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LAW OFFICE MANAGEMENT

Reducing Firms' Pro Bono Liabilities

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COURTS AND bar associations in-creasingly are recognizing that pro bono work is an important part of a lawyer's professional duty. Simultaneously, the demand for pro bono representation continues to grow. As law firms grapple with ways to fulfill this professional obligation, they must consider how to limit their liability for malpractice claims arising out of pro bono work.

The payment of a fee is not a prerequisite to the existence of an attorney-client relationship or to the maintenance of a malpractice action. Thus, representation of a pro bono client raises the same professional liability issues as does representation of any other client.

For example, what if a lawyer accidentally misses a filing deadline or drafts an ambiguous contract provision? What if the client is displeased with the result, despite the attorney's best efforts? If a pro bono client brings a malpractice action, will the law firm's professional liability insurance policy provide coverage? Are there any gaps in that coverage? How can the firm minimize the risk that a malpractice claim will be initiated at all? Just as these problems are not unique to pro bono work, neither are their solutions.

Although law firms generally understand that the same duty of zealous representation is owed to both pro bono and fee-paying clients, they may fail to recognize that the same risk management procedures should be followed. Firms may perceive pro bono work as especially risky because the matters are often sensitive or controversial, or because the clients may have been referred by a bar or community organization instead of through the usual channels. In fact, pro bono work is no riskier than any other representation, provided that firms approach it with the same attention to quality control.

Assessing Insurance Coverage

First, however, law firms must be aware of the insurance coverage afforded to pro bono work by their professional liability policies. Most firms' policies cover pro bono work to the same extent that they cover any other client representation. The definition of "lawyering" usually does not require that the client pay a fee. Nevertheless, because policies can vary, a firm must review its particular policy to be sure that pro bono work is, indeed, covered.

Additionally, a law firm should review its policy for some potential gaps in coverage. For example, there may be a limitation on the scope of practice covered. Firms that engage in specialized practices, such as patent law, may have policies limited to their practice in those areas. Other firms may have policies that are generally inclusive but exclude a specific area, such as family law. A firm must be aware of these limitations and be sure that its pro bono work falls within the scope of its policy.

Moreover, attorneys doing pro bono work not only may represent clients but also may act as trustees, guardians ad litem or mediators, roles that may fall outside a policy's definition of lawyering. Again, a law firm should check the policy definitions and exclusions to be sure that the work is covered.

Coverage disputes may arise when attorneys serve as pro bono staff members of organizations. For example, a law firm may loan an attorney to an organization to serve as its in-house counsel. The firm's policy, however, may apply only if the lawyer works for the firm, not for some other entity. This obviously does not restrict lawyers from representing community organizations or governmental units, but it could lead to a coverage dispute if the lawyer is deemed to be working for an entity other than the firm.

Disputes also may occur when the policies of both the firm and some other organiztion provide coverage. Bar associations and other organizations that coordinate pro bono activities and refer the actual work to specific practitioners may have their own insurance to cover attorneys working under their auspices, even if the attorneys are also covered by law firm insurance. But a firm's policy may restrict coverage from another source.

Disputes could arise about which insurer will direct the defense and provide coverage in the first instance. Again, it is best to check the firm's policy at the outset.

A law firm cannot evaluate the adequacy of its insurance coverage without collecting information about the pro bono work its attorneys perform. Many firms have clearly defined procedures for assigning pro bono matters but may lack mechanisms for tracking the handling of those matters. The more information a firm has about the types of pro bono work performed by its attorneys, the more meaningfully the firm can assess its insurance coverage.

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Managing Risk

Even if a law firm's insurance covers pro bono work, it is certainly in the firm's best interest to reduce the likelihood that a malpractice claim ever will be asserted.

A firm thus should focus its risk management efforts on ensuring that it fully serves its pro bono clients' needs. It should treat pro bono matters with the same seriousness and diligence accorded fee work. The most effective techniques for limiting liability to fee-paying clients apply equally to pro bono work: assignment of properly qualified lawyers to the matter, adequate supervision and regular communication with the client.

Attorneys often are asked to handle pro bono matters that are outside the scope of their normal practices. Indigent individuals may need legal assistance in matters such as landlord-tenant relations, family law, entitlements programs and criminal defense, all areas that require specialized knowledge or training. Attorneys who usually represent businesses may be unfamiliar with the law and practice in those fields.

Just as a law firm would not permit a real estate lawyer to handle a labor negotiation, it should not allow lawyers to handle pro bono matters for which they are not qualified. This hardly means that business attorneys should not represent clients in matters involving, for example, the denial of Social Security benefits. Rather, firms should ensure that their attorneys are properly qualified to practice in new areas by encouraging them to take advantage of training programs and resources offered by local bar associations or other organizations.

Furthermore, attorneys working pro bono need the same level of supervision as attorneys perform any other legal work. Younger lawyers, eager experience, often seek out pro bono work, mak adequate guidance especially important. The sup vising attorney also may need some speciali knowledge or training to provide effective as tance. An attorney handling a landlord-tenant mat for the first time, for example, must know that son one is available to answer questions. Such super sion may be provided by a more experienced law in the firm or by the local bar association, wh may be able to provide technical backup.

Pro bono client relations are, as in any other rep sentation, critical in preventing later charges of m practice. It is, of course, a breach of an attorne ethical obligations to give less attention to a pro bo client than to a fee-paying client, or to communic with that pro bono client any less frequently carefully.

To the extent that pro bono clients may be unfan iar with the legal system, it is even more import that the attorney explain issues carefully and tiently. Again, all of the practices normally follow for consulting clients and keeping them inform apply equally to the representation of pro bo clients.

All of these techniques to limit the risk of a m practice claim — assigning properly trained a qualified attorneys, providing adequate supervisi and encouraging regular communication with ents — serve a double purpose. They not only help minimize the chances of a claim against the lawy and the law firm; they also help ensure the over quality of the services rendered to the pro bo client.

Finally, limiting malpractice risks requires effo at the management level. Law firms have develop various institutional systems to monitor pro bo work and ensure its high quality. Some firms, pending on their size, appoint a pro bono coordinat or even a committee to oversee pro bono activiti Other firms may let their attorneys work pro bono an ad hoc, individual basis. But the less informati that a firm has about the pro bono activities of lawyers, and the less a firm is involved in screeni pro bono cases and matching lawyers with approp ate matters, the greater the liability risks.

Even a law firm that does not have a formal p bono coordinator or committee should take a regul inventory of its attorneys' pro bono activities. Su an inventory should elicit complete informati about the pro bono matters the lawyers are handlir including the nature and status of those matters a the services being rendered.

Gathering this information will enable the firm become aware of potential problems, such as an torney who is performing pro bono work without t proper training or supervision. Knowledge of the e tent of the firm's pro bono activities also can ser other purposes. It can create opportunities for publi ity about the firm's public service work or enable t firm to recognize lawyers who are performing esp cially exemplary pro bono work.

As part of its monitoring of attorneys' pro bo work, a law firm should keep track of their time the same way that it tracks time devoted to fee wor This information may be used to rebut claims that attorney did not attend properly to a pro bono ma ter. It also can enable a firm to give credit for t time attorneys spend on pro bono work.

There is no reason for firms to resist expandir pro bono activities because of concern about liabili exposure. Proper insurance coverage, combined wi proven techniques for providing high-quality clie representation and efficient law firm managemer can help firms minimize those risks while satisfyir their professional obligation to perform pro bo work.

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