Malpractice Avoidance:
Presented By: Wilma S. Fields

I. Lawyer's Professional Liability – Selected Issues.

A. Article I. The Insured – who’s insured and for what.

B. Article II. The Coverage.

(1) The coverage – scope of coverage & specific examples of legal work covered.

(2) Defense, Settlements – know these requirements and conditions and follow them.

(3) Discovery clause – exists for benefit of both insured and insurer – avail yourself of this clause when needed and without hesitation.

(4) Extended Reporting Endorsement (“tail” coverage).

   (a) Who is entitled to buy it;

   (b) Circumstances in which you need it;

   (c) AIM insureds can buy individual tail if leaving a firm.

C. Article III. Exclusions – what is specifically not covered.

D. Article IV. Understanding limits of liability and your responsibility for paying your deductible.

E. Article V. Claims – understand your duty and responsibility to timely report and cooperate in your defense.

F. Article IX. Mergers & acquisitions – materially changing the composition of attorneys in your firm requires you to be re-underwritten.

G. XII. Notice. Know how to inform your insurer you have a claim (or possibility of a claim.)
II. The recession that began in 2008, makes attorneys the target of lawsuits in many practice areas.

A. Real estate practice is the highest risk area of practice for most attorneys.

(1) Traditionally, title insurance companies demand that their attorney-title agents assume the role of indemnitee for them for errors allegedly caused by attorney-title agents. This is an unhealthy relationship and one to avoid.

(2) One company, Mississippi Valley Title Insurance Company (a subsidiary of Old Republic Title Insurance Company), reportedly has a new contract form that asks attorneys to agree that their services are non-legal services. This characterization, if successful, takes your acts outside the coverage of your malpractice policy which insures you in the course of rendering legal services for others in the practice of law.

(3) Recession that began in 2008 has created massive numbers of default by borrowers creating third-party claims (non-client claims) against closing attorneys.

(4) Are you using an independent abstractor’s work upon which to express a title opinion?

(a) Know that suit is likely to be brought against you (irrespective of merit) for the abstractor’s negligence.

(b) Ask for a certificate of errors & omissions insurance from your abstractor’s insurer.

(c) Be aware that if abstractor later drops insurance, none will be available when you and abstractor are sued.

(d) Choose carefully those upon whom you rely for professional services.

C. Reporting claims made against you by a title insurer.

   (1) Provide timely advice to your malpractice insurer.

   (2) Maintain confidentiality and privilege of your report and communications to your malpractice insurer (do not carbon copy the title insurer!).

III. Banks and lending institutions since 2008 have become more aggressive in attempting to recoup their losses from bad transactions and have shown a greater willingness to sue attorneys representing them.

   (1) Document, in writing, all advice from banks and lenders that authorize you to vary from their established loan closing procedures.

   (2) Instruct your staff not to prepare closings that vary from loan closing instructions without having written documentation from the bank or lender and your having first reviewed it.

   (3) Permanently maintain the written documentation in your file. In the event you are later sued, it will be invaluable in your defense.

IV. A. Expect dishonest clients and fraud in economically troubled times.

   (1) Watch for client schemes to defraud lenders (sub-prime mortgage schemes that may subject you to civil or criminal liability).

   (2) Beware of e-mail schemes from persons whose identity you do not know and cannot verify.

      (a) Never represent a person with whom your only contact is via e-mail.

      (b) Do not allow yourself to collect and disburse funds under circumstances that are suspicious or require little professional effort on your part.

      (c) Hold funds for disbursement until, under all circumstances considered, you are sure the check or draft you deposited has been paid by the payor bank and you are sure it is a valid and
authorized instrument.

(d) Understand and appreciate that advice from your bank that the check or draft has “cleared” is of no protection for you and not a basis upon which to disburse funds from your trust account.

(e) Korea has become the new center of international wire fraud. Beware of foreign “clients” contacting you. Ask yourself “why would they contact me in the first place”?

V. A. Corporate representation, representation of joint ventures and similar endeavors requires an attorney to limit (and document) whom he represents.

(1) In dealing with clients and others, have a well-defined role in providing legal services. An unclear or misperceived relationship in corporate and business representation may disqualify you from representing your client in litigation. Do not allow your role to become blurred as to whom you represent. Corporate counsel generally owes his loyalty to the corporation, not to any individual in the corporation but exceptions may exist.

