LAW OFFICE MANAGEMENT

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INTRODUCTION

This book was designed to fill the gap between a new attorney's practical legal knowledge and the need for business and financial acumen in the operation of a law office. Most law schools are derelict in their practical instruction on how an attorney should actually run an office, how to do it well and how to make money at it. Law schools tend to devote themselves to the sterile aspects of the practice of law. Little guidance or instruction is devoted to how the law school graduate will ultimately go about establishing a legal practice.

Prior to the 1990's, most law schools did not consider it necessary to teach law office management courses. This belief was centered on an unfailing optimism by the legal profession that attorneys would always be in high demand and would always earn a good living. Unfortunately, those responsible for shaping the direction of the legal profession failed to envision the huge growth in the number of attorneys from the 1870's forward. In California, for instance, from 1974 through 1995, the number of practicing attorneys nearly tripled to more than 110,000 attorneys. While the number of attorneys nearly tripled during this period, the population did not even double in California. The effect of this explosion of attorneys in California is simply a reflection of the accepted rule of supply and demand. As the supply increases, the demand and cost for the item decreases.

It has become more important that ever for attorneys to adopt practical business procedures to market themselves and manage their practices to maximize their earning potential and their net income. The purpose of this course is to guide attorneys in that endeavor. It is designed to assist attorneys in recognizing and avoiding the pitfalls that practicing attorneys face early in their careers. If an attorney does not have a grasp of the basic management procedures necessary to operate an office efficiently when he becomes a sole practitioner, he begins a long and expensive learning process.

This course is designed to address the most common and pressing concerns of the sole practitioner with a small law office. It begins with the procedures for establishment of the office and its management, such as the delegation of authority and the assignment of supervisory and administration duties. Law office systems and controls, such as timekeeping, financial records, billing and docket control are discussed. In addition, this course covers the types of automated equipment a law office should have. Suggested forms used in practice, such as interview forms, docket control forms, case summaries and the like, are included for use.

CHAPTER 1

ESTABLISHMENT OF THE PRACTICE

I. INITIAL ORGANIZATION

A. INTRODUCTION

It has been observed that very seldom does a law office have clients who come off the street. Today almost all potential clients telephone for an appointment, just like they would with any other professional. In fact, the more affluent, established and the better reputation the law firm has, the less likely they will have potential clients enter without an appointment. Most people call for an appointment. More often than not, these people will consult the phone book, or they will see some advertising and will call the attorney. Advertising for the new law office is discussed in the chapter "Marketing of the Practice."

One of the first decisions that an attorney entering private practice must make is what form the practice will take. If the attorney prefers to practice alone, he should decide whether or not he will form a professional corporation or be a sole practitioner. If he plans to form a law practice with one or more attorneys, they must decide together if they will form a partnership, corporation, or perhaps a professional limited liability company. These considerations are discussed in the chapter "The Form of Practice." The basic consideration behind choosing a form of practice is the limitation of personal liability for any actions by other attorneys or employees of the practice.

B. BOOKKEEPING

A new law firm or a small firm with one or two employees must establish good bookkeeping and accounting procedures for the office at the beginning of the practice. The "Trust Account" chapter covers establishment of the office's client trust account. In addition, accounts must be opened for personal use, payroll, operation and the like.

The new sole practitioner or the small firm of two or more attorneys might initially want to consider a computerized bookkeeping and payroll service. The firm probably will find it less expensive to use these services. The firm can thus avoid investing in computer equipment and programs and doing the work in house. As the firm grows, it may decide to do its own bookkeeping, but until that time it may be a good idea to have it done outside. In the small practice, valuable attorney time should be used to generate business and make money rather than spending time on bookkeeping tasks. It might be less expensive initially for the sole practitioner to do such work, but once he gets busy with clients, it is more cost effective for him to review a bookkeeper's monthly product than to keep the books and records up to date personally. A small law office should be able to contract such tasks through a computerized bookkeeping service for a relatively small amount.

Another advantage these computerized bookkeeping services provide is handling payroll matters. Their computer programs can prepare the checks for the attorney's signature, compute the necessary state and federal withholdings and prepare all state and federal employee withholding tax forms at a great saving of time for the small law office. The charge for such work is usually quite reasonable and is a legitimate tax deductible expense.

C. MANAGEMENT

There is no set way for managing an office. Whatever really works for the law office to get the job done quickly and not expose anyone to malpractice should be considered. Different theories concerning law office management are discussed in great detail in Section IV.

In a sole proprietorship the management will be conducted by the attorney. In law offices with more than one attorney, the management is usually by a managing committee. This managing committee usually determines the practice's various administration duties. This committee also might appoint an administrative manager or a law office manager who will be responsible for personnel, accounting, file clerks, copying facilities, libraries, billing management and the nonlegal staff.

Frequently there are department heads in the larger firms for different types of law that the firm practices. There might be an estate department, a corporate department, a personal injury department, each with a manager, assistant manager and so forth handling the staff and the legal assistants. This is the general makeup of larger firms. For the smaller firms, one attorney tends to be the managing partner and all firm members meet on a regular basis, perhaps daily since they work in the same office, to discuss general business. The managing partner will oversee the office manager who is responsible for the legal secretaries, writing checks and paying the bills.

All law firm checks should be signed by the sole practitioner, or in the case of a multi-attorney law firm by the managing attorney or partner. As an aside, the law firm should never have its checks prepared by a nonattorney.

The treatment of client trust accounts is detailed in the "Trust Account" chapter. All checks should be signed by only one attorney, and all bank statements should be received unopened by the managing partner. In addition, a monthly review of all accounts and ledgers should be done by the managing attorney or partner for the firm and not by a lay person. In this way, each check can be seen by the managing person as he signs it. These are common basic steps, and if they are taken, the chances of an embezzlement decrease.

D. OFFICE MANAGER

Often, as the law firm increases in size, the day-to-day housekeeping chores of administration, such as paying regular bills and delegation of authority and duties to different secretaries, should be done by the office manager. That gives the attorney freedom to do what he is trained to do: practice law. Once the law office has more than three secretaries or paralegals, it is going to require someone with authority for the day-to-day business affairs other than the practice of law. This person is usually designated the office manager.

Whenever a law office plans to have more than one employee, an office policy manual should be prepared. The implementation of the procedures in the manual, except for the firing of employees, should be the initial purview of the office manager. The policy manual should state how the office is to be run, the job descriptions of each person and what each person is expected to do. Specifically, it should include a written policy for the hours of employment, designation of normal office hours, lunch breaks and coffee breaks, management of the telephone and reception area, determination of work schedule for Saturdays, calculation of overtime, vacation time, and holidays. Additionally, every law office should have written policies concerning fringe benefits such as life and health insurance, payday, advances and most importantly, some form of employee evaluation. Criteria for job evaluations should be explained. Also the firm's policy on sick leave, wearing attire (how the employees should look in the office) and designation of smoking area should be included.

A law firm, as with any other employer, should adopt procedures for addressing employee complaints and grievances. Included in this section should be a policy covering termination and whether or not it can be for cause or without cause.

E. SECRETARY

Many sole practitioners and small law offices do not have the need for a full-time secretary. With computer automation of the office, there are some types of law practices that do not require secretaries. In these practices, most of the drafting is done by the attorney directly on the computer, and there is little for a secretary to type. The secretary in this type of office becomes a receptionist and file clerk. When a secretary is needed, the attorney can call an employment service to have someone help on a temporary basis. Many attorneys are sole practitioners in this situation. They save a great deal of money by not having a full-time secretary.

A full-time secretary generally does not help the small law office a great deal unless the law firm is in the litigation area. Much of the need to have a secretary is generated by litigation. When a small law firm is in the litigation area, it is usually necessary to have a secretary because there is so much paperwork to do, such as complaints to draft, motions, interrogatories and the like to be prepared, copied, served and filed. The time required for these processes is enough for a litigation law office to need a full-time secretary to handle the time-consuming nonlaw acts. Many small law firms which are not primarily engaged in litigation can manage without a full-time secretary or with a temporary secretary as needed.

Many attorneys, especially beginning sole practitioners, will not have the need or enough work to keep a full-time secretary busy. In most cities of moderate size, there are employment agencies who will help a law firm get a legal secretary on a part-time basis. In addition, many legal secretaries love to work part-time for extra salary. By using a legal secretary from a temporary service, the attorney does not have a full-time employee. Therefore, the law office does not have to worry about withholding, fringe benefits, getting an employee ID number and many other things that employers are required to do. A law office should not hire an employee (a secretary or anyone else) unless there is no other way to get the needed work done cheaper. If the person is not going to help your office, there is no point in having that person as an employee. If the firm does not need a secretary, the office should not have one.

F. FILING SYSTEMS

Every law firm must adopt and implement a filing system to keep track of the cases handled by the firm. The actual procedure for setting up a filing system is discussed in the "Client and Case Management" chapter.

Most law offices have a filing system where each client is given a number, and each case handled for that client is identified by the client's number and an identifying letter relating to that particular case. There are some law firms that have their filing system segregated according to what type of law is being practiced by the attorneys. For instance, such firms could have all their probate files in one area of the file room and their bankruptcy, corporate, etc. each in a different area.

Probate cases can generate huge amounts of paperwork. The average probate fills an entire carton and files can be a foot thick with all that has to be done in terms of the accounting, property being sold, inventory and appraisals. Probate files can take up a large percentage of storage area, so many firms tend to segregate them. Segregation of the files requires a good filing system to be able to split client files up among various filing cabinets, to make sure that the files are always documented and that the individual cases can be found as they are needed.

The complexity of such an arrangement means that more can go wrong than in the basic filing system. Nevertheless, the convenience in being able to find a case quickly may override this concern. In point of fact, this is how most courts handle their pleading. Many courts color code their pleadings, family law, criminal, civil, injunctive, etc. Each file is then given a number and filed in the area of the file room allotted to that type of case. One particular plaintiff may have several cases in the court file room scattered among the segregated files.

G. SOLE PRACTICE

An attorney entering into sole practice will need an office. There are three options for the sole practitioner regarding an office in addition to simply renting an office. The alternative options are opening a home office, office sharing and an executive suite. Each of these options has its own advantages and to some extent disadvantages as well.

The home office is least used by attorneys in moderate and large cities, but is often used in small communities. A home does not appear as professional as an office in an office building. The advantage of a home office is that it is less expensive to operate. In fact, except for the business telephone, it is virtually free. In small communities there is little prejudice against home offices because in such communities there are few business offices available for rental. In small towns, many professionals will have their offices in their homes. Another advantage of a home office is that the attorney can work on a case at any time without having to leave home. He is able to deal more efficiently with the case load because no time is lost in commuting to and from the office.

The executive suite is a relatively new concept since the 1970's. This is a situation where a developer builds an office building and provides the reception service to the tenants. In addition, the building has one or more general conference rooms available to be reserved by the tenants. The developer also may provide, upon request, copy, fax and secretarial service. The advantage of this arrangement is that the tenant does not have to pay for services until they are used. In addition, the attorney can have access to conference rooms without the necessity of paying rent for the space when it is not being used. Another advantage of an executive suite is that there are usually other attorneys in the building. This arrangement also increases the potential for the attorney to receive pour-over (referral) work from the other attorneys in the building simply because of their close proximity. The rent for an executive suite is more expensive than for an office elsewhere, but the other services available or included in the suite may make the arrangement cheaper than the stand-alone law office.

Another method of securing an office is office sharing with another attorney. This arrangement is not a partnership. Usually one attorney has rented the office space and is subletting it to one or more other attorneys. There are several advantages in office sharing. The rent for office sharing is often less than the attorney would pay if renting a similar office directly. Office sharing often permits the new attorney access to the other attorney's law library. In addition, the attorneys may share the cost of a secretary which neither one alone could afford. The most important advantage of an office sharing relationship is that the new attorney has someone who is legally trained with whom to discuss cases. One of the main drawbacks to sole practice is that the attorney is on his own and the risk of missing issues or adopting erroneous strategies increases if the attorney is unable to discuss such matters with other attorneys.

II. MANAGEMENT OPERATION

A. THEORY OF OPERATION

It is often stated that there are two competing theories for the effective management of a law office. In fact, there is no one correct manner in which to operate an office. While all offices share many similarities, such as the type of law practiced and the number of employees and the types of employees, each office is nonetheless unique. The human factor often makes adherence to a predetermined management scheme inefficient. An effective law office will adopt the management most closely associated with the management style and philosophy of its owner or partners and then adapt to the individual human nature of the office. The point for any manager to remember is that there is no one ultimately correct form of management. The organization should adopt and develop the form of management that works best under the particular circumstances of the organization. The first management theory is operation by system. The second theory is operation by management. The theories are not mutually exclusive and tend to overlap a great deal, but they are two different theories.

Operation by system involves management by established procedures. Everything is supposed to be done "by the book" (a procedures manual). Whenever an issue arises, its solution will be found in the book, and the proscribed response implemented. When another question arises, it is resolved in the same way. The effective operation system will have procedures for virtually every type of reasonable expectancy.

With operation by management, the manager at every level will have previously formatted answers and responses for most problems as they arise that relate to the manager's delegated field of authority. The quintessential example of operation by management is the United States military. Nearly all conduct by military personnel is governed by well- defined rules and regulations. The average military officer is given very little actual discretion to act independently from the group. Nearly all military operation sans management is directed through the inter-connected operations systems governing every particular action of its personnel.

The operation-by-management theory stresses the independence and problem solving abilities of the individuals in whom management authority is vested. Under this theory, it is the managers, through the exercise of their individual judgment based upon their training and expertise, who handle the problems as they arise and conduct the decision making for the organization. The manager is delegated specific authority to manage and administer certain organizational affairs. Within the scope of this delegated authority, the manager may make decisions without the need of obtaining permission from superiors. The organization will be bound by the decisions made by the manager that were within the scope of the delegated authority or which the organization may subsequently ratify under the ordinary rules of agency. An example of such management is the scheduling supervisor of a business who sets the delivery schedule for goods to be both shipped and received. While there are general guidelines on how to conduct such operations, the supervisor is vested with great discretion to change operations to address new circumstances as they arise and therefore work more efficiently.

Most law offices, depending on their size and complexity of operation, will use both systems to some extent. As the office grows, it will become more and more systematic in how it is operated simply because there are more people involved with the operations that must be administered.

In the small office of the sole practitioner, the operational procedure is more of management than procedure. The reason is that the attorney-owner or managing partner is more familiar with all of the aspects of the office and what is occurring throughout the office. It is easy for the person to handle problems as they arise. If the small law office has a secretary, it is easy for the manager to direct how any particular matter should be handled and later to refer to that particular previous procedure.

B. JOB DESCRIPTIONS

Regardless of which management theory a law office uses, there should be a well-defined job description for every person employed or who is a part of the organization. Both agency law and the theory of respondeat superior make it very important that every person associated with an organization understand what his duties are and the limit of his authority to act for the law office. There must be discussion about what the particular duties of each person are going to be, and there should be a clear chain of command set forth to govern the office's management. The manager, assistant manager and person who runs the office must be clearly identified to all. While the above sounds rather simplistic, such communication is necessary so everyone knows their responsibilities and to whom they should direct any questions.

One managerial practice often overlooked is development of an office manual which specifically states the job description for each person. An office procedures manual will prevent duplication of work and assure that someone is assigned to do each task that arises. One of the worst things that can happen for a law office is for a statute of limitations to be missed and a case lost because someone failed to handle the matter because they assumed it was someone else's responsibility.

As the number of employees and the number of attorneys increases, the office must be managed more on a systems basis simply because there is so much activity. This is especially true in a full-service law firm. As the number and types of cases that a firm handles grows, so does the need to implement actual management and operational practices. It is no longer feasible, practical or possible for the attorney in charge to look at everything on a case-by-case basis. Cases should be segregated according to type of problem, and procedures for handling them must be readily, instantaneously available.

In addition, as the staff of an office increases it becomes more important and practical to have specialization among the staff. It might be efficient to have an office manager to handle the administration aspect, a receptionist to answer the phone and greet clients, a legal secretary to handle some types of legal affairs, and secretaries assigned to attorneys based upon their particular expertise. The attorney or a managing partner will supervise the person doing bookkeeping.

Once the law firm reaches a certain size, which will depend on many variables, such as type of organization and type of legal work, it will have a staff of lawyers, legal assistants and administrators. The administrative staff will usually consist of an office manager who supervises the bookkeeper, the file clerks, copy management and the law office library. A large law firm, with 10, 20, 30, perhaps as many as 200 attorneys, will reach a point where it adopts a more sophisticated form of management simply because it has actually become a group of mini-law offices.

In larger law firms, there will be attorneys who specialize in particular areas of the law. The legal work of some attorneys may be totally different from that practiced by attorneys in another area. Probate law practice, for instance, is extremely different from corporate law, which is different from bankruptcy law. Administrative law could be different from everything else, although there may be some overlapping. The specialization of the attorneys in a firm will often result in the specification of the staffs that are assigned to the individual attorneys. This requires the adoption of greater and more effective support staff procedures.

C. BILLING MANAGEMENT

In every law office, systems and controls must be adopted and developed to keep track of records, client files, client billing, etc. If an attorney is retained on an hourly basis rather than a flat rate or contingency rate, he will need to keep track of his billable hours. Many law firms, especially larger ones, require a minimum number of billable hours per year by every attorney (associate) who works for them. An attorney in this type firm, must complete those billable hours, even if it means working 60 or 70 hours a week. Every attorney must keep a good record of the time spent on each case, both for billing purposes and for good case management. From this information he is able to determine if too much or too little time is being spent on a case. With experience, an attorney will be able to estimate with relative accuracy the amount of time required to prepare to represent a client in a particular matter.

The easiest way to keep track of the time spent on a case is to have a notebook and record the time as it is accrued. In keeping track of work on a case, the attorney should put down the time spent and also a notation of what was done, the case number, the client, and whether or not people were met. At the end of the month, the attorney can compile his billing report from the notes in his book. For the computer literate, there are many computer-assisted devices on the market specifically geared to attorneys. There are appointment logs which permit the attorney to type in the time spent, what was done, and other notes. At the end of the month a computer disc with the information can be delivered to the secretary for processing.

Another way to account for time spent is to record on a cassette recorder the case information as the work is being done and deliver it for compilation. Regradless of the method employed, the attorney must keep track of billable work, because without these records the attorney will be unable to charge accurately and collect for such work.

III. MALPRACTICE AND MALPRACTICE INSURANCE

A. INTRODUCTION

The specter of malpractice should haunt every attorney. In the back of every attorney's mind should be the thought that he could be sued and probably would be sued for malpractice in the event of a mistake made by him or anyone working for him. In the last few years, solely because of the huge increase in competition among attorneys, there has developed a new area of law: legal malpractice.

There has always been malpractice liability imposed on attorneys for their actions. What is new, however, is that there are now attorneys who specialize only in suing other attorneys for alleged malpractice. In nearly every legal publication, there are advertisements by attorneys whose practice is suing other attorneys. As a result of this specialization, the number of malpractice lawsuits filed against attorneys has increased at progressively higher rates each year since 1990.

One of the reasons for the large increases in attorney malpractice suits is that many attorneys carry malpractice insurance. As with any other insurer, a malpractice insurer is more likely to settle a marginal case than risk a higher judgment at trial. The insurer is more willing to settle the case and thereafter either raise the insurance premium of the attorney or cancel the insurance altogether.

An attorney who has no malpractice insurance will suffer a double whammy in a malpractice suit. Without an insurance policy, the attorney will have to either hire another attorney to defend the action or he must defend the action himself. In either event, defense of the action will cost the attorney dearly, win or lose. If the attorney hires a defense attorney, he will have to pay the defense attorney. If he conducts his own defense, he loses income by working on his own case for free instead of earning a living.

If the attorney wins a malpractice case, he does not have to pay a judgment. Unless, however, he can prove that the suit was a malicious prosecution or an abuse of process, he cannot sue the losing plaintiff and former client for the damages, loss of reputation and business as a result of the suit.

If the attorney's fee agreement with the client has a clause awarding attorney fees to the prevailing party in the event of a lawsuit, and if the attorney wins, he will recover his attorney fees if a defense attorney had been retained.

Many courts will not award attorney fees to an attorney who defends himself in a malpractice action. The attorney must actually hire a defense attorney to get attorney fees. Of course, if the retained attorney loses the malpractice case, the attorney must pay the client's attorney fees as well as the judgment. In most states, if any money is awarded, even as part of a settlement, to a plaintiff in a malpractice action, that person is the prevailing party and is entitled to attorney fees unless the settlement agreement states otherwise. Bearing all of the above in mind, it is important that attorneys design their practice and their case management procedures to minimize the potential for malpractice claims.

B. DEFENSIVE PRACTICES

The most common cause of malpractice arises from missing filing dates or missing important information that prejudices the client's case. The biggest concern of an attorney regarding malpractice is that he will miss something that cannot be cured. Attention to detail will greatly reduce this fear, but it will not alleviate it altogether. The potential always exists.

One way to limit the potential of malpractice is in the choice of area in which the attorney practices. There are some areas of law, such as bankruptcy or probate work, where it is difficult to commit malpractice. The simple reason for the reduced potential of malpractice in these areas is that nothing is final in such areas until the court says so. The court supervises virtually everything being done in the case. The court's reviews of the attorney's actions make it more likely that mistakes will be discovered and cured before they can injure the client, and in some instances an attorney can reopen a matter (such as an estate in bankruptcy) and correct mistakes. In like manner, an attorney in probate will usually have the court's supervision on every major step. If the court grants permission for an attorney to do an act after notice to all of the heirs of the proposed action, unless the notice deceived the heirs, their failure to object to the action will normally relieve the attorney of any malpractice claim. In both probate and bankruptcy, it is difficult for an attorney to commit malpractice negligently.

In litigation, however, it is a whole different ballgame. An attorney can misstate positions, lose evidence, fail to "follow up" on particular clues as another attorney might have done, and other things that will give rise to malpractice liability. It is obvious there are many things that can happen in a litigation matter that can result in a malpractice complaint. To reduce the potential for a malpractice claim, the attorney must adopt good management and filing procedures so he can keep track of what is expected to be done in a case. An attorney must always be able to prove that the case was handled correctly. Case and client management are discussed in their own chapter. They are mentioned here to reinforce the fact that such proper techniques will lessen the potential of malpractice.

Documentation of all verbal and written communication with a client is an important tool in avoiding a malpractice claim. Once a client loses a case, it is human nature to blame the attorney. Occasionally, the client takes the frustration of losing the case to the next step and sues the attorney. In many malpractice cases, the client claims that the attorney misled the client in some fashion. The client alleges that had there been no misrepresentation, the client would not have lost the case or would have done something differently. The attorney in such a case is required to prove a negative act, that he did not tell the client what the client claims to have been told. The only way for an attorney to protect himself from such a situation is to document all client communications. For oral and telephone communications, the attorneys should immediately thereafter send confirming letters of the conversation's content simply to prove what was discussed and agreed.

It is quite popular today to sue attorneys for malpractice without good reason or just cause. If the attorney has not protected himself by keeping complete records, he can be sued for malpractice when he didn't commit it. There is no doubt that many attorneys have settled malpractice claims because they could not prove they did not give the advice the client claims.

One of the best defensive practices to malpractice actions is simplicity itself. It is wise for the attorney to screen a person carefully before agreeing to represent him as a client. There are some who will immediately sue an attorney if they lose their action. An attorney must attempt to recognize this type of individual and avoid him. Simply taking as a client everyone who enters an office exposes the attorney to such individuals.

C. MALPRACTICE INSURANCE

For complete peace of mind and protection an attorney should consider purchasing malpractice insurance. As a result of the plethora of malpractice suits occurring in the last few years, malpractice insurance premiums have skyrocketed. In some states, malpractice insurance is offered by insurance companies formed by attorneys. In California, for instance, attorneys have formed the "Lawyers Mutual Insurance Company" to furnish malpractice insurance to attorneys. Many state bars also have established relationships with insurance carriers to provide insurance to their members.

There are different types of malpractice policies. The first type is the "occurrence" policy. This type will cover the attorney for any claims arising from actions during the period of time the policy was in effect even if the attorney is not insured by the company at the time the claim is made. This type of policy is not always available.

Many insurance companies now require that the attorney not only be a client at the time of the incident but also at the time of the claim. Under this situation the attorney is required to be a client for life. The insurance company does not want to insure a client for the potential liability of one big risk and not receive proceeds for the other years when the risks are low.

There is also "tail" insurance. This is a particular coverage that persists after policy termination. Many insurance companies end tail coverage only by retirement. Some companies will offer tail coverage even though a client is moving to another carrier.

One type of policy not readily available is the "blanket" policy that covers the attorney for claims made while the policy is in effect; the attorney is not required to have been an insuree at the time the incident arose. The attorney is only required to be an insuree when the claim is filed. This type of policy was popular with new attorneys who did not have assets. A malpractice by an attorney early in his practice would collect little because the attorney had little to lose. As the practice grew and the attorney acquired assets, a blanket policy would thereafter protect the attorney for malpractice performed in the early years. Of course, there was a trade-off in premiums. The insurance company would charge the attorney more for the blanket policy because it was insuring for past work as well as work being conducted during the term of the policy.

Professional liability insurance is a legitimate business expense, and the premiums for the insurance are tax deductible. The amount an attorney pays for premiums is based upon the type of law the attorney practices. An attorney with a bankruptcy practice will pay less in premiums than an attorney in real estate litigation. Insurance companies base their premiums and coverage on the types of law an attorney practices. Some insurance companies offer attorneys the option of choosing coverage only for claims arising in certain areas of law. In this situation, for example, the attorney can elect to be covered for any real estate malpractice claim but not any social security malpractice claims.

When shopping for malpractice insurance, the old adage of "buyer beware" applies. Insurance policies by their very nature must be read closely with all riders so that one fully understands what is in them. Because of an attorney's knowledge of the law and legal training, an attorney would be less likely to win an action based on misunderstanding the policy than a lay person. The attorney must understand the exact coverage of the policy.

CHAPTER 2

THE FORM OF PRACTICE

I. INTRODUCTION

Obviously, one of the best ways to make money is to earn it. There are two legal ways for a person to earn money: working for others and working for himself. As an employee, a person has the stability of knowing that a fixed paycheck will be forthcoming each week. The drawback is that the employee does not share in the profits of the business and does not have the time to form his own business.

An attorney in sole practice shapes his own destiny. No money is earned unless he earns it. When no client comes into the office for advice or services, the attorney does not earn any money. However, a sole practitioner has the opportunity to make more money overall throughout a year than a salaried associate doing the same work. In addition, a sole practitioner can, because he owns the legal practice, set the hours, goals and objectives of the practice. An attorney who decides to go into business for himself or with others is to be congratulated.

An attorney entering private practice must decide how his legal practice will be organized. An attorney may, in some states, incorporate or form a limited liability company or may operate as a sole proprietor. An attorney practicing law with one or more other attorneys must decide whether the relationship will be in the form of a partnership, corporation or limited liability company.

The scope of this chapter is to help attorneys understand the advantages and liabilities of each form of operation. Such information can yield an intelligent decision concerning the form of business of the legal practice.

The normal rules of agency apply in the practice of law. The torts committed by employees in the course of their employment are imputed to the employer. This is the legal concept of "respondeat superior." A law firm is governed by this principle like any other organization. Businesses incorporate or organize themselves as limited liability companies in order to limit the personal liability of the business owner, whether shareholders or members.

Most states permit their professionals, such as attorneys, to incorporate or practice their profession through a limited liability company. If a law firm has employees, the law firm should either carry a large amount of insurance or be incorporated or organized as a limited liability company. This allows each of the attorneys owning the law firm to protect himself as much as possible against any judgments obtained as a result of employees' or other attorneys' actions. The incorporation or formation of a limited liability company to practice law acts as a one-time insurance policy.

The most recent development in business law is the creation of the limited liability company. The first limited liability company was created in the 1970's. For many years limited liability companies were not popular because the tax law during that period subjected them to more taxation that either a corporation or a limited partnership. In 1977, Wyoming created the first limited liability company for an oil company, and the company was granted a private tax ruling stating it would be treated as a partnership. In 1980 the Treasury Department issued proposed regulations stating that a limited liability company would be taxed as a corporation because its members did not have a partners' liability for the company's debts. It was not until 1988 that the Internal Revenue Service finally issued Revenue Ruling 88-76, 19882 CB 360, stating that a limited liability company could be taxed as a partnership. This revenue ruling calmed the concerns which people had regarding forming limited liability companies. As a result, there has been a dramatic boom in the number of states which permit limited liability companies to be created under their laws. As of April 1997,all states and the District of Columbia permit limited liability companies to be formed. However, just as some states do not permit attorneys to form professional corporations, not all of the states permit attorneys to form professional limited liability companies. An attorney wishing to form a professional limited liability company must verify that such professional legal practices are permitted under the attorney's state law.

II. A PROFESSIONAL CORPORATION

A. INTRODUCTION

Today, the most common way for two or more attorneys to practice law together is in the form of a professional corporation. A professional corporation is basically the same as a regular corporation with one major difference. Each of the shareholders of a professional corporation must have a license to practice the profession for which the corporation was formed. The purpose of this requirement is to keep an unlicensed person from exerting any control over the legal services rendered to the corporation's clients and to assure that client confidences are not shared with persons who are not under an ethical requirement to observe them. A professional corporation is essentially the same as any other corporation except for this difference.

A corporation is an artificial entity created in conformity with a particular state's law. As a distinct legal entity, a corporation is considered to be separate and apart from all of the people who own, control or operate it. A corporation holds most of the rights of a legal person. A corporation is able to execute contracts, incur debts, hold title to both real and personal property and paying taxes. The attractiveness of corporations lies in their ownership by shareholders that gives them unique advantages over both sole proprietorships and partnerships.

A corporation is said to have perpetual existence. A corporation will legally exist forever unless it is dissolved or terminated under state law. One of the main grounds for a corporation's existence being terminated is its nonpayment of taxes. As long as a corporation pays its taxes, it will remain in effect.

A corporation's perpetual existence is an important advantage over other forms of business. A partnership terminates upon the death of a partner, and a sole proprietorship also terminates upon the death of the owner. A corporation continues regardless of the death of a shareholder. The perpetual existence of a corporation is one of its compelling features. The fact that a corporation continues regardless of the death of its shareholders is what gives a corporation its stability. Most people are reluctant to invest in a business that is not a corporation and that may terminate upon the sudden death of any partner. The stability of a corporation derives from its continuity of existence beyond that of its shareholders.

The main advantage a corporation has over a sole proprietorship or a partnership is that the shareholders are not personally liable for the debts of the corporation or the actions of the employees. In a partnership or sole proprietorship, if a partner or employee does an act in the scope of his employment that injures another person, each of the partners or the owner (if a sole proprietorship) is personally liable to pay for the resulting damages. The most any shareholder can personally lose if a monetary judgment is taken against the corporation is the assets he contributed to the corporation in payment for his stock.

This limited liability for corporate shareholders is different from a partnership or sole proprietorship. There, the owners are totally liable for all debts of the business. The creditors of the business can seek and attach every dollar and piece of property that a partner or sole proprietor owns to settle a judgment against the partnership or sole proprietorship. There will be no attachment of personal assets to satisfy corporate debts. This limited liability for the debts of the business is the reason most people incorporate. Few people would ever invest in a business if by doing so they risked losing everything they have earned or will earn in the future.

There is a limitation on the limited liability of an attorney who does business in the form of a limited liability company. An attorney is responsible for reviewing and overseeing the acts of all employees regarding legal work that they may be doing in the office. State law may dictate that an attorney is personally liable separate from his stock ownership for negligence of an employee when the attorney should have noticed the negligence. Example: Two attorneys engage in business as a professional corporation. Their employee is involved in a car accident while serving papers for the firm. Neither attorney will be personally liable for a judgment arising as a result of the accident. Assume instead that a secretary missed filing a pleading that resulted in a loss of one of the law firm's cases. The law firm can be sued and will be liable for malpractice. The attorney who supervised the secretary would also be subject to liability, but the liability would derive under malpractice law and not by virtue of the attorney owning the law firm. In fact, if the attorney was just an associate of the law firm instead of a shareholder, there would be liability against the attorney for failure to oversee the secretary.

