



THE RISK MANAGER

Spring 2001

PRESIDENT'S MESSAGE



Report to Re-Insurers – I have just returned from the annual trip to London to meet with representatives of Lloyds syndicates who underwrite the Company's reinsurance cover. We shared with each of them our continued good loss ratios and steady increases in premium volume, number of insureds, number of firms and our best estimate as to the Company's market share of Florida's insured attorneys. Of course, we will report the actual figures with bar graph comparisons to each of you in the Annual Report to our policyholders.

New Policy Coverages – I am particularly pleased to report, as I did in London, two significant policy changes that afford additional coverages at no additional premium. At its last meeting, the Company's Board of Directors approved Staff's and Underwriting Committee's recommendation to provide coverage for defense costs arising out of grievance complaints against an insured attorney; and, coverage for per diem income losses resulting from an insured attorney's attendance at trials defended by the Company. A more detailed explanation of these coverages, as provided by the Policy, will be forthcoming to each policyholder in the near future.

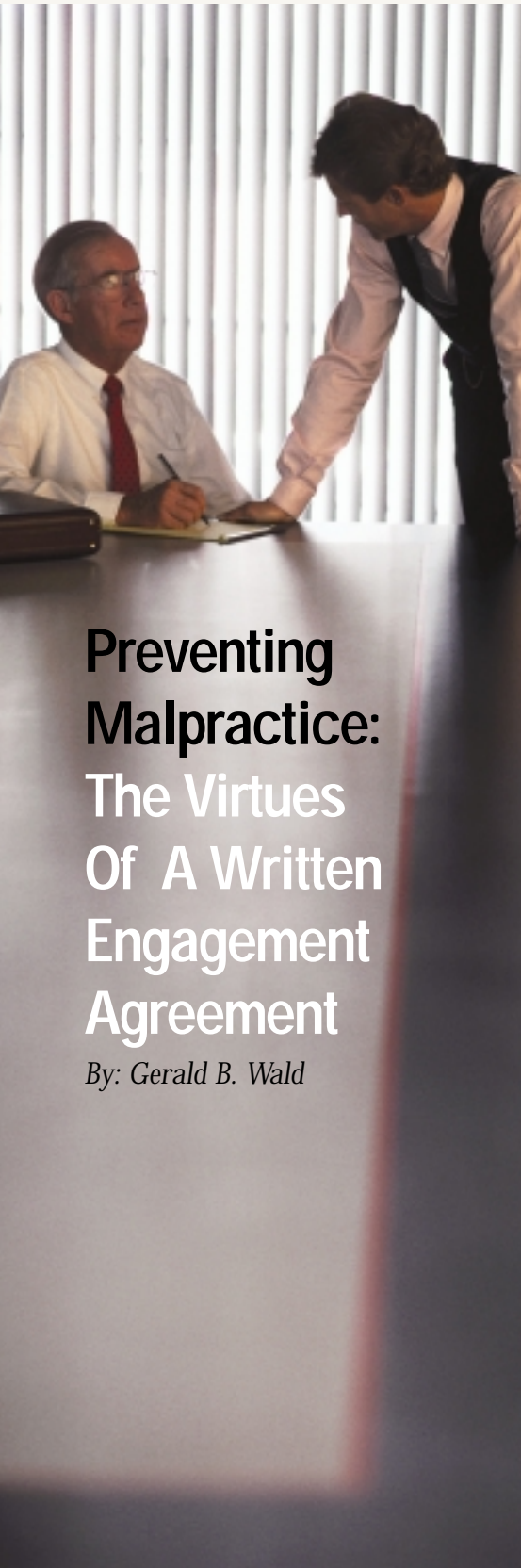
Expectations for 2001 – With high ratios for January 1st renewals and relatively low reserves for pending claims we look forward to another year of steady growth and outstanding underwriting and claims service to each of our insureds.

Service – I urge each of you to advise the Company if and when we may be of service. As you know, you have a very distinct advantage by doing business with an insurer with its operations and offices in Florida. Our Executive Vice President, our underwriting and our claims staff members can and will visit you at your office when necessary and appropriate. That is one of the many strengths and advantages of our Company that I am so proud to serve and represent.

A handwritten signature in blue ink that reads "William E. Loucks".

William E. Loucks
President

“...if a lawyer views a written engagement agreement solely as a means to confirm fees, he or she overlooks its significant effect in avoiding or defending a malpractice action.”