(2) Beware of inexperienced entrepreneurs, clients investing their last dollar or borrowing money they can’t afford to lose.

VI. As the economy declines, fewer clients have the ability to pay you for your services. Suits for fees can be risky. Consider whether they are really worth it?

A. High risk of counterclaim being asserted by former client against suing attorney.

(1) Malpractice exposure and cost of deductible under the malpractice insurance policy.

(2) Additional time spent pursuing former client = additional lost money.

(3) Risk of ethical complaint also being filed by client against former attorney.

B. Some factors to consider in evaluating whether to sue a former client for a fee.

(1) Amount in controversy – avoid suits for small amounts of money.
(2) Result obtained for former client and possibility for claim to be asserted by former client against suing attorney.

C. Recommendation – avoid suits for fees if possible. If fact situation requires suing a former client, first obtain independent opinion of counsel prior to filing suit.

VII. A. Be cognizant of the fact that people who work with you (attorneys, partners, associates, secretaries, office accountants and others who may handle money) are not immune from acts of dishonesty, embezzlement and criminal conduct. Also, personal circumstances may create chronic inattention and negligence. Watch for the following and take immediate and appropriate action to protect your clients, your office and your reputation and standing as an attorney:

(1) Drug addiction;
(2) Alcoholism;
(3) Severe emotional problems affecting the person you work with, or a crisis in that person’s family:
   (a) Divorce.
   (b) Spouse who has lost a job or suffered great financial loss.
   (c) A family member with a life-threatening illness or a drug addiction.
   (d) Physical/emotional illness in the person with whom you work.

B. Ethical considerations and obligations:

(1) Rule 8.3., Ala. R. Prof. Cond., Reporting professional misconduct.
   (a) A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(2) Most lawyers malpractice insurance policies have a requirement that in order for you to be considered an “innocent insured” and, thereby, have coverage for claims made as the result of the acts of a dishonest attorney or employee of your firm, you must not remain passive after
discovering the fraud or dishonesty and timely report same to your insurer.

VIII. Practice tips that can keep you out-of-court as a party defendant!

A. Document your file - it is time consuming, but it is invaluable to your defense.
   (1) Major case decisions.
   (2) Client instructions that run counter to your better judgement.
   (3) Offers and refusals of settlement.
   (4) Advise given your client.
   (5) Instructions received from your client.
   (6) Representations made by your client regarding facts of his case.

B. Do not give away client files without keeping copies. This is especially important where an allegation of malpractice has or could be made.

C. When closing real estate transactions, use an acknowledgment of representation form for all parties to the transaction to sign. Identify who your client is; the fact that you do not represent other parties and that they are free to consult with counsel of their choice. This information needs to be made known in advance of the closing with an acknowledgment of representation form being used by all at the time of closing.

D. Use written fee agreements. Maintain accurate and running time records whether you are on an hourly, flat or contingent fee agreement.

E. Know when to say no! Not every client has a cause of action, not every case is worth pursuing. The law does provide a remedy for every perceived injury. Marginal cases should be rejected. Use non-engagement letters when declining a case in addition to personal/telephonic advice of non-engagement. Advise non-engaged client to seek other counsel promptly if the case is to be pursued.

F. Employ a system to check conflicts of interest before you receive confidential information from prospective client or accept a case.

G. Employ a docket control system with cross-checks.
(1) Computerized systems are the best and essential for firms.

(2) Data entry must be cross-checked to catch errors.

(3) Maintain a hard-copy of back-up in the event of computer failure.

H. Calendar important events.

(1) Closing dates for commercial transactions, real estate, etc., and chores essential and preliminary to same.

(2) Statutes of limitation - calendar these immediately upon opening a file.

(3) Filing deadlines, including but not limited to:

   (a) Bankruptcy proofs of claim, objections to discharge, etc.;

   (b) Pleadings;

   (c) Tax returns.

   (d) Petitions for probate.

I. Employ tickler dates in your calendar system. There are two types of tickler dates:

(1) Precedent - Gives warning of time remaining to draft and file a complaint, prepare for deposition, file discovery responses, etc.

(2) Subsequent - just as important and most frequently overlooked. This provides assurance that a task started is actually completed, e.g.:

   (a) Subpoenas issued (were the served?)

