

# Insights and Commentary from Dentons

The combination of Dentons US and McKenna Long & Aldridge offers our clients access to 1,100 lawyers and professionals in 21 US locations. Clients inside the US benefit from unrivaled access to markets around the world, and international clients benefit from increased strength and reach across the US.

This document was authored by representatives of McKenna Long & Aldridge prior to our combination's launch and continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

# Professionalism and Ethics Update

*Randy Evans  
&  
Justice Harris Hines*

# Daily Report

Monday, March 2, 2009

Karen Sloan

**“As market falls,  
malpractice suits to rise”**

CLIENTS MAY LOOK TO RECOUP their losses; experts expect lawsuits to crop up in connection with failed financial deals, foreclosures, fraud and bankruptcy cases.”

# Daily Report

Monday, March 2, 2009

Karen Sloan

*“National insurance provider CNA Financial Corp., predicts that legal malpractice claims will be up by 5 percent in 2009, said Vice President Shauna Reeder, who oversees the large law firm professional liability group. CAN has already seen an increase in claims related to fee disputes . . . .”*

# Daily Report

Monday, March 2, 2009

Karen Sloan

*“A recent American Bar Association study that looked at legal malpractice claims filed between 2004 and 2007 reported that the total number of claims increased by more than 36 percent compared with the previous three-year period.”*



*It will never  
happen to me!*

# Daily Report

Monday, March 2, 2009

Karen Sloan

“The second category includes ‘groundless claims’ filed by clients who would not sue their attorney under better economic circumstances.”

# American Bar Association Standing Committee on Lawyer's Professional Liability

Fifth Study of National Legal  
Malpractice Claims Data  
1985, 1995, 1999, 2003, 2007

# Claims but NO malpractice

½ or 51.49 percent of claims were  
either abandoned or resulted in  
NO payment  
and  
14.62 percent of claims were  
dismissed with a judgment for the  
defendant

# But when there is malpractice -

the number of claims that resulted  
in an indemnity payment of >\$2m  
has more than doubled in 3  
years.

# Not that it makes us feel that much better, but

“Interestingly, the category capturing claims that proceeded to a judgment in favor of plaintiff, *Payment – Judgment for Plaintiff*, constituted a miniscule 0.70 percent of all claims by activity in the 2007 Study, down from 2.42 percent in the 2003 Study.

# More significantly,

“Almost 65% of claims were resolved with no expense payment, and 70% were resolved with an expense payment of \$1,000 or less.”

And,

“The 2007 Study reveals that once again nearly 8 of every 10 claims are closed with no indemnity payment.”

# Running Away

Neighbor Boy: I've run away from home. I'm going to live with you from now on.

Neighbor: What will your parents say.

Neighbor Boy: Nothing, We drew your name out of a hat.

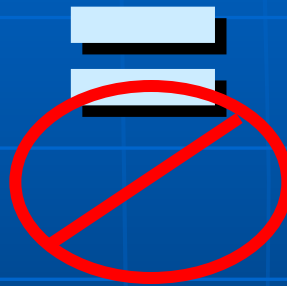
So, with approximately  
two out of three all  
claims against an  
attorney resulting in no  
payment, the question is

...



*... exactly how  
do you prevent a  
claim when  
there has been  
no malpractice?*

# Malpractice



***Malpractice  
Claims***

# Legal Malpractice

## ■ ***Duty***

- ***express contract***
- ***implied contract***
- ***third parties***

## ■ ***Breach***

- ***failure to use that degree of care, skill, diligence, and prudence commonly possessed and exercised in the legal profession***

## ■ ***Proximate caused damages***

# Legal Malpractice Claim

***A claim arising out of  
an act, error or  
omission in the  
rendition of  
professional services  
in his or her capacity  
as an attorney.***

And when you do have a  
claim,

how do you prevent a claim  
from becoming a nightmare?

It could be worse -

How?

# Things could be worse -



Or,



Or,



Worth1000.com

Or,



Or,



# Effective Prevention

- ***Risk Recognition***
- ***Issue Recognition***
- ***Systems Solutions***

# **Effective Prevention Requires**

- **Individual Action**
  - understanding the risks
  - knowing the issues and the rules
  - modifying personal habits
- **Systems Solutions**
  - insuring compliance
  - creating fail-safes for noncompliance