In addition to limited liability, special tax treatment of Subchapter S small corporations makes them as attractive as partnerships. The federal government taxes Subchapter C corporate income twice. Corporate income is taxed when the corporation first earns it and again when distributed to the shareholder. The federal corporate tax rate is:

1. 15% of the first $50,000 of taxable income, plus
2. 25% of the next $25,000 of taxable income, plus
3. 34% of the remainder of taxable income over $75,000.

Corporations having income between $100,000 and $335,000 are taxed at a 39% rate to recover the taxes saved on the lower graduated rates.

When the after-tax income is distributed to the shareholders as dividends, the shareholders must include it on their tax returns and pay additional tax on it. One alternative to this double taxation is for a small corporation to pay most of the income as legitimate salaries to the shareholders for work they have done. The salary is deductible by the corporation whereas a dividend payment is not deductible. Thus, if the income can be paid as salaries, corporate taxes are reduced.

The federal tax code calls a regular corporation a C corporation and subjects it to a different taxing structure than a partnership or a sole proprietorship. A special corporation called an S corporation is taxed quite differently from a regular C corporation. The income tax of a C corporation is subject to double taxation. It is taxed first when the corporation files its corporate tax return for the net earnings for the corporation. The C corporation income is subject to tax again after the corporation pays dividends to its shareholders. The dividends that a shareholder of a C corporation receives must be included in the income of the shareholder on Schedule B of Form 1040. Example: A C corporation has $1,000,000 net profit. It will pay approximately $360,000 in taxes. After the corporation distributes the remaining $640,000 to the shareholders, they will pay taxes on it again. Assuming the shareholders' tax rate is 28%, the shareholders will pay an additional $179,200 in taxes. The total taxes on the corporate income of $519,200, paid by both the corporation and then its shareholders, could exceed 51%.

Partnerships provide more flexibility than S corporations in a few areas:

1. Partnerships may admit anyone as a partner and have any number of partners, whereas S corporations are limited to 35 members of special status, and
2. Partnerships can divide profits and losses in a manner not related to the partners' ownership interest. In contrast, S corporations must divide profits and losses among its shareholders in accordance with their percentage of stock ownership.

Generally, these differences are not significant because the S corporation usually does not want additional shareholders and does want profit and losses allocated according to stock ownership.

An individual who incorporates a business is given the opportunity to use the tax advantages of fringe benefits. A corporation is allowed to deduct from its pretax income the costs of certain fringe benefits that are not deductible by persons in a partnership or sole proprietorship. One of the main areas of tax advantage is a retirement plan. A corporate employer may contribute, tax free, significantly more to the employee's retirement plan than a self-employed person's Keogh plan. In addition, employees of corporate plans may borrow to $50,000 of the funds contributed to a plan without penalty. Such is not the case with Keogh plans. Other fringe benefits that are deductible by a corporation but not by a partnership or sole proprietorship are health, life and disability insurance and a $5,000 death benefit. These benefits are deductible by the corporation and usually are tax free to the corporate employee.

The costs for incorporating a business vary somewhat from state to state. In California, the cost for filing the Articles of Incorporation and the minimum franchise tax fee is about $915. In addition, the corporate books (including the minute books, stock book and the corporate seal) cost between $75 and $125. Attorney fees are normally $800 to $1,000 in California, if needed. Most states are not as expensive as California and charge between $300 and $500 for an incorporation. Attorney fees in these states vary from $300 to $1,000. The cost of incorporation should be viewed as a one-time insurance premium. Once the business is incorporated, the shareholders are protected from individual liability caused by the actions of the corporation or its employees. After incorporation, shareholders no longer have everything they own at risk. Peace of mind is an important consideration when deciding to incorporate.

After a corporation is formed, the yearly requirements for meetings and record keeping are not much more than those of any noncorporate business.

B. STEPS FOR INCORPORATION

1. INTRODUCTION

There is no mystery or difficulty in forming a corporation. In its simplest sense, a corporation is merely a license to do business in a particular manner. In that sense, the Articles of Incorporation is the application for the license and when accepted for filing by the secretary of state becomes the license. In fact, in legal parlance a corporation is said to have been "licensed to do business" once it is filed.

The act of incorporating a business is simple. All it entails is filing of the Articles of Incorporation and the subsequent issuance of stock. The actual act of incorporating is no more than standing in line before a clerk in the secretary of state's office and having the articles file-stamped (it can also be accomplished by mail). There are many companies that provide corporate kits that include basic articles, minutes and bylaws specifically designed for use in just one state at a cost of $50 to $100. The corporate kit does not address the many issues or provide the information contained in this book. This book goes beyond the mere corporate kit and provides guidance and advice on the considerations that arise in forming any corporation. Before filing any articles the incorporator should decide what additional provisions, if any, may be needed in the articles. In addition, the attorney should read the provisions of the state's corporation code to assure that state law has not recently been changed, affecting the new incorporation.

There are many choices that an incorporator must face in forming a corporation. Many of those choices can be difficult considering the many options available and the particular concerns of each business. An example is whether or not to become a close corporation, which requires the shareholders to agree to operate the business pursuant to a shareholders' agreement rather than under the formalized procedures of the state's corporate law. Another example is whether or not the corporation should elect to seek Subchapter S tax treatment and when, since such an election can be made at the first directors' meeting or in any year subsequent. Nothing can replace the cold practical consideration of the person forming the corporation. That person knows the business purposes and how it will be operated. The most any book can do is steer the incorporator to those provisions and issues of concern and most practical use.

There is no set definition of a small corporation. The definition varies among the states and is different under federal law. Generally, it means a corporation with a limited number of shareholders. When a business qualifies as a small corporation, it has the opportunity of availing itself of special advantages. Under federal tax law, a small business (less than 35 shareholders) may elect subchapter S tax treatment which allows the corporation to be treated as a partnership for tax purposes. Many states have similar subchapter S laws for small corporations. Several states also permit small corporations with varying numbers of shareholders (in Delaware it is 30; in Ohio it is unlimited, provided there has never been a public offering) to elect to become close corporations as discussed above.

2. PROCEDURE

The steps for incorporating a business are simple: file the Articles of Incorporation and issue the stock.

a. CHOOSING A CORPORATE NAME

All corporations must have a name that denotes "corporation" and not "partnership" or "sole proprietorship." The name usually must contain the word "Incorporated," "Corporation" or "Limited." The name must not mislead the public into believing it is an agent of the federal or state government. The name of the corporation usually must be followed by the words "a corporation" or the initials "P.C." for corporation.

In practice the main concern is whether the proposed name is so similar to an existing corporation's name as to mislead the public. No state will permit two corporations to have the same name or names so similar that they are confusing. To avoid the possibility of having the articles rejected because of similarity to the name of an existing corporation, the incorporator should conduct a name search with the secretary of state's office. If the name is not in use, it can be reserved for 60 days or longer. The search can be accomplished by mailing a request with the proposed name and a check in payment for the search to the secretary of state. The amount of the check and where to send it can be obtained by calling the secretary of state's office. A search through the secretary of state's file may take 30 days. There are attorney service firms listed in the phone book for the state capitol that will do the name search and reservation within two days for about $30.

b. PREPARING AND FILING ARTICLES

After the corporate name is reserved, the incorporator then prepares and files the Articles of Incorporation. Each state has its own requirements for the contents of the articles. In every state, corporate kits may be purchased which contain the basic articles, shares of stock and filing materials needed to become a corporation under that state's law. These kits cost $50 to $100. Most attorneys charge to $1,000 to tailor-make a set of articles (seldom necessary).

After the articles are prepared, they must be filed with the secretary of state's office. Most states require the articles to be filed in triplicate, and each copy must be signed by the incorporator. Therefore, four or more copies should be filed to insure that the corporation will receive a conformed, file-stamped copy. The filing can be done by mail, and it will take 30 to 60 days for return. The alternative is to use an attorney service firm to file the articles. Such a firm usually takes only a week to get the articles returned and charge about $50 for the service. The advantage of the attorney service firm is that any problem can be corrected faster. Most attorney service firms also sell corporate kits in the event the incorporator wishes to purchase one. This CLE progarm also has a course of corporations which also contains the basic corporate kit for all states.

When the articles are filed, the incorporator must pay the filing fee and the yearly franchise fee for the corporation. The fees vary from state to state. In California the total fee is $917 ($117 filing fee and $800 franchise tax). The correct amount of the fees can be obtained by calling the secretary of state. If an attorney service firm is used, they will know the fees.

c. ISSUING STOCK

After the articles are filed, the corporation exists in a de facto mode. That means the corporation exists on paper, but until stock is issued it does not exist at law ("de jure"). The fact that it has outstanding shares in the hands of shareholders is the defining characteristic of a corporation.

Once the articles are filed, the incorporator calls a special meeting of directors. In most states the initial directors are named in the articles. In other states, the incorporator appoints the first directors at the meeting.

At this first meeting, the bylaws are adopted by the corporation. This is an important step because it is the adoption of the bylaws that creates the officer positions of the corporation and governs its daily operations. The officers of the corporation are then appointed. The most important matter of business at the first meeting of directors is the issuance of the stock. Here the corporation sells its stock in exchange for money, property or labor furnished or to be furnished to the corporation. When the stock is issued the incorporation is complete.

C. S CORPORATIONS

1. INTRODUCTION

A regular corporation is described in Subchapter C in the federal tax code as a "C" or "regular" corporation and is subject to a different taxing structure than either a partnership or a sole proprietorship. A special corporation called an S corporation is described in Subchapter S of the code and is taxed quite differently from a regular corporation. Normally, the federal government taxes corporate income twice for a regular or C corporation. Corporate income is taxed when the C corporation first earns it, and the corporate income is taxed a second time when distributed to the shareholder.

The federal corporate tax rate is:

1. 15% of the first $50,000 of taxable income, plus
2. 25% of the next $25,000 of taxable income, plus
3. 34% of the remainder of taxable income over $75,000.

Corporations having income between $100,000 and $335,000 are taxed at a 39% rate to recover the taxes saved on the lower graduated rates. When the after-tax income is distributed to the shareholders as dividends, the shareholders must include it on their tax returns and pay additional tax on it. One alternative to this double taxation is for a small corporation to pay most of the income as legitimate salaries to the shareholders for work they have done. The salary is deductible by the corporation; whereas a dividend payment is not deductible. Thus if the income can be paid as salaries, corporate taxes are reduced. A second alternative is for the C corporation to retain a reasonable amount of income in its treasury called "accumulated earnings." A corporation is permitted to accumulate reasonable amounts of earnings for future use of the corporation. Since the earnings are not distributed as dividends, they are not taxed to the shareholders. Retained earnings also are not available for use by the shareholders.

The income tax of a C corporation is subject to double taxation. It is taxed first when the corporation files its corporate tax return on the net earnings of the corporation. The C corporation income is taxed again after the corporation pays dividends to its shareholders. The dividends that a shareholder of a C corporation receives must be included in the income of the shareholder on Schedule B of Form 1040. For example, assume that a C corporation has $1,000,000 net profit. It will pay approximately $360,000 in taxes. After the corporation distributes the remaining $640,000 to the shareholders, they will have to pay taxes on it again. Assuming the shareholders' tax rate is 28%, the shareholders will pay an additional $179,200 in taxes. The total federal and state taxes paid by a C corporation and its shareholders, on the corporate income of $519,200, as a result of this double tax can exceed 51%.

2. DEFINITION

Subchapter S of Chapter 1 of the Internal Revenue Code (IRC) (hence the name S corporation) permits qualifying C corporations to receive special tax treatment. Under the IRC, qualifying corporations may elect to become an S corporation and be taxed in a manner similar to that of a partnership for federal income tax purposes. An S corporation becomes a pass-through entity whereby all of its income and deductions are passed to the shareholders. The shareholders claim their share of the corporation's income and deductions on their individual tax returns.

The S corporation is not subject to corporate income tax, accumulated earnings tax or the personal holding company tax at the federal level. However, it may be subjected to a special tax on its passive net income. Such tax arises when the S corporation has (1) earnings and profits and (2) gross receipts composed of passive investment income.

When an existing C corporation elects subchapter S status, there is a gains tax on any gain attributable to the appreciation in value of any asset from S corporation conversion date to asset sales date. The requirements to become an S corporation are statutorily set. The moment that the requirements are no longer met, the S status of the corporation terminates. Only a small business corporation can elect S status. To be a small business corporation, the corporation must meet the following requirements:

a. It must not have more than 35 shareholders (married couples are treated as one shareholder),
b. It must be a U.S. corporation,
c. No shareholder can be a nonresident alien,
d. The corporation can have only one class of stock,
e. All shareholders must be individuals, estates or trusts,
f. The corporation cannot be part of an affiliated group of corporations.
g. The corporation can not be a bank or insurance company, and
h. The corporation has elected to be treated as a Subchapter S corporation.

A corporation electing S corporation treatment will have its profits and losses passed to the shareholders. Passing the profits and losses results in the shareholders, not the corporation, being taxed on them. The S corporation income is taxed as though it was derived from a partnership or sole proprietorship.

An S corporation must use a calendar year as its taxable year unless a legitimate business purpose is proved to the satisfaction of the IRS.

3. TAX TREATMENT

a. FEDERAL LAW

An S Corporation is a corporation given special tax treatment under federal law. The effect of the S corporation election is to have the corporation treated for general tax purposes as if it were a partnership. In an S corporation, the income is attributed to shareholders in accordance with their stock ownership. The S corporation itself pays no income tax on the federal level.

Once a valid S election is made, the S corporation will no longer be subject to corporate income tax, accumulated earnings tax or the personal holding company tax at the federal level. An S corporation may be subjected to a special tax on its passive net income. Such tax arises where the S corporation has (1) earnings and profits and (2) gross receipts composed of passive investment income. Example: An S corporation earns $1,000,000. It will pay no taxes. The shareholders of the S corporation will have to include the $1,000,000 on their tax returns. Assuming a 28% federal individual tax rate, the shareholders will pay $280,000, not the total $519,200 that a C corporation and its shareholders must pay in combined taxes.

Because of its tax advantages, every highly successful small corporation should consider electing to become an S Corporation.

b. STATE LAW

A federal S corporation election does not mean that the corporation will be treated as a partnership for state taxes. Not all states permit S corporation treatment for small corporations doing business in their states. For most states, despite a federal tax election, the corporation will continue to be taxed as though the federal election had never been made. The reason for nonpartnership treatment is obvious. By denying S status to the corporations, the states retain the double taxation on the corporate income.

Unless a corporation does business in a state that has no income tax on corporations (not all do), it will have to file a return and pay taxes. Only a few states, such as California, permit S corporation tax treatment. In these states, the profit and loss of the corporation is passed through to the shareholders. In California, an election to be treated as a federal S corporation automatically operates as a state election as well. A federal S corporation not wishing to be an S corporation in California must specifically inform the state that it elects not to be an S corporation for state tax purposes. Unlike federal law, California continues to impose a corporate tax on S corporations at a reduced tax rate of 2.5% but not less than the state's minimum tax on net income. California, however, does not impose a tax on excessive passive income like the federal government does.

Most of the states that permit S corporations require an affirmative election by the corporation for that tax treatment.

4. METHOD OF ELECTING THE S STATUS

A corporation wishing to become an S corporation must have the written consent of its shareholders for the S status. Where the stock is owned jointly by a married couple, both spouses must consent to the S status. Where the stock is owned jointly, all joint owners must consent to the S treatment.

The consent must be signed by each shareholder of record when the election is made. In the situation that an existing corporation is electing to receive S status for the year of election, any shareholder who owns corporate stock at any time during that year before the election is made is also required to consent to the election even though the shareholder may no longer be a shareholder.

The corporation is required to file Form 2553 with the IRS together with all shareholders' consent to S status for the corporation. The S election must be made on or before the 15th day of the third month of a corporation's tax year for the S corporation election to become effective for that tax year. A late filing of the S election would be ineffective for the current tax year but would be effective for subsequent tax years. For new corporations, this means the election must be filed within 2½ months of the incorporation to be effective for the first tax year.

Once the election is made, it is valid and in force for as long as the corporation meets the qualification requirements for S corporation status. The shareholders can revoke their S election. Once an S election is revoked or terminated, the corporation must wait five years before it can apply again for S corporate status.

Each state has its own laws as to whether or not the corporation can be treated as an S corporation. In states that have no corporate or individual tax, this is not a problem because there is nothing to tax. In states that have a corporate tax, the state must have adopted tax laws permitting S treatment or else for the state side, the corporation and shareholders will still be taxed as a C corporation as before. California automatically grants S treatment to any California corporation that receives federal S status. California requires the S corporation to file Form 3560 to notify the state of the S election.

Regardless of whether or not a state permits S corporation treatment under its laws, the greater tax savings will come from the federal election. Therefore, if the corporation wishes to be an S corporation, it can be so recognized and taxed federally even if the state will not allow it. A tax consultant for the corporation can advise whether under applicable state law it is possible to make a state S election.

5. TERMINATION AND REVOCATION OF S STATUS

An S status election can be revoked by the corporation by filing a revocation statement with the IRS Service Center handling the return. The revocation statement must state that the corporation is revoking its S election. The revocation statement must also state the number of shares that are issued and any outstanding stock (both voting and non-voting). In addition, the statement must be accompanied by a shareholders' consent to the revocation signed by shareholders owning more than half of the outstanding stock (both voting and nonvoting) at the time the revocation election was made. Because the requirements to be an S corporation are statutorily set, the status is automatically terminated prospectively when any of the following events occur:

a. The corporation's shareholders exceed 35 (married couples count as one shareholder).
b. The corporation issues more than one class of stock.
c. The corporation becomes part of an affiliated group.
d. The corporation begins to operate as a bank or insurance company.
e. Ineligible shareholders acquire stock (foreign aliens, corpo-rations, etc.).
f. The passive investment income (a) exceeds 25% of the corporation's gross receipts for three consecutive years, and (b) the corporation has earnings and profits at the close of the three consecutive years.

Once the S status is terminated, the corporation must wait five tax years before it can reapply for S status unless the IRS gives special consent to an earlier application.

5. TAX RETURNS

Because an S corporation is treated differently than a regular C corporation, it must file different tax returns. Profits and losses of an S corporation are passed to the shareholders, and the corporation is not taxed by the federal government.

The income, losses and other K-1 items are allocated to the shareholders on a per share per day basis. Each shareholder is allocated a percentage portion (based on the shareholder's ownership interest) of the pass-through items of each day in the taxable year. Example: An S corporation has $750,000 in income. George and Harry each own 25 shares for a full year. Mark owned 50 shares for half a year and then sold them to Marcie for the other half of the year. The allocation is made as follows:

a. The $750,000 is divided by the number of shares divided by the number of days (366) of the taxable year ($750,000 ÷ 100 ÷ 366) for a total of $20.49 per day.

b. Each shareholder's allocation equals the number of days times shares owned times the daily allocation per share.

George	25 shares X 366 days X $20.49 =	$187,500
Harry	25 shares X 366 days X $20.49 =	$187,500
Mark	50 shares X 183 days X $20.49 =	$187,500
Marcie	50 shares X 183 days X $20.49 =	$187,500
		$750,000

Even though the S corporation is not taxed directly on its income, an annual tax return, the U.S. Small Business Corporation Income Tax Return (Form 1120-S) must be filed within two months and 15 days of the end of the corporation's tax year. Form 1120-S is an information return. The IRS uses the corporate return to cross-check the shareholders' returns to ensure they are actually reporting their share of the S corporation income.

6. SHAREHOLDERS

a. RESIDENT

An S corporation is a pass-through vehicle for the income and deductions of its shareholders. The shareholder's tax effect on the state level depends on whether the corporation is an S or C corporation and if the shareholder is a resident or nonresident of the corporation's state of domicile. The United States Supreme Court in its 1920 decision Shaffer vs. Carter F 252 U.S. 37 made clear that a state is permitted to tax all the income of a resident from whatever source. Income from stock (dividends) is generally taxed at the residence of the stock's owner.

States tax a C corporation on its income from all activities in the state. Dividends of C corporations are usually taxed to the individual shareholders according to their state of residence and not the state where the corporation does business. If a state exempts S corporations from state corporate income tax, the state derives no income unless it can tax the shareholders on their portions of the corporate income. This is no problem when the shareholder is a state resident because the state can tax all income of its residents, whatever the source. Therefore, for residents of the state where the S corporation is located, the corporate income will be passed to the shareholder and taxed routinely.

b. NONRESIDENT

(1) GENERALLY

The United States Supreme Court in its 1920 decision Shaffer vs. Carter 252 U.S. 37 made clear that a state is permitted to tax all the income of a nonresident to the extent it arises from property or activity located in the state. If a state exempts S corporations from state corporate income tax, the state derives no income unless it can tax the shareholders on their share of the corporate income. This is no problem when the shareholder is a state resident because the state can tax all income of its residents, whatever its source. The problems arise when the shareholder of an S corporation is a nonresident.

Each state addresses the issue of corporate income distributed to nonresident S corporation shareholders in its own fashion. Some states like Delaware and Vermont require the S corporation to pay the tax attributable to its out-of-state shareholders. Some states such as Indiana and Maryland require the S corporation to withhold taxes for its out-of-state shareholders. California and a number of other states require non-residents to file written consent to the state's personal income tax on the pass-through income. Several states (Mississippi, Nebraska, Oklahoma, and Rhode Island) require the corporation to pay the taxes on nonresident shareholders if the shareholders do not file their consents to be taxed.

(2) DISADVANTAGE WHEN SHAREHOLDER'S HOME STATE HAS NO INCOME TAX

A distinct disadvantage can arise if the nonresident shareholder lives in a state that does not have an individual income tax. The following states do not have an individual income tax: Florida, Washington, Texas, Nevada, Alaska, South Dakota and

Wyoming.

If the stockholder is a resident of a state that (a) has no individual income tax or (b) does not include S corporation income from out-of-state sources (Connecticut, New Hampshire, Tennessee, Michigan and Oklahoma) by electing S treatment, the person will owe income tax to the state where the corporation was formed.

A nonresident shareholder in the above states owes no taxes to his home state but is volunteering to pay taxes to the corporation's home state on his S corporation income. If the election was not made, the tax would have been paid in the corporation's state at the corporate level with no additional tax at the shareholder level in either state. Still, whether the shareholder is taxed in his home state or the S corporation's state, the income of the S corporation is still taxed only once at state level, whereas C corporation income would be taxed twice.

(3) STATE TAX CREDITS

All states have jurisdiction to tax the income of their residents, plus income from all sources for nonresidents. Therefore, all income tax that has a source in another state has the potential of double taxation. To avoid having the income from an S corporation taxed to the shareholder both in the corporation's state and the shareholder's state, most states allow their residents to claim a credit for taxes paid to another state, as long as the other state does not allow a credit. This credit allowed by the shareholder's state generally cannot exceed the taxes that would be paid in the shareholder's state. For example, California permits its residents to claim as a credit taxes paid in the following states:

> Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

To be eligible for credit for income tax paid to another state, the state giving the credit usually requires that the income have its source in the taxing state. Intangible income, such as dividends, that is taxed by a state because the state considers the individual to be a resident usually will not qualify for a credit. Moreover, most states will not give a credit for a dividend distribution that is treated as an S corporation distribution by one state but a C corporation distribution by the other.

(4) FRINGE BENEFITS

How fringe benefits in an S corporation are treated depends on the amount of stock the recipient of the fringe benefit owns. An employee who owns more than 2% of the corporate stock in an S corporation is required to include the receipt of all fringe benefits, such as medical reimbursement payments, in gross income. The shareholder is entitled to deduct fringe benefits only to the extent that a partner in a partnership could do so.

(5) BASIS OF STOCK

The basis of the stock in an S corporation is treated very much as the basis in a partnership interest. Generally, both taxable and non-taxable income and deductible and nondeductible expenses will serve either to increase or decrease the shareholders' bases in their stock. Income and loss will apply to adjust the basis before application of the rules relating to distributions for any particular year. To the extent that property distributions are treated as a return of basis, the stock basis will be reduced by the fair market value of the property. Income passed to a shareholder will first increase the shareholder's basis in loans to the corporation to the extent it was previously reduced by the pass-through of losses.

(6) CONCLUSION

There are innumerable tax consequences that might result if a shareholder is a nonresident of the state where the corporation is formed. Before an S election is made, the shareholders should consult with a tax professional to determine the tax effect the nonresident shareholders.

Generally, for a resident shareholder an S election is advantageous. Without the election, the resident shareholder is taxed on the dividends. When the election is made, the resident shareholder is still taxed on the distribution that would have been a dividend under a C corporation. The only difference is that the C corporation would have to pay taxes on any earnings retained by the corporation. Therefore, it is usually better for a resident shareholder to elect S treatment if available under state law. A tax professional should be consulted if the corporation has any sophisticated tax situations or if the shareholders have any questions.

III. A PARTNERSHIP

A. INTRODUCTION

The traditional form for two or more attorneys to practice law together has been the legal partnership. The main reason for this is that many states do not permit professionals to form professional corporations or limited liability companies. Another reason that partnerships are used is because they are simple. A partnership is not required to be in writing to be legal, although it makes a great deal of sense to have it in writing. It is not uncommon for legal partnerships to have one or more partners who are themselves professional corporations.

While general partnerships are simple to form and operate, that does not mean that they are unregulated. On the contrary, a complete body of partnership law has been developed both by case law and statutory law. The rights and obligations of partners and those persons dealing with partnerships are covered by a state's general partnership law in the absence of written agreement of the partners to the contrary.

This section will educate the reader about the differences between partnerships and corporations, and more to the point, it is intended to raise an awareness of the legalities expected of those doing business in the form of a partnership. It is important that lawyers considering the possibility of forming a partnership possess a good understanding of the rights and obligations that arise from a partnership arrangement.

B. THE UNIFORM PARTNERSHIP ACT

The National Conference of Commissioners on Uniform State Laws wrote the Uniform Partnership Act (UPA). The UPA has been adopted by every state except Louisiana. The UPA provides the rules on how a partnership is to operate when the partnership agreement is not explicit. In short, the UPA fills the blanks in a partnership agreement. The partners can agree not to use the UPA provisions, and they can write their own replacement provisions if they elect to do so.

C. DEFINITION

A partnership is two or more persons or entities working together as co-owners to run a business for profit. The Internal Revenue Code defines a partnership in Section 761(a) as:

> "a syndicate, pool, joint venture or other unincorporated organization through which. . .and business is carried on. . . and is not a corporation trust, or an estate (meaning sole proprietorship)."

A partnership may be formed by a written agreement or it may be formed by an oral agreement of the parties. The determining factors as to whether or not a partnership exists are:

1. Whether the parties intended to form a partnership, and
2. Whether they intended to make a profit from the activities.

Once the foundational elements of a partnership are met, the partnership is formed and governed either by the terms of the written agreement, the UPA or in the case of Louisiana, its own state partnership law.

A joint venture is a partnership that was created to accomplish a very narrow purpose. Most partnerships exist to make a profit while engaging in a particular type of business. A joint venture seeks to make a profit usually on a one-time basis. When the purpose of the partnership is accomplished, the joint venture automatically terminates. Example of a regular partnership: Two persons form a cement paving company. Example of a joint venture: Two persons agree to work together to pave just one job. Joint ventures, as with regular partnerships, are governed by the partnership law of the state where they are formed. Like any partnership, the agreement should be in writing or otherwise have its provisions set by its state's Uniform Partnership Act. Except for the limited purpose of the joint venture, it has the same issues, problems and elements of a regular partnership.

D. TAX TREATMENT

Partnerships are treated for federal tax purposes as pass-through vehicles. All profits and losses of the partnership pass through the partnership and are attributed to the partners. The effect of this pass-through of profits and losses is that the partnership itself is not taxed. Partnership income is not subject to double taxation as is the income of a regular C corporation. To achieve this same tax benefit for small corporations, Congress created the S corporation.

A partnership does not pay any taxes on the income from the partnership. All partnership profits and losses are passed to the partners. The partnership files a Form 1165 informational partnership return and a K-1 to inform the IRS how the profits and losses are being allocated to each partner. Each partner is treated for tax purposes as a self-employed individual. Each partner is required to estimate his share of the partnership income and make estimated quarterly payments to the IRS.

Under the 1986 Tax Reform Act, profits and losses passing through to partners retain the same character they had in the partnership. A passive profit or loss to the partnership remains a passive profit or loss. All of an active partner's attributed profits and losses will be taxed as active if he materially participates in the partnership business. A partner who does not actively participate in the partnership business will have all of his share of profits and losses taxed as passive.

Generally a joint venture is treated the same as a partnership for tax purposes. There are, however, certain differences or elections that pertain only to joint ventures, such as:

1. A joint venture must, like a partnership, file an informational return except for certain real estate joint ventures.
2. The joint venture makes tax elections for computation of its taxable income.
3. The joint venture can adopt its own tax year, but it must have IRS permission to use a tax year different from any principal partner.

4. Under the IRC, a joint venturer (one of the partners in the joint venture) may enter into a business transaction with the joint venture and be treated as an outsider for tax purposes.
5. If the joint venture is basically a passive investment, the members of the joint venture may elect to be excluded from some or all of subchapter K of the IRC that defines how partnerships are taxed.

The above tax aspect of joint venturers gives them an advantage of flexibility over regular general purpose partnerships.

E. PARTNERS' LIABILITY FOR PARTNERSHIP DEBTS

The main drawback to any general partnership is that the partners are personally liable for the debts of the partnership. In short, the partners have agreed by forming a partnership to guarantee payment of any debts or judgments taken against the partnership. Partners are not liable for the personal nonpartnership related debts of the other partners.

Under the UPA, the partnership (and thus the partners) are liable for "any wrongful act or omission of any partner in the ordinary course of the business of the partnership." Where loss or injury is caused to any person by the partnership, the partners are individually liable for payment of the damages. In addition, the partners are liable for their share of any damages that arise from the actions of any partnership employee or the other partners during the course of their work for the partnership. Example: If a partner is involved in a car accident and kills two people while engaging in partnership work, all of the other partners will be liable to pay the damage award that the heirs of victims receive in wrongful death action against the partnership. If the award is $1,000,000 and the partnership has assets of only $200,000, a personal judgment will be taken against each partner for $800,000.

This is one of the main drawbacks of the partnership. The general rule of thumb is that if a partnership is formed and it has employees, the partners should either carry a great deal of insurance or incorporate as a limited liability company to limit their individual personal liability for the partnership's debts.

F. FIDUCIARY DUTIES OF PARTNERS

By law, each partner is the agent of the partnership. Each partner owes fiduciary duty to the partnership and to the other partners to act in their best interests. Some of the most important things that partners cannot do are:

1. A partner may not usurp a partnership benefit. This means that a partner must give the partnership the right of first refusal on any business opportunity that the partner comes across that may be of benefit to the partnership. Example: If the partnership is in the paving business and a partner finds out that a school is intending to repave its parking lot, the partner cannot bid on the job for himself without first informing the partnership of the job and giving the partnership the chance to bid on the job.
2. A partner may not divert partnership assets for his own personal use. Such conduct is a breach of trust and may even expose the partner to criminal liability.
3. The partner must fully disclose all material facts affecting the partnership and its affairs to the other

partners.

A partner who breaches any of these duties may be sued by the other partners for lost profits or other damages suffered as a result of the partner's misconduct. If the partner usurped a partnership benefit, he may be ordered to pay all of the profits realized from the transaction to the partnership on the theory that the partnership should have received it.

G. AUTHORITY TO ACT FOR PARTNERSHIP

In a general partnership, each partner has full authority to act on the partnership's behalf in the normal course of its business. Each partner can bind both the partnership and the other partners to contracts even if the other partners did not authorize or approve the contracts. This unlimited power on the part of one partner to bind the partnership and the other partners is the biggest concern of most investors. The partners may agree to limit their authority to bind the partnership or act on its behalf.

People dealing with a partnership are entitled to assume, unless informed otherwise, that any partner has the right and power to act for the partnership in the normal course of its business. Even though a partner may only have actual limited authority to act for the partnership, the apparent authority of the partner may nevertheless bind the partnership to contracts with third parties. Contracts entered with people who did not actually know that the partner lacked the authority to bind the partnership are binding on the partnership.