Preventing Malpractice: The Virtues Of A Written Engagement Agreement

By: Gerald B. Wald

It is startling, but true. Each year, one in 19 Florida lawyers faces a malpractice suit. Contributing to this troubling statistic are legal malpractice suits which do not stem from incorrect advice or missed deadlines. Instead, a significant number of malpractice suits result from a breakdown in communications between lawyer and client, which can lead to a perception that the attorney either failed to fulfill certain duties or charged for unnecessary or improper work. If the expectations of the attorney-client relationship are well documented from the beginning, many malpractice cases could be avoided.

On a daily basis, lawyers are asked to draft, interpret or litigate contracts for their clients. Just as the cobbler, whose children go without shoes, the attorney often ignores his own training and embarks on legal representation without entering into a written contract with his client. While Rule 4-1.5(f) of the Florida Rules of Professional Conduct requires that all contingency fee contracts be written, there is no such mandate for matters billed on an hourly basis. One might assume that the lack of such a requirement means that a written engagement agreement is unnecessary for hourly billed matters. Such an erroneous assumption can result in dire consequences if a client later files a malpractice action. An engagement agreement defines the contractual relationship, minimizes misunderstandings that can lead to future disputes, establishes legal rights and helps prevent potential ethical problems. Both the attorney

and the client can benefit from a written engagement agreement outlining the duties and expectations of the parties.

All lawyers are subject to the ethical requirements of the Florida Rules of Professional Conduct, Rule 4-1.5(e), which states that “when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.” The Comment to Rule 4-1.5(e) recognizes that a written statement concerning fees reduces the possibility of misunderstanding. However, if a lawyer views a written engagement agreement solely as a means to confirm fees, he or she overlooks its significant effect in avoiding or defending a malpractice action.

An engagement agreement can eliminate a potential lawsuit simply by naming the proper client. For example, an attorney hired to provide tax advice to a small Chapter S corporation with a single officer regularly communicates directly with that officer, who may view the attorney as his personal attorney. Without an engagement agreement clearly stating that the attorney is providing advice to the corporation only, the attorney might be at risk should he fail to properly advise the officer of personal tax consequences upon termination of the corporation's 401-K plan. Likewise, attorneys representing separate defendants engaged in a joint defense can benefit from a written joint defense



agreement. When the interests of all defendants are not completely aligned, a joint defense agreement, clarifying which attorney represents which defendant, can protect an attorney sued for malpractice by a party he does not consider to be his client.

Attorneys are often hesitant to ask longstanding clients to enter into engagement agreements, for fear that the clients may be insulted by such a request. Such fears are unwarranted since many clients, both corporate and individual, are accustomed to signing contracts and would appreciate a clear understanding of the scope of the relationship.

Just as there are items that a conscientious trust and estates lawyer makes certain to include in a will, there are items that a conscientious attorney should include in the initial engagement agreement. In addition to the fee arrangement and amount of any retainer, an engagement agreement should define the scope of the representation. The scope of the representation should identify those matters to be decided by the client and fully describe any services which are not included in the representation. Delegation of duties to attorneys within the firm also should be stated. If time is critical to the representation, time deadlines for all major tasks should be included. As a general rule, an attorney should avoid making specific promises of results likely to be achieved. Finally, the agreement should state that the client is expected to provide full cooperation to the attorney.

Clients should be informed that hourly rates may vary depending on the type of service. For example, if court appearances are charged at a higher rate than office work, the various rates should be set forth in the engagement agreement. Specifying the minimum time charged for a task and the basis upon which the time is calculated (i.e., one-tenth or one-quarter of an hour) helps to prevent disputes. If representation is expected to extend beyond a specific date, it is wise to state that the firm's hourly rates may increase periodically.



Even in situations where the client is an attorney, such as corporate in-house counsel or an out-of-state lawyer associating local counsel, a written engagement agreement is advisable. An engagement agreement should clearly delineate tasks to be performed among various attorneys in order to avoid misunderstandings. For example, the engagement agreement may limit local counsel's role to advising on the local rules and procedures and specifically exclude the drafting of substantive pleadings.

An engagement agreement also can be useful when a client fails to pay agreed upon fees. A well drafted agreement outlines the method for resolving fee disputes, whether through alternative dispute resolution or the courts and includes provisions governing choice of law, venue and jurisdiction. It is advisable for the agreement to provide for an award of attorneys' fees and court costs to the prevailing party in the event of a fee dispute.

A well drafted engagement agreement defines the contractual relationship, minimizes misunderstandings that can lead to future disputes and prevents potential ethical problems. The prudent attorney should heed the advice commonly received in law school and enter into well drafted engagement agreements at the beginning of the attorney-client relationship. The practice of carefully documenting the attorney-client relationship in an engagement agreement can have the added benefit of preventing malpractice lawsuits.



Gerald B. Wald

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