# **Risk Recognition**

***Understanding the  
Risks.***

# The Risk of a Legal Malpractice Claim

- Frequency
- Severity
- Susceptibility

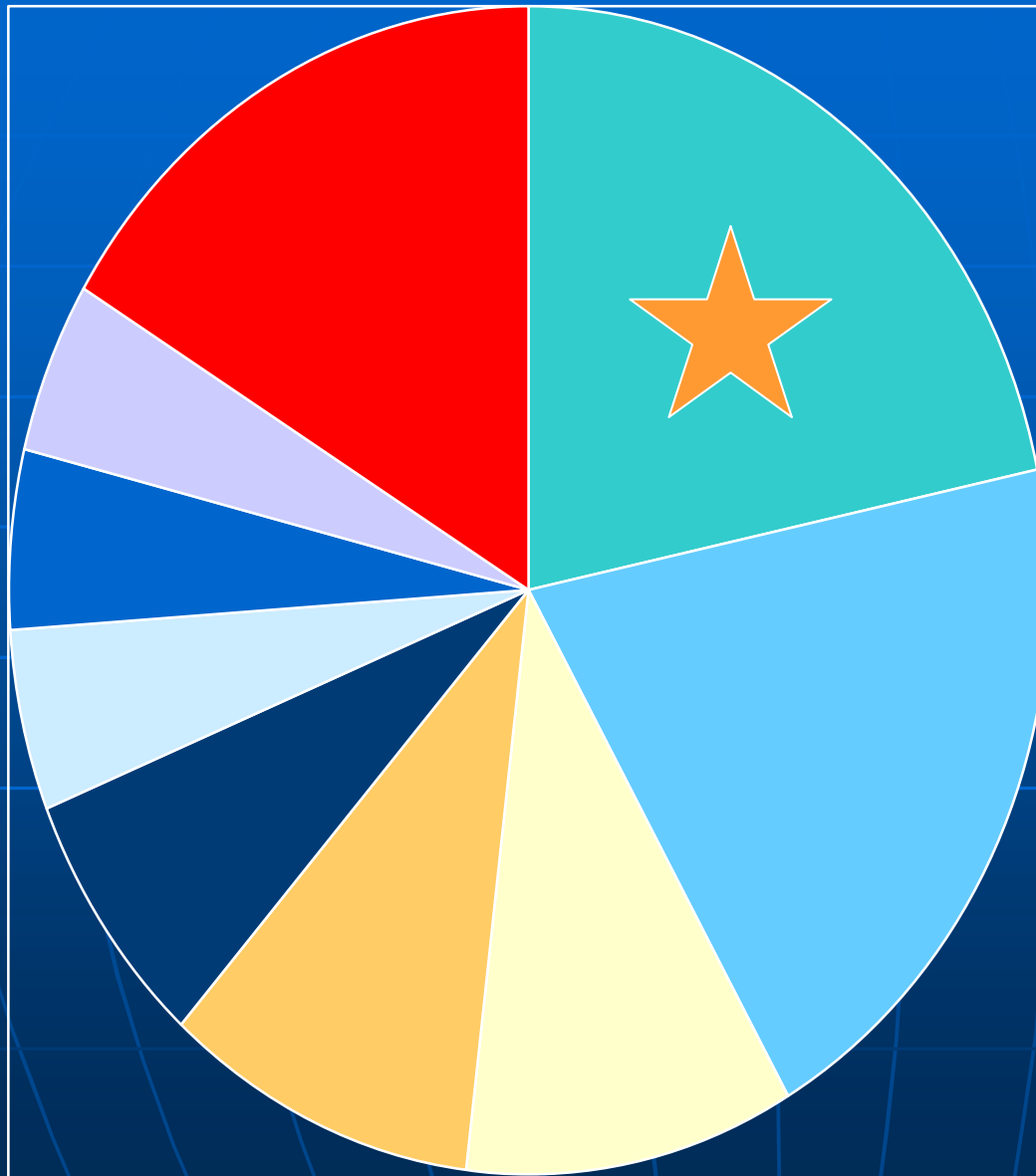
# Frequency

# Frequency varies according to:

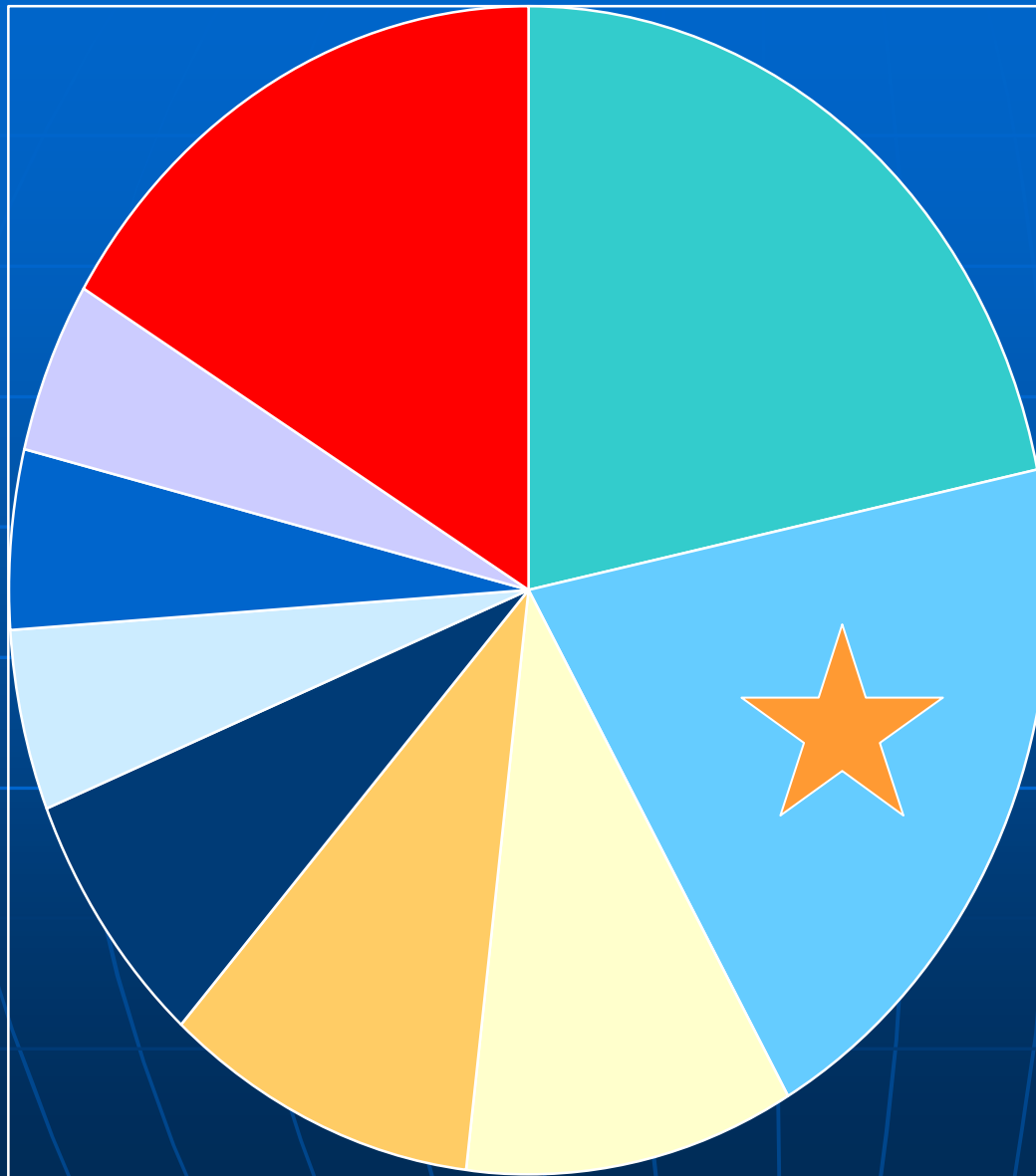
- *Area of practice*
- *Firm size*
- *Years of Practice*
- *Geographic Location*