There are some acts that a partner can never do unless the authority is specifically granted in a partnership agreement. Anyone dealing with a partner is presumed to know that unless the partnership agreement gives the partner specific authority to act in certain special areas, a valid contract in those areas cannot be executed.

The UPS requires that, unless the partnership agreement expressly states that a partner can do the following acts, the acts are invalid and not binding on the partnership:

1. The transfer of a partner's interest to another.
2. The conveyance of partnership property.
3. The mortgaging of partnership property.
4. Confession of a judgement against the partnership.
5. Submission of a partnership claim to arbitration.
6. Any act that would make it impossible to carry on the business of the partnership.

Anyone dealing with a partnership should always ask to review the partnership agreement to assure himself that the partner executing the contract does indeed have the authority to do so.

H. CONSIDERATIONS BEFORE DECIDING TO FORM A PARTNERSHIP

Before forming a partnership, the parties should consider the following issues and decide for themselves how they should be addressed:

1. The name of the partnership.
2. The term of the partnership.
3. The purpose of the partnership.
4. Whether or not a joint venture is being created.
5. How the partnership will be funded.
6. How profits and losses will be determined and distributed.

7. Admission of new partners.
8. Expulsion of old partners.
9. Withdrawals of contributed assets.
10. Expense accounts.
11. Salaries and draws of income by partners.
12. Responsibilities of the partners.
13. Dissolution of the partnership.
14. Staffing and management.
15. Comparison with the alternative of incorporating.
16. Extent of possible personal liability for partnership debts.

These are important considerations but not the only ones. Each partnership is different because each is composed of different people with different viewpoints. Remember, anything not detailed by the partnership agreement will be determined by the state's Uniform Partnership Act. If the partners do not want the UPA to apply on a particular point, they must expressly create their alternative provision.

I. RIGHTS OF THE PARTNERS

All partners have certain basic rights in a general partnership. These rights are:

1. The right to insist on a partnership accounting, including the right to have the books examined by an outside accountant.
2. The right to dissolve the partnership in accordance with the terms of their partnership agreement or, if none, the Uniform Partnership Act of the state.
3. The right to restrain the partnership from performing acts prohibited under the partnership agreement.
4. The right to bring a legal action for breach of the

partnership agreement.

These are implied rights in any partnership agreement. Provisions in partnership agreements that waive such rights are usually invalid and against public policy.

J. MANDATORY ADMISSION OF PARTNERS

One concern that has recently developed is whether or not a law practice is governed by the federal employment laws regarding the promotion of associates to partners. In California, a federal court held that law firms doing business as partnerships are governed by such laws. Therefore, in at least one case in California, a law firm doing business in a partnership form and advancing associates to partners in the past could not deny partnership participation to an equally qualified associate in the future. This issue has not yet been addressed by the Supreme Court or other jurisdictions. The California holding was based on a case in which a woman sued for discrimination because she was denied partnership. The law firm defended by claiming they had a basic right of association that gave them the authority to determine with whom the partners wanted to engage in a partnership. The partnership lost.

The issue addressed in this instance is that of equal opportunity in employment. It is one of which attorneys must be aware when doing business in the partnership form. The attorneys should carefully review the law on this subject before offering partnership to any associate to ascertain if a right or expectation of partnership is being created among current or future associates.

K. PROFITS AND LOSSES

One of the most important issues in any partnership is how the profits and losses are divided. After all, the partners formed the partnership in order to conduct a business and make money. Therefore, it is important to know how the accounting of the partnership's profits and losses will take place.

Under the UPA, all profits and losses of a partnership are divided equally among the partners. The equal division of profits and losses occurs even if they contributed unequal amounts of work or property to it.

The partners can agree to an unequal division of profits and losses, such as based on partnership ownership interest or contributions. Any agreement to an unequal division of profits and losses must be detailed to ensure that the UPA does not apply.

L. PARTNERSHIP PROPERTY

Under the U PA, property titled in the partnership name is owned by the partnership. A partner who contributes property to a partnership gives up ownership in the property. Likewise, property purchased with partnership funds is owned by the partnership.

The property held in a partnership can be legally sold, transferred or conveyed only by the partnership. Since partnership property is owned by the partnership, it cannot be directly attached to satisfy any court judgment taken against a partner. A partner's ownership interest in a partnership can be attached and sold by a creditor, but the creditor cannot attach the underlying property in the partnership.

M. ADDITION OF NEW PARTNERS

The UPA requires unanimous consent of all partners before the admission of new partners. Unless the partnership agreement has a clause to the contrary, the UPA requirement controls, and the admission of new partners requires unanimous consent. Requiring unanimous consent only makes sense. If unanimous consent is not required, new partners could be added over the objections of partners who might not have entered the partnership had they known who would be their future partners.

Under the UPA, a new partner is only liable for the partnership debts incurred before becoming a partner and only to the amount of his contribution to the partnership. The partner is liable, as any partner, for all of the partnership debts incurred after becoming a partner. Example: George joins an existing partnership that owes $200,000 in debts. George contributes $50,000. After joining, the partnership acquires another $100,000 in debt. Of the total partnership debt, George is liable for $150,000 ($50,000 pre-existing debt and $100,000 debt after joining) and the other partners are liable for the whole $300,000.

N. TAX EFFECT OF CONTRIBUTING PROPERTY TO A PARTNERSHIP

A tax consideration that all persons forming a partnership should bear in mind is the tax consequence of contributing services for an equity interest in the partnership. Under federal tax laws, when a person purchases a partnership interest for either services rendered or to be rendered, that partner has to recognize as income the value of the partnership interest received. A person cannot acquire a partnership tax free by bartering services. Example: George agrees to become a partner by working for it, and the partnership interest acquired is worth $10,000. George would have to report the $10,000 as income on his tax return.

The tax consequence of acquiring a partnership interest for services may result in the transaction not becoming commercially viable. It simply may not be worthwhile to work for an interest. In addition, there is often an undercurrent of resentment from the partner who contributed services against the partner who just contributed money. In a successful partnership it is not uncommon for the partner who contributes most of the work to feel slighted when a partner who does less but who contributed the start-up capital receives a bigger share of the partnership because he contributed the capital.

O. ASSIGNABILITY OF THE PARTNERSHIP INTEREST

Generally, a partner may freely sell or convey his interest in the partnership unless the partnership agreement says otherwise. As a normal point of fact, if the other partners do not approve of the transfer, they can usually dissolve the partnership. In a professional legal partnership, a partnership interest can only be assigned to another attorney. The canons of professional responsibility do not permit a nonattorney to own an interest in a partnership engaged in the practice of law. It is permitted, however, for the surviving spouse or family to receive payments from the partnership to compensate for work previously done by the deceased partner.

Under the Uniform Partnership Act, the remaining partners do not have to dissolve the partnership if they object to the transfer of an interest to another attorney. The remaining partners may continue partnership operations as before but not accord the new partner all of the rights of full partner. The new partner has the right to receive the selling partner's share of profits but is prohibited from demanding an accounting or inspecting corporate books.

P. EXPULSION OF A PARTNER

Partnerships that have a large number of partners sometimes have a provision in the partnership agreement permitting the expulsion of a partner without dissolution of the partnership. Expulsion clauses in partnership agreements are valid if they exist to protect the partnership from harm caused by an expelled partner's breach of the partnership agreement or his fiduciary duties owed under it.

The procedure for the expulsion must be in the partnership agreement. An expulsion is obviously against the wishes of the expelled partner. Therefore, the courts will narrowly construe an expulsion clause to ensure it does not violate state law and is not against public policy.

Q. TERMINATION OF A PARTNERSHIP

Termination means that business is no longer being conducted by the partnership except to the extent necessary to complete its affairs. A partnership will end one day. It is not like a corporation that has perpetual existence. The partnership agreement usually lists the conditions under which a partnership will terminate. The partnership agreement may have a clause stating that the partnership will terminate:

1. When the partnership purpose is accomplished (in a joint venture).
2. On a certain date stated in the partnership agreement.
3. If a partner becomes insolvent or bankrupt. Under the UPA, when a partner files for personal bankruptcy, the partnership is automatically terminated even though the business may itself be solvent. When a partner goes bankrupt the relationship with the partnership and the other partners greatly changes. By filing for bankruptcy protection, the filing partner is no longer liable for the partnership debts. The liability for payment of partnership debts remains with the partners who did not file bankruptcy. It is this general release of liability for the partner filing bankruptcy that gives rise to the termination of the partnership. The partners can agree not to have the partnership dissolved automatically upon the bankruptcy of a partner by a provision in the partnership agreement. Unless the partnership agreement states otherwise, the UPA will apply, and the partnership will be terminated upon the filing of bankruptcy by a partner.
4. If a partner dies or becomes disabled.
5. If any partner withdraws from the partnership.
6. If a partner dies or resigns without a clause in the

partnership agreement stating otherwise, the law is that a partnership terminates on the death of a partner or his resignation.

7. If any of the following events occur, under the UPA a court may order dissolution of a partnership for the following reasons regardless of specific clauses in the partnership agreement stating otherwise:
    a. A partner has been found insane by a court.
    b. A partner is incapable of performing his duties under the partnership agreement.
    c. A partner's conduct has prejudicially affected the ability of the partnership to carry on its business.
    d. A partner has repeatedly breached the partnership agreement.
    e. The partnership can only do business at a loss.
    f. Equitable reasons support the dissolution.

A lawsuit seeking termination on any of these grounds will be difficult and costly to prove. An alternative is for the partnership agreement to have a specific provision permitting expulsion of a partner for any of the above reasons.

Termination of a partnership is accomplished in three steps:

1. The decision to terminate is made either by the partners or by law through the application of the provisions of the UPA.
2. The existing business of the partnership is completed. Under the UPA, each partner remains liable for the debts of the partnership incurred during the dissolution of partnership affairs.
3. The final cessation of business, the payment of creditors, taxes and final division and distribution of the remaining assets to the partners takes place.

After a partnership has been dissolved and its assets liquidated, the distribution is made as follows to the extent of partnership assets:

1. All federal and state taxes are paid.
2. All employee wages and benefits are paid.
3. All secured liabilities are paid.
4. All unsecured liabilities are paid.
5. The remaining funds, if any, are divided among the partners in accordance with their percentage of ownership interest in the partnership.

The proceeds received by a partner in the dissolution of a partnership is a return of his investment. Any gain or loss in the dissolution is treated as a capital gain or loss. Example: A partner paid $4,000 for stock and received $3,000. He had a $1,000 capital loss. If the partner received $6,000, he would have a $2,000 capital gain.

Depending on the complexity of the partnership business, termination may be quick, or it may be a long and involved process. Until the partnership is fully terminated, the individual liability of the partners continues. If the partnership does not have enough assets to pay all its debts and liabilities at time of termination, the partners must pay the remaining balance. If the partnership and some of the partners are insolvent, the UPA requires the remaining solvent partners to pay all the outstanding debts and liabilities of the partnership. Example: The partnership owes $2,000,000; it has assets of $1,000,000 and three of the four partners are insolvent. The remaining partner, who may own only

10% of the partnership, must nevertheless pay the entire $1,000,000 outstanding debt of the partnership. It is to avoid this result that the UPA states that a partnership dissolves when a partner files for bankruptcy protection.

Under the Uniform Partnership Act, a partnership does not pay interest on a partner's share of proceeds after dissolution except for the time "after the date when repayment should have been made." If the partnership is late in making a distribution after the dissolution, it must pay interest for the time of the delay. As with most provisions of the UPA, the partners can make an agreement not to have this provision apply. Partners may agree to have the partnership pay interest on a partners' distributed share from the date the dissolution plan is adopted rather than the date the distribution could be made.

R. TAX TREATMENT OF CONTRIBUTED PROPERTY

A partner who contributes property to a partnership does not recognize gain or loss on the transfer to the partnership. Example: A partner contributes real estate to the partnership with a basis (cost) of $200,000. The property has a fair market value of $1,000,000. If the partner had sold the property, he would have had to pay capital gain on the $800,000 profit. By contributing the property instead, the partner does not realize any capital gain. The partnership has the contributing partner's basis in the property, not its fair market value at the time of transfer. If the partnership sells the property for $1,000,000 the partnership has a capital gain of $800,000 that will be passed to the partners.

S. COMPARISON WITH A SUBCHAPTER S CORPORATION

A partnership is subject to its own peculiar tax treatment under federal tax law. Most unincorporated associations and trusts that conduct business are taxed as though they were corporations. Partnerships, however, are treated differently. The income is attributed to the partners in accordance with their percentage of partnership interest. The partnership itself pays no income tax at the federal level. Example: A partnership earns $1,000,000. It pays no taxes. The partners must include the $1,000,000 on their tax returns. Assuming a 28% federal tax rate, the partners will pay $280,000, not the total $519,200 that a C corporation and its shareholders must pay.

An S corporation is a corporation that, like a partnership, permits the pass-through of income to the shareholders. The major differences between a partnership and an S Corporation are as follows:

1. Partnerships may admit anyone as a partner and may have any number of partners, whereas S corporations are limited to 35 members of special status.
2. Partnerships can divide profits and losses in a manner not related to the partners' ownership interest. By contrast, S corporations must divide profits and losses among the shareholders in accordance to their percentage of stock ownership. In most cases, these differences are not important because the S corporation usually does not want additional shareholders and does want profit and losses allocated according to shareholder investment.

3. There is no personal liability on the part of the shareholders for the S corporation's debts. In comparison, the general partners, but not limited partners, have personal liability for the partnership debts.

Persons considering doing business as a partnership should weigh the relative merits of both a partnership and an S corporation and elect the one that best suits their type of business.

T. FICTITIOUS NAME

Most states require a partnership to file a fictitious business name if they are doing business with the public. All states require a partnership doing business under a name other than its own to file a fictitious business name statement. The purpose of a fictitious name statement is to give the world notice of the entity or person actually running the business. Usually the filing is in the county clerk's office of the county where business is conducted under the fictitious name. If the partnership does business under a fictitious name in several counties, the filing must be done in every county where it does business.

U. TAX WITHHOLDING

When a new partnership is formed, all of the partnership's employees are required to fill out new W-4 forms (Employee's Withholding Exemption Certificate). Everyone, except the partners, who receives compensation for work is an employee and is required to complete the W-4 form. Since the partners are owners of the partnership and have to make estimated payments every quarter on their earnings, they are not required to complete W-4 forms.

As an employer, the partnership must withhold federal income tax and social security tax together with all mandated "state withholding" from the salaries of the employees. These taxes are withheld and reported on a calendar year basis regardless of the tax year of the partnership. The returns for the tax withholding and the deposits are submitted to the IRS on a quarterly or more frequent basis.

The amount withheld from an employee's paycheck by the partnership is based upon the employee's wage level, marital status and the number of allowances claimed on the W-4. The IRS will provide the partnership with information and assistance in calculating the proper amounts to be withheld.

Partners are not considered employees. Partners are denied many of the tax advantages available to normal employees. The deductions allowed employees for fringe benefits are not available for partners. There is no withholding from the partners for Social Security and other taxes.

V. PARTNERSHIP TAX RETURNS

A partnership and a regular C corporation treated differently. Profits and losses of a partnership are passed to the partners and are not taxed by the federal government. Even though income from a partnership is not taxed at the federal level, an annual tax return, U.S. Partnership Tax Return (Form 1165) must be filed. Form 1165 must be filed within three months and 15 days of the end of the partnership's tax year. Form 1165 is an information return that the IRS requires to assure that the partners are actually reporting their shares of the partnership income. The IRS publishes a pamphlet, Publication 541 (Tax Information on Partnerships) to assist partnerships in their tax filing.

A tax year is the year period for that a partnership calculates its tax liability. The Internal Revenue Code requires the partnership to use the tax year adopted by the principal partners. Principal partners are defined under the IRC as anyone owning over 5% of the partnership. A partnership is required to file and pay its federal withholding return (Form 941) quarterly. The return is required to show the income and Social Security taxes withheld from the employees' wages as well as the matching social security contributions by the partnership. The partnership is required to deposit the federal income and Social Security taxes on a monthly basis in an approved commercial or federal reserve bank.

The partnership is required to furnish an annual Wage and Tax Statement (Form W-2) to every employee prior to January 31 of each year for the previous calendar year. The W-2 must show the total wages paid and the amounts deducted for income and social security taxes. The partnership must submit the original of each employee's previous W-2 and the annual Transmittal of Income and Tax Statement (Form W-3) to the Social Security Administration no later than the last day of February for the previous calendar year. For example, for tax year 1994, it must be filed by the end of February 1995.

W. STATE TAXES

Unless a partnership does business in a state that has no income tax (there are very few), it will have to comply with state tax laws. Partnerships are treated by the state tax codes in a manner similar to their treatment by the IRC. Partnerships, under state tax laws, are viewed the same as under federal law: pass-through vehicles. All profits and losses of the partnership pass through, meaning they are attributed to the individual partners according to their ownership interests in the partnership.

The effect of this pass-through of profits and losses is that the partnership is not taxed and there is no double taxation of the partnership income as with a regular corporation's income. Individual state laws can vary from the federal tax law on specific items, but overall they are quite similar in concept.

IV. LIMITED LIABILITY PARTNERSHIPS

The most important change in partnership law since the creation of the limited partnership is occurring now. A few form of partnership has been enacted by some states called the **REGISTERED LIMITED LIABILITY PARTNERSHIP or just the LIMITED LIABILITY PARTNERSHIP (LLP).** The limited liability partnership is a cross between the two existing types of partnerships: the general partnership and the limited partnership. On the whole, a LLP is the treated the same as a general partnership except for the fact that the LLP provides a degree of protection to the partners for the liabilities of the partnership. A LLP must, the same as any other type of partnership, be composed of two or more persons, trusts, or companies who have joined together to engage in a business for profit.

The driving force behind the enactment of LLP Acts is that professionals are permitted to practice their profession through the use of the LLP. As discussed in the Section V **LIMITED LIABILITY COMPANIES,** some states, most notably California, do not permit professionals to do business through the use of a limited liability company, LLC. In such states, professionals are limited to doing business in a corporate form, as either a regular corporation or subchapter S to limit their liability for the debts of the business. In order to provide professionals to get together and conduct their profession with some degree of limited liability for professionals working together, some states have enacted limited liability partnership acts. California is a state that does not permit professionals to operate through a LLC and instead adopted in October 1995, one year after the enactment of its LLC Act, a LLP Act. Other states which permit LLP's are Delaware, Minnesota, New York, New Mexico, Texas along with the District of Columbia. More states may be adopt such acts in the future. As of April 1997, all 50 states along with the District of Columbia have enactment limited liability company acts. **A LIMITED LIABILITY COMPANY OFFERS THE OWNERS (MEMBERS) SAME DEGREE OF FREEDOM AND OPERATION AS AN LLP ALONG WITH EVEN GREATER PROTECTION FOR LIABILITY FOR THE BUSINESS'S DEBTS.** Usually, if a person can do business in either the LLC or the LLP form, the LLC form is better. As stated above, however, not all states permit their professionals to do business in the LLC business form. Therefore, in such states, the LLP is the only alternative to a forming a corporation if it is available in the person's state

A. **STATUS OF THE PARTNER**

The LLP is for most purposes the same as a general partnership. All of the discussions previously,in this books, regarding a general partnership except for the personal liability of the partners applies to the LLP. A partner of a LLP is a general partner not a limited partner. One of the major differences between the LLP and a general partnership is that the LLP is governed and managed by a written partnership agreement whereas the general partnership is not required to have a written partnership agreement. **THE GENERAL PARTNERSHIP AGREEMENT IN THE PARTNERSHIP CLE COURSE CAN BE USED FOR A LLP IN THOSE STATES THAT PERMIT LLP'S.**

As with a general partnership or limited partnership, the partners are the owners of the partnership in accordance to the terms and conditions set forth in the partnership agreement. As with any partnership, the partners are responsible for the management of the partnership either directly or through management which they elect or appoint. The partnership agreement will govern, when stated, those disputes that normally arise during the normal course of business. When the partnership agreement does not cover such instances, the normal business disputes or matters are handled by the majority vote of partners. When the disputes,in questions, are outside the normal course of business, the dispute can only be resolved by the unanimous vote of the partners, RUPA section 401(J).

One of the common concerns that arise in the creation of a partnership,be it a general partnership, limited partnership or LLP, is how the partnership can be capitalized. Every business needs money to operate and a partnership is no different. The question is, however, how the partnership will get its money and what would happen if the company fails. Partnerships almost always have to rely on capital contributed by their partners. The issue is, then, whether the capital will be treated as a loan or the purchase of an equity interest. Loans have to be repaid but do not entitle the lender to an ownership interest in the partnership. Whereas a contribution to equity is not repaid but does purchase a percentage of the partnership. This issue is important if the partnership fails and there is not enough cash to return the capital to the partners after the payments of the partnership debts. The law is settled on this point it is in practice that difficulties arise. Any partner, even for a LLP, can lend money to the partnership and transact business with it in accordance with state law. On dissolution of the partnership, the partners stand on the same footing as regular creditors to the extent of their loans,equity interest remain separate. The treatment of loans by partners to the partnership is the same for LLP's as with other types of partnership as discussed in the earlier termination chapter.

B. A PARTNER'S LIMITED LIABILITY FOR THE PARTNERSHIP DEBTS

In a general partnership, the partners are jointly and severally liable for all of the debts of the partnership. In a limited partnership, the general partner is jointly and severally liable for the debts of the partnership while the limited partners are not liable for those debts. The difference stems from the fact that the limited partners have no management and control of the limited partnership.

Since the LLP is a cross between the general partnership and limited partnership, so too is the liability of its partners for the LLP's debts. Generally, partners are jointly and severally liable for the debts of the LLP except that they are specifically held not to be liable, neither directly or indirectly, for the negligence, wrongful acts or misconduct of the other partners. This generally means that if one partner injured another person in the course of the partnership's business, that partner might be personally liable for the damages along with the assets of the partnership but not the other partners. In contrast, if an employee injures a person while in the course of the partnership business, both the partnership and the partners themselves are usually liable for the damages. However, state law is controlling and not all states with LLP Acts treat the issue of liability the same. Some states, for example, extend a partner's limited liability to acts committed by agents and employees while both New York and Minnesota go even further and limit all partner liabilities for all obligations of the LLP. Partners of a LLP still remain liable for their own wrongful misconduct. In addition, most states having LLPs hold partners liable for the misconduct of persons under partners management, control or direction which is rather straight forward.

The rights of creditors of a LLP are determined by state law. As stated above, partners of a LLP possess some degree of limited liability for the debts of the partnership. If a creditor debt is of the type for which a partner is not liable, then a creditor cannot seek payment of the debt from the partner. If the debt is one for which limited liability protection does not apply, then the creditor can seek collection from the partners. Generally, a partner is not liable for the errors and omissions of the other partners, employees or agents of the partnerships. To know the extent of the limited liability, the state LLP Act must be reviewed.

C. **SPECIAL REQUIREMENTS FOR THE LLP**

A general partnership has no formal requirements. A general partnership is usually not required to have its partnership agreement in writing or to file anything with the state. A limited liability partnership however must do both. A LLP needs the partnership agreement in writing, the one in this book would suffice in order the form a LLP.

A LLP, unlike a general partnership, is also required to file an application with the Secretary of State or Department of Corporations to become registered as a LLP hence the second name, REGISTERED LIMITED LIABILITY COMPANY. The application form can be acquired upon request from the Secretary of State's office if an official one is required. Some states that have LLP Acts do not have official application forms but simply require that the application be typewritte n stating information required to be produced under the state's LLP Act. The application, itself, is extremely easy to complete. The basic information to be provided is the name of the partnership, name and addresses of the partners, the business address of the LLP and the agent for service of proces of the LLP. In essence, this information is the same required by a Certificate of limited partnership. Usually, only one filing is required with the Secretary of State. Delaware, however, requires an annual renewal filing of the LPP is converted into a general partnership with liability protection for the partners. Most states that have an LLP Act also require a LLP formed in another state which wishes to do business in the state to register with the Secretary of State as well. For such states, the failure of a foreign LLP to register would strip the LLP of its limited liability protection for its partners.

All LLP Acts require that the name of the company contain with the words "limited liability company" or the abbreviation "LLP". The name, as with any company can not be so similar to another company as to be deceptive.

D. CONVERSION OF A GENERAL PARTNERSHIP TO A LLP

The states that permit LLPs also permit general partnerships to be converted into LLPs. The conversion is simple and, in essence, the same as the formation of a new LLP. The general partnership will file with the Secretary of State and application for conversion which contains the basic information as an application from a new LLP along the name of the original general partnership which is being converted. Conversion does not alter or change the partners' liabilities for the company that were incurred prior to the conversion. Prior to the conversion, eachof the partners was personally for the payment of all of the debts of the partnership. After the conversion, each of the partners still remain personally liable for payment of all of the debts and obligations of the partnership incurred prior to the conversion. Only the new debts and obligations incurred by the partnership following the conversion will be governed by the limited liability provisions of the state's LLP Act.

From a tax standpoint, conversion should not result in a taxable event to either the partnership or any of the partners. In contrast, when a regular corporation converts to a subchapter S status or into a limited liability company, that is considered to be a taxable event. As such, the conversion of a corporation could result in its assets being reappraised and taxes paid on what the IRS would consider to be paper distributions. In such cases, more than the business form is being changed; the tax status is also being changed from a corporate tax status to that usually of a partnership. Conversion from a general partnership to a LLP would not be taxable event because the entity still remains a partnership for tax purposes only the precise business form changes not tax status or ownership.

E. **OPERATING A LLP IN OTHER STATES**

As stated above, not all states permit a limited liability partnership to be formed under its state law. Therefore, if an LLP wishes to do business in another state, a review of the law of that second state should be reviewed. If the second state permits LLPs to formed under its state law, then there is no problem with doping business in that state. The United States Constitution's Full Faith and Credit and Privileges and Immunities Clauses would require the second state to permit the foreign LLP to operate with limited liability for its partners. Constitutional issue arises when the second state does not permit LLP's to operate under its state law. In this situation, permitting a foreign LLP to operate with limited liability for the partners would permit non-citizens an advantage not available to its own citizens. The result could be that citizens in the second state would form LLP's in another state just to come into the home state and operate.

The issue of foreign operations of the LLP also came up for limited liability companies. Now, all 50 states have limited liability company acts. Prior to adopting such acts it was very unclear as to whether a limited liability company doing business across state lines would have limited liability protection for its members.

For LLP the projected future is different. Most states do not have a LLP Act even though they have a LLC Act. The reason for this is that most states do not prohibit professionals from doing business in the form of a limited liability company. The main reason for having a LLP is that the partners are not permitted to form a LLC. A Limited Liability Company is usually better than a LLP because it generally gives a greater degree of protection from the company's debts while providing the same flexibility of the LLP. Therefore states that permit professionals to form LLCs see no reason to enact LLPs. It is always important to review state law when considering to do business in the LLP form. A LLP valid in one state may not, in the end, be held to bestow limited liability protection for its partners for acts committed in another state that does not recognize LLPs. In that situation, it may be possible for the LLP to form a LLC in the second state and do in the second state as the LLC. Partnerships can be members of an LLC. All of which means that doing business in other states requires care and compliance with the laws of each of the appropriate states.

V. A LIMITED LIABILITY COMPANY

A. INTRODUCTION

A limited liability company (LLC) is a cross between a corporation and a partnership. The characteristics that are shared with a corporation and partnership are:

1. Most importantly, an LLC bestows limited liability protection on its members just as a corporation does its shareholders and a limited partnership its limited partners.
2. An LLC can provide free transferability of its membership

interests the same as a corporation or partnership.

3. An LLC can provide for continuity of life after the death, resignation, expulsion or bankruptcy of a member the same as a corporation or partnership.

In addition, an LLC may give full management and control to just a few managing members, that is the same treatment that is available in a partnership and similar to that of board of directors of a corporation.

Most state that LLC Acts also permit attorneys to practice law in a professional LLC. Some states, however, such as California and Nevada, do not permit professionals to form LLC's. Some states that do not currently permit professionals to form LLC's have legislation under consideration to remove those restrictions.

Following are the major differences between LLC's and corporations and partnerships:

1. Unlike a corporation, that can have perpetual existence, some LLC Acts an LLC can only exist for a stated period of time (30 years in some states).
2. Unlike the partners of a partnership, the members of an LLC are not personally liable for the debts of the company, that is the same basic treatment as that of shareholders of a corporation.
3. Unlike a corporation, the LLC does not have corporate restrictions on financing. In particular, the LLC does not need to create a special surplus account for distributions.
4. Absent an agreement among the members to the contrary,

profits and losses of an LLC in the majority of states are allocated in accordance with the percentage of their capital contributions. A few states have adopted the per capita partnership rule that holds that if there is no agreement on their division, profits and losses will be allocated equally among the members. Either method is different from that of a corporation in that profits and losses are based upon the number of shares that a shareholder owns in the corporation.

The main advantage of an LLC is the limited liability that it provides its owners (called "members"). As an LLC, the most that members can lose in a lawsuit against the company are the assets they contributed to the LLC. The limitation of liability does not extend to any personal guarantees of company debts by a member. If a member personally guaranteed a company loan of $100,000, the member is personally liable for the repayment. The member's liability arises not because the person is a member of the company but because the member signed a guaranty to pay the loan so as to get the lender to make the loan to the company.

Limited liability for members is quite different from that of a partnership where the partners are totally liable for all debts of the business. Creditors of a partnership can attach every dollar and piece of property that a partner owns to settle a judgment against the partnership. Such personal attachment to satisfy company debts cannot be taken against the assets of a member. It is to avoid this unlimited liability for the debts of the business that people incorporate or form an LLC. Few people invest in a business if they risk losing everything they have earned or will earn in the future.

LLC's are relatively new. As of April 1997, all 50 states have adopted an LLC act. Even the District of Columbia now permits LLC's to be form within its borders and for a foreign limited liability company to operate within it and which will provide limited liability protection to its members.

An LLC is considered to be separate and apart from all of the people who own, control or operate it. An LLC holds most of the rights of a legal person. An LLC is can validly execute contracts, incur debts, hold title to both real and personal property and pay taxes. The attractiveness of LLC's stems from the fact they are separate legal entities from their owners (members). Thus they have unique advantages over both corporations and partnerships.

B. FORMATION

An LLC is a statutory creation. It can only be formed by strict compliance with the state law under which it is created. LLC's, just as corporations and limited partnerships, require public filing of formation documents. The reasons for filing Articles of Organization are:

1. To give public notice that the company is formed in a way that bestows limited liability on the members for the debts of the company, and
2. To tell the public where the company is located and who can act on its behalf.

Most states permit an LLC to only have one owner, member. However, several states require an LLC to have at least two members. Corporations, on the other hand, are permitted to have only one shareholder. In addition, several states permit one person to form an LLC, but the company will not be given effect until it has more than one member. These states include Arizona, Colorado, Delaware, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota and Virginia.

The states that require a company to have two or more members also require that two or more persons sign either the Articles of Organization or a subscription agreement prior to the filing of the articles. If a company falls below the minimum number of members for an LLC, the company will not only be dissolved but will lose the limited liability shield for its members to the extent necessary to complete the company's business. This could be important if a company continues to do business for an undue period of time with less than the minimum number of members. The two-member requirement ensures the availability of the partnership classification for tax purposes. A partnership requires by definition two or more persons engaged in business. If the company does not have two members, it cannot be considered a partnership.

1. ARTICLES OF ORGANIZATION

Articles of Organization are an application by a group of individuals or entities for a license to do business as an LLC in the state. Once the articles are accepted and filed, the LLC is formed. Each state sets its own requirements for the contents of the articles; however, they all require:

1. A name for the company that does not mislead the public but does disclose that it is an LLC.
2. The address of the company's principal place of business.
3. The name and address of the company's registered agent in the state.

The requirement for listing both the resident agent and the registered office is also imposed upon a company that is incorporating. The registered agent must be listed because he is the one authorized to receive process against the company. The resident agent is the one who is served legal notices, summons and complaints on behalf of the company. A company's failure to maintain a resident agent in the state by default agrees to let the secretary of state serve as the resident agent. The registered office is the location where the company's books and records are kept in the state. The listing gives notice to the world at large where any complaint against the company can be served.