   (b) Documents mailed to courthouse for recording (deeds, mortgages, complaints, certificates of judgement, etc.) did they get there in time? Have they been returned?

   (c) Copyright registrations;

   (d) Contracts sent to clients; opposing parties for execution;

   (e) Due diligence information needed for commercial/securities transactions.
J. Decline to represent clients for whom you have a "gut feeling" that they are going to be a problem.

IX. What to do if you have a claim.

A. Give timely notice to your malpractice insurer because:

(1) It is required under all policies. Timely notice of a claim is a condition precedent to coverage under AIM's policy.

(2) It allows your interest to be better protected.

(3) Prompt defense and attention to your claim frequently allows your insurer to minimize damages.

(4) Under a claims-made and reported policy, notice of claim to a malpractice insurer protects your interest now and in the future. It effectively creates an occurrence-type coverage (once reported) as to that claim. Coverage for the reported claim continues even if the policy subsequently is not in force.

B. Where a claim has not yet been asserted but circumstances exist that evidence an insured has committed malpractice, notice must be given to AIM in accordance with its policy. This allows AIM to be apprised of the problem, set reserves, appoint counsel if necessary and, in some cases, conduct claim repair to eliminate or mitigate the malpractice.

C. How to give notice to your insurer.

(1) Professional liability policies require written notice and state where it is to be sent.

(2) AIM requires written notice.

(a) Do not rely on U.S. mail to make initial contact with AIM for the purpose of providing notice of a claim - delayed and lost mail is becoming more frequent. Lost time could prejudice both insured and IM particularly in time-sensitive matters (e.g., litigation, statute of limitation claims, fast moving transactional matters still in progress);

(b) Call AIM and provide advice of the problem;
(c) Follow-up promptly with a written report via fax (original can be sent subsequently by mail), Federal Express or other courier service.

(3) Follow your insurer’s directions in providing written notice and the content it requires. AIM generally needs a synopsis of the operative facts, complete names of persons/entities involved, dates of incident(s) and significant events with issues explained and potential damages discussed.

D. Tell your client you will look into the matter and will be back in touch with him. This will give you some “breathing room” to contact your professional liability carrier for it to assume necessary and appropriate defense efforts.

X. What **not** to do if you have a claim.

A. Do not admit liability or accept responsibility.

(1) Liability is not always clear even where errors or omissions result. Many professional judgement calls of an attorney result in adverse consequences to clients - an attorney is not responsible for errors in judgement.

(2) Damages are seldom liquidated or certain in malpractice cases. Evaluation by defense counsel is necessary to estimate damages.

B. Do not waive the red flag of malpractice insurance. Doing so, almost certainly guarantees that you will: (1) be sues; and/or (2) make settlement efforts difficult or impossible.

(1) Clients mistakenly perceive malpractice insurance as a means of receiving everything they ever hoped for and dreamed of from their cases.

(2) Clients erroneously think that your malpractice insurer is a painless source of funding, available for the asking, without consequence to them or you.

C. Do not try to effect self-help remedies. Remember the old adage that one who represents himself has a fool for a client.

(1) Self-help without the consent of your malpractice insurer violates the terms and conditions of your policy and can leave you without coverage.
(2) If you get yourself into trouble, you're probably the wrong person to attempt to get yourself out. Defense counsel appointed for you is in a more objective position to extricate you from your predicament.

(3) Self-help remedies normally:

(a) Make matters worse because the statements and positions you make and take may impede a more effective defense effort later;

(b) Place you in an impossible ethical dilemma with your client;

(c) May subject you to future charges of fraud if your client later becomes dissatisfied with the remedy you achieved.

D. Do not give notice to your professional liability insurer via a carbon copy of a letter responding to your former client or his current counsel's demands.

(1) Surprises upset malpractice insurers.

(2) Treat claims communications with your malpractice insurer as confidential and privileged.

E. Beware that some title insurers are suing their attorney/agents more frequently. When a title insurer makes a demand against you as its agent, communicate confidentially with your malpractice carrier - do not carbon copy or otherwise include your title insurer in the loop! Your malpractice insurer's interest is to defend you; a title insurer's interest is recouping its loss from you. These interests are not the same.

F. Do not hire counsel on your own. Your carrier will do this. AIM will consult with you regarding selection of counsel.

G. Never pay the claim on your own - this will leave you without coverage.