# Area of Practice

- *Plaintiff's Personal Injury*
- *Real Estate*
- *Family Law*



- PI-PL
- Real Estate
- Family Law
- Estate
- Collection
- Criminal
- Corporate
- Bus. Trans.
- Other



- PI-PL
- Real Estate
- Family Law
- Estate
- Collection
- Criminal
- Corporate
- Bus. Trans.
- Other

# Plaintiffs Personal Injury and Real Estate as a Risk Area

“Although through the life of the Study *Real Estate* has been a perennial runner-up to No. 1 *Personal Injury Plaintiff*, in terms of share of all legal malpractice claims, in the 2007 *Real Estate* has climbed closer to than ever to the top spot, with a category increase of 3.59 percentage points since the 2003 Study.”

# Real Estate Attorneys Beware



# There are storm clouds ahead -

“A breakout for each of the study years 2004 through 2007 shows *Real Estate* claims rising in each of those years, surely a harbinger of continued growth in that category in 2008 and beyond.”

# The bottom line:

“Of all claims analyzed in the 2007 Study, 21.56 percent were against plaintiff’s personal injury lawyers and 20.05 percent were real-estate-related.”

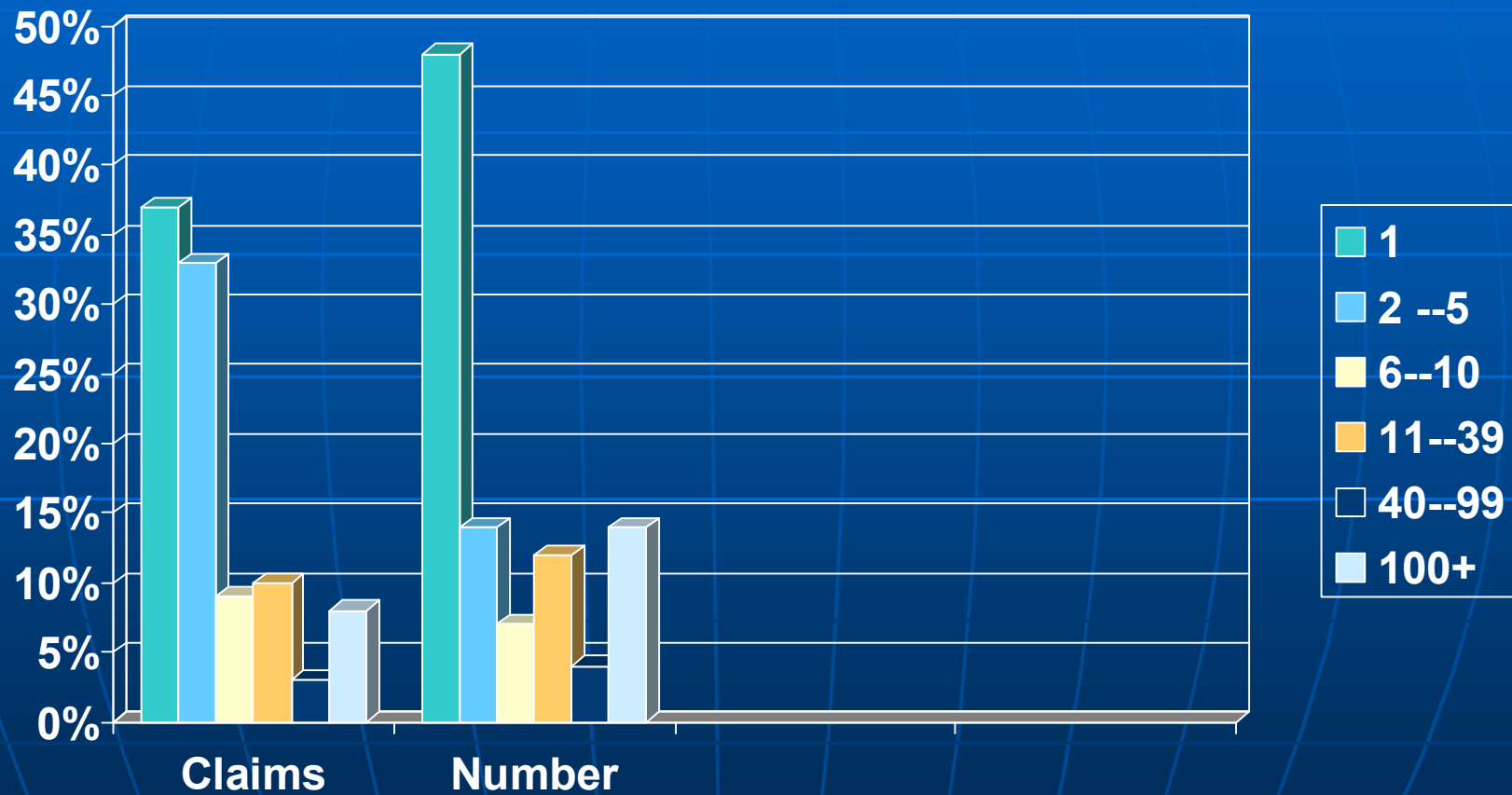
# Other areas to watch -

“Then again, in the 2003 Study we predicted that ‘areas to watch’ included intellectual property, claims stemming from corporate governance scandals, and claims by bankruptcy and litigation trustees.”

# Common Elements

- Administrative Error Risk
  - number of transactions
  - direct result effect
- Irreparability of Error
- Direct Personal Contact

# Firm Size



# Claims by Firm Size

- Solo – 37.24%
- 2-5 – 32.85%
- 6-10 – 8.98%
- 11-39 – 9.73%
- 40-99 – 3.25%
- 100+ – 7.95%

# Claims by Firm Size

- Solo – 37.24%
- 2-5 – 32.85%
- 6-10 – 8.98%
- 11-39 – 9.73%
- 40-99 – 3.25%
- 100+ – 7.95%

# Risk

“More than 70 percent of reported claims arise from firms with fewer than five attorneys. . . .”

# Explaining the Risks

- **Law firm rules; solo mentality**
- **Absence of systems**
  - client intake
  - conflict of interests
  - file
- **Lack of Back-up**
- **Susceptibility to Hungry Lawyer Syndrome**
  - too many cases
  - too many areas

