics and Management from DePauw University and a M.B.A. from University of Colorado. For more than 20 years, Chris oversaw the Colorado Bar Association's endorsed Lawyers Professional Liability Program, several other non-sponsored lawyers' professional liability programs and Schwab's I-A-Solutions Investment Advisor Errors and Omission Program. He has created and implemented marketing plans with various underwriting partners to achieve profitable premium growth.



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