Several states also require additional provisions to be included in the articles such as:

1. How capital contributions into the company will be received by the company.
2. Whether the company will be treated as a corporation or partnership for tax purposes.
3. The name and address of each organizer.
4. Whether all the members or centralized management will manage the company.

The states of Colorado, Florida, Minnesota, Nevada, West Virginia and Wyoming require the articles to state if the company has an agreement that it will continue in effect upon the death, bankruptcy or withdrawal of a member.

The reader should familiarize himself with the particular LLC law of the state where the LLC will be formed to assure that the law has not recently changed. The provisions of the Articles of Organization can only be altered by filing an amendment to the articles. Because it is difficult procedurally to amend the articles, members sometimes place important management provisions in the articles. In practice the entire operating agreement or any of its provisions can be included in the articles. Once something is listed in the articles, it can only be changed by filing an amendment to the articles.

The articles must be approved and adopted before they are filed. Those who will file the articles will call a meeting of potential members. Those at the meeting decide the provisions to be contained in the articles. They also decide whether all the members or a centralized panel of selected managers will manage the business. Once the articles are adopted, they must be signed by all of the members if no managing members are selected or by all of the managing members if management is to be by selected managing members. Usually the operating agreement for the company is also created and adopted at this meeting.

2. OPERATING AGREEMENT

The LLC exists on paper after it files its articles. The LLC, however, does not exist at law (de jure) until membership certificates are actually issued. The fact that the company has outstanding membership certificates in the hands of members is the defining characteristic of the existence of an LLC. Recall that a corporation, in like manner, is not considered in effect until it has issued and sold stock. Following the filing of the articles, the potential members of the LLC meet to purchase their membership certificates and adopt the operating agreement for the business. After the membership certificates have been issued, the company is fully formed.

Operating agreements are the rules for the general day-to-day management and operation of the LLC. Contained in the operating agreement are the terms of the company as it relates to:

1. The capitalization of the business.
2. The distributions made from the business.
3. The admission and withdrawal of members.
4. The management of the business.
5. The fiduciary duties owed to and by the members.
6. The dissolution of the company.

The operating agreement is adopted by the members and thereafter can be amended only by a majority vote of the members. An operating agreement designates many of the areas of potential conflict within an LLC and the delegation of duties and responsibilities. Operating agreements can be general in nature or closely tailored to the needs and desires of the members. Some states do not require the operating agreement to be in writing. It is always a good practice to have one written, and most states require it to be in writing. Only if the agreement is in writing can the actual intent of the members be proven with confidence.

Operating agreements are not set in concrete. Members can alter or amend the operating agreements by simply having a properly conducted meeting to do so. The purpose of operating agreements is to establish procedures for the daily administration and management of the LLC. As the LLC develops, the operating agreement must be amended to keep pace with the changing structure of the LLC.

As can be seen from the foregoing discussions, the steps for forming a business as an LLC are simple and can be summed up as:

1. File the Articles of Organization,
2. Adopt the operating agreement, and
3. Issue the membership certificates.

Once these steps have been accomplished, the LLC is formed and can commence operations. An LLC is easier and less expensive to create than a corporation or a limited partnership provided ordinary caution and care are undertaken.

3. MEMBERS

Members are the owners of an LLC. Usually an LLC need only have one member. Members own the membership certificates of the LLC and have the right to vote in the election of managing members. A member's ownership interest in the company is determined by:

1. The member's percentage of contribution in relation to the total contribution of all members, or
2. Per capita (equally divided among all the members irrespective of contribution), or
3. An agreement between the members.

Members are not personally liable for the debts of the LLC beyond the extent of their investment in the membership certificates of the LLC. The exception to this limited liability exists where a member personally guarantees the payment of a company debt or obligation.

Members of an LLC engaged in the practice of law must all be attorneys. As with professional corporations and partnerships, a legal professional LLC requires its members to all possess a license to practice law. The reason for this derives from the canons of professional responsibility that prohibit fees being paid to nonattorneys and the ethical possibilities of nonattorneys influencing an attorney's representation of a client.

Surviving spouses or family members of a deceased member, however, are entitled to receive compensatory distribution for the work done by the deceased partner and payment for the deceased member's interest in the professional LLC without violating the professional rules.

Members may agree to manage the company themselves or to elect a few members who are called the "managing members." In addition to electing members who are called managing members, the members are required to vote for the following acts:

1. Any amendment of the Articles of Organization,
2. Any sale, option or lease of substantially all of the LLC's assets,
3. Any merger or consolidation of the LLC with another LLC,
4. Amendment of the operating agreement,
5. Removal and replacement of managing members, and
6. Dissolution of the LLC.

The term "managing members" refers to all of the managing members. Managing members must be elected if the operating agreement does not specifically assign the management to all of the members. If managing members are elected, they alone are responsible for running the day-to-day business of the LLC. When the LLC is taxed as a corporation, the managing members are permitted reasonable compensation for their services. In small LLC's, the managing members usually serve without pay since they are usually protecting their own investment. The decision to have the LLC managed by elected managing members is an element of corporate existence. If the company also has free transferability of its shares or a continuity of life, it will be taxed as a corporation and not as a partnership.

Most operating agreements for an LLC require an annual members' meeting to review the business affairs and conduct of the company. At this time the members also elect managing members for another year. Members are usually given votes equal to their percentage of ownership in the company as evidenced by their membership certificates. A majority of those votes is needed to pass a resolution (the matter voted upon).

A member owes to an LLC a duty of loyalty. A member cannot usurp a company benefit: take for himself a benefit that could go to the LLC. A member owes to the LLC the right of first refusal of any business opportunities the member discovers that could affect the LLC. Example: The LLC is in the paving business. A member cannot form a competing paving business and solicit business from the LLC's existing clients. When a member has a personal interest in a matter before the board, the member is only allowed to vote on it if:

1. The member's interest has been fully disclosed to the board, and
2. The contract is just and reasonable.

A member cannot be sued by other members for losses incurred as a result of his actions or decisions provided they were undertaken in a reasonable and prudent manner.

As agents of the LLC, members have the authority to bind the LLC by their actions. Members can execute contracts for the LLC and can subject the LLC to liability for damages arising from their negligent or intentional acts committed on the LLC's behalf.

All states that permit LLC's hold that an assignment of a member's interest only passes financial rights unless the operating agreement states otherwise. The assignee (person who acquired a member's interest in the company) only acquires the right to participate in the management of the company through a majority vote of the other members. This vote usually must be unanimous. This is an important consideration. Unless the operating agreement states otherwise, the nonassigning members must agree to let the new member participate in the management. This requirement for nonassigning member approval to receive full benefit of a member interest denies free transferability. This is a corporate characteristic that can possibly deny the LLC being taxed as a partnership.

4. MEMBERSHIP CERTIFICATES

Membership certificates can be considered as the ownership interests in an LLC. The membership certificate is little more than a record that a person is a member of the company. The degree of interest that the member has in the company is determined by the terms of the operating agreement. Every LLC is authorized to sell a certain number of membership certificates in accordance with the security laws of the state where the company is formed. The purchasers of the membership certificates acquire an ownership interest based on their percentage of the membership certificates to the total membership certificates outstanding. Membership certificates may be sold by an LLC for money, labor, services, canceled debts or for property contributed to the LLC. Membership certificates also can be purchased with a promissory note; in such cases the membership certificates are usually (but not required to be) secured by tangible property.

Membership certificates can be voting or nonvoting in nature. Nonvoting membership certificates are usually issued by an LLC to raise money without giving the owner the right to participate in the business. To attract purchasers for its nonvoting membership certificates, an LLC could guarantee a fixed distribution payment with the option to later convert the nonvoting interests into voting interests based upon a fixed formula.

B. TAXATION

How an LLC will be taxed is the second most important concern, the first being the limited liability of members. Because an LLC has elements of both a corporation and partnership, it can, depending on the facts, be treated for tax purposes as either a corporation or a partnership. When the LLC is taxed as a partnership, its income is passed to its members and double taxation is avoided. On the other hand, when an LLC is taxed as a corporation, its income is taxed twice, first upon being earned and second when distributed to its members as dividends. It is almost always better for an LLC to be taxed as a partnership so as to avoid the double taxation.

Regardless of how a LLC is treated for tax purposes, be it as a partnership or as a corporation, the members of the LLC will not have personal liability for the debts of the company.

Federal Tax law changed dramatically in 1997. As of January 1, 1997 all newly formed LLC’s with two or more members will be treated as a partnership for tax purposes unless the LLC elects corporate tax treatment either as a C corporation or S corporation. A single member LLC will be treated as a sole-proprietorship for federal tax purposes. This is a complete reversal of prior federal tax law. Prior to 1997, an LLC was taxed as a corporation unless it could prove to the IRS that is should be a partnership. In order to prove that a pre-1997 LLC should be taxed as a partnership it had pass a special four-prong test created by the IRS.

As of January 1997, LLC are automatically given partnership tax treatment unless they specially opt out of it. To opt for corporate tax treatment, the LLC will file a new IRS Form 8832. The election is effective on the date specified in Form 8832 or the date filed if no date is specified. An effective date can even be chosen that preceeds the filing date by up to 75 days. See IRS.

Regulation sec. 301.7701-3(c)(1)(i).

While LLC’s no longer have to pass the IRS’s four prong test for federal tax purposes, many states still apply that test in order to determine if the LLC will get state partnership tax treatment. These states had patterned their tax laws after the federal tax law and have not, as yet, changed their tax law to coincide with the new federal laws. In addition, some states have written the four-prong test into their LLC Acts so that the Articles of Organization filed in those states must address the issues raised in the four prong test.

Because some states still use the IRS four-prong test to determine if an LLC will be treated as a partnership for state tax purposes, this chapter will discuss the four-prong test. The IRS Revenue Rulings on the four-prong test are still persuasive authority for determining whether an LLC will get partnership taxation in a state which still employs the test. If it is not known whether a particular state uses the IRS four prong test in deciding whether to give an LLC partnership treatment, the organizer can go ahead and assume that it does and meet the test, thereby assuring partnership tax treatment for both federal and state purposes. Later if it is determined that the state does not use the four prong test or if state law is changed to do away with it, the company can change the articles or operating agreement any way that it wishes without fear of losing the state partnership tax treatment.

THE FORMER IRS FOUR-PRONG TEST STILL USED IN MANY STATES

The IRS utilized until January 1, 1997, a four-prong test for determining whether an LLC will be taxed as a corporation or a partnership. If an LLC possesses any three of the four following corporate characteristics, it will be taxed as a corporation and not as a partnership:

1. Limited Liability For Its Members. All LLC's will have this characteristic. It is to obtain limited liability for the members and the members elected to conduct business as an LLC.
2. Centralized Management. The states which permit LLC's allow the members to vest the management of the business in certain managing members. When this is done, the management of an LLC assumes the corporate characteristic of a board of directors.
3. Free Transferability of Interests. The right to sell, transfer or convey an interest in a business freely and without restrictions is a corporate characteristic. Such a right is similar to a person being able to sell his stock in a company. If the non-selling members must consent before the new member can participate in the management, then there is no free transferability, and this corporate characteristic would not be present.
4. Continuity of Life. The most important aspect of a corporation is its continuance after the death or withdrawal of one of its shareholders. A corporation, unlike a partnership, does not terminate upon the death of its shareholders. If an LLC is required under the terms of the operating agreement to remain in full effect until its termination date, and even after the death of a member, it will be considered to have the continuity-of-life characteristic of a corporation. If the remaining members must vote to continue the company life,

this corporate characteristic does not exist.

When three of the four characteristics listed above were present, the LLC was taxed as though it is a corporation. It does not make good sense to do business as an LLC unless the company will be treated as a partnership for federal tax purposes. In states which still utilize the IRS test for determining whether the LLC will be treated as a partnership for state tax purposes, if an LLC has any three of the above characteristics, it will be taxed as a corporation. Such taxation would be detrimental to members so care must be taken in deciding which common characteristics the company should share with a corporation.

Another tax concern of an LLC is how its property will be treated for tax purposes. Property which is titled in the LLC name is owned by the LLC, not the individual members. The same is true for property contributed to a corporation or a partnership. A member who contributes property to an LLC relinquishes ownership in the property, and property purchased with LLC funds is owned by the LLC. This company ownership of the property means that creditors of members cannot attach the property. They are limited to attaching the member's interest in the LLC. The property held by an LLC can be legally sold, transferred or conveyed only by the company. The LLC's basis in the contributed property is the basis that the member had before it was contributed.

C. DISSOLUTION OF AN LLC

Dissolution of an LLC is the termination of the LLC and is in fact its legal death. Dissolution usually occurs under the terms of the operating agreement when any of the following occurs:

1. The members holding more than 50% of the voting rights in the LLC vote to terminate.
2. The managing members dissolve the LLC because
   (a) The LLC never issued any shares and thus was never a true LLC.
   (b) The LLC has filed a chapter 7 bankruptcy petition.
   (c) The LLC has disposed of all its assets and hasn't conducted business for several years (usually five years).
3. Creditors successfully file a legal action seeking involuntary dissolution of the LLC in order to have their debts paid through the liquidation of the company assets.
4. The LLC reaches the termination date listed in the Articles of Organization.

The most common reason for the early termination of a company is the death, bankruptcy or expulsion of a member. Unless the operating agreement states otherwise, a company will automatically terminate upon the death, bankruptcy or expulsion of a member.

In the absence of a contrary provision in the operating agreement, voluntary withdrawal of a member will automatically dissolve the company in most states. A few states such as Delaware, Iowa, Maryland, Texas, Virginia and West Virginia permit members to withdraw without dissolving the company if it is not prohibited in the operating agreement. The states of Arizona, Colorado, Illinois and Minnesota permit a member to withdraw even though forbidden in the operating agreement. In a situation where a member withdraws and the company is not dissolved, the member is entitled to the return of his capital. Florida, Kansas, Nevada, Utah and Wyoming each require the return of a withdrawing member's capital within six months unless an earlier date is specified in the operating agreement. Several states, including Arizona, Colorado, Illinois and Minnesota, provide for a reduction of the capital returned to a withdrawing member when the withdrawal was in violation of the operating agreement and caused the company to incur damages. In the absence of contrary intent expressed in the operating agreement, the states of Arizona, Colorado, Delaware, Illinois, Iowa, Louisiana, Minnesota, Nevada, Oklahoma, Rhode Island, Texas and Virginia, state that the withdrawing member is to receive the fair market value of his interest in the company minus any damages cause by a wrongful withdrawal from the company.

After dissolution has been approved or ordered, the LLC must stop doing business except to the extent necessary to complete the affairs of the LLC. When resolution to dissolve is adopted or ordered, the LLC is required to file a certificate of dissolution with the secretary of state where it was formed. Company assets are distributed in the following order of priority:

1. All federal and state taxes are paid.
2. All employee wages and benefits are paid.
3. All secured liabilities are paid.
4. All unsecured liabilities are paid.
5. The remaining funds, if any, are divided among the members in accordance with their percentage of ownership interest in the outstanding membership certificates of the LLC.

The proceeds received by a member in the dissolution of an LLC are a return of the member's investment. Any gain or loss realized by a member as a result of the dissolution is treated as a capital gain or loss. For example, assume that a member had paid $4,000 for the membership certificates. He received $3,000. He had a $1,000 capital loss. If the member received $6,000, he would have a $2,000 capital gain.

All states require LLC's formed under their laws to file a statement of dissolution either before or after the dissolution is completed. Arizona, Florida, Kansas, Louisiana, Maryland, Minnesota, Nevada, Oklahoma, Utah and Wyoming, in addition, require filing a statement of intent when the dissolution is finished. The states of Delaware, Illinois, Iowa, Rhode Island, Texas, Utah, Virginia and West Virginia do not require a first filing stating the intent to dissolve. All states require the final filing when the dissolution is completed.

Some states require the creditors of the company to be given specific notice of the intent to dissolve the company. For instance, Kansas requires the company to mail each creditor notice of the dissolution within 20 days of filing the intent to dissolve.

D. LAWSUITS

An LLC is a legal entity, but it needs an individual to file any lawsuit on its behalf because it is an artificial entity. When the management of the company is reserved by the members, a suit can only be brought by a member after a majority vote of the members. An exception to the majority vote requirement for filing suit may exist if there is a conflict of interest among the members or some members are breaching their fiduciary duties. In this situation, the nonagreeing members are excluded from the voting and only the votes of the disinterested members will be considered. If the suit is commenced and it is later found that the members whose votes were ignored were not in violation of their fiduciary duties and had no conflict of interest, the persons bringing the suit can be held personally responsible for any damages caused by virtue of the suit. When a suit is brought by virtue of a majority vote of all members, no member will be personally liable for any damages that might result to the company. When the company is being managed by managing members, it is the managing members who have the authority to file suit on behalf of the company. A manager is bound by a fiduciary standard of care as a reasonable and prudent manager in making a decision to commence a lawsuit.

A member who makes an unauthorized or improvident suit that violates the fiduciary standard of care is liable. Where a member files suit without the authority of the other members, the company is nonetheless bound by the decision or settlement. Not to have the company bound would open the possibility of multiple suits on behalf of the company. The company may sue a member for any damages the company suffered from the member bringing an unauthorized suit or settling one improperly.

CHAPTER THREE

HIRING STAFF

I. INTRODUCTION

From the moment a law firm decides to hire employees, its life will never be the same. In the hiring, promotion and compensation of employees, a law firm is no different under the law than any other type of private employer. Congress has passed employment laws that impose somewhat onerous and often ridiculous hiring restrictions. The result is that employers, including law firms, can find themselves totally at the mercy of unscrupulous employees or prospective job applicants who file frivolous employment complaints. In addition, the regulatory agencies seldom side with the employer.

A national television news show devoted an entire program to an example of this plight during the 1992 Presidential campaign. A small employer in Illinois with about 50 employees was charged by the Federal government's Equal Employment Opportunity Commission with discrimination against a black woman because she had not been hired for a job. The employer's business was located in a Hispanic part of town. All of the employees were minorities. The only white person was the boss. The number of employees had varied in the past. Many employees would come and go. The employer had other black employees. The Equal Employment Opportunity Commission concluded that given the demographics of the area, the employer should have had more black employees and ordered him to pay a fine of $100,000. There was no proof of discrimination, only the imposition of the demographic study and the agency stated the study was not a requirement of proof. The show even interviewed former black employees who all stated they had never known of or felt discrimination or been treated unfairly on the job. The employer had offered the woman a job but she refused. She chose instead to receive the government agency's award for lost pay for not being hired.

In our society, a terminated employee or an unsuccessful job applicant has nothing to lose by filing a false complaint alleging discrimination. Most complaints are not required to be "verified under penalty of perjury." As such, the most outlandish claims can be made. In fact, there are people who deliberately apply for a job with the hope of being rejected so they can file a discrimination suit. After the suit is filed, the person offers to settle for an amount considerably less than the employer would have to spend defending himself against the worthless complaint.

Employment law is not now nor ever has been settled. Every state and the federal government have their own laws regulating employment relations. A corporation operating plants in several states will have problems peculiar to each state. Such corporations must be careful to obey all states laws and not give unequal treatment to their employees in the different states because of their differing state laws.

The penalties for violating labor laws can be astounding. In a case involving sex discrimination, an insurance carrier paid over $250,000,000,000 in settlements. Courts can go back years and make awards for hundreds of people regarding past conduct. It is absolutely imperative that an employer know, understand and follow the law. Ignorance and good faith mistakes are not sufficient defenses to violations of employment law.

This chapter instructs a law firm how to hire competent, professional and decent employees without violating state or federal law. Toward that end, it touches upon the major considerations of employment law an employer must know.

II. NONDISCRIMINATORY QUESTIONS THAT AN EMPLOYER MAY ASK

An employer has the right to seek the most qualified person for a job and to establish job-related requirements for it. The employer is permitted to ask questions and obtain certain personal information to be used in making employment selection and job assignment decisions. The tests for the appropriateness of a certain question are whether or not it:

1. Will result in disproportionate rejection of members of a protected group, or
2. Is a valid predictor of successful job performance.

An employer is prohibited from making any nonjob-related inquiry that may directly or indirectly limit a person's employment opportunities because of race, color, religion, national ancestry, physical handicap, marital status, sex or age (for adults).

An employer is not permitted to ask a woman her maiden name. Such information is considered irrelevant to job performance and an unnecessary intrusion into her privacy. Also asking such a question may tend to stigmatize an unmarried woman or perpetuate stereotypes that a single woman may get married and quit while a married woman is a more stable employee. Appropriate questions that can be asked instead are "Have you ever used another name?" or "Is any additional information necessary relative to a change of name, use of an assumed name or nickname necessary to enable a check on your work or educational record? If so, please explain."

The employer is permitted to ask the applicant for his place of residence. Such information is necessary for the ordinary operation of the business. The employer has a legitimate reason for wanting that information to be able to contact the individual when necessary and to maintain required tax and governmental records. The employer has no valid business reason for asking whether an applicant owns or rents a home. Such a question may have the effect of discriminating against a job applicant who is a renter because the employer may feel a person owning a home would be less willing to relocate if a better job comes along. An employer may incorrectly view a person owning a home as being more stable and reliable than a renting employee.

There are conflicting laws regarding the questions that an employer may ask a job applicant regarding citizenship and birthplace. It is illegal to discriminate against a person because of citizenship or national origin. Yet, it is equally illegal to hire an illegal alien. The problems facing an employer hiring aliens and the necessary compliance provisions are such that an employer doing so must ensure the applicant is legally permitted to work in America. An employer should never ask an employee the following questions:

1. Are you a citizen?
2. What is the citizenship of your spouse, parents, brothers, sisters, uncles or aunts?
3. Where were you, your parents and spouse born?

An employer may not require the applicant to provide proof of naturalization, a green card or work permit prior to the decision to offer the person a job. An employer may ask the following question, "Can you, after employment, submit verification of your legal right to work in the U.S.?" The employer may make a statement that proof of the right to work in the United States may be required after a decision is made to hire the applicant.

It is against the law to ask questions that are designed to discover an applicant's national origin. Questions that have been held to be illegal are:

1. What is your, your spouse's and your parents' nationality, lineage, ancestry, national origin, descent, or parentage?

2. What is your mother tongue?

3. What is the language that you most commonly use?

4. How did you learn to read or write the foreign language?

If a foreign language is necessary or relevant for the job, an applicant can be asked if he reads, writes or speaks a language other than English.

Most states make it illegal for an employer to ask an applicant about any arrests that the applicant may have suffered. Such information is considered by those states as irrelevant and an intrusion into the job applicant's right of privacy. Arrests that did not lead to criminal charges being filed are usually not public records and thus not discoverable by the general public. People can be arrested by mistake or in violation of their civil rights or as a material witness. There is no relevance between an applicant's arrest where no prosecution occurred and job performance. Therefore, questions regarding any arrests of an applicant should not be asked.

Questions regarding criminal convictions depend on whether the conviction is a felony or misdemeanor and its relation to job performance. Most states, such as California, permit an employer to ask an applicant the general question, "Have you ever been convicted of a felony?" California and a few other states require a statement to follow this question to the effect that a conviction will not necessarily disqualify an applicant from employment. A few states require the questions to be tailored directly to the job, such as for a druggist, "Have you ever been convicted of a felony regarding drugs?" or for a job requiring a driving license, "Have you ever been convicted of a felony regarding a motor vehicle?" Many states, such as California, do not permit an applicant to be questioned about misdemeanor convictions. In California, many misdemeanors would be only infractions in most other states, such as fishing without a license or taking a sign down without a permit. In any event, most states do not consider questions about misdemeanor convictions legal.

Questions regarding the refusal or cancellation of a bond are illegal in California. Most states would permit such questioning if they were tailored to a job that required bonding. For example, if bonding is required for a job such as a cash register operator, the employer might be able to ask, "Have you ever had a bond cancelled for a cash registering job?" A better action would be for the employer to state that bonding is necessary for the position. The bonding company would then probably discover any past rejection or cancellation without involving the employer in any illegal invasion of the applicant's right of privacy.

An employer should be careful inquiring about an applicant's military service. The information sought could lead to charges of age discrimination or national origin discrimination. Other questions that should not be asked are:

1. General questions about military service such as dates and types of discharge. It might be possible to calculate the applicant's age from this information and

expose the employer to possible age discrimination claims Such questions are against California law. Some states may permit them, but the risk outweighs the benefits.

2. Questions regarding service in a foreign military are against California law. Such questions may lead to discovery of an applicant's national origin and expose an employer to a discrimination lawsuit.

In California, the safe employer should ask the applicant only questions concerning relevant skills acquired during the military service. This is a good practice even in states not as liberal as California to avoid challenges or potential lawsuits for past practices if the law should happen to change.

It is illegal in California to ask an applicant to list all organizations, clubs, societies and lodges to that he belongs. These questions are so general they elicit irrelevant information. Likewise, the questions require the disclosure of information that may serve as the basis for discrimination based on age, religion, sexual or national origins. The theory is that if the employer does not know of the information, he will not be able to use it to discriminate. An employer may ask an applicant the following question, "Please list job-related organizations, clubs, professional societies, or other associations to that you belong. You may omit those that indicate your race, religious creed, color, national origin, ancestry, sex or age."

An employer must be careful when speaking to references furnished by an applicant. In questioning the references, the employer may only ask those questions that could be asked of the applicant. The employer may not ask an applicant's references questions whose answers would elicit prohibited information regarding the applicant's race, color, national origin, ancestry, physical handicap, medical condition, marital condition, age or sex. An employment discrimination complaint can be filed by a job applicant against any employer who asks such improper questions.

An employer is permitted to ask an applicant the name of the person who referred the applicant for the employer's position. The employer may also request the names of the persons willing to provide professional or character references on the applicant. An employer may ask an applicant to furnish the name and address of a person to be notified in case of an accident or emergency. Such information serves a legitimate business purpose of the employer. The employer is not permitted, in California, to ask the name, address and relationship of a relative to be notified in case of an accident or emergency. From this information may be inferred other information of marital status or national origin that is otherwise improper and irrelevant for job performance. For example, if a parent is listed as the relative to be contacted, from that parent's name the applicant's ethnic background might be determined.

III. AGE DISCRIMINATION

Age discrimination is the firing or hiring of an employee based solely on age. To fight age discrimination, in 1967 Congress passed the American Discrimination in Employment Act (ADEA). Under this act, an employer cannot discriminate in the hiring, firing or promotion of employees between 40 and 65 years of age. In 1978, the act was extended to most employees up to 70 years of age with the following exceptions:

1. Executive or high-level policy-making employees.
2. College or university employees.
3. Bona fide occupational qualifications such as airline pilots retiring at 65 years of age.

There have been significant and well publicized cases in the last few years where employees who were discharged because of their age have recovered huge awards in court.

Age discrimination is against both state and federal law. Yet some jobs may legally have age limitations: airline pilots who must retire at age 65 or a bartender in a state where the legal age to drink is 21. Age questions that are illegal or dubious and should be avoided include:

1. What is your age?
2. What is your birth date?
3. What are the dates of attendance or completion of elementary or high school?
4. General questions that are designed or tend to identify applicants as being over 40 years of age.

Questions that do not promote age discrimination are:

1. If hired can you show proof of age?
2. Are you over 18 years of age?
3. If under 18, can you, after employment, submit a work permit?

An employer may make a statement that employment is subject to verification that the applicant meets legal age requirements. Age discrimination for a job is permitted when the type of job requires exceptionally good health. If the risk to the public increases as the employee ages, the validity of an age limit for employment or for mandatory retirement also increases. Federal courts have upheld the mandatory retirement of airline pilots at 65 years of age by recognizing that pilots of that age have more strokes and heart attacks than younger pilots. A pilot having a heart attack may result in a plane crash.

IV. EQUAL PAY FOR EQUAL WORK

The Federal Equal Pay Act applies to nearly all employers in the United States. Under the Act, employers must pay the same amount to men and women working under similar conditions and doing jobs that require similar skills, effort and responsibility. Salary differentials based on nonsex reasons such as seniority or work performance are still permissible. Job titles are not dispositive in determining if the work done by men and women are similar. The actual duties need not be identical but they must be substantially equal in order for the Act to apply.

The Equal Pay Act is administered by the Equal Employment Opportunity Commission (EEOC) at 2401 E. Street, N.W., Washington, D. C. 20506. If the EEOC decides not to act on a complaint filed against an employer, the employee will have two years to file a lawsuit for an equal pay violation or three years for intentional discrimination. The court can award back pay, court costs and attorney fees.

V. INDEMNIFICATION

In most states an employer cannot require an employee to indemnify (reimburse) the employer for torts committed during the normal course of employment. Some employers as a condition of employment require employees to agree to pay all claims and judgments (indemnify) that other persons may have against the employer as a result of the employee's actions. Example: An employee is involved in a car accident while running a job errand. The employer is sued because the accident occurred while the employee was performing his job. An indemnification requirement for employment would force the employee to pay the judgment against the employer.

Employment contracts requiring employee indemnification usually violate both the state's labor code and public policy. An employee is by law an agent for the employer, and the employer is responsible for what the employee does in the course of employment. An exception that might permit indemnification: the employee commits an intentional tort. Most states will permit the employer to sue the employee for reimbursement for the damages that the employee caused by his tort.

VI. DISMISSAL FOR ALCOHOLISM

Alcoholism is not considered a handicap under the Federal Rehabilitation Act or in most states. In most states it is permissible to fire an alcoholic employee. The reason used for the firing when work product is not affected is the anticipated future medical expenses caused by the alcoholism.

A few states, such as New York and Ohio, have laws that prevent an employee from being fired for alcoholism unless the employee is unable to perform his duties safely and properly. A person fired or adversely treated by an employer because of alcoholism can get information about his rights from the National Council of Alcoholism at 733 Third Avenue, New York, New York 10017. Some states, such as Louisiana, distinguish between the chronic alcoholic (who is specifically excluded under the definition of handicapped: is not considered handicapped) and former alcoholics. Since former alcoholics are no longer chronic alcoholics, they are considered handicapped. On the other hand, both California and Texas specifically exclude alcoholism as a physical handicap under their law.

The recently enacted Americans with Disabilities Act (ADA) may extend handicap protection and the requirement of reasonable accommodation by the employer to alcoholics. As this area of law develops, law firms as employers will be able to determine the extent of the reasonable accommodation that the act imposes.

VII. SEXUAL HARASSMENT

Sexual harassment as defined by the Equal Employment Opportunity Commission pertains to either physical or verbal conduct and exists when:

1. Submission to the conduct is made either explicitly or implicitly a condition of employment,

2. Submission to or rejection of such above condition is used as a basis for employment decisions affecting the individual, or

3. Such conduct substantially interferes with an individual's work or creates an offensive work environment.

Once an employer is informed of sexual harassment and does not take sufficient corrective action, he can be sued in federal court or have a complaint filed with the EEOC. A responsible employer will not tolerate sexual harassment of employees at work.

Sexual harassment does not require overt contact by one person to another. There have been many lawsuits where women have sued other women for creating a hostile work environment. These women have claimed that the other women have caused them severe emotional distress by using explicit sexual or profane language. The Ninth Court of Appeals, that covers the west coast, has held that the test to be used in determining whether any conduct is harassment is the "reasonable woman" standard: if a reasonable woman would be offended, it is harassment regardless of whether the average reasonable man would consider it harassment.

In 1994, a federal jury in San Francisco awarded a former legal secretary $50,000 in compensatory damages, $225,000 punitive damages against the attorney and $6.3 million (later reduced to $3.5 million by the judge) in punitive damages against the law firm in an action for sexual harassment. This case signifies that juries are far more willing to assess large punitive damage awards against law firms than against ordinary employers. The huge damages award in this case against the law firm in relation to the relatively small compensatory damages and low punitive damages against the attorney should cause all law firms to reevaluate their grievance procedures to assure that no sexual harassment is practiced in the office.

VIII. WORKER'S COMPENSATION

Worker's Compensation is a state sponsored insurance program in that each employer must participate. It provides insurance coverage for all employees who sustain injuries on the job. The program provides cash benefits and medical care for workers who become disabled by injury or sickness related to their job. If death results from the job related injury, benefits are paid to the surviving spouse and dependents. Injured employees face a disadvantage because the program bars them from suing their employers for the injuries suffered on the job. An injured worker is not precluded from suing third parties for injuries suffered on the job, only from suing the employer.