# Years of Practice

- *Under four*
- *Four to Ten*
- *Greater than Ten*

# The Actual Risk

- *Greater than Ten*
- *Four to Ten*
- *Under four*

# Why?

- *More attorneys*
- *More complicated transactions*
- *Direct contact with client*
- *Busier*
- *Deeper pocket*

# The Excuses

- *Someone else's responsibility*
- *Too busy and missed "detail"*
- *Ignored systems/rules*
- *Filing snafu*

# *It's a Bad Day.*



- Plaintiff's Personal Injury or Real Estate Practice (one out of every four)
- Solo Practitioner or small firm (four out of every five)
- Practicing for more than ten years (two out of every three)

# What is a lawyer to do?

Did you hear about the two explorers who were going through the jungle when a ferocious lion jumped out in front of them?

The first explorer whispered to the second explorer to keep calm. The first explorer then asked the second explorer if he remembered what they had read in the book on wild animals.

"If you stand absolutely still and look the lion straight in the eye, he will turn tail and run away," said the first explorer.

The second explorer said, "Fine. You've read the book, I've read the book, but the question is 'has the lion read the book?'"

# Severity

**Severity tends to be  
more  
issue/procedure  
driven.**

# Severity generally involves:

## ■ *Nature of the errors*

- Conflicts of Interests
- Fiduciary Obligations
- Fraud

## ■ *Nature of Practice*

- Size
- Type
  - Securities/Bonds/Real Estate
  - National/Regional/State/Local

# Severity is worsened by:

- *failure to adhere to well established rules*
- *financial or personal gain*
- *dishonesty and/or lack of candor*
- *failure or refusal to acknowledge that an error has been made*
- *lack of knowledge of the rules*

# The Aggravating Circumstance

"The *Intentional Wrongs* group of alleged errors represented 13.53 percent of all claims in the new study, a noteworthy increase from its 9.79 share reported in the 2003 Study. In the study's 25 data-year history, this category had never before accounted for more than 11.92 percent of all claims (reached in the 1985 Study, which covered years 1983-1985.)"

# Why it matters?

- negligent supervision
- predicate criminal or fraudulent act
- vicarious liability
- personal assets

# Effective Prevention

- *Risk Recognition*
- *Issue Recognition*
- *Systems Solutions*

# The Self Audit

- *Pre - file Opening*
- *File Opening*
- *Representation*
- *File Closing*

# Pre-file Opening

***"An ounce of prevention is worth a pound of cure."***

# Pre-file Opening

- ***Identify the Client(s)***
  - the duty
  - the attorney-client privilege
  - withdrawal
  - ethical obligations -  
***CONFLICTS OF INTEREST***

# Knowing the Rules.

*Attorneys should either know the rules or should find out what the rules are,*

***especially  
when the  
rules apply  
to the  
attorney!***

# ***The Cross-Examination***

- **You are aware that there are rules for the resolution of conflicts of interests?**
- **You are aware that the rules are designed to protect clients of attorneys?**
- **So what is the test for resolution of conflicts of interest?**
- **You know where the rules are do you not?**
- **So, you know the rules exist, you do not know them; you know where the rules are, but you do not look them up?**

***So, is it fair to say that  
you are conscious of  
the rules, but  
indifferent to their  
application?***

# Pre-file Opening

- ***Identify the Client(s)***
  - the duty
  - the attorney-client privilege
  - withdrawal
  - ethical obligations -  
***CONFLICTS OF INTEREST***

# Pre-file Opening

- ***Identify the Client(s)***
  - ***Former Clients (Successive Representation)***

## **Rule 1.9 CONFLICT OF INTEREST: FORMER CLIENT**

**A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.**

# Successive Representation:

The threshold inquiry, prior to accepting a representation, and **prior to receiving any confidences or secrets**, must be whether the interests of the proposed client are materially adverse to the interests of any former client in a substantially related matter.

The failure to conduct this threshold inquiry may not only result in the loss of the proffered representation, but also result in the inability to represent the former client.

Once the attorney learns confidences and secrets, both the former and proffered client can preclude the attorney from representing the other.

# Successive Representation

- *Obtain the names of all interested parties*
- *Compare the names to a list of all former clients*
- *If there is a match, determine whether the prior representation and the proffered representation are substantially related*
- *If **not** substantially related, continue the Pre-file Opening Process*

# Successive Representation

- *If substantially related, determine whether the proposed representation is materially adverse to the former client;*
- *If **not** materially adverse, continue with Pre-File Opening Process;*
- *If substantially related and materially adverse, advise proffered client and determine whether the proffered client desires to use you;*

# Successive Representation

- *If so, provide full disclosure to former client*
- *Request consent from former client to proffered representation*
- *If denied, decline representation*
- *If granted, obtain written confirmation of consent*

# Pre-file Opening

- ***Identify the Client(s)***
  - **Former Clients (Successive Representation)**
  - **Multiple Clients (Multiple Representation)**

# Triggering the Multiple Representation Rules

# Triggering the Multiple Representation

***Am I representing more  
than ONE (1) client  
whose interests are  
involved in this  
matter?***

**More than ONE (1)  
or, if you prefer,**

**$>1$**



"It's just so confusing! All of those lines, arrows and holes. I don't know who I voted for."  
- Florida Teacher



# VOTING FOR DUMMIES®

**SPECIAL!**  
Follow the  
Arrow Test

**A Reference for  
Florida Residents**  
*...and other dumb voters.*

**By Bill Daley**  
*A second generation  
of voting manipulation.*



Hole punching techniques  
made simple.  
Just because you're dead  
doesn't mean you can't vote.  
We'll show you how!



# More than ONE (1)

- ***Count the number of clients requesting that you represent them in the matter***

# More than ONE (1)

- ***Count the number of clients requesting that you represent them in the matter***
- ***Determine whether any existing client is an interested party in the matter***

# Multiple Representation Conflict Resolution

***Are there things I would  
do differently if I  
represented only one of  
the clients as opposed  
to both?***

An attorney who undertakes to represent at the same time adverse parties in any type of legal relationship, whether contractual or otherwise, does not obligate himself to any higher duty or standard of care than if he endeavored to represent only one of those parties. On the other hand, he clearly owes no lesser duty to each of his clients, and he must protect the interests of each zealously **as if their interests were his sole responsibility.**

Hill v. Okay Constr. Co. Inc. , 312 Minn.  
324, 252 N.W.2d 107, 117 (1977)

# The Obvious Example:

***Husband and Wife ask  
attorney to represent  
both in securing divorce.***

# The Test:

***Are there things I would  
do differently if I  
represented only one  
client as opposed to  
both?***

# Representing Only the Wage Earner

- ***Increase the alimony***
- ***Decrease the child support***
- ***Re-characterize property settlement per IRS rules***
- ***Seek joint custody***

# Representing Only the Non-Wage Earner

- *Increase Child Support*
- *Re-characterize Alimony as Property Settlement*
- *Retain sole custody*

If there are **NOT** things  
that the attorney would  
do differently,  
*the attorney may **accept**  
the representation  
without further analysis.*

If there **ARE** things that  
the attorney would do  
differently,  
*the attorney may **NOT***  
*accept the*  
*representation without*  
*further analysis.*

If there **ARE** things that  
the attorney would do  
differently,  
*then the attorney **must**  
proceed to the next  
phase of conflict  
resolution.*