Once a firm hires an employee, the employer becomes responsible for paying all worker's compensation, disability and social security payments. If these payments are not made, several years later they may come back to haunt the person. An example is the Zoe Baird case. Ms. Baird was nominated by President Clinton to be the U.S. Attorney General. It was discovered that she had employed undocumented aliens and had not made the required social security and other withholding payments for the employees. The hue and cry from the public regarding this breach of the law by someone who was to be the top law enforcement officer of the nation resulted in her name being withdrawn from consideration.

IX. OSHA

The national Occupational Safety and Health Administration (OSHA) was created by the 1970 Occupational Safety and Health Act. An employer may be subject to civil fines of $20,000 with criminal sentences of one year per violation. OSHA exists to assure that the workplace is run in a safe manner. Most states have their own state OSHA and both state and federal work together to assure workplace safety. Complaints about OSHA violations are kept confidential upon request. Federal complaints can be filed at the United States Department of Labor, OSHA, 200 Constitution Avenue, N.W., Washington D.C. 20120. Each employer should contact OSHA and request their handouts regarding information that all employers are required to post at the job site.

X. OVERTIME

The Fair Labor Standards Act requires that employees be paid overtime pay of at least one and one-half times their regular pay when they work in excess of 40 hours per week. Employers are not permitted to average an employee's hours over two or more weeks to avoid paying overtime. Not all employees are covered by the Act. Executive, professional and administrative personnel are not covered by the Act as well as some employees of small businesses.

The Act is administered by the Wage and Hour Division of the U.S. Department of Labor. Complaints should be filed in the nearest office listed in the telephone book. Upon request, that division will provide a copy of its pamphlet "Handy Reference to the Fair Labor Standards Act."

XI. AT-WILL EMPLOYMENT

Most employment in the United States is done without executing a written contract. Termination of such employment is therefore "at the will" of the employer. Unless state law requires grounds for discharge of an employee, an employer may fire an employee who does not have an employment contract at any time and for no reason provided the discharge is not for a discriminatory reason.

The only limitation on an at-will employer is that the employer may not fire an "at will" employee for an illegal discriminatory reason such as age, sex, religion or natural origin. California is in a minority of states that will find an implied contract not to fire an employee without just cause if the employer says or does anything that creates the reasonable belief that discharge will only be for cause. The implied contract theory used in California is not followed in most states.

XII. CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 pertains to discrimination in employment. The key provisions of the Act permit:

1. Compensatory and punitive damages against an employer for

victims of intentional discrimination based on sex, religion, disability, race or natural origin. Damages are capped based on the size of the employer.

2. Jury trials in cases involving compensatory and punitive damages.

3. An easier burden of proof by the plaintiff.

4. An expansion of existing law to cover racial harassment and discharge on the job.

Under the Civil Rights Act of 1991, the Rehabilitation Act and the American with Disabilities Act were amended to permit victims of intentional discrimination on the basis of sex, disability or religion to sue for compensatory or punitive damages. Victims of racial discrimination were already permitted to sue for such damages under Title 42 U.S.C. Section 1981. Recovery of the above damages is not permitted in cases of unintentional discrimination due to the impact of neutral employment practices.

Plaintiffs may recover both compensatory and punitive damages for violation of the Civil Rights Act of 1991, but punitive damages are not recoverable from a government agency or political subdivision. In order to get punitive damages, it must be shown that the employer acted with malice or reckless disregard of the employee's civil rights. Recovery for both compensatory (future pecuniary losses, pain and suffering, etc.) and punitive damages is limited by the size of the employer as follows:

MAXIMUM RECOVERY	NUMBER OF EMPLOYEES
$ 50,000	15-100
$100,000	101-200
$200,000	201-500

$300,000	501 or more

There is no limit on compensatory damages for past pecuniary losses, nor are damages suffered as a result of racial discrimination limited under section 1981 of Title 42 U.S.C. 1981. As strange as it seems, prior to the Civil Rights Act of 1991, while it was unlawful to discriminate on the basis of race in hiring and promotions, it was not unlawful to harass an employee based on race. The United States Supreme Court had held that previous civil rights laws did not protect workers from racial discrimination of the job.

The 1991 Civil Rights Act now permits claims for racial discrimination in the making, performance, modification and termination of employment contracts as well as the enjoyment of all benefits , privileges, terms and conditions of the contractual relationship. In other words, an employer is no longer permitted, under federal law, to harass employees because of their race. The 1991 Civil Rights Act makes it easier for an employee to maintain a legal action for an alleged civil rights violation in employment. Under the Act, once an employee demonstrates that a particular practice by an employer causes a disparate impact on minorities and women, the burden of proof shifts to the employer to justify the practice.

The employer is required in such cases to show that the challenged practice is job related for the position in question and consistent with business necessity. The employee may also prove unlawful disparate impact by showing that a less discriminatory alternative is available and the employer refuses to adopt it.

Prior to the 1991 Civil Rights Act, many employers, specifically governmental agencies, routinely adjusted upward the employment test scores for minorities. This procedure was called gender or race norming. Supposedly these practices were intended to adjust for the fact that women and minorities were not exposed to the educational system to the extent of white males. Had they been, the theory went, they would have actually achieved these higher scores. The Civil Rights Act now prohibits race and gender norming. In December 1991, the federal government prohibited state employment agencies from increasing the scores of minority applicants on federally sanctioned aptitude tests.

Mixed motive discrimination exists when an employer acts, at least in part, for a discriminatory reason but proves that it would have reached the same decision based on nondiscriminatory reasons. Under the 1991 Civil Rights Act, when the employer shows in a mixed motive case that the same result would have been taken for nondiscriminatory reasons, the court may prohibit the employer from considering the discrimination motive in the future, award declaratory relief, attorney fees and costs. In such cases, the employee still may not recover damages, reinstatement or promotion.

Prior to the 1991 Civil Rights Act, plaintiffs alleging age discrimination had two years from the date of the alleged discriminatory act or three years for willful discrimination to file a lawsuit. The time was tolled for up to a year if the EEOC attempted to get voluntary compliance. By comparison, persons claiming racial discrimination under the 1964 Civil Rights Act only had 90 days to file a lawsuit after the EEOC gave the complainant a letter notifying him of his "right to sue." The Act amends the Age Discrimination in Employment Act (ADEA). The EEOC is now required to notify the complainant on termination of the complaint proceedings. The complainant will then have only 90 days to file suit after receipt of the notice.

Prior to the 1991 Civil Rights Act, plaintiffs could not recover fees over $40 expended for expert witnesses. This made getting a recovery in many cases worthless because it could be absorbed entirely by the expert witness fees. In the alternative, cases went to trial without experts because of the costs involved. The 1991 Civil Rights Act now awards the plaintiff expert witness fees if the plaintiff should prevail.

XIII. PREGNANCY

It is against the law to discriminate against a pregnant worker. Most states require an employer to provide unpaid leave for a pregnant woman for three months. The federal government requires an employer with over 25 employees to offer parental leave for three months after the child is born. It is also against the law for an employer to reduce or take away a woman's seniority while she is on pregnancy leave. Pregnancy is not a disability, so the employer is not required to furnish any disability benefits. A pregnant woman is entitled to sick leave during the pregnancy.

The United States Supreme Court recently held that employers cannot deny women the opportunity to work in an environment that might cause genetically deformed children. In that case, the employer, a battery manufacturer, excluded women from working in areas where they would be exposed to chemicals or materials known to cause birth defects. The employer was concerned with the possibility of having to pay higher insurance premiums to cover the anticipated medical treatment of children born with defects as a result of their mothers' exposure. The court found the argument irrelevant. Since the fathers were exposed to the hazards, the mothers had a right to demand exposure if they wanted it. Regardless of personal feelings in the matter, the Supreme Court has ruled that the employer cannot discriminate, even with the best of intentions and legitimate business motives.

XIV. MANDATORY DRUG TESTING

The United States Supreme Court has upheld mandatory drug testing by employers in two cases. In Skinner vs. Railway Exec. (1989) 489 U.S. 602, the court upheld mandatory drug testing of U.S. Custom Employees who search for drugs or who handle firearms. The Court's decision made it clear: mandatory drug testing is permissible when done for legitimate business and safety necessity. The Court employed a balancing act to determine if the harm sought to be prevented would be accomplished by the drug test. If not, then the testing is denied as an invasion of the worker's privacy. In American Federation of Governmental Employees vs. Thornburgh 720 F.2d 789, U. S. District Court for the Northern District of California denied mandatory drug testing for all prison employees as overboard for security purposes.

The Drug Free Workplace Act of 1988 requires every employer receiving federal grants or contracts to create and implement drug free policies at work. The Act does not require or authorize an employer to conduct drug testing of employees. Most states have implemented laws that govern when an employer can require drug tests.

XV. DISABILITIES

A. HANDICAP DISCRIMINATION

The Federal Rehabilitation Act (the Act) states:

> "No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any activity receiving federal financial assistance."

Under the Act, a handicapped person is any person who has or has had a physical or mental impairment that substantially limits major life activity. Persons with serious illnesses or diseases, such as heart disease and cancer are considered handicapped under the Act. The Act applies to any employer receiving federal financial assistance or any employer having federal contracts of over $2,500. Most states also have laws similar to the federal Rehabilitation Act that preclude discrimination based solely upon a person's handicap.

A handicapped person is any person who was born with or has acquired a physical or mental impairment, has a record of such impairment, or is regarded as having such an impairment, that limits one or more major life activities, such as self-care, performing manual tasks, seeing, hearing, speaking, breathing, and working on a temporary or permanent basis. A physical or mental impairment is any physical disorder, disfigurement, or anatomical loss or limitation of movement, or any mental or psychological disorder acquired as a result of illness, accident or birth.

Under both Federal and California law, AIDS is classified as a physical handicap. Therefore, it is unlawful for an employer to discriminate in employment regarding persons afflicted with AIDS. An employer may not ask an applicant questions that may disclose the AIDS infliction. However, a physical examination for the job may be required that may disclose the AIDS infection. The law is still being developed in AIDS discrimination. Generally, in California, as long as the person can perform the job and the job does not involve food preparation or handling, the employer is not permitted to discriminate because of the presence of the HIV virus. Yet, if the applicant has already begun to have medical problems associated with AIDS, the employer may refuse to hire him. It is still legal to refuse to hire a sick person who may not reasonably be able to do the job or will immediately incur substantial medical treatment.

The Rehabilitation Act was implemented under Title VII of the Civil Rights Act. The Rehabilitation Act contains three main provisions in Title VII that apply to recipients of federal financial assistance, federal contractors and the federal government: sections 501, 503, and 504 respectively. Under section 504, an employer connected with the federal government by virtue of a contract or grant must not discriminate. Regulations promulgated under section 504 prohibit an employer receiving federal funds if he discriminates against handicapped individuals in recruiting, advertising, processing applications, hiring, tenure, promotion, transfer, layoffs, fringe benefits, or in any other manner. Coverage under the Act pertains only to employers with 15 or more employees.

In order to determine if an employer has met the requirements to accommodate a handicapped person's disability, the following elements should be examined:

1. Whether the requirements for all positions for that the handicapped person may be hired, promoted, etc. are legitimate, necessary, equitable and reasonable.
2. Whether the requirements are equally applied.
3. What specific accommodations would be necessary to enable the handicapped person to perform the tasks.
4. What the impact is on the organization in terms of cost or business necessity.

Reasonable accommodation is determined on a case-by-case basis after giving consideration to all of the above factors. The United States Supreme Court has held that an employer is not required under federal law to make substantial or major adjustments to an employment program to allow a handicapped person to participate. If the handicapped person could not reasonably be expected to perform the tasks required to be performed by a typical graduate of the program then the employer is not required to let the handicapped person participate in the program. An "otherwise qualified handicapped person" is someone who is able to meet the program requirements including relevant physical qualifications despite the handicap. While meaningful access to the program must be available to all handicapped persons, the employer is not required to make such substantial changes in the program that the fundamental purpose of the program will be significantly altered or defeated.

B. THE AMERICANS WITH DISABILITIES ACT

The Americans With Disabilities Act (AMDA) was a federal law enacted in 1992. After July 26, 1992, it applied to all employers with 25 or more employees. In 1994 the Act was amended to cover all employers with over 15 employees. The Act requires employers to make reasonable accommodations for disabled employees, both in the hiring process and the workplace.

Under the American Disabilities Act, a person who has a substantial physical or mental impairment is disabled. Under AMDA, a substantial impairment is one that significantly impairs or restricts a major life activity such as hearing, seeing, speaking, breathing, walking, performing manual tasks, caring for oneself or learning. An individual with a disability must still be qualified to perform the essential function of the job with or without reasonable accommodation in order to be covered by the Act and protected from discrimination.

Under the American Disabilities Act, the employer is liable for discrimination if no attempt is made to accommodate a disabled person reasonably in hiring or in performing the job in the workplace. Reasonable accommodation is not defined in the Act. Compliance is intended to be determined on a case-by-case basis. The requirement to accommodate a disabled person reasonably is satisfied when the future accommodation poses an undue hardship on the employer. There will be numerous administrative hearings and court cases needed to determine what constitutes undue hardship on the employer. This is a developing area of law, and it will take specific court decisions to define everyone's rights and duties.

Deaf persons pose their own unique difficulties. The main problems are how to keep the deaf person involved in the business and to be able to communicate with him reasonably. Some companies have addressed these problems by hiring interpreters. Through the interpreters, the deaf employees are able to participate in meetings and interact with other staff. A small company might not have the money or ability to hire such interpreters. Sign language might be a substitute or communication might be through a computer if the cost is not prohibitive.

C. PERMISSIBLE QUESTIONS FOR HANDICAPPED JOB APPLICANTS

Some sample questions that are proper to be asked by a potential employer to a prospective handicapped employee are:

1. Is there any reason that you cannot perform the job or any other position for that you are being considered?
2. How does stress or deadline pressure affect your job performance?
3. Do you have a drivers license? (If necessary for the job)
4. How is your health in general?
5. In an emergency who should be contacted?
6. What are your personal and professional goals?
7. Who referred you to this job?
8. How did you learn of this job?
9. Where did you go to school?
10. Do you have any physical or mental handicaps that might affect job performance in the position for which you have applied or in which you might later want placement?

D. QUESTIONS NOT PERMITTED TO A HANDICAPPED JOB APPLICANT

Unless the following questions relate to a bona fide occupational qualification, they should not be asked:

1. Do you have a mental or physical handicap?

2. How did you become disabled?

3. What special needs or accommodations do you require in order to work?

4. What genetic disorders (epilepsy, multiple sclerosis, etc.) do you suffer?

5. What medication do you regularly take?

6. Do you have a restricted diet?

7. Do you get tired in the afternoon?

8. Can you travel without assistance?

9. Have you ever had a heart attack or seizure of any type?

10. Are there any restrictions on your driver's license?

The significance of the above questions should be obvious. If any of the above questions are asked and the job applicant is not hired, then the job applicant has a prima facie case that the employer illegally discriminated against him. In that event, the employer may face a discrimination lawsuit. In addition, if the employer does business with the federal government, all federal contracts may be terminated. It is not worth the risk for an employer to ask questions that a rejected job applicant can use as a basis for a complaint of invidious discrimination.

E. STATE ACTS

In addition to the Federal laws discussed above, all employers must comply with state handicap laws. For example, a private law school was located in a building that then had only two floors. California law required that the school install an elevator between the first and second floors. The school had no handicapped students or teachers.

Apparently the rationale was that disabled students were discouraged from attending the school because they could not get to the second floor. In reality, the installation was a useless expense the school did not experience a rush of handicapped students to its doors even after the elevator was installed. The money could have been better spent improving the library to better educate students. Yet state law required the elevator, and it was installed.

CHAPTER 4

CLIENT AND CASE MANAGEMENT

I. INTRODUCTION

Client and case management are two sides of the same coin. In order to succeed, an attorney must handle both the client and the case in a competent and professional manner. Without the client, there is no case. The attorney must treat the client in such a way that he will hire the attorney. He must then obtain the information necessary to prosecute the client's action, and he must remain hired. It is only when these foregoing requirements are met that the attorney actually begins the practice of law. Without a case, there is nothing for the attorney to do. Once the attorney has a case, he must manage the case and take it to completion. In litigation the case will end in a judgment or settlement. For transactional work, the case will end in the desired transaction being completed or terminated. In any event, the client comes first, then the case and then the case's management.

II. THE CLIENT

A. THE INTERVIEW

When a client enters a law office, he must be interviewed. The interview is the most important communication that an attorney will have with a client. It is in the interview that the attorney must learn enough from the client to make an informed decision to represent the client or not in the legal matter the client desires.

The interview is also important from the client's standpoint because it is at this point that the client decides whether or not to retain the attorney.

Many attorneys lose desirable clients at the first meeting simply because they have mismanaged the interview process. The interview is important in the practical aspects of law. If the attorney at the interview is not able to attract good clients by convincing them of his ability to represent them competently, he will not be a financial success regardless of the legal proficiency he possesses.

Successful attorneys agree that the best way to decide whether or not to accept a case is to understand fully the facts the situation. The successful attorney will interview the client and record the answers on an interview or questionnaire form. Alternatively, the attorney should provide the client an interview or questionnaire form and request him to complete it. After the client completes the form, the attorney should question the client on the facts and make notes of the client's answers. There are advantages in both tactics. When the attorney questions the client and completes the form, the clients often express appreciation in the organized manner of the attorney. When the client completes the form which is then reviewed by the attorney, clients feel personally drawn into the action and begin to develop a team feeling of unity with the attorney.

If the attorney has a secretary, she can give the client interview form to the client before he sees the attorney. This saves time by permitting the attorney to avoid asking repetitive questions. The point to remember is that the attorney should develop and implement client interview or questionnaire forms for the various types of law he practices. It is not necessary to have forms for all areas, but it will promote efficiency to have them in the areas of law the attorney practices.

It is particularly necessary in personal injury cases, and is important in most other cases, to gather good background information. Important information to be elicited in any questionnaire includes the name of the client, date of the accident or incident and the name of their insurance company (because you may be in a no-fault insurance state and thereby dealing with their insurance company), the name of the other person involved, the name of the other person's insurance company if it is known, and if they were referred by anyone (so the attorney can send the appropriate thank you letter). The attorney will need information about the plaintiff's background, and if there was an accident or incident of some type, how much money they were earning before the incident and how much afterward.

It is beneficial for the attorney to know the client's prior employment for five or six years so he can determine the client’s stability. An attorney must take the client as the attorney finds him. Occasionally the attorney will have a flaky client with a good cause of action. He needs to know everything about the client so he can be prepared to counter the negative items that will be raised against the client.

In auto accidents or civil suits deriving from criminal activity, the attorney will also want to obtain the client's police record. If the client is going to testify at trial and has a prior record, the client could be impeached on it. In such a situation, the attorney might not want to have the client testify in that case. The attorney will want to know about any prior suits or claims, because if the person is litigious and has filed frivolous complaints in the past, the attorney might not want to deal with him. All of this information can be obtained from a complete interview that uses well developed interview forms.

In deciding whether or not to take a client, an attorney should listen for complaints that the person has made regarding former attorneys. Some attorneys are not good and some simply have bad management practices; however, that is not true of all attorneys. A client who complains about more than one prior attorney raises a red warning flag. The attorney should decide if it was really bad luck that the client had a series of bad attorneys or if there is a deep problem with the case or personality of the client that causes problems with attorneys. The attorney should be especially wary and interview in greater depth.

Following this chapter are basic types of client information forms used for bankruptcy, estate planning, auto accidents and premises liability. These forms can be adapted for other areas of law but give a general idea of the type of information that a questionnaire should elicit.

B. ETHICAL DECISIONS IN TAKING A CASE

There is a theory advanced by many social interest groups that attorneys should take any case brought them in good faith even though the attorney might not be paid. Many state bar organizations, such as Nevada, are attempting to implement mandatory pro bono requirements on attorneys licensed in the state. If such programs are adopted, the attorneys in the affected states must comply in order to keep their license. Until a state mandates such a program, the attorney remains governed by the Canons of Professional Responsibility as adopted by his licensing state in determining under what circumstances an attorney can reject a client or a case.

There is an ethical obligation on the part of attorneys in the United States not to reject a case simply because a person is unable to pay a fee. This is the ethical consideration promulgated under the Code of Professional Responsibility 2-24 through 2-30. This obligation intends to be fulfilled by accepting a fair amount of unpopular matters for indigent clients as suggested to in the Code of Ethical Consideration 2-26.

As a practical matter, many attorneys cannot afford to handle a lot of cases without pay for the simple reason that they have to earn a living. Not all attorneys make megabucks each year. Many attorneys work on a salary based on 40 hours a week, and they make between $3,000 and $4,000 per month, so there is not a lot of time or money available to support a great deal of pro bono work.

Trial and appellate courts will often appoint attorneys to represent clients without the attorney's input. Example: An attorney went to court on a civil matter in Bakersfield, California. As soon the attorney walked into court, the judge called the attorney to the bench and gave the attorney a file saying, "This is yours." The attorney did not know what the judge meant, looked at the file and discovered he had just been appointed counsel for a convicted child molester. This was a civil matter where the county was seeking to terminate the man's parental rights. The county claimed the respondent's children had been abused. The attorney found himself representing a thoroughly reprehensible defendant. Still, a defendant is entitled to the best representation he can get. Afterward, the attorney discovered that seven other attorneys had rejected the case. The attorney did the best that he could in the case and adequately protected the rights of his client even though he did not initially want to handle the case or represent the client.

The point to remember is that an attorney can be ordered by the court to represent a client as long as the attorney is paid. In such a situation, unless the attorney has a good reason to refuse, he can be required to do it. The attorney who is representing a client as a result of a court order must be sure to do his very best job or else run the very real risk of being sanctioned. No attorney, even one representing a client that the attorney does not want to represent, can ever deliberately sabotage the client's case.

There are some exceptions to court appointments. If the appointment is going to require the attorney to violate a disciplinary rule or the law in some fashion, the attorney is required to withdraw or decline appointment. Normally, this situation arises in the area of attorney-client privilege the attorney would be using confidential information obtained in representing another client. The attorney simply cannot do that. Likewise, if the court-ordered appointment places an unreasonable and onerous financial burden on the attorney, the attorney has the right to seek refusal on that basis. For example, assume that an attorney is appointed to represent a mass murderer. The attorney knows this trial is going to take six to eight months. As a sole practitioner, the attorney knows that he cannot be away from his practice for that long. The attorney can seek to explain to the court the effects such a long trial will have on his practice. That is a legitimate ground for not being able to represent the client. In contrast, if this appointment is only going to be a one or two-day affair, it will be hard to prove the requisite burden. Another ground for denying a court appointment is that the attorney is so biased against a person that there is no way the attorney can overcome it. This is a hard thing to prove, and it is dangerous to argue because it is an admission that the attorney is prejudiced against someone or against a particular cause. This might affect his getting other work or perhaps induce a judicial sanction later in the attorney's career. An attorney is under no obligation to like the client, but if the attorney's feelings actually inhibit the client's representation, the attorney must bring it forth.

C. DAY-TO-DAY DEALING WITH THE CLIENT

Getting authorization for representation from a client is the first step in a successful practice. Next, the attorney must keep the case. Hopefully, the attorney will develop such a relationship with the client that the client will use him in additional matters and also recommend him to others. In a large law firm, such relationships seldom arise simply because the attorney often does not feel the desire or need to develop such a relationship. For the small office or the sole practitioner, this is bread and butter. A satisfied client is the best advertisement for the small firm or sole practitioner. In the continuing relationship between the small law office and the client, the attorney should engage in basic common sense practices to keep the client informed and develop in the client a team mentality.

The attorney should take steps to keep the client informed on the status of the case. It is the lack of communication between clients and attorneys that is the biggest single complaint against attorneys. Many cases take years to develop and go to trial. During this period, there will be times when nothing happens. An attorney should send a letter to his client at least every 90 days to bring him current on the status of the case. Even if nothing has happened since the last letter, the attorney should still send the letter to keep the client appraised of the status of the case. Clients deeply appreciate this courtesy.

Clients should be sent a statement in their bills detailing what the attorney has done. Some attorneys even send copies of all pleadings both received and prepared by the attorney in the case. This has the advantage of showing the client that the attorney has been working the case. When collecting fees, the attorney should try to coordinate the client's payments to times when the client receives money from the attorney's actions. It is always easier to collect fees when the client is about to receive money and has not had the opportunity to spend it yet. Clients especially like it when the attorney takes time to show what portion of the attorney fees may be tax deductible by the client, such as for estate planning.

The attorney should introduce the client to his secretary and all support staff who will be working on the case. Doing this will reinforce the team spirit that the attorney should be developing. It also has the effect of allowing the client to direct simple procedural questions to the staff and free the attorney to spend more productive time on the case itself.

When the case is over, the attorney should send a letter to the client expressing thanks to the client for having chosen him to handle the matter. This will be especially sensitive in a situation where the case was lost. By neglecting to do it, however, the attorney will create the impression of not caring about the client's welfare. When the attorney has striven to develop a team mentality, the closing letter should be part of it.

Clients, as a practical matter, are less willing to sue an attorney for malpractice if they like the attorney and are considered part of a team. The same exists for doctors. It has been shown by many studies that doctors and attorneys are less likely to be sued even for the most egregious malpractice if the clients personally like the attorneys or doctors. For this reason, if none other, attorneys should take the above steps to become friends of their clients and not just their impersonal representatives.

D. CLIENT INTERVIEW FORMS

The following interview forms are presented hereafter:

1. Automobile Incident
2. Premises Liability
3. Bankruptcy
4. Estate Planning

CLIENT INFORMATION FORM

FOR AUTOMOBILE INCIDENT CASE

CLIENT NAME : ____

CASE NAME: ____

ATTORNEY'S NAME: ____

A. BACKGROUND INFORMATION

1. Name (include all other names once used, i.e. maiden)

____

____

2. Address and Phone Number (home and business)_______________

____

____

____

3. Employer's name, address and phone number:________________

____

____

____

4. Spouse's employer's name, address and phone number: ___

____

____

____

5. Occupation: ____

____

6. Spouse's occupation: _______________________________________

7. Social Security Number: ______________________________

8. Spouse's social security number: ______________________________

9. Former military service (branch and dates of service:

____

____

10. Date and Place of Birth: ______________________________

11. Name of Spouse: ______________________________

12. Date and Place of Spouse's Birth: ______________________________

____

13. Date and Place of Marriage: ______________________________

14. Length of Residency in the State: ______________________________

15. Children: ______________________________

____

____

____

6. Children of spouse (step-children): ______________________________

____

____

17. Grandchildren: ______________________________

____

____

____

18. Grandchildren of spouse: ______________________________

____

____

____

19. Parents and addresses: ____________________________________

____

____

20. Parents of spouse and addresses: __________________________

____

____

B. INCIDENT

1. DATE OF INCIDENT: _____________________________________

2. TIME OF INCIDENT: _____________________________________

3. LOCATION OF INCIDENT: _________________________________

____

____

4. CONDITION OF ROAD: ____________________________________

____

____

5. WEATHER CONDITION: ____________________________________

6. PASSENGERS IN CLIENT VEHICLE (INCLUDE ADDRESS AND PHONE): ____

____

____

____

7. PASSENGERS IN OTHER VEHICLE (INCLUDE ADDRESS AND PHONE): ____

____

____

____

8. WHO WAS THE DRIVER OF THE OTHER VEHICLE? _______________

____

9. DO YOU HAVE AUTOMOBILE INSURANCE? YES ( ) NO ( ).

IF SO WITH WHOM? ____

HAVE YOU REPORTED THE INCIDENT TO YOUR INSURANCE

COMPANY? YES ( ) NO ( ). IF NOT, WHY? ___________________

____

10. WHO WAS THE DRIVER OF THE OTHER VEHICLE? ______________

____

DOES HE HAVE INSURANCE? YES ( ) NO ( ) DON'T KNOW ( ).

IF SO, WITH WHOM? ____

____

11. DESCRIPTION OF INCIDENT: ________________________________

____

____

____

____

12. WERE POLICE OR LAW ENFORCEMENT CALLED TO MAKE A

REPORT? YES (   ) NO (   ). IF A REPORT WAS MADE, BY

WHOM? ____

____

13. WAS ANYONE CITED OR ARRESTED FOR CAUSING THE

INCIDENT? YES ( ) NO ( ). IF YES, WHO WAS CITED AND BY

WHOM? ____

14. WERE PHOTOGRAPHS TAKEN? YES ( ) NO ( ). IF YES, BY

WHOM? ____

15. WITNESSES INCLUDE ADDRESSES AND PHONE NUMBER:

____

____

____

____

16.WHERE ARE THE VEHICLES THAT WERE IN THE INCIDENT?