# Multiple Representation Conflict Resolution

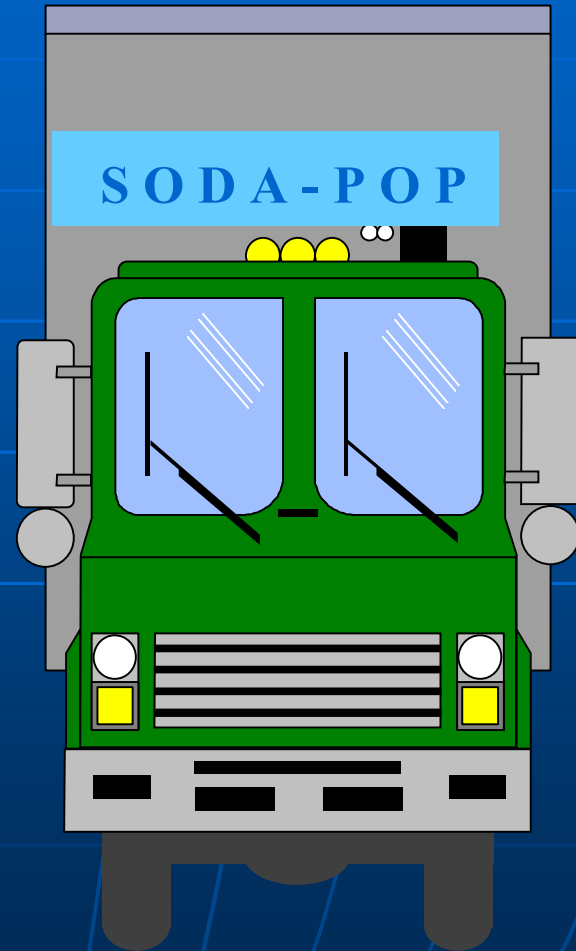
- *Are there things I would do differently if I represented only one of the clients as opposed to both?*
- *Is it reasonably unlikely that I will be able to provide adequate representation to one or more of the affected clients?*

The critical component  
of this test is

***LINKAGE.***

# An Example:

- *The soda truck driver at the nightclub.*



# Note the relationship of the defenses

***For the truck-driver:  
delivering soda  
and acting  
within the  
scope of  
employment.***

***For the  
employer:  
acting outside  
the scope of  
employment.***

# If there is linkage,

*if it reasonably unlikely that I will  
be able to provide adequate  
representation to one or more of  
the affected clients,*

the attorney **must**  
**decline** the  
representation.

There are some  
conflicts which are  
**not** waivable.

# Examples

- *The plaintiff and defendant in the same action*

No one could conscionably contend that the same attorney may represent both the plaintiff and defendant in an adversary action . . . . Obviously, the attorney cannot serve the opposite interests of his two clients fully and faithfully. The ancient rule against one attempting to serve two masters interposes.

Jedwabny v. Philadelphia Transp. Co.,  
390 Pa. 231, 135 A.2d 252, 254 (1957)

# Some Factors.

- The clients may seek incompatible results;
- the clients may pursue mutually disadvantageous tactics; or
- the clients' adverse interests may outweigh their common interests.

There are some  
conflicts which are **not**  
waivable.

# Examples

- *The plaintiff and defendant in the same action*
- *Representation of buyer and seller in negotiating terms of contract of sale*
- *Representation of a client who was to be the chief witness in another pending matter against another client*

**There are some  
conflicts which are  
not waivable!**

*If it is not reasonably unlikely that I will be able to provide adequate representation to one or more of the affected clients,*

*then the attorney should proceed to the next step.*

# Multiple Representation Conflict Resolution

- *Are there things I would do differently if I represented only one of the clients as opposed to both?*
- *Is it reasonably unlikely that I will be able to provide adequate representation to one or more of the affected clients?*
- *Have both clients been provided full disclosure?*

. . . This is a question that must be conscientiously resolved by each attorney in light of the particular facts and circumstances that a given case presents. It is **utterly insufficient** simply to advise a client that he, the attorney, foresees no conflict of interest and then to ask the client whether the latter will consent to the multiple representation. This is no more than an empty form of words.

In re Lanza, 65 N.J. 347, 322 A.2d 445, 448  
(1974)

To satisfy the requirement of full disclosure by a lawyer before undertaking to represent two conflicting interests, **it is not sufficient that both parties be informed of the fact that the lawyer is undertaking to represent both of them**, but he must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them.

In re: Boivin, 271 Or. 419, 533 P.2d 171 (1975)

***Communicate the  
Risks!***

# Topics to be addressed

- *Description of the things the attorney might explore and pursue if the attorney represented only one client as opposed to both clients*
- *Warning that the attorney does not represent the interests of one client as they relate to the interests of the other client*
- *Discussion of the advantages and disadvantages of a single attorney as opposed to different attorneys for each*
- *Disclose the risks if an actual conflict develops and consequences*

Teacher: This essay on  
your pet cat is word for  
word the same as your  
brother's essay.

Student: It is the same cat.

IT IS OKAY TO COPY HERE.

# Things done differently

- the courses of action that might not be pursued or considered;
- the impact on confidential and privileged information
- reservations about the joint representation
- the possibility of future conflicts or a decision by one client to stop the joint representation

# potential problems

- conflicts in position or testimony
- differing settlement positions
- shared information and the privilege
- differing litigation strategies

# Agreeing on the Exit Strategy

- Agree on an exit strategy so that both the clients, and you know how to proceed if an actual conflict develops
- Include how confidential information will be handled

# Multiple Representation Conflict Resolution

- *Are there things I would do differently if I represented only one of the clients as opposed to both?*
- *Is it reasonably unlikely that I will be able to provide adequate representation to one or more of the affected clients?*
- *Have both clients been provided full disclosure?*
- *Have both clients consented in writing to the multiple representation?*

# Pre-file Opening

- ***Identify the Client(s)***
  - **Former Clients (Successive Representation)**
  - **Multiple Clients (Multiple Representation)**
  - **Non-Clients**

# Reducing the Risk to Non-Clients

- **Are there interested parties who are not clients?**
- **Have the interested parties been advised in writing that you do not represent them?**
- **Have the interested parties been advised regarding the need for separate representation?**

# Prohibited Transactions

- Business Transactions
- Use of Information
- Instrument conveying gift
- Media or literary rights
- Financial assistance
- Others paying fee
- Limiting exposure to malpractice

# Pre-file Opening

- ***Identify the Client(s)***
  - **Former Clients (Successive Representation)**
  - **Multiple Clients (Multiple Representation)**
  - **Non-Clients**
- ***Identify the Matter***

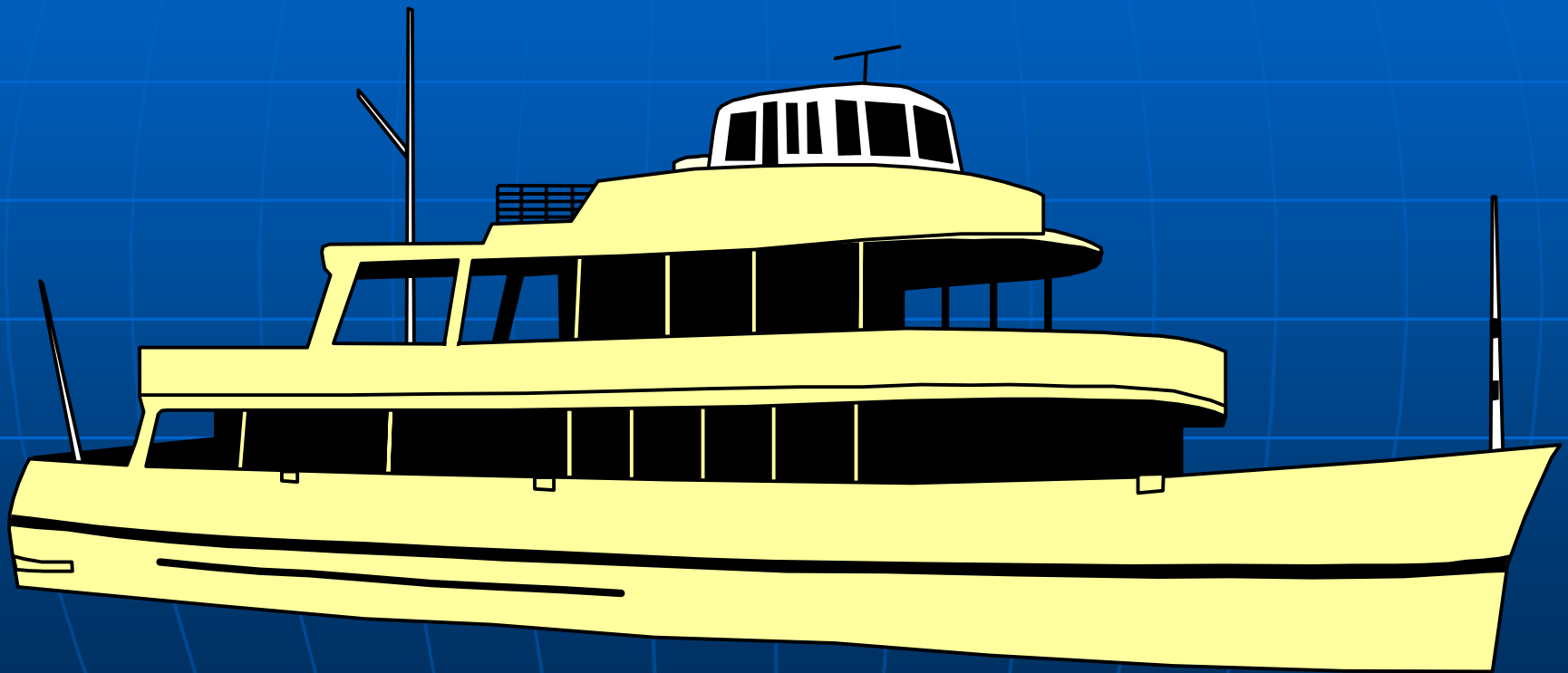
# Pre-file Opening

- ***Identify the Client(s)***
  - **Former Clients (Successive Representation)**
  - **Multiple Clients (Multiple Representation)**
  - **Non-Clients**
- ***Identify the Matter***
  - **Expertise**

# **The Hungry Lawyer Syndrome**

# Admiralty Question?

# Admiralty Question?



# Expertise

- Is the matter within your expertise?
- If not, can you become qualified through study and investigation without unreasonable delay or expense to your client?
- If not, has the client consented to the association of competent counsel?
- If not, decline the representation.

# Pre-file Opening

- ***Identify the Client(s)***
  - **Former Clients (Successive Representation)**
  - **Multiple Clients (Multiple Representation)**
  - **Non-Clients**
- ***Identify the Matter***
  - **Expertise**
  - **Issue Conflicts**

# Issue Conflict Resolution

- Does the matter involve issues pending in other representations?
- If so, is the proffered client's position adverse to the positions taken in the other representation?
- Is it reasonably unlikely that I will be able to provide adequate representation to one or more of the affected clients?