____

____

17. WHAT TOWING COMPANY TOWED THE VEHICLES? ________________

____

18. WERE AMBULANCES CALLED? YES ( ) NO ( ). IF YES, WHO?

____

C. MEDICAL TREATMENT

1. WHAT IS THE SCOPE OF YOUR MEDICAL INJURY ? _____________

____

____

____

____

2. WHAT IS THE SCOPE OF YOUR PASSENGER'S MEDICAL

INJURY? ____

____

____

3. WHAT IS THE SCOPE OF THE OTHER DRIVER'S MEDICAL INJURY?

4. WHAT IS THE SCOPE OF THE OTHER DRIVER'S PASSENGERS' MEDICAL INJURY?

5. WHAT TREATMENT HAVE YOU BEEN RECEIVING?

6. WHAT TREATMENT HAVE THE OTHER INJURED PERSONS BEEN RECEIVING?

7. WHO HAS BEEN PAYING FOR THE MEDICAL BILLS?

8. HOW MUCH HAVE YOUR MEDICAL BILLS BEEN TO DATE?

____

9. WHAT IS AN ESTIMATE OF WHAT THEIR TOTAL WILL BE?

____

D. LOST WAGES

1. WERE YOU ABLE TO WORK? YES ( ) NO ( ). IF NO, HOW MANY DAYS OF WORK HAVE YOU LOST AS A RESULT OF THIS ACCIDENT?

____

2. DID YOUR SPOUSE LEAVE WORK TO NURSE YOU? YES( ) NO ( ). IF YES, HOW MUCH TIME AWAY FROM WORK? _____________________

____

3. WHAT WAS OR IS YOUR SALARY? _____________________________

YOUR SPOUSES'S SALARY? _____________________________________

DIAGRAM OF THE SCENE OF THE INCIDENT:

CLIENT INFORMATION FORM

FOR PREMISES LIABILITY CASE

CLIENT NAME : ____

CASE NAME: ____

ATTORNEY'S NAME: ____

A. BACKGROUND INFORMATION

1. Name (include all other names once used, i.e. maiden)

____

____

2. Address and Phone Number (home and business)________________

____

____

____

3. Employer's name, address and phone number:__________________

____

____

____

4. Spouse's employer's name, address and phone number: ________

____

____

____

5. Occupation: ____

____

6. Spouse's occupation: ____

7. Social Security Number:______________________________________

8. Spouse's social security number: ___________________________

9. Former military service (branch and dates of service:

____

____

10. Date and Place of Birth: ____________________________________

11. Name of Spouse: ____

12. Date and Place of Spouse's Birth: ___________________________

____

13. Date and Place of Marriage: _________________________________

14. Length of Residency in the State: ___________________________

15. Children: ____

____

____

____

16. Children of spouse (step-children): _________________________

____

____

17. Grandchildren: ____

____

18. Grandchildren of spouse: _____________________________________

____

____

19. Parents and addresses:_______________________________________

____

20. Parents of spouse and addresses: ____________________________

____

____

B. INCIDENT

1. DATE OF INCIDENT: ____

2. TIME OF INCIDENT: ____

3. LOCATION OF INCIDENT: ____________________________________

____

____

4. CONDITION OF PREMISES: ___________________________________

____

____

5. WEATHER CONDITION (IF OUTSIDE OR RELEVANT): ____________

____

6. WHO WAS THE OWNER OF THE PREMISES? ______________________

____

7. WERE THE PREMISES BEING RENTED? YES ( ) NO ( ).

IF YES, BY WHOM? ____

8. DOES EITHER THE OWNER OR LESSEE HAVE INSURANCE?

YES ( ) NO ( ). IF YES, WITH WHOM? ______________________

____

9. DESCRIPTION OF INCIDENT: _________________________________

____

____

____

____

____

10. WERE POLICE OR LAW ENFORCEMENT CALLED TO MAKE A REPORT? YES ( ) NO ( ). IF A REPORT WAS MADE, BY WHOM? ____

13. WAS ANYONE CITED OR ARRESTED FOR CAUSING THE INCIDENT? YES ( ) NO ( ). IF YES, WHO WAS CITED AND BY WHOM? ____

14. WERE PHOTOGRAPHS TAKEN? YES ( ) NO ( ). IF YES, BY WHOM ____

15. WITNESSES INCLUDE ADDRESSES AND PHONE NUMBER:

____

____

____

____

16. WERE AMBULANCES CALLED? YES ( ) NO ( ). IF YES, WHO?

____

C. MEDICAL TREATMENT

1. WHAT IS THE SCOPE OF YOUR MEDICAL INJURY? _____________

____

____

2. WHAT TREATMENT HAVE YOU BEEN RECEIVING? ______________

____

____

____

3. WHAT TREATMENT HAVE THE OTHER INJURED PERSONS BEEN RECEIVING? ____

____

____

____

4. WHO HAS BEEN PAYING FOR THE MEDICAL BILLS? ______________

____

____

____

5. HOW MUCH HAVE YOUR MEDICAL BILLS BEEN TO DATE?

____

6. WHAT IS AN ESTIMATE OF WHAT THEIR TOTAL WILL BE?

____

D. LOST WAGES

1. WERE YOU ABLE TO WORK? YES ( ) NO ( ). IF NO, HOW MANY DAYS OF WORK HAVE YOU LOST AS A RESULT OF THIS ACCIDENT?

____

2. DID YOUR SPOUSE LEAVE WORK TO NURSE YOU? YES( ) NO ( ). IF YES, HOW MUCH TIME AWAY FROM WORK? ______________________

____

3. WHAT WAS OR IS YOUR SALARY? ______________________________

YOUR SPOUSES'S SALARY? ______________________________________

DIAGRAM OF THE SCENE OF THE INCIDENT:

CLIENT INFORMATION FORM

FOR BANKRUPTCY CASE

CLIENT NAME : ____

CASE NAME: ____

ATTORNEY'S NAME: ____

A. BACKGROUND INFORMATION

1. Name (include all other names once used i.e. maiden)

   ____

2. Address and Phone Number (home and business) ______________

   ____

   ____

3. Employer's name, address and phone number: ________________

   ____

   ____

   ____

4. Spouse's employer's name, address and phone number: _______

   ____

   ____

   ____

5. Occupation: ____

6. Spouse's occupation: ______________________________________

7. Social Security Number: ___________________________________

8. Spouse's Social Security Number: __________________________

9. Former military service (branch and dates of service):

10. Date and Place of Birth: ________________________________

11. Name of Spouse: ________________________________

12. Date and Place of Spouse's Birth: ________________________________

13. Date and Place of Marriage: ________________________________

14. Length of Residency in the State: ________________________________

15. Previous marriages for each spouse: ________________________________

16. Children: ________________________________

17. Children of spouse (step-children): ________________________________

18. Deceased Children: ________________________________

19. Grandchildren: ______________________________________

20. Grandchildren of spouse: ______________________________

21. Parents and addresses: ________________________________

22. Parents of spouse and addresses: ________________________

B. PROPERTY

1. Real Property (for each piece of real property state):

a. (1) Type of property: ______________________________________

____

a. (2) Location of property: __________________________________

____

a. (3) Holder and amount of liens on the property: ___________

____

____

____

____

a. (4) Fair market value of the property not deducting for the liens: ____

____

a. (5) Date of purchase and original amount:

____

a. (6) How is title to the property taken? (What does it say on the deed - separate property, joint tenancy, tenancy by the entireties, tenancy in common?): ____________________________

____

b. (1) Type of property: ______________________________________

____

b. (2) Location of property: __________________________________

____

b. (3) Holder and amount of liens on the property: ___________

____

____

b. (4) Fair market value of the property not deducting for the liens: ______________________________

b. (5) Date of purchase and original amount:

____

b. (6) How is title to the property taken? (What does it say on the deed - separate property, joint tenancy, tenancy by the entireties, tenancy in common?): ______________________________

c. (1) Type of property: ______________________________

c. (2) Location of property: ______________________________

c. (3) Holder and amount of liens on the property: ______________________________

c. (4) Fair market value of the property not deducting for the liens: ______________________________

c. (5) Date of purchase and original amount: ______________________________

____

c. (6) How is title to the property taken? (What does it say on the deed - separate property, joint tenancy, tenancy by the entireties, tenancy in common?): ______________________________

____

2. Bank Accounts (including savings and loans and credit unions):

a. Name, address and account number:

____

____

b. Name, address and account number:

____

____

c. Name, address and account number:

____

____

3. Stocks and Bonds:

a. Type and Company issuing: __________________________________

____

b. Amount: ____ __________

c. Date and manner of acquisition (purchase, gift or inheritance:

____

d. Fair Market Value: ____

e. Basis (purchase price or basis on date of gift or inheritance):

4. Insurance:

a. Type:

b. Group, term or whole life:

c. Company and policy number:

d. Amount:

e. Beneficiaries:

5. Safety Deposit Boxes:

a. Location:

b. Box number:

c. Contents:

6. Tangible personal property (list all property worth over $100.00 such as jewelry, tools, cars, boats, etc):

7. Intangible personal property: (list all intangible property

such as money owed, royalties, copyrights and other interests not previously listed:

a. Loans:

(1) (a) Name and address of debtor: ______________________________

____

(1) (b) Amount of loan outstanding: ______________________________

(1) (c) Security for loan (deed of trust, mortgage, collateral:

____

(2) (a) Name and address of debtor: ______________________________

____

(2) (b) Amount of loan outstanding: ______________________________

(2) (c) Security for loan (deed of trust, mortgage, collateral:

____

(3) (a) Name and address of debtor: ______________________________

____

(3) (b) Amount of loan outstanding: ______________________________

(3) (c) Security for loan (deed of trust, mortgage, collateral:

____

(4) (a) Name and address of debtor: ______________________________

____

(4) (b) Amount of loan outstanding:______________________________

(4) (c) Security for loan (deed of trust, mortgage, collateral:

____

b. Other Interests:

1. Type of Interest: ____

---

2. Date and manner of acquisition (gift, purchase or inheritance):

---

3. Basis (purchase price or value or basis at time of gift or inheritance):

---

8. Pensions, IRA's, SEP's, Death and Retirement Benefits (list location, account number and amount of each plan or account):

---

9. Expectancies (list any property that is expected to be received in the future along with the source for inheritances, property settlements or insurance proceeds):

---

10. Debts and Liabilities (list all debts and liabilities along with whether or not the obligation is secured):

---

a. Secured debts:

(1) (a) Creditor and address: ______________________________

____

(1) (b) Account number and outstanding balance: _____________

____

(1) (c) Nature of Collateral: ______________________________

____

____

____

(2) (a) Creditor and address: ______________________________

____

(2) (b) Account number and outstanding balance: _____________

____

(2) (c) Nature of Collateral: ______________________________

____

____

____

(3) (a) Creditor and address: ______________________________

____

____

(3) (b) Account number and outstanding balance: _____________

____

(3) (c) Nature of Collateral: ______________________________

____

b. Judgment Creditor:

b. 1. Case number and amount of lien: ______________________________

____

b. 2. Property which lien attaches: ________________________________

____

c. Unsecured debts:

c. 1. Debts owed under contractual or leasehold agreements:

____

____

____

____

c. 2. Pending lawsuits: ____

____

____

____

____

c. 3. Unsecured loans: ____

____

____

____

c. 4. Damages caused to others: _____________________________________

____

____

____

____

c. 5. Other liabilities: ____

____

____

____

____

C. BANKRUPTCY

1. Date and court where previous petition filed:

____

2. Type of bankruptcy (Chapter 7 or Chapter 13):

____

3. If a Chapter 13, has the plan been completed? If not what remains to complete the plan?

____

____

4. If a Chapter 7, are there any debts being redeemed ratified or affirmed in the bankruptcy action?

____

____

5. If married, has your spouse filed a bankruptcy petition? If so, where?____

____

ESTATE PLANNING QUESTIONNAIRE

CLIENT NAME : ____

CASE NAME: ____

ATTORNEY'S NAME: ____

A. BACKGROUND INFORMATION

1. Name (include all other names once used, i.e. maiden)

   ____

2. Address and phone number (home and business)

   ____

   ____

3. Employer's name, address and phone number:

   ____

   ____

4. Spouse's employer's name, address and phone number:

   ____

5. Occupation:____

6. Spouse's occupation:______________________________________

7. Social security number:_______________________________

8. Spouse's social security number:______________________

9. Former military service (branch and dates of service): ____

   ____

   ____

   ____

10. Date and place of birth:______________________________

11. Name of spouse:____

12. Date and place of spouse's birth: ______________________

____

13. Date and place of marriage: ____________________________

____

14. Length of residency in the state; ______________________

____

15. Previous marriages for each spouse: ___________________

____

____

16. Children:____

____

____

17. Children of spouse (step-children):_____________________

____

____

18. Deceased children: ______________________________________

____

19. Grandchildren: ____

____

20. Grandchildren of spouse: _________________________________

____

21. Parents and address: ____________________________________

____

____

____

22. Parents of spouse and address: ____________________

____

____

____

23. Last Will:

a. Date executed: ________________________________

b . Location of original: __________________________

____

c. Attorney who prepared will, address, phone: ______

____

____

B. PROPERTY

1. Real property (for each piece of real property state)

a. (1) Type of property: ____________________________

____

(2) Location of property____________________________

____

(3) Holder and amount of liens on the property:_______

____

(4) Fair market value of the property not deducting for the liens: ________________________________

(5) Date of purchase and original amount: ___________

____

(6) How is title to the property taken? (What does it

say on the deed? separate property, joint tenancy, tenancy in the entirety, tenancy in common): ____________________

b. (1) Type of property: ____________________

(2) Location of property: ____________________

____

(3) Holder and amount of liens on the property:

____

(4) Fair market value of the property not deducting for the liens: ____________________

____

(5) Date of purchase and original amount: ____________________

____

(6) How is title to the property taken? (What does it say on the deed? separate property, joint tenancy, tenancy by the entirety, tenancy in common):

____

____

c. (1) Type of property: ____________________

(2) Location of property: ____________________

____

(3) Holder and amount of liens on the property: ______

____

(4) Fair market value of the property not deducting for the liens: ____________________

(5) Date of purchase and original amount: ____________

____

(6) How is title to the property taken? (What does it say on the deed? separate property, joint tenancy, tenancy by the entirety, tenancy in common):

____

2. Bank Accounts (including savings and loans and credit unions):

a. Name, address, account number: _____________________

____

____

b. Name, address, account number: _____________________

____

____

c. Name, address, account number: _____________________

____

____

3. Stocks and bonds:

a. Type and company issuing: _________________________

____

b. Amount: ____

c. Date and manner of acquisition (purchase, gift, or inheritance): _____________________________________

d. Fair market value: _________________________________

e. Basis (purchase price or basis on date of gift or inheritance):____________________________________

4. Insurance:

a. Type: ____

b. Group, term or whole life: ______________________

c. Company and policy number: ______________________

____

d. Amount: ____

e. Beneficiaries: ___________________________________

____

5. Safe deposit boxes:

a. Location____

____

____

b. Box number: ______________________________________

c. Contents: ____

____

____

6. Tangible personal property (list all property worth over $100.00, such as jewelry, tools, cars, boats, etc.):

____

____

____

____

____

____

____

7. Intangible personal property (list all intangible property, such as money owed, royalties, copyrights and other interests not previously listed):

a. Loans:

(1) (a) Name and address of debtor: ___________

____

(b) Amount of loan outstanding: ________________

(c) Security for loan (deed of trust, mortgage, collateral):________________________________

____

(2)(a) Name and address of debtor:_________________

____

(b) Amount of loan outstanding: ________________

(c) Security for loan (deed of trust, mortgage, collateral): _______________________________

____

(3)(a) Name and address of debtor:_________________

____

(b) Amount of loan outstanding: ________________

(c) Security for loan (deed of trust, mortgage, collateral

____

____

b. Other interests:

(1) Type of interest: ______________________

(2) Date and manner of acquisition (gift, purchase or inheritance): ______________________

(3) Basis (purchase price or value of basis at time of gift or inheritance): ________________

____

8. Pensions, IRA's, SEP's, death and retirement benefits (list location, account number and amount of each plan or account): ____

____

____

____

____

____

____

9. Expectancies (list any property that is expected to be received in the future along with the source, for instance:inheritances, property settlements or insurance proceeds): ____

____

____

____

10. Debts and liabilities (list all debts and liabilities

along with whether the obligation is secured):

a. Secured debts:

(1) (a) Creditor and address: ____________________

____

(b) Account number and outstanding balance:

____

(c) Nature of collateral: ___________________________

____

(2) (a) Creditor and address: ____________________

____

(b) Account number and outstanding balance:

____

(c) Nature of collateral: ___________________________

____

(3) (a) Creditor and address: ____________________

____

(b) Account number and outstanding balance:

____

(c) Nature of collateral: ___________________________

____

b. Judgment creditor:

(1) Case number and amount of lien: _______________

____

(2) Property which lien attaches: _________________

____

c. Unsecured debts:

(1) Debts owed under contractual or leasehold agreements: ______________________________

____

____

(2) Pending lawsuits: ______________________________

____

(3) Unsecured loans: ______________________________

____

(4) Damages caused to others: ______________________________

____

(5) Other liabilities: ______________________________

____

C. ESTATE PLAN

1. Guardian for children:

a. Name of children: ______________________________

____

b. Name of guardian: ______________________________

c. Address of guardian ______________________________

____

d. Guardian of person____ estate____ or both____

e. Bond waived____ bond required____

f. Name of alternate guardian: ______________________________

g. Address of alternate guardian: ______________________________

____

h. Guardian of person____ estate____ or both____

i. Bond waived____ bond required____

2. Executor:

a. Name:____

Address:____

b. First alternate: __________________________________

Address:____

c. Second alternate: _________________________________

Address:____

3. Establishment of a trust:

a. General intended distribution ____________________

____

____

____

____

b. Property included in the trust: __________________

____

c. Beneficiaries of the trust: ______________________

____

____

d. Name and address of trustee: _____________________

____

____

D. SPECIAL INSTRUCTIONS

1. Persons to be excluded and disinherited from the will and/or trust:

   a. Name: ______________________________

      Address: ______________________________

      ____

   b. Name: ______________________________

      Address: ______________________________

      ____

2. Payment of all taxes to come from residual of estate (after specific bequest made? (This is normal) Yes____ No____

3. Specific instructions (funeral wishes, anatomical gifts, etc.):

   ____

   ____

   ____

   ____

E. PROPOSED DISPOSITION

1. Specific gifts of personal property:

   a. Description:______________________________

      To: ______________________________

   b. Description:______________________________

      To: ______________________________

   c. Description:______________________________

      To: ______________________________

d. Description: ______________________________

To: ______________________________

2. Specific gifts of real property:

a. Description: ______________________________

To: ______________________________

b. Description: ______________________________

To: ______________________________

c. Description: ______________________________

To: ______________________________

d. Description: ______________________________

To: ______________________________

3. Charitable gifts:

a. Description: ______________________________

To: ______________________________

b. Description: ______________________________

To: ______________________________

4. Remainder of estate:

a. Single heir:

Name: ______________________________

Address: ______________________________

b. Multiple heirs:

Name: ______________________________

Address: ______________________________

Name: ______________________________

Address: ______________________________

F. OTHER CONSIDERATIONS

1. Are your intended heirs deeply in debt? ________________
____

2. Are the financial affairs of your heirs so bad that they may file for bankruptcy protection? ______________

3. Has a spendthrift trust for the heirs been considered?
____

G. BANKRUPTCY

1. Date and court where filed: _____________________________
____

2. Type of bankruptcy: Chapter 7____ Chapter 13____

3. If a Chapter 13, has the plan been completed? If not, what remains to complete the plan? _____________________
____
____

4. If a Chapter 7, are there any debts being redeemed, ratified or affirmed in the bankruptcy action? ________
____
____

5. If married, has your spouse filed a bankruptcy petition?
____

H. DURABLE POWER OF ATTORNEY (DPA)

1. Health care

   a. Do you want a DPA? _________________________________

   b. How long do you want it to last? __________________

c. Who would be your attorney in fact? ______________

____

d. Who would be your alternate attorney in fact?

____

e. What special medical care do you want if you are unable to make your wishes known? ________________

____

____

f. Are there some types of medical decisions that you do not want to give the attorney in fact authority to make on your behalf ___________________________

____

____

g. Do you want your agent to be able to order an autopsy or make organ donations? ______________

h. Do you want your agent to be able to make the decision to place you in a retirement or nursing home? ____

2. Business affairs

a. Do you want a DPA? ______________________________

b. How long do you want it to last? ________________

c. Who would be your attorney in fact? _____________

____

d. Who would be your alternate attorney in fact?

____

____

e. How do you want your business affairs handled if you are unable to make your wishes known? ________

____

____

f. Are there any special business affairs that you do not want the attorney in fact to handle or become involved in any manner? ______________________

____

____

g. Are there certain acts that you do not wish to give the attorney in fact the authority to do on your behalf ____

____

____

____

I. LIVING WILL DECLARATION

1. Do you want a living will declaration? ______________

2. Do you want extraordinary means to keep you alive if you are unable to make your wishes known? ______________

____

3. Would you consent to the withholding of food and water if you were "brain dead" or in an unrecoverable coma?

____

4. What types of medical treatment would you want and accept if unable to make a decision for yourself? ____________

____

5. Who would you want to make decisions for you if you cannot make them for yourself? ________________________

____

III. FEE AGREEMENTS

A. INTRODUCTION

In Britain trial attorneys are called barristers. Barristers have a pocket on the back of their robes. Historically and traditionally it was considered distasteful for a barrister to represent a client for money. For a barrister to discuss representing a client for a fee just was not done, it was not proper! A barrister would turn his back to his client, and his client would put the amount of compensation in the pocket in the robe. The barrister was required to leave it to the client to decide how much money he should be paid for the work he had done. If he lost, the barrister would usually get nothing because the client of that day (as today) was generally unwilling to pay an attorney for a losing effort. To this day, barrister robes still have that little pocket in them, although today's barristers no longer rely upon the largess of their clients to determine the amount of fees they receive.

Today under both the ABA Code of Professional Responsibility and the Model Rules of Professional Responsibility a professional duty is imposed upon an attorney to reach an agreement (preferably early in the relationship) on the attorney's compensation for the services rendered. Although recommended by the ABA, it is not required that the attorney fee agreement be in writing. Nonetheless, many states, such as California, have enacted specific legislation or have required under their particular Canons of

Professional Responsibility that the attorney have the fee agreement in writing.

As a practical matter, an attorney should have the fee agreement is writing both for business and professional reasons. It is hard to prove in a fee dispute exactly what was or was not covered without the fee agreement being written. In addition, fee disputes harm an attorney's reputation in the community and hamper developing new business. Having a fee agreement in writing that details the services and compensation will reduce fee disputes.

There are three types of fee arrangements: the "hourly" fee (for the work done by an attorney on an hourly basis), the "flat rate" fee (for total services provided) and the "contingency" fee agreement.

A fee agreement should be in writing and signed. It was not previously required; however, it makes a lot of sense, and most state bars now require fee agreements to be in writing. The ABA model rule 1.5(B) actually requires the fee question to be determined very early in the relationship except where the attorney already has an on-going relationship with the client. In such a case, although the attorney can be more lenient, he really should not be when speaking about the attorney fee with the client.

Under ABA Code Disciplinary Rule 2106 and Model Rule 1.5(A), an attorney is subject to discipline for trying to seek an unconscionable fee. There is no definition or set standard for an unconscionable fee. The unconscionability of a fee is determined on a case-by-case basis as to whether or not it offends the sensibilities of the court or fee arbitrator. The court looks at a number of different factors to determine whether or not an attorney has acted unreasonably in an effort to extort more money than is merited for the amount of work done.

There are nine different factors that the court or state bar will investigate to determine whether or not the fee was unconscionable. These standards have been proposed by the American Bar Association and adopted by virtually every state in some form:

1. Time and labor actually performed by the attorney on the case. In a situation where an attorney might charge $5,000 for three hours work, there begins to appear the inference that the fee charged by the attorney was too high.

2. The novelty and difficulty of the question involved. The more novel and difficult a legal question posed by a case, the more time and effort will be required for legal research and preparation. It is more difficult for a client to find an attorney willing to undertake a novel or difficult area of law. If the attorney loses the case, it would tend to hurt the attorney's reputation in both the general and legal community. Example: A client is seeking a product liability suit on a forklift. There are few attorneys with

the experience and expertise in such types of product liability cases. The attorney may charge a higher fee and not be unconscionable.

3. Whether or not working for this client will interfere with doing other profitable work of the attorney. While an attorney is working for one client, he is not able to spend unlimited time working for another client. Lost earnings, in such a situation, are a factor to be considered. If the attorney has no other clients (if the attorney is retired), he might receive less than an attorney who is fully booked because the attorney might be found to have the ability to have replaced the lost income by taking additional work.

4. What other attorneys in the community charge for similar work is compared to the attorney fee to determine if it is significantly higher than the norm. If an hourly rate is less than that of most other attorneys, the attorney has a good case to argue that he did not charge an unreasonable amount. A converse finding can be made if the attorney vastly overcharges from the norm for the same type of legal matters.

In the past, it was fairly common for the county bar association to publish fee agreements or fee rates that were being charged by attorneys in the area. That is no longer done. It created the idea that an attorney charging these amounts was charging a fair fee. It has been held to be a violation of the Sherman Anti-Trust Act for attorneys to agree on a schedule of maximum fees just as it was a violation of the Sherman Act to agree on minimum fees. In like manner, an attorney should not rely upon any published hourly rate schedule he may find.

5. The amount in controversy and the results that were obtained for the client must be considered. If the attorney won $1,000,000 for the client and the bill is only $100,000, that is a factor indicating the fee was not unconscionable. If the attorney won a judgment of $100,000, a bill of $75,000 would tend to indicate unconscionability.

6. Time limitations are also considered. If the attorney had to drop everything he was doing to handle a case quickly because of immediacy, he is entitled to a higher-than-normal fee because of the psychological pressures added to the normal preparation of a trial. For example, in cases that have to be taken over just days before a trial and the attorney is unable to get a continuance, he must drop everything else to work solely on that case. In determining the validity of the fee, the psychological pressures and stresses incurred in immediately leaping into the fray are legitimate factors to be considered in awarding a higher fee.

7. Prior relationships with the client. This is another emotional area because an attorney will often spend more time and effort on a case than the case may warrant. The attorney may be overworking the case and thereby overcharging or not charging enough for the amount of time and effort put into the case.
8. The experience, reputation and ability of the attorney handling the case. The better qualified the attorney is, the more of a specialist, the more the attorney legitimately charges. An attorney, for instance, with two Masters Degrees, an LLM in Law in addition to a law school degree and one in Business, is legitimately able to charge more than an attorney with just a Juris Doctorate degree. Such an attorney would have his fees evaluated not in light of an ordinary attorney's fees but against other tax attorneys doing the same type of work. A client would expect to pay more for a specialist than a general practitioner right out of law school.
9. The final area evaluated in determining whether or not a fee is unconscionable involves the type of fee agreement. While a contingency fee can be higher than an hourly or fixed fee, it still cannot be so high as to shock the conscience of the court.

None of these factors in themselves are usually determinative on the issue of whether an unconscionable fee was charged. It is the cumulative effect of the factors that will determine if the attorney is charging a fee that offends the conscious of the court or the fee arbitrator.

Many states will allow the attorney to have an attorney fee lien on the property of the client. Sometimes the lien is limited to the settlement in a particular case. In some states it will be against all of the property owned by the client until there is a resolution of the fee dispute. Usually in a lien situation, the attorney must thereafter commence a suit within a specific period of time after the lien is filed or the case from which the client received a judgment is concluded. In some states, the lien period for filing suit is six months. In most states, in order to perfect an attorney lien, the attorney must file a notice of lien in the case, and the lien stays in effect until the case is concluded. On conclusion of the case, if the client wins and receives a judgment, the amount of the attorney fees claimed by the attorney lien will be held in trust by the succeeding attorney or the court. A hearing will be conducted to determine the correct amount of attorney fees to be awarded to the attorney asserting the lien.

Law offices have reached the twentieth century concerning collecting money. ABA Formal Opinion 338 permits a lawyer to bill his client and allows payment by credit card. In addition, under Formal Opinion 320, the lawyer may participate in a bar association program that enables clients to finance fees through bank loans. Moreover, a client may give an interest bearing note to an attorney to secure payment of fees. This was permitted in the case of Hulland VS State Bar, 8 Cal. 3D, page 440, 1972. Criminal attorneys in particular take interest-bearing notes along with titles to their client's cars to secure payment of their attorney fees. This all has to be detailed in their fee agreement.

Another area that arises occasionally is whether or not the fee agreement has given the attorney an interest in the litigation itself, that is improper. Disciplinary Rule 5-103 and ABA Model Rule 1.8(J) forbid an attorney acquiring a proprietary interest in the cause of action (the subject matter of the litigation) in that the attorney is representing the client. If an attorney is bringing an action on behalf of a client or is defending an action on behalf of a client, he cannot become a party in the suit by acquiring an interest in the subject matter of the lawsuit. The rationale behind the prohibition appears, on its face, misplaced. It seems that if the attorney had something to gain in the case by owning an interest in the subject matter, the attorney would be even more diligent in his prosecution. Then again, perhaps he would be tempted to be overly diligent and stray into unethical areas. Nonetheless, that is the law, and it must be obeyed.

Any discussion of fee agreements would be incomplete if the attorney did not discuss what happens if he is fired during the middle of representation of the client. If an attorney is on an hourly fee arrangement, there is no problem; the attorney simply submits a bill for the work done, and the client is responsible to pay it. If it is in a flat-fee situation, the attorney can collect for the reasonable value of the provided legal services. An attorney in a flat-rate situation does not collect for the full amount owed under the contract because he has not completed the work. The attorney receives the reasonable value of the rendered legal services based on a percentage of how much of the case was completed by the attorney. If the attorney completed 50% of the case, he should receive half of the agreed fee. Courts or fee arbitrators would look at it that way, or they might put an hourly fee value on the work that had been done and charge accordingly.

In neither event would an attorney ever collect more than he would have received under the actual fee agreement itself. In fact, if another attorney is hired, the courts or arbitrators will reflect on the value of the amount of work the discharged performed versus the amount of work the new attorney had to do to complete the case. In a contingency fee agreement where the attorney has been fired, the discharged attorney is entitled to recover the reasonable value of the provided legal services based on the percentage of the actual award. If the discharged attorney, was to receive 30% of the award and the case is settled for $500,000, there is a $150,000 fee award and the value of the discharged attorney's work is $50,000. The discharged attorney will never get more than the fee agreement defined, and the recovery is also based upon the amount that the other attorney is paid to complete the case.

Every fee agreement should have a clause that bestows attorney fees to the prevailing party in the event of a lawsuit. Some attorneys omit this provision hoping the client will not receive attorney fees in the event of a successful malpractice action. That might be a good reason if the attorney does not have malpractice coverage or practices in a sloppy manner. In most instances, however, the clause will be of benefit to the attorney.

In lawsuits against the client for failure to pay fees, the attorney will receive attorney fees if another attorney is hired to collect for him and if such a clause is present. The reason is that many states will not permit an attorney to collect additional attorney fees for collecting a judgment on his own case. In such states, the attorney who wins the case against the client will not be compensated for the time spent in getting the judgment. When an attorney fee clause is in the retainer agreement, the attorney can hire another attorney to get the judgment and the client will pay the attorney fees when judgment is won.

B. CONTINGENCY FEE AGREEMENTS

The most common exception to the prohibition against an attorney acquiring a proprietary interest in an action being handled by him is that of a contingency fee arrangement between the client and the attorney. An attorney can enter into a contingency fee agreement even though it gives the attorney an ownership interest in the case, specifically a percentage of the judgment or settlement, if the client and attorney should prevail or settle their case. Contingency agreements change the position of the attorney from an employee of the client to a coplaintiff.

A contingency fee arrangement is where the plaintiff, who is the client of the attorney, wins an award and the payment of the attorney fee is a fixed percentage of that award after the costs and expenses of the case have been returned to the attorney. If the client does not win, the attorney gets nothing. In some countries, contingency fee agreements are unethical. In the United States, they are not prohibited. They are tolerated as long as the contingency fee is not considered to be unconscionable. Example: An attorney gets 50% of the case for doing an hour of work and not taking it to trial. Almost every court will find the fee to be unconscionable.

There is a lot of criticism on contingency fee cases, especially in the area of medical malpractice, by doctors. They feel that contingency fee cases tend to bolster the litigation. The other view is that most contingency fee clients do not have the money to pay for a case on an hourly basis. Most attorneys would not take a case that is literally pro bono , and they receive an hourly rate at the end if they win. This situation really does not work for the attorney. For example, in California it usually takes about five years to have a jury trial heard. If an attorney has to wait five years to get paid on a straight hourly basis, he will go bankrupt. They will do better waiting for a straight hourly fee paid in advance.

There are certain cases in that contingency fee agreements are absolutely prohibited. ABA Code Disciplinary Rule 2106 and ABA Model Rule 1.5(D)(2) prohibit contingency fee agreements in criminal cases. Perhaps the reason is the client is not going to get any money after he wins in a criminal case, so there is nothing for the attorney to lien or in which to claim an interest. Another situation involving ethics and Model Rule 1.5(D)(1) where an attorney is not permitted to get a contingency fee is in family law. Example: In a divorce case, the attorney might say, "If we get you a property settlement of $100,000, you have to pay us a 50% fee." There is no rationale. The computation would be suspect.

In some domestic cases, however, a contingency fee would be appropriate. The spouse the attorney is representing will be receiving money based on the amount and quality of work the attorney does, and the more successful the attorney, the more the work is worth. For example, assume that in a family law divorce case that the spouses had property in two states. There was a huge disparity between what the wife said the property was worth and what the husband said it was worth. This was a community property situation where each spouse is presumed to own a one-half undivided interest in all property that was acquired during the marriage except that received by gift, devise or bequest. A contingency fee agreement would have been proper because the amount of money involved was high and the work was extremely complicated and was merited. Still, an attorney cannot enter a contingency fee agreement in a family law matter but must instead use an hourly fee or flat rate agreement.

ABA model rule 1.5(C) requires that a contingency fee agreement be in writing and that the agreement state how the fee is to be calculated, including the percentages the attorney will get if the case is settled before trial, after trial or after an appeal. Litigation and other expenses also are to be defined, including when they are to be deducted, and whether or not there will be deductions for expenses incurred before or after the contingency fee is calculated. With any kind of fee agreement, the attorney is required to give an accounting to his client, whether it be a contingency fee, an hourly fee or a flat fee. There must be an accounting to determine how everything has been paid. A point to remember is that the client is responsible for paying the attorney all court costs and litigation costs that had been advanced. Those are deducted first from any settlement or award. What is left will be split according to the percentages in the fee agreement.

Contingency fee agreements have always been recognized as necessary in the legal profession in order to open the legal system to the poor. For example, a major litigation case concerning product liability can cost $200,000. The cost for such a case is beyond the ability of nearly everyone to pursue on a hourly basis. For this reason contingency fees were developed.

A contingency works by splitting the risks and benefits of the recovery between the attorney and the client. If the client loses a contingency case, the client is only out the costs of pursuing the case. In the same vein, upon loss of a contingency fee case, the attorney loses all of the time and effort spent on the case that could have been directed towards other profit-making activity. The attorney lost the opportunity of earning fees for doing different work for other clients.

Many persons and entities have suggested that states place a ceiling on contingency fees as a method of tort reform. Groups so advocate with the avowed intent of reducing the number of cases filed in the courts. These groups recognize that if attorneys cannot receive a fee equal to the potential of loss, they will not take the case on a contingency fee basis. This has been the case. Whenever limits have been placed on contingency cases, the number of cases taken in those areas have decreased. Attorneys reduce the number of speculative contingency cases they take and concentrate on the case with a guaranteed recovery or those offering an hourly or flat fee.

Whether or not an attorney should seek a contingency fee arrangement with a client depends on the viability of the case, how long it will take to go to trial, the amount of time it will take to prepare and the financial standing of the attorney. By its very nature, a contingency fee case does not bring money into an office until settlement or judgment has been obtained. The attorney could wait several years before getting any money from the case. For this reason, many of the larger law firms do not take contingency cases.

All law firms, regardless of size, should be selective in taking contingency cases. Sometimes it is possible for a sole practitioner to bring in one or more other attorneys as co-counsel on a contingency case, thereby spreading the risk and the rewards. In any event, most attorneys and certainly most sole practitioners lack the financial ability to handle a large contingency fee case alone.

In the same vein, many personal injury attorneys will handle relatively ordinary contingency cases such as auto accidents on a contingency basis because these are relatively easy cases to develop and settle. The attorney must understand that no matter how good the case is, unless sufficient money comes into the office to pay the bills while the case is pending, the attorney should refuse the case. An attorney must earn a living. Following this section is a basic contingency fee agreement for use in California and also for use elsewhere. With modifications, it can reflect the needs of various clients.

C. FLAT RATE AND HOURLY FEE AGREEMENTS

Besides contingency fee agreements, an attorney can also use a flat rate or hourly rate agreement. The basic difference between the two forms of agreement is that the attorney does the work for a lump sum, a flat rate, or the attorney works for an hourly fee, regardless of the amount of time spent on the case. There is effectively a ceiling on a flat rate agreement, whereas the hourly rate has no ceiling for the total job.

A retainer is often obtained by the attorney with an hourly fee agreement and can be used with flat rate fee agreements when the payments are to be made in installments rather than in a lump sum at commencement. A retainer is a deposit to assure representation by an attorney.

There are two types of retainer that an attorney can obtain from a client. A refundable retainer is not earned by the attorney until the attorney has done work for the client. The rate at that the retainer is used is determined by the attorney fee agreement. A fee agreement that charges $150 per hour will use a $600 retainer after four hours of work by the attorney.

Whenever an attorney agrees to represent a client on an hourly basis or a flat rate payable in installments, the attorney should get a reasonable retainer. The fee agreement should contain a clause that requires the client to maintain a fixed minimum in the account. Example: The fee agreement calls for a $500 retainer. Once the attorney bills for $500 of work, the client should contribute $500 to the retainer account to maintain the required balance. The attorney then will always have a minimum amount in the retainer account to cover future work.

It is important to get a retainer before work begins. If a case is not important enough for a client to provide a retainer, the attorney should consider not taking the case. This is a different situation from a contingency case wherein the attorney does not expect to be paid until and unless the case is won. In a hourly or flat rate situation, the attorney expects to be paid regardless. If the client is unable or unwilling to pay a retainer at the beginning, the client may be unable or unwilling to pay the fee after the case is decided. It is important to ascertain at the initial interview if a potential client is the type who will not pay the attorney or attempt to not pay the attorney after the case is done. The best way is to ask for a retainer. The advantage to an attorney is that retainers lessen fee disputes after the case is done. Most fee disputes occur after a case is completed, and the attorney sends the final bill to the client for payment. At this time, the client no longer needs the attorney and is more likely to look for a reason to avoid paying the bill. If the bill has already been paid via a retainer, the likelihood of a fee dispute is greatly diminished. Studies show that attorneys who require their clients to pay and maintain retainers have a lower number of fee disputes than attorneys who do not use retainers.

The following are suggested attorney fee agreements drafted for use in California. These forms can be modified for use to meet the needs of most clients for other states as well.

1. Contingency Fee Agreement
2. Flat Fee Agreement for Family Law
3. Hourly Fee Agreement for Litigation
4. Flat Fee Agreement for Litigation
5. Flat Fee Agreement for Estate Planning

CALIFORNIA CONTINGENCY FEE AGREEMENT

THIS AGREEMENT is made this ______ day of ________________, 19 _____ by and between ____ hereinafter called "CLIENT" and _________________________________ ________________________ hereinafter called "ATTORNEY."

1. Client in consideration of services rendered and to be rendered by Attorney to Client, hereby retains Attorney to represent ____ as Attorney at Law to prosecute, defend and otherwise settle a cause of action against ____

____

____

____

and whomever may be liable, arising out of ______________________

____

____

on the __________ day of __________ , 19 ____ at ________________

____.

2. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to institute appropriate legal proceedings, conduct all necessary discovery and to take all other steps leading to settlement, trial and termination of the litigation.

3. Client promises to pay to Attorney for the prosecution of

the above-entitled matter as an attorney fee the following:

A. 33 1/3% of any amount recovered, if settled prior to commencing trial.

B. 40% of any amount recovered during and after trial, if there is no appeal.

C. 50% of any amount recovered after appeal.

It is understood and agreed by Client that Attorney shall have and is specifically given herein a special and charging lien for attorney fees on any proceeds from a settlement or judgment obtained or payable in this case as a result in whole or in part of the legal work and services of the attorney.

4. It is understood and agreed that all monies expended by Attorney in prosecution of the cause of action shall constitute an advance of costs to be paid by Client. If said costs are not paid prior to settlement or satisfaction of judgment, said costs shall be deducted from client's share of the settlement or satisfaction of judgment and paid to Attorney. In the event sufficient funds are not recovered to reimburse Attorney for any advance of costs, Client shall reimburse Attorney for any sums advanced and yet unpaid.

5. Attorney shall receive the above-mentioned percentage as a fee for said legal services from all money and property of any kind whatsoever that shall be obtained from any said cause of action or from the settlement thereof and from any proceeding in aid of judgment or decree in said action.

6. Attorney agrees to prosecute said cause upon the above basis.

7. Client acknowledges that Attorney has made no guarantee regarding the successful termination of said cause of action or matter and that all expressions relevant thereto are matters of professional opinion only.

8. Attorney acknowledges and agrees that no settlement or compromise of this matter shall be undertaken without the written approval of Client unless pursuant to a written power of attorney executed by Client.

9. Client agrees and promises to pay Attorney a reasonable attorney's fee in the event Client for whatever reason or no reason at all effectuates a substitution of attorneys before settlement or judgment in this matter. In the event Client effectuates a substitution of attorneys after an offer of settlement has been made by the defendants in the above matter, at Attorney's option the attorney's fee is to be the percentage set above if said settlement offer is accepted by Client.

10. Client may discharge and substitute another attorney as Client's attorney at any time and without cause.

11. Any proceedings in the aforementioned litigation after the trial phase of the action are not covered by the terms of this Agreement. Fees for such further proceedings (such as appeal, execution of judgment, writs, etc.) shall be negotiated between Attorney and Client before the same are commenced.

12. Should Client fail to perform his obligations under the terms of this Agreement, Client consents to relieve Attorney as his attorney of record in this action or matter upon Attorney's motion to be so relieved.

13. Client agrees to maintain contact with Attorney and provide Attorney with current addresses and telephone numbers. Client further agrees to answer all correspondence from Attorney and participate in Attorney's prosecution of Client's matter.

14. In the event of litigation over the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

15. The fee set forth in this Agreement is not set either by law or statute and is negotiable between Client and Attorney.

16. The attorney does not carry errors and ommissions insurance.

Or

16. The attorney carries errors and omissions insurance through ____.

IN WITNESS WHEREOF the parties have executed this Agreement on the date first written above.

____

Client

____

Attorney

CALIFORNIA FAMILY LAW FEE AGREEMENT

THIS AGREEMENT is made this ______ day of _________________, 19 _____ by and between ____ hereinafter called "CLIENT" and _________________________________ _________________________________ hereinafter called "ATTORNEY."

This agreement is required by the California Business and Profession Code Section 6148 and is intended to fulfill the requirements of that section.

1. Client in consideration of services rendered and to be rendered by Attorney to Client, hereby retains Attorney to represent Client through Judgment in Superior Court proceedings for dissolution of Client's marriage to _____________________________

____

Included in the representation are all matters relating to property settlement, child custody, spousal support, child support and any other family law matters in the State of _______________.

2. The following legal services that are not to be provided by Attorney under this agreement include but are not limited to the following: review of Client's estate plan and drafting of a will or other estate planning documents, representation in proceedings (e.g. to enforce or modify provisions of the judgment).

Should Client later decide to use Attorney to provide legal services not covered under this agreement, a separate written agreement between Attorney and Client will be executed reflecting the terms under that such additional representation will be undertaken.

3. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to institute appropriate legal proceedings, conduct all necessary discovery and to take all other steps leading to settlement, trial and termination of the litigation.

4. Client will pay Attorney at the rate of ________________ _________ Dollars ($) per hour as attorney's fee for the legal services to be provided in accordance with the terms and conditions of this Agreement. Attorney will charge Client for services performed on Client's behalf in increments of one-tenth of an hour that are rounded to the nearest one-tenth of any hour.

5. Client will pay Attorney a retainer in the amount of ____________________________ Dollars ($) to be received by Attorney on or before ________________________________to be applied against attorney's fees and costs incurred by client. This amount will be deposited in an interest-bearing trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay attorney's fees and costs as they are incurred by Client. Any interest earned will be paid as required by law to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If at the termination of services under this Agreement the total amount incurred by Client for attorney's fees and costs is less than the amount of the

deposit, the difference will be refunded to Client.

Whenever the deposit is entirely consumed, Client will deposit ________________________________ Dollars ($) to be held in trust on the same terms above.

6. Attorney will charge for all activities undertaken in providing legal services to Client under this Agreement, including but not limited to the following: conferences, court sessions and depositions (preparation and participation), correspondence and legal documents (review and preparation), legal research, and telephone conversations. Travel time will be charged both ways.

7. Client acknowledges that Attorney has made no promises about the total amount of attorney's fees to be incurred by Client under this agreement.

8. Client shall provide Attorney any and all collateral that Attorney deems necessary as security in addition to a charging lien on the proceeds from any judgment or settlement obtained as a result of Attorney's work for attorney's fees as set forth hereinabove.

9. All court costs will be borne by Client, and Attorney will charge the same to Client's account as they are incurred.

10. It is understood and agreed that all monies expended by Attorney in prosecution of the cause of action shall constitute an advance of costs to be paid by Client. If said costs are not paid prior to settlement or satisfaction of judgment, said costs shall be deducted from client's share of the settlement or satisfaction

of judgment and paid to Attorney. In the event sufficient funds are not recovered to reimburse Attorney for any advance of costs, Client shall reimburse Attorney for any sums advanced and yet unpaid.

11. Attorney agrees to handle the above-entitled matter on the above-stated terms and conditions.

12. Client acknowledges that Attorney has made no guarantee regarding the successful termination of said cause of action or matter and that all expressions relevant thereto are matters of professional opinion only.

13. Attorney acknowledges and agrees that no settlement or compromise of this matter shall be undertaken without the written approval of Client unless pursuant to a written power of attorney executed by Client.

14. Client may discharge and substitute another attorney as Client's attorney at any time and without cause.

15. Any proceedings in the aforementioned litigation after the trial phase of the action are not covered by the terms of this Agreement. Fees for such further proceedings (such as appeal, execution of judgment, writs, etc.) shall be negotiated between Attorney and Client before the same are commenced.

16. Should Client fail to perform his obligations under the terms of this Agreement, Client consents to relieve Attorney as his attorney of record in this action or matter upon Attorney's motion to be so relieved.

17. Client agrees to maintain contact with Attorney and provide Attorney with current address and telephone numbers. Client further agrees to answer all correspondence from Attorney and participate in Attorney's prosecution of Client's matter.

18. In the event of litigation over the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

19. The fee set forth in this Agreement is not set either by law or statute and is negotiable between Client and Attorney.

20. The attorney does not carry errors and ommissions insurance.

Or

20. The attorney carries errors and omissions insurance through ____.

IN WITNESS WHEREOF the parties have executed this Agreement on the date first written above.

____

Client

____

Attorney

CALIFORNIA HOURLY FEE AGREEMENT

THIS AGREEMENT is made this __________ day of _____________, 19______ by and between ____ hereinafter called "CLIENT" and _________________________________ ___________________________ hereinafter called "ATTORNEY."

This agreement is required by the California Business and Profession Code Section 6148 and is intended to fulfill the requirements of that section.

1. Client in consideration of services rendered and to be rendered by Attorney to Client hereby retains Attorney to represent

____

as Attorney at Law to prosecute, defend or otherwise settle a cause of action against ____ and whomever may be liable, arising out of _______________________

____

____

____

on the _________ day of _____________ , 19 _______ at _____________

____.

2. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to institute appropriate legal proceedings, conduct all necessary discovery and to take all other steps leading to settlement, trial and termination of the litigation.

3. Client will pay to Attorney the sum of ________________ __________________ Dollars ($) per hour for attorney fees for the legal services provided under this Agreement. For any court appearance, there will be a minimum charge of _____________ __________________________ Dollars ($). Attorney will charge in increments of one-tenth of an hour, rounded for each particular activity to the nearest one-tenth of any hour. The minimum time charged for any particular activity will be one-tenth of an hour. Attorney will charge for all activities undertaken in providing legal services to Client under this Agreement, including, but not limited to, the following: conferences, court sessions and depositions (preparation and participation), correspondence and legal documents (review and preparation), legal research, and telephone conversations. Travel time will be charged both ways.

Client acknowledges that Attorney has made no promises about the total amount of attorney's fees to be incurred by Client under this agreement.

4. Client will pay all "costs" in connection with Attorney's representation of Client under this agreement. Costs may be advanced by Attorney and then billed to Client unless the costs can be met from Client deposits that are applicable toward costs. Costs include but are not limited to court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees. Attorney will obtain Client's consent

before incurring any costs for consultants, expert witnesses, or investigators.

5. Client will pay Attorney a deposit in the amount of ___ _________________________ Dollars ($) to be received by Attorney on or before _________________________________ and to be applied against attorney's fee and costs incurred by client. This amount will be deposited in an interest-bearing trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay attorney's fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by client for attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

Whenever the deposit is entirely consumed, Client will deposit ________________________ Dollars ($) to be held in trust on the same terms above.

6. It is understood and agreed that all monies expended by Attorney in prosecution of the cause of action shall constitute an advance of costs to be paid by Client. If said costs are not paid prior to settlement or satisfaction of judgment, said costs shall be deducted from Client's share of the settlement or satisfaction of judgment and paid to Attorney. In the event sufficient funds are not recovered to reimburse Attorney for any advance of costs,

Client shall reimburse Attorney for any sums advanced and yet unpaid.

7. Client shall provide Attorney any and all collateral that Attorney deems necessary as security in addition to a charging lien on proceeds from any judgment or settlement obtained as a result of Attorney's work for attorney's fees as set forth hereinabove.

8. Attorney will send Client monthly statements indicating attorney's fees and costs incurred and their bases, any amounts applied toward the deposit and any current balance owed. If no attorney's fees or costs are incurred for a particular month, or if they are minimal, the statement may be held and combined with that for the following month. Any balance will be paid in full within 30 days after the statement is mailed.

9. Attorney agrees to handle the above-entitled matter on the above-stated terms and conditions.

10. Client acknowledges that Attorney has made no guarantee regarding the successful termination of said cause of action or matter and that all expressions relevant thereto are matters of professional opinion only.

11. Attorney acknowledges and agrees that no settlement or compromise of this matter shall be undertaken without the written approval of Client unless pursuant to a written power of attorney executed by Client.

12. Client is informed that the Rules of Professional Conduct of the State Bar of California require Client's informed written

consent before any attorney may begin or continue to represent Client when the attorney has or had a relationship with another party interested in the subject matter of the attorney's proposed representation of the Client. Attorney is not aware of any relationship with any other party interested in the subject matter of Attorney's services to Client under the terms of this Agreement. As long as Attorney's services are required for Client under the terms of this agreement, Attorney will not agree to provide legal services to any other party without Client's written consent.

13. The Court may order or the parties to the dispute may agree that another party will pay some or all of client's attorney fees, costs or both. Any such order or agreement will not affect Client's obligation to pay attorney's fees and costs under this Agreement, nor will Attorney be obligated under this Agreement to enforce such an order or agreement. Any such amounts actually received by Attorney, however, will be credited against attorney's fees and costs incurred by Client.

14. Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Attorney is a client's attorney of record in any proceeding, Client will execute and return a substitution of attorney form immediately on its receipt from Attorney. Notwithstanding the discharge, Client will remain

obligated to pay Attorney at the agreed rate for all services provided and to reimburse Attorney for all costs advanced.

15. Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under that the Rules permit such withdrawal include but are not limited to the following: (a) the client consents, (b) the client's conduct renders it unreasonably difficult for the attorney to conduct the employment effectively, (c) Client fails to pay attorney's fees or costs as required by his agreement with the attorney. Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided and to reimburse Attorney for all costs advanced before the withdrawal.

16. Although Attorney may offer an opinion about possible results regarding the subject matter of this Agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guaranty.

17. Any proceedings in the aforementioned litigation after the trial phase of the action are not covered by the terms of this Agreement. Fees for such further proceedings (such as appeal, execution of judgment, writs, etc.) shall be negotiated between Attorney and Client before the same are commenced.

18. Should Client fail to perform his obligations under the

terms of this Agreement, Client consents to relieve Attorney as his attorney of record in this action or matter upon Attorney's motion to be so relieved.

19. Client agrees to maintain contact with Attorney and provide Attorney with current address and telephone numbers. Client further agrees to answer all correspondence from Attorney and participate in Attorney's prosecution of Client's matter.

20. In the event of litigation over the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

21. The fee set forth in this Agreement is not set either by law or statute and is negotiable between Client and Attorney.

22. The attorney does not carry errors and ommissions insurance.

Or

22. The attorney carries errors and omissions insurance through ____.

IN WITNESS WHEREOF the parties have executed this Agreement on the date first written above.

____

Client

____

Attorney

CALIFORNIA FLAT RATE FEE AGREEMENT

THIS AGREEMENT is made this ______ day of _________________, 19 _______ by and between _______________________________________ hereinafter called "CLIENT" and _________________________________ _____________________________ hereinafter called "ATTORNEY."

This agreement is required by the California Business and Profession Code Section 6148 and is intended to fulfill the requirements of that section.

1. Client in consideration of services rendered and to be rendered by Attorney to Client, hereby retains Attorney to represent ____ as Attorney at Law to prosecute, defend or otherwise settle a cause of action against ____ and whomever may be liable, arising out of ______________________ ____ ____ ____ on the _______ day of ______________, 19 ______ at _______________ ____.

2. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to institute appropriate legal proceedings, conduct all necessary discovery and to take all other steps leading to settlement, trial and termination of the litigation.

3. Client will pay Attorney the sum of ____________________ ________ Dollars ($) in consideration of legal services performed by Attorney through the trial phase of above-described matter, if any.

4. Of the above-mentioned sum, ______________________________ Dollars ($) shall be paid by Client to Attorney on the execution of this Agreement.

5. The balance of the sum of_______________________________ Dollars ($) shall be paid by Client to Attorney in monthly installments of _____________________ Dollars ($) per month, commencing on the ________ day of ___________________, 199 ___, and continuing thereafter until paid in full.

6. Client shall provide Attorney any and all collateral that Attorney deems necessary as security in addition to a charging lien on the proceeds from any judgment or settlement obtained as a result of Attorney's work for attorney's fees as set forth hereinabove.

7. All court costs will be borne by Client, and Attorney will charge the same to Client's account as they are incurred.

8. It is understood and agreed that all monies expended by Attorney in prosecution of the cause of action shall constitute an advance of costs to be paid by Client. If said costs are not paid prior to settlement or satisfaction of judgment, said costs shall be deducted from Client's share of the settlement or satisfaction of judgment and paid to Attorney. In the event sufficient funds

are not recovered to reimburse Attorney for any advance of costs, Client shall reimburse Attorney for any sums advanced and yet unpaid.

9. Attorney agrees to handle the above-entitled matter on the above-stated terms and condition.

10. Client acknowledges that Attorney has made no guarantee regarding the successful termination of said cause of action or matter and that all expressions relevant thereto are matters of professional opinion only.

11. Attorney acknowledges and agrees that no settlement or compromise of this matter shall be undertaken without the written approval of Client unless pursuant to a written power of attorney executed by Client.

12. Client may discharge and substitute another attorney as Client's Attorney at any time and without cause.

13. Any proceedings in the aforementioned litigation after the trial phase of the action are not covered by the terms of this Agreement. Fees for such further proceedings (such as appeal, execution of judgment, writs, etc.) shall be negotiated between Attorney and Client before the same are commenced.

14. Should Client fail to perform his obligations under the terms of this Agreement, Client consents to relieve Attorney as his attorney of record in this action or matter upon Attorney's motion to be so relieved.

15. Client agrees to maintain contact with Attorney and

provide Attorney with current addresses and telephone numbers. Client further agrees to answer all correspondence from Attorney and participate in Attorney's prosecution of Client's matter.

16. In the event of litigation over terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

17. The fee set forth in this Agreement is not set either by law or statute and is negotiable between Client and Attorney.

18. The attorney does not carry errors and ommissions insurance.

Or

18. The attorney carries errors and omissions insurance through ____.

IN WITNESS WHEREOF the parties have executed this Agreement on the date first written above.

____
Client

____
Attorney

FLAT ESTATE PLANNING FEE AGREEMENT FOR CALIFORNIA

THIS AGREEMENT is made this _____ day of __________________, 19 ______ by and between ____ hereinafter called "CLIENT" and _________________________________ _____________________________ hereinafter called "ATTORNEY."

This agreement is required by the California Business and Profession Code Section 6148 and is intended to fulfill the requirements of that section.

1. Client in consideration of services rendered and to be rendered by Attorney to Client, hereby retains Attorney to represent Client as Attorney at Law to render tax advice and to draft whatever estate planning documents Client wishes to fulfill his estate planning goals. Specifically, Client wants Attorney to prepare a revocable trust, durable power of attorney and living will declaration.

2. Client empowers and authorizes Attorney to take all steps in the matter deemed advisable, namely to receive and review all legal documents of Client.

3. Client will pay to Attorney the sum of ________________ Dollars ($) in consideration of legal services performed by Attorney under the terms of this Agreement.

OPTIONAL

4. The fee for legal services shall become immediately due and payable upon receipt Client of the estate plan.

OPTIONAL

Of the above-mentioned sum, _______________________ Dollars ($) shall be paid by Client to Attorney upon the execution of this Agreement.

5. The balance of the sum of ____________________ Dollars ($) shall be due from Client upon receipt by Client of Client's completed estate plan. A payment plan may be established consisting of monthly installments of ____________________ Dollars ($) per month, commencing upon the __________ day of __________, 19 ____ and continuing thereafter until paid in full.

5 or 6. Client shall provide Attorney any and all collateral that Attorney deems necessary as security for Attorney's fees, as set forth hereinabove.

6 or 7. All court costs will be borne by Client, and Attorney will charge the same to Client's account as they are incurred.

7 or 8. Client will pay all "costs" in connection with Attorney's representation of Client under this Agreement. Costs may be advanced by Attorney and billed to Client unless the costs can be met out of client deposits that are applicable toward costs. Costs include but are not limited to court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees. Attorney will obtain Client's consent before incurring any costs for consultants, expert witnesses, or investigators.

8 or 9. Attorney agrees to handle the above-entitled matter on the above-stated terms and condition.

9 or 10. Client may discharge and substitute another attorney as Client's Attorney at any time and without cause.

10 or 11. Should Client fail to perform his obligations under the terms of this Agreement, Client consents to relieve Attorney as

his attorney of record in this action or matter upon Attorney's motion to be so relieved.

11 or 12. Client agrees to maintain contact with Attorney and provide Attorney with current addresses and telephone numbers. Client further agrees to answer all correspondence from Attorney and participate in Attorney's prosecution of Client's matter.

12 or 13. Attorney will prepare the necessary deed to transfer real property into the trust as one piece of real property. Client is responsible for the recordation of transfer of other real property into the trust.

13 or 14. In the event of litigation over the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

15. The fee set forth in this Agreement is not set either by law or statute and is negotiable between Client and Attorney.

16. The attorney does not carry errors and ommissions insurance. Or

16. The attorney carries errors and omissions insurance through ____.

IN WITNESS WHEREOF the parties have executed this Agreement on the date first written above.

____

Client

____

Attorney

IV. CASE MANAGEMENT

Once the client interview has been conducted, the client hired and a fee agreement executed, the attorney gets to the business of practicing law. The case now has a goal and purpose towards which all of the attorney's legal expertise, education and proficiency is now directed. To achieve the desired goal, the attorney must adopt basic systems for the management of not only this case but all his cases.

A. FILING SYSTEM

The single most important management system in any law office is its filing system. There must be adopted in every office a procedure to quickly and efficiently file and retrieve client files and materials. Simplicity of organization and use should be the hallmarks of any adopted filing system. It is possible to develop filing systems that are so sophisticated that they are impractical and nearly impossible to use by an average person. If a file cannot readily be found, the filing system is inadequate regardless of its complexity. The purpose of a filing system is to organize the law office and the various cases handled by the law firm. There is always the potential of liability for malpractice in losing a document through misfiling. There are many ways to avoid or lessen the potential of misfiling papers.

A filing system should provide both adequate and secure storage for all files, both current and closed. Safety is often an item overlooked by a law firm. Yet, most files and the information in them cannot be replaced if the file is destroyed. This is especially true in will files and on- going litigation. If the exhibits or proofs of these cases are lost or destroyed, it can result in a client's losing the case. Attorneys have been found liable for malpractice for not providing sufficient security for their clients' files. All important and irreplaceable items, such as original client wills, deeds, leases, ownership certificates and other valuable documents that cannot be replaced should be placed in fire-proof safes or kept in a bank safe deposit box. In addition to opening a file for each client's case, the attorney should have stapled inside the folder a large envelope to hold small items, such as receipts or notes that otherwise might be lost.

The basic minimum filing system usually is a numerical system. These file systems usually begin with a set number, such as 1000. A client's file is given a number, perhaps 1005. That is the client's general number. Each subsequent case will have a sub number (a), (b), (c) etc. Example: George Custer retains an attorney to do an estate plan. He is assigned the next available full number: 1327. Later George Custer hires the attorney to incorporate a business. His file is assigned number 1327(a). Later, George Custer hires the attorney to handle a social security claim and that case gets the number 1327(b).

To use the minimum system, there should be a master alphabetic rolodex both on the computer and as a card file that lists each client and the file numbers for each case handled for the client.

There should also be a master numerical cross-rolodex and computer file that lists the file numbers with the clients’ names. In this manner, with only a file number or a name, file information can be located easily to review the case and the client without having to retrieve the file itself.

A more complicated system takes the basic system indexes and uses them to create a topic-law index that lists all files under the areas of law in that they relate. In such a system, there would be, in addition to basic indexes, topic indexes for the different areas of law in that the office had practiced. Example: In a probate index all probate cases are listed by both client name and client case number. The same is done for other fields of law, such as incorporation, bankruptcy, etc. The advantage of this additional system is that an attorney with a probate question can pull up previous probate cases and see how similar matters or questions were handled. This system may not be necessary in a sole practitioner's office where the attorney does all the work and is familiar with all previous work. The sole practitioner can go directly to similar cases without the need of resorting to a topic index. When there are two or more attorneys or a paralegal assisting an attorney, the ability to cross-reference one case with similar cases in the same field can be especially useful for research and document preparation.

B. CASE PREPARATION

Establishing a filing system is the first step in managing an office. Once the system is operating, the attorney can begin assigning case numbers to clients and filing their cases. The next filing issue that arises in case management is the practical aspect of working the case itself. A law office must establish procedures for calendaring all of the activities that must be undertaken in each case. This includes all court appointments, scheduled depositions, discovery due dates, client conferences, client meetings, statutes of limitations, etc.

The most common type of case calendaring uses a tickler system. In the tickler system, the attorney has a rolodex divided into monthly sections. The tickler is an index-sized card with multi-backed carbon sheets. The attorney writes a notation on the card as to what must be done and when, such as preparing interrogatories on July 1 in the Peterson case file 1300 by May 15, reminded monthly. One of the tickler sheets would appear on the first day of each month before July. Each day the attorney or secretary would review the file and check it for tasks to be done that day. The notice is moved to the next day until the matter is attended. By use of the tickler system, the attorney can tell at any one time what matters are still open and need to be addressed. The tickler system is also used to remind the attorney of court appearances, depositions and meetings. Computerized ticklers are now available for attorneys to replace the traditional rolodex.

In addition, but not in place of the tickler system, is the master calendar. Every law office must have a large daily calendar on which everything that must be done on a certain date should be listed. The master calendar accomplishes the same result as a tickler, but it is easier to use because it merely takes a glance toward the wall to see what must be done and when. The master calendar and the tickler are cross-checking devices used to complement each other. The master calendar can also be used on a computer in the same manner as a tickler system.

In working a case, the attorney should use questionnaires to keep track of the case's status. When there is more than one person working on a file, there must be a procedure to keep track of what has been done (so there is no repetition of work) and to assure that nothing is missed on mistaken belief that someone else did it.

The following are sample forms of the types that should be used by every attorney engaged in litigation to assure that all important matters are addressed and are not overlooked. There are also many form books available to attorneys in law libraries and that provide suggested checklists to aid in case management.