# Issue Conflict Resolution

- If so, has there been full disclosure to both clients in writing?
- If so, have both clients consented in writing after full disclosure?

# Pre-file Opening

- ***Identify the Client(s)***
  - **Former Clients (Successive Representation)**
  - **Multiple Clients (Multiple Representation)**
  - **Non-Clients**
- ***Identify the Matter***
  - **Expertise**
  - **Issue Conflicts**
- ***Agreeing on the Fee***
  - **Type**
  - **Billing**
  - **Payment**

And the most important  
thing about agreeing on  
a fee:

Timing.

# The Self Audit

## ■ *Pre-file Opening*

- Identify the Client(s)
- Identify the Matter
- Agreeing on the Fee

# The Self Audit

## ■ *Pre-file Opening*

- Identify the Client(s)
- Identify the Matter
- Agreeing on the Fee

## ■ *File Opening*

# File Opening

- Documentation
- Documentation
- Documentation
- Documentation

# Reduce it to writing!



or,



# File Opening

- The Engagement Letter
- The Fee Contract

# Engagement Letter/ Fee Contract

- **Identify the client**
- **Specify the scope of the Representation**
- **Confirm the fee arrangement**
- **State the terms for withdrawal**

# additional topics

- how to communicate with the client
- document retention policy
- other representations
- Barnes v. Turner language

# The Nonengagement Letter

# The Self Audit

## ■ *Pre-file Opening*

- Identify the Client(s)
- Identify the Matter
- Agreeing on the Fee

## ■ *File Opening*

## ■ *Representation*

# Representation

- Quality Control / Peer Review
- Continuing Education
- Effective Mentoring
- Complete and Accurate Financial Records
- Client Communication

# Client Communication

- Written communication as a practice
  - FYI - form letter or memo
  - Interim Billing Statements as a Status Report
  - Templates for
    - engagement letter
    - conflicts disclosure
    - consent to settle
  - Status Reports at scheduled intervals
  - File closing letters

# Client Relations

## ■ *CLIENT COMMUNICATION*

- Listen
- Create Realistic Expectations
- Timely Response to Inquiries
  - Phone calls
  - Letters
- Send Interim Status Reports
- Bill Frequently
- Send Copies of Pleadings and Important Documents

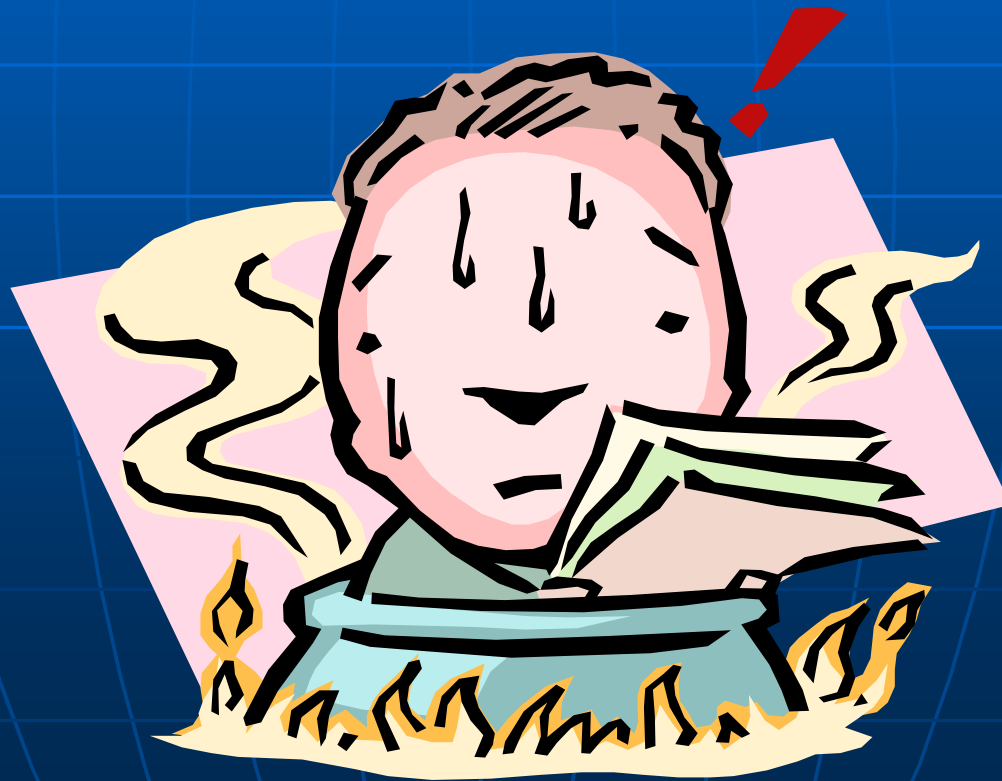
# The Self Audit

- *Pre-file Opening*
- *File Opening*
- *Representation*
- *File Closing*

# **File Closing**

- ***File closing letter***
  - **termination of representation**
  - **financial accounting**
  - **document disposition**
- ***File transfer - active to inactive***
  - **physically**
  - **systems**

# ***Stay Out of Hot Water. . . .***



Thank you.

Randy Evans