1. Case Calendar Schedule
2. Case Discovery Schedule
3. Automobile Accident Management Sheet
4. Opposing Expert Medical Witness Checklist

CASE CALENDAR SCHEDULE

CLIENT NAME: ____

CASE NAME: ____

ATTORNEY'S NAME: ____

FEDERAL DEADLINES

1. COMPLAINT (A) DATE FILED: _______________________________

   (B) DATE SERVED: _______________________________

   (C) METHOD OF SERVICE: __________________________

2. DEADLINE FOR DESIGNATION OF NONPARTIES (90 DAYS FROM FILING OF COMPLAINT): ____

3. DATE ANSWER FILED: _____________________________________

4. DATE CROSS CLAIM OR THIRD PARTY ACTION FILED: _____________ ____

5. DATE CASE AT ISSUE (10 DAYS AFTER ANSWER): ________________

6. TRIAL DATE: ____

7. JURY TRIAL REQUESTED YES ( ) NO ( )

8. DATE DISCLOSURE CERTIFICATE DUE (EARLIER OF 180 DAYS AFTER CASE BECOMES OF ISSUE OR 90 DAYS BEFORE TRIAL DATE): _______ ____

9. SUPPLEMENTAL DISCLOSURE CERTIFICATE DUE (80 DAYS BEFORE TRIAL): ____

10. EXPERT DESIGNATION DUE (80 DAYS BEFORE TRIAL): _____________

11. DEADLINE TO SUBMIT DISCOVERY (65 DAYS BEFORE TRIAL):

____

12. DEADLINE TO OBJECT TO PROPOSED EXHIBITS: ____________________

13. DISCOVERY CUTOFF (30 DAYS BEFORE TRIAL): ____________________

14. ISSUANCE OF SUBPOENAS (30 DAYS BEFORE TRIAL): ______________

OTHER

____

____

____

____

____

CASE DISCOVERY CALENDAR

CLIENT NAME: ____

CASE NAME: ____

ATTORNEY'S NAME: ____

FEDERAL DISCOVERY

1. APPLICABILITY OF RULE 26.1: YES ( ) NO ( )

2. PLAINTIFF'S INTERROGATORIES TO DEFENDANTS:

   (A) DEFENDANT ____________________________________

   SERVED: _____________________

   DUE DATE _______________ EXTENSION ____________

   (B) DEFENDANT ____________________________________

   SERVED: _____________________

   DUE DATE _______________ EXTENSION ____________

3. PLAINTIFF'S REQUEST FOR ADMISSIONS:

   (A) DEFENDANT ____________________________________

   SERVED: _____________________

   DUE DATE _______________ EXTENSION ____________

   (B) DEFENDANT ____________________________________

   SERVED: _____________________

   DUE DATE _______________ EXTENSION ____________

4. PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS:

   (A) DEFENDANT ____________________________________

SERVED: ________________________

DUE DATE _________________ EXTENSION ______________

(B) DEFENDANT ____

SERVED: ________________________

DUE DATE _________________ EXTENSION ______________

5. DEFENDANT'S INTERROGATORIES TO PLAINTIFFS:

(A) PLAINTIFF ____

SERVED: ________________________

DUE DATE _________________ EXTENSION ______________

(B) PLAINTIFF ____

SERVED: ________________________

DUE DATE _________________ EXTENSION ______________

6. DEFENDANT'S REQUEST FOR ADMISSIONS:

(A) PLAINTIFF ____

SERVED: ________________________

DUE DATE _________________ EXTENSION ______________

(B) PLAINTIFF ____

SERVED: ________________________

DUE DATE _________________ EXTENSION ______________

7. DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS:

(A) PLAINTIFF ____

SERVED: ________________________

DUE DATE _________________ EXTENSION ______________

(B) PLAINTIFF ____

SERVED: ________________________

DUE DATE ________________ EXTENSION _____________

8. PLAINTIFF'S DEPOSITIONS:

DEFENDANT ____________________________________ DATE ____________

DEFENDANT ____________________________________ DATE ____________

EXPERT _______________________________________ DATE ____________

EXPERT _______________________________________ DATE ____________

WITNESS ______________________________________ DATE ___________

WITNESS ______________________________________ DATE ___________

WITNESS ______________________________________ DATE ___________

WITNESS ______________________________________ DATE ____________

9. DEFENDANT'S DEPOSITIONS:

PLAINTIFF ____________________________________ DATE ____________

PLAINTIFF ____________________________________ DATE ____________

EXPERT _______________________________________ DATE ____________

EXPERT _______________________________________ DATE ____________

WITNESS ______________________________________ DATE ___________

WITNESS ______________________________________ DATE ___________

WITNESS ______________________________________ DATE ___________

WITNESS ______________________________________ DATE ____________

AUTOMOBILE ACCIDENT MANAGEMENT SHEET

CLIENT NAME: ____

CASE NAME: ____

ATTORNEY'S NAME: ____

RETAINER AGREEMENT: YES ( ) NO ( )

CLIENT INFORMATION SHEET: YES ( ) NO ( )

EXECUTED CLIENT'S MEDICAL RELEASE FORMS: YES ( ) NO ( )

POLICE REPORT ON ACCIDENT

REQUESTED:______________________________

RECEIVED:_______________________________

CRIMINAL COMPLAINT (IF FILED AGAINST EITHER PARTY)

REQUESTED:______________________________

RECEIVED: ______________________________

ACCIDENT RECONSTRUCTION EXPERT TO BE HIRED: YES ( ) NO ( )

NAME: ____

WHEN RECEIVED: ____

PHOTOGRAPHS:

CLIENT: TAKEN ____

OPPOSING PARTY: TAKEN _____________________________________

INJURED WITNESS: TAKEN ____________________________________

SCENE OF ACCIDENT: TAKEN __________________________________

CLIENT VEHICLE: TAKEN _____________________________________

OPPOSING PARTY'S VEHICLE: TAKEN ___________________________

CLIENT'S INSURANCE POLICY: RECEIVED ____________________________

MEDICAL BILLS: RECEIVED ______________________________________

STATUTE OF LIMITATIONS: ______________________________________

SETTLEMENT LETTER TO OPPOSING ATTORNEY: SENT __________________

COMPLAINT (A) DATE FILED: ____________________________________

(B) DATE SERVED: _________________________________

(C) METHOD OF SERVICE: ___________________________

ANSWER (A) DATE FILED: __________________________________

(B) DATE SERVED: _________________________________

JURY DEMANDED: YES ( ) NO ( )

WITNESS INTERVIEWS:

NAME: _______________________________ DATE: ______________

NAME: _______________________________ DATE: ______________

NAME: _______________________________ DATE: ______________

NAME: _______________________________ DATE: ______________

WITNESS DEPOSITIONS:

NAME: _______________________________ DATE: ______________

NAME: _______________________________ DATE: ______________

NAME: _______________________________ DATE: ______________

NAME: _______________________________ DATE: ______________

CLIENT'S MEDICAL RECORDS REQUESTED FROM:

NAME: _______________________________ DATE: ______________

NAME: _______________________________ DATE: ______________

NAME: _______________________________ DATE: ______________

NAME: _______________________________ DATE: ______________

OPPOSING PARTY'S MEDICAL RECORDS REQUESTED FROM:

NAME: ______________________ DATE: ____________

NAME: ______________________ DATE: ____________

NAME: ______________________ DATE: ____________

NAME: ______________________ DATE: ____________

MOTIONS

COMMENTS

OPPOSING EXPERT MEDICAL WITNESS CHECKLIST

CLIENT NAME: ____

CASE NAME: ____

ATTORNEY'S NAME: ____

1. INVESTIGATE PREVIOUS WORK OR TESTIMONY IN CASES FOR DEFENSE AND PROSECUTION.
2. QUESTION TIME SPENT IN ACTUAL EXAMINATION OF CLIENT.
3. QUESTION THOROUGHNESS OF EXAMINATION. WHAT WAS DONE AND HOW WAS IT DONE?
4. WERE X-RAYS TAKEN? If SO, WHERE ARE THEY? HAVE COPIES BEEN PROVIDED?
5. HAS THERMOGRAPHY BEEN PERFORMED? IF SO, WHAT RESULTS AND WHERE ARE PHOTOS?
6. WHAT OTHER TESTS WERE PERFORMED? WHAT WERE THE RESULTS? WHERE ARE THE RESULTS OR REPORTS ON THE TESTS?
7. WHAT TESTS COULD HAVE BEEN PERFORMED BUT WERE NOT? WHY?
8. WHAT TREATISES, ARTICLES, BOOKS OR SEMINARS WERE CONSULTED IN REGARDS TO THIS EXAMINATION?
9. WERE ANY OTHER PROFESSIONALS CONSULTED REGARDING THIS EXAMINATION OR DIAGNOSIS? IF SO, WHO?
10. WHAT MEDICAL REPORTS HAVE BEEN PREPARED REGARDING THE EXAMINATION? HAVE THEY ALL BEEN PROVIDED?
11. WHAT IS THE DIAGNOSIS OF THE PERSON EXAMINED?
12. WHAT IS THE PROGNOSIS REGARDING PERMANENT DISABILITY?

13. WHAT IS THE PROGNOSIS REGARDING REHABILITATION?

14. WHAT IS THE EXPERT OPINION AS TO THE REASONABLENESS AND NECESSITY OF THE PAST TREATMENT?

15. WHAT IS RECOMMENDED AS FUTURE TREATMENT AND REHABILITATION FOR THE PERSON?

16. WHAT ARE THE RISKS AND POTENTIAL BENEFITS FOR FUTURE TREATMENT?

17. WAS YOUR REPORT SUBMITTED TO ANYONE FOR COMMENT AS TO CONTENT OR CHANGES BEFORE BEING ISSUED IN FINAL FORM?

CHAPTER 5

MARKETING OF THE PRACTICE

I. INTRODUCTION

The worst mistake that any attorney can make is to assume that merely opening a law office will guarantee financial success. The days of being a success merely because the person is an attorney is over. Today's society is overflowing with attorneys. To be a success today, the new attorney must promote his practice. In 1976, there was a total of only 46,000 attorneys in California. In 1979, 86,924 new attorneys were admitted in California. In 1995, there were nearly 130,000 new attorneys admitted to practice in California, nearly triple what it was 20 years earlier. The population in California did not triple during those 20 years but the number of attorneys did.

The explosion in the number of attorneys has had a deleterious effect on the practice of law. The law of supply and demand is now a cogent element in the practice of law. A review of the San Francisco Daily Journal on January 9, 1995 reflected the trend of attorney employment in California. There were only 36 jobs listed in the paper as opposed to 115 legal secretary and paralegal positions. In addition, the paper showed that the salaries for new attorneys and attorneys with less than four years experience generally ranged from the low $20,000's to the mid $30,000's which is actually less than the salaries offered five years earlier.

The bottom line is that unless someone graduates in the top portion of a good major law school class, there are going to be problems in getting employment with an existing law firm. The facts show that 60% of all new attorneys admitted within the previous five years had entered private practice.

Traditionally, new attorneys worked as an assistant district attorney or public defender for a few years before entering private practice. This allowed the attorney to develop the legal skills necessary for private practice. Those jobs are simply no longer available. Nearly all government attorney jobs today require several years experience even for the entry level. Exceptions are sometimes made for minority attorneys where affirmative action may apply, but absent that situation there are few of those positions available unless the attorney has experience.

The large increase in the number of attorneys has forced new attorneys in higher numbers than ever before to enter private practice. In addition, the competition with the new attorneys forces more experienced attorneys into price competition. As a result, attorneys must market themselves and their skills as never before.

Traditionally, attorneys did not advertise. In fact, up until the early 1970's attorneys generally were not permitted to advertise. It was considered a breach of professional ethics to advertise. The reluctance for attorneys to advertise is a throw-back to the middle ages. From the middle ages forward, English barristers have had a large pocket sewn on the back of the robes that they wear into Court. The attorneys at the conclusion of the case would turn their backs to the their clients, and the clients would place compensation in the pocket. The barrister could not sue the client over the fee received or not received. It was considered inappropriate for a gentlemen to solicit or argue over payment for services of his profession. This reluctance to advertise or solicit work has continued to this date. Although some attorney advertising is now permitted, it is still the most regulated of any type of professional advertising.

II. ADVERTISING

Marketing a practice involves advertising in all of its various forms. The right of an attorney to advertise is a recently won right and is still highly regulated. Before an attorney undertakes any advertising campaign, regardless of how innocent it may appear, he should understand the limitations on advertising and the case law that has developed on the subject.

The areas of solicitation and advertisement embroil many attorneys with their state bars. Yet these are not areas that lead to malpractice actions against the attorney unless there has been some kind of misstatement about qualifications. Most restrictions on advertising imposed against attorneys are the result of a feeling that it is unseemly (not very professional) for an attorney to advertise. In point of fact, a blanket restriction against advertising works to the disadvantage of the public. Unless an attorney advertises, it is difficult for most lay people to discover whether or not the attorney is qualified to handle a case. It is also difficult to determine who is a good attorney and who is not. It is acknowledged that advertisements can go too far and they can be misleading, but in most instances advertising is correct and limitation on advertising works as a disservice to the public in general.

Prior to the mid-1970's, the 1908 ABA Canons of Professional Ethics absolutely forbade attorneys to advertise or solicit clients in any form whatsoever. This began to change in the 1970's when both public interest groups and the attorneys themselves began to question the wisdom and merit of having such prohibitions. The first case that went to the United States Supreme Court regarding attorney solicitation was Bates vs the State Bar of Arizona, 433 U.S. 350, 1977. It involved the use of print advertising directed to the public. The U. S. Supreme Court used a premarket analysis in rendering its decision and held there is a first amendment right to advertise, but a state can adopt reasonable regulations to assure that the advertising is not false or misleading.

The Bates case was the first time the first amendment rights of free speech were extended to attorneys in their right to commercial speech. The Bates case involved two attorneys who were prosecuted for having published a list of their services in a legal newspaper with the term "reasonable rates." They didn't give any amount, they just said "reasonable rates." Nonetheless, the State Bar of Arizona prosecuted them for violation of the restrictions on attorney advertising. The court found that the restriction on attorney advertising did not violate the Sherman Anti-Trust Act; however, the court did find it violated the first amendment stating, "It prevented publication in a newspaper of a truthful advertisement concerning the availability and terms of routine legal services." Since the court found that the first amendment protection extended to commercial speech and specifically to attorneys, restriction was held to be unconstitutional.

Almost immediately following the decision in the Bates case in 1977, came the Ohio case of Ohralik vs. Ohio State Bar Asso., 436 U. S. 447. In that case the attorney visited two teenage girls who were injured in an automobile accident. The attorney solicited their employment. That was a violation of the Ohio Canons of Professional Responsibility that forbade lawyers' soliciting clients with whom they did not have a pre-existing attorney-client relationship. Ohralik relied upon the Bates case of commercial free speech, and argued that he had a free speech right to solicit clients. The Supreme Court rejected that argument and ruled that a state could enact rules against solicitation and forbid in-person solicitation in circumstances that were likely to result in overreaching or misleading a lay person.

This is significant because this Supreme Court decision effectually stated a corollary that an attorney could have solicitation for nonprofit purposes. It is possible and professionally permitted for an attorney to contact a person with whom he does not have a previous relationship and offer his services for free. In that situation, he is not attempting to realize any kind of profit. As a result of the Ohralik decision, such contact would be permitted because the attorney does not have a profit motive for doing so.

If profit does derive to the attorney in some direct fashion from a representation, that may or may not taint the solicitation. Ohralik made it clear, however, that states do have the power and authority to ban solicitation by attorneys in the profit situation. In 1978, there was also an important case: In re Primus 436 U.S. 412 (1978). In this situation, the lawyer named Primus had contacted some black women who were allegedly sterilized as a condition to receive Medicaid benefits. Primus had offered to represent the women for free as part of the services of the ACLU. The attorney was disciplined for this solicitation. The Supreme Court, following the Ohralik case, held that such sanctions were improper because the attorney was acting on behalf of the public, i.e. she was working for the ACLU and was not seeking any personal benefit. The court found that the attorney's actions were praiseworthy and of the highest ethical standard. The court recognized that there is nothing wrong in representing poor people for free to protect their rights, especially in a situation where the government has infringed upon their rights, such as forcing sterilization.

The next important case was In re RMJ, 455 U.S. 191, 1982 involving the Missouri bar. If a lawyer wanted to advertise his expertise in specific areas of the law in Missouri, state law required that the advertisement be limited to an exclusive state list of areas and specific language had to be used. An attorney was not permitted, for example, to advertise personal injury law but was permitted to advertise "tort law," which was on the state's authorized list. Missouri also required that an advertisement state that listing the areas of law that the attorney practiced did not mean certification by the state bar in those areas. Moreover, if the attorney was licensed in another state besides Missouri, he could not list that fact in the ad. This restriction in particular made no legitimate sense. It would seem quite beneficial for a client to know there is a certain attorney who can handle matters in another state, especially if the client lives close to the state boundary and may have legal matters in both states.

In the RMJ case, the United States Supreme Court established the guidelines for regulating attorney advertising. The court made it clear that the information being advertised must not be misleading, false or deceptive, i.e. the Bates situation. Such information or advertising can be banned outright. Secondly, in order to restrict acceptable and non-misleading information, there must be a substantial interest in the state involved and regulation must be in proportion to the interest served. Now, state bars must employ a balancing test. They can no longer say, "We do not want our clients deceived, therefore you shall not do it." They can regulate, but they have to ensure the regulation is in proportion to what they are trying to prevent or protect.

The United States Supreme Court specifically struck down the restrictions on the lists of fields of practice and the jurisdictions where the attorney was listed, neither of that were inherently misleading in any way, shape or form, because the court found there was no real justification behind it. The lists of fields of practice can in itself be misleading. In the same vein, it can be totally valid. The courts can restrict composition of those lists as long as it is not a complete ban or there is some manner that is related to what they are trying to prevent happening.

After the Supreme Court ruling in RMJ, the ABA revised some of its model rules in order to comply with the Supreme Court's holding in that case. Under the Model Rules, if any information is false or misleading, it is prohibited outright. That is simply a restatement of the Bates position. Under Disciplinary Rule 102(A), communications about legal services must be dignified. This is not required now under the new Model Rule 17.1. The definition of false and misleading information is information that is a misrepresentation of a fact or law or omits a fact necessary to make a statement considered as a whole not materially misleading or "is likely to create an unjustified expectation about results the lawyer can achieve." What they are attempting to prevent the attorney from guaranteeing he is going to win or from introducing similarly situated former clients on a TV ad and saying, "I got $100,000 for this person. I can do the same for you." Such conduct is improper and in violation of virtually every state's canons of professional responsibility. Such endorsements by former clients really treats the viewing public as idiots. It is difficult to imagine the average person hiring an attorney simply because a former client said the attorney won an award for a lot of money without any knowledge of what that case was really about. Successful attorneys have a high degree of professionalism, and they let their work product speak for them by the fact that they win their cases. They do not need to get a client to say, "Well, he settled my case for $200,000." It is just not needed. The better the attorney, the less they have to do in these really glossy advertisements.

Following the RMJ case came Zauderer vs. Office of Disciplinary Council, 471 U.S. 626, involving a lawyer's advertisement that was directed to specific people in a group. The attorney sent printed material and solicitations to women who had been injured by the Dalcon Shield, the birth control device that resulted in toxic shock syndrome for many of the women who used it. The Office of Disciplinary Council for the Supreme Court of Ohio instituted disciplinary actions against the attorney for solicitation. Ohio was claiming that the attorney breached his professional ethics by targeting too narrow a group. He had reached a point where he was really soliciting a very narrow group of women in violation of state law as opposed to simply advertising to the public at large.

The other issue they were talking about was dignity. One of the main attributes in the earlier Model Code of Professional Responsibility, Disciplinary Rule 2-102, required that all advertisements be dignified, i.e. hold the legal profession to the highest standards. The information in the ad could be totally correct, but if the bar association believed it was not dignified, they could sanction the attorney. As a result, some attorneys were disciplined for what they considered undignified advertising. The Supreme Court in this case strikes the use of dignity as a standard for determining whether or not there can be an advertisement. The court specifically states:

> "Although the state undoubtedly has a substantial interest in assuring that attorneys maintain their dignity and decorum in the courtroom, we are unsure that the state's desire that attorneys maintain their dignity in their communication with the public is an interest substantial enough to justify their abridgment of their first amendment rights."

In addition, the court in Zauderer stated the advertisement directed to a narrowly favored group was permitted, but that the advertisement in question was misleading in that it had the line, "If there is no recovery, no legal fees are owed by our client." That phrase was considered to be misleading to the public because it didn't mention the fact that clients still have an obligation to pay litigation costs, court costs, etc. as required by the canons of professional responsibility. Attorneys can properly only give limited and specifically defined financial support to their clients. They can advance litigation costs or fees, but the client must repay them. Therefore, any statement that they will take a case on contingency and absorb all fees is improper because it is a violation of the canons of professional responsibility.

Technically, the attorney in that case was sanctioned not for the advertising and not for having it directed to a narrow group (which was the big issue the Supreme Court in Ohio wanted to have addressed). He was sanctioned for a minor thing: simply having a misstatement that the plaintiff would not have to pay any legal fees if the case was not a winner. The importance of this case is that it permits an attorney to advertise directly to a narrow group of persons as long as the group is not so narrow as to be effectively on a one-to-one basis.

Model Rule 7.1(C) prohibits an attorney from comparing his services with that of services provided by other attorneys unless the comparison can be factually substantiated. An exception exists when statements that a lawyer's fees are reasonable can be verified by reference to objective standards and tend to be valid. Model Rule 7.4 permits an attorney to list fields of practice, but claims of expertise are prohibited under this rule unless the attorney has actually completed some type of state specialization requirement. In addition to listing fields of practice, comments on Rule 7.4 suggest the attorney also should not use the phrases "limited to" or "concentrated in" because they tend to imply that the attorney is a specialist. This is only a comment, not the actual rule.

In most states, attorneys are still permitted to state that an attorney's practice emphasizes a particular field, even if not a specialist, simply to show that the attorney practices in those particular areas. In most advertisements, such as the telephone book, attorneys do not have sufficient space to put the words emphasizing specialties. They would rather use that space to list the specific disciplines of their practice. Often, for example, is seen such listings as: "Estate Planning" or "PI or Real Property" or "General Practice" rather than the complete words simply because there is insufficient room.

The Kentucky case of Shapiro vs. Kentucky Bar Association, 486 U.S. 466 followed the Zauderer case in 1988. This case involved sending letters or advertisements to potential clients who each faced a similar legal problem. The common denominator was foreclosure on their homes for failure to pay debts. The state bar refused to sanction sending letters. The state bar considered it to be improper solicitation because the attorney was going to receive a benefit from it. The state bar determined from the Ohralik case that the attorney was going to receive a private benefit from being retained by clients receiving his letter. This was an area the bar could regulate, and they prohibited sending the letter. The United States Supreme Court distinguishes its Ohralik decision from this case. Ohralik was a face-to-face solicitation; Shapiro was a letter. The Supreme Court finds that a solicitation through personal act or contact (Ohralik) creates more likelihood of overreaching and the state can bar it. On the other hand, a letter directed to a group (Shapiro), has less likelihood of overreaching. The Supreme Court, however, did rule (in Shapiro) the states do have a right to institute regulations that are reasonable to oversee advertisements and solicitations to private individuals for profit.

Consequently, most states have enacted a requirement that such advertisements or solicitations state on the printed material that it is in fact an advertisement and that the sender is required to verify the accuracy of the facts stated. To put this into perspective, in 1990 the United States Supreme Court in Peal vs Attorney Regulatory and Disciplinary Commission held that an attorney cannot be disciplined for simply listing his certification as a trial specialist by the National Board of Trial Advocacy (NBTA). The state had objected to the advertisement because the state believed it gave the impression that the state itself was the certifying entity when the state was not; the NBTA was not a state agency. The Supreme Court held that the attorney's statement of certification as a trial specialist was true and verifiable rather than a claim of quality and the statement included objective facts supported by the inference of that quality.

It is important to stress again that in attorney advertising or solicitation an attorney is not permitted to pay any money or give anything of value to a person for recommending his services to another person. This is Model Rule 7.2(C). This rule does not prohibit the attorney from paying the reasonable cost of advertising. Obviously, the attorney has to pay for advertising. No one is going to do it for free. One situation where this comes into play is where an attorney is recommended by a client to a third party. The attorney in gratitude might believe he should reduce the bill of the client who made the recommendation. That, of course, is illegal. One clear exception: The nonprofit lawyer referral services established by state bars in which attorneys have memberships and get referrals from the service and pay a certain amount to be a member; the situation is different because it is covered by statute itself; otherwise, it probably would be illegal.

Solicitation will be discussed separately. Refer to ABA Model Rule 7.3 that was enacted in response to the cases discussed above: Ohralik, Primus and Shapiro. The general rule is that an attorney is not permitted to seek for-profit work through a personal or live telephone contact with a prospective client with whom the attorney has had no prior professional dealing and is not related to the person in a family way. If the person is a family member related by blood in some fashion, the attorney can contact them because the attorney have the right to contact family members. There is no real statement on how distant the family relationship must be to be too distant. He could be a cousin seven times removed. At some point, however, the family relationship does terminate or else we would all be related to everyone else because we all came from Adam and Eve. Absent that, the attorney can contact people as long as the attorney stays within the guidelines of the cases discussed above and the state law of the attorney's licensing state.

Written materials that are sent and labeled as advertisement would usually be permitted under most state law under their canons of professional responsibility. However, it is always necessary to be familiar with the state law of each state which the attorney advertises. For example, there is a significant difference between Nevada's and California's regulations for attorney advertisement. Consequently, it would be prudent to obey the more stringent Nevada regulations on California advertising because those advertisements might reach Nevada and might cause an unintentional violation.

Many disciplinary actions involve the violation of the Runner and Capper rules covered under Model Rule 8.4(A). This rule prohibits an attorney from using an agent to do what the attorney cannot do. If an attorney cannot contact a person directly, it makes sense that the attorney would not be able to pay a runner or capper to do it for the attorney. In fact, payment is not even a requisite factor for a disciplinary violation. If, for example, an attorney asked someone to go out and find business for him and that person does attempt to get clients for the attorney, then the attorney could be liable for the personal contacts of made that person. If someone does it on their own, that is by word-of-mouth and is perfectly legal, and there is nothing wrong with that. It is understandable that if an attorney is good attorney, then people are going to recommend the attorney's services to others. The only question is whether the attorney has asked for the solicitation or has or hired people to get business for the attorney. The answer has to be "No" or else the attorney has violated the runner and cappers rules of most state bars. Such contacts or use of runners and cappers violates Rule 7.3.

There are exceptions to the rule. Rule 7.3(A) applies only when there is a significant motive of profit involved in the lawyer's solicitation. If the attorney is not trying to make money but are trying instead to do a nonprofit pro bono service, there is no problem with direct contact because the attorney is not getting any benefit out of it personally. Many attorneys do a lot of pro bono work, and occasionally they will have a case where they will be handling several people pro bono. It often is a good idea to have others join as parties to have a better class or to preserve rights; so the attorney will contact a person and inform him, "I am handling such-and-such in a case and am handling it pro bono, and your issues are pretty similar. Do you want to join? If so, I will handle you as well for free. If not, you can get your own attorney or not file at all." After a full and complete discussion, the person often does not join because he does not want to be involved in a lawsuit. Occasionally someone joins. Again, it is free work as a part of public service, representing indigent people who cannot represent themselves to preserve their rights. There is nothing wrong with an attorney conducting such work.

One area in that the runner and capper situation does not apply is contacting family members or former clients who are current clients about legal representation. Attorneys are allowed to do that. In addition, attorneys are allowed to talk to family members. Attorneys can offer their services to former clients and are allowed to talk to current clients without fear of violating Rule 7.3. Once the potential client however, declines the offered representation, in essence says "No," then the attorney is not supposed to continue contacting the person. After a "No," the attorney would be in violation of Rule 7.3(B) that prohibits the attorney from using "coercion, duress or harassment" in an effort to get clients. There are situations where attorneys continue to call a client until they exhaust the client or the client threatens to get a restraining order. Often this arises in a class-action or some horrific automobile or airline accident where there are a lot of plaintiffs involved and liability is clear cut; having the client sign is sort of like money in the bank for the attorney. Nearly everyone has seen those characterizations of attorneys parachuting into a city following an airline disaster in an effort to acquire clients within a few days and therefore control the litigation. While this is illegal, it nonetheless happens all too frequently. In fact, this is one of the most cited instances which gives blackens the reputation of all attorneys. The attorney is permitted to send personal letters to solicit clients, but he is not allowed to contact people personally if they do not already have a relationship. Nonetheless, that seems not to be the situation in a most of these cases.

All attorneys should remember that Rule 7.3 requires that all written or recorded communication with prospective clients who are being targeted by the attorney include the words "advertising material" on them. This must appear on the outside of the envelope and on the first page of the communication. Recorded communication must also both begin and end with the "advertisement" announcement especially when an attorney is using a taped telephone solicitation. The purpose of that regulation is to ensure everyone knows this is a solicitation and that they have the right to disregard the advertisement or not listen to the phone message instead of thinking they are listening to something important or even that they are talking to the attorney.

III. TELEPHONE BOOK

The most important and effective means of advertising and marketing for an attorney is the phone book. Most attorneys get their new clients from the phone book. A new client usually does not have an existing attorney, although occasionally the person is changing attorneys for any of a variety of reasons. The new client usually will select the attorney out of the phone book and call for an appointment. Generally, a potential client will only call one attorney at a time. Few clients really shop around. They may call the attorney and ask what type of law he handles and the price for a consultation.

Advertising in a phone book is the least expensive type of advertising for the attorney. A monthly ad in the yellow pages that is approximately 4 square inches (about 2 columns by 2 inches) tends to run about $50 per month. In this space, an average attorney can place a lot of information such as office location, phone number, states of practice, fields of practice and special licenses. It is also possible to buy white pages advertising. The determining factor is the amount of money that the attorney wishes to spend. In addition, most yellow pages have divided their yellow pages into specialty sections as well. The attorney can place an ad or just the name, address and phone number under each section. An attorney might have a 2-column ad twice in the specialty sections under the most important fields of practice and also have the attorney's name listed under the other major filed in which the attorney sometimes practice. An attorney should avoid running the columns on the same pages or on facing pages. One ad on a facing page is distinctive enough to be eye-catching. This amount of advertising is about $115 per month. This is very inexpensive when compared to newspaper advertising: $175 each time an ad the size of a business card runs.

Attorneys will come to realize the importance of a phone ad early in the success of a legal practice. After an attorney has moved his office a couple of times, he will realize that advertising in anything other than the phone book is usually not very effective. Not being in the phone book can be the "kiss of death" because most people locate their attorneys from the phone book. As a practical matter, attorneys will find that whenever they are not in the phone book, either as a result of opening a new office or moving an existing office, that they really will get very little new business from people who do not already know of the attorney. Most people hire their attorneys through the phone book and attorneys not in the phone book operate at a severe disadvantage.

It is important to know the deadlines for getting into a phone book. If a deadline is missed, an attorney might have to wait as long as a year before getting an ad in the phone book. As a result, the attorney might have to engage in other more costly forms of advertisement to keep his name before the public.

IV. RADIO AND TELEVISION ADVERTISING

Everyone has seen television ads for attorneys and attorneys are advertising more frequently on radio as well. For the sole practitioner, television advertising is usually cost prohibitive. To be effective on television, the attorney must advertise on prime time, and that is the most expensive slot. There is a run of program rate where a television station will run the ad during the day whenever it has a spot available. For business ads this is usually a waste because they tend to run late at night and do not generate sufficient business to recover their cost. There is one advantage in television advertising. Cable companies often develop local stations and expand the coverage of the station over a much larger area. In this situation, the advertiser's ad is shown to a larger marketplace.

Radio advertising can also be valuable for an attorney. A one-minute ad in many markets is around $20 for the major syndicated shows. A general ad twice a week on RUSH LIMBAUGH, PAUL HARVEY and DR. DEAN EDELL, national shows with high audiences, will cost about $40 per show. It would serve its purpose of introducing the attorney to the public.

The most effective radio advertising is for the attorney to be a guest on a radio talk show where clients can telephone their legal questions and the attorney answers them. Most state bars will not permit the attorney to take any of the callers as a client as they view this as a form of solicitation. It is, however, permitted for attorneys to answer legal questions of the public on the air. The advantage of doing this is that the attorney has more than a mere minute of paid advertising to demonstrate his legal knowledge and reasoning ability. If the attorney is lucky, the station might invite him to appear on a regular basis. This type of marketing works for attorneys quite well.

V. LEGAL WRITING

An often overlooked means of marketing a law practice is to write a legal column. Nearly every city or town has a local free newspaper. Most such newspapers are looking for articles. A very good way to receive free exposure is for an attorney to write a free legal column for the paper. Example: In northern Nevada there is a free popular newspaper called the SIERRA SAGE. The editors readily agreed to have a free legal column written. The column is approximately 1200 words per month, that is approximately four questions from the public and their answers or general advice. The paper comes out once per month and has a circulation of 30,000. In contrast, the local newspaper is printed only twice a week; so the SIERRA SAGE is a relatively well-read paper. A normal ad covering this space would cost over $200. The best part about it is that an attorney is able, through the article, to demonstrate his proficiency and knowledge on a topic or field rather than merely stating that he possess it.

In addition to writing a column for a local paper, an attorney might consider writing a column for specialty managers or newsletters. Many attorneys offer to write legal columns on the areas in that they practice in monthly magazines. For example, an attorney practicing environmental law might contribute an article to an environmental magazine. The result of this is that the attorney begins to be perceived as an expert or specialist in the area by the public. A person reading the article might therefore use the attorney because of the developed name recognition. As a practical matter, except for national magazines that have a permanent staff, most magazines would greatly appreciate the receipt of a well written article by an attorney.

An attorney might also write a column or article for the state bar publication. This generally will not yield much in the way of employment; although there might be some referrals generated from it. The main advantage from writing such articles is that it improves the attorney's professional resume and standing. This can be important if the attorney ever seeks a judgeship or other appointed position.

VI. SEMINARS

A common marketing strategy that has developed in the past few years is for attorneys to conduct seminars for prospective clients. This is most often done in the estate planning area. Attorneys will rent a room and run an ad in the newspaper and often on the radio as well. At the seminar, the attorney presents an overview of the specific area of law and gives examples of how the law works.

Seminars are also given by non-attorneys. The result has been that attorneys have had to give their own seminars just to compete. Many state bars have been remiss in their obligation to prevent the unauthorized practice of law by non-attorneys. This is especially true in the estate planning area. Most of the so-called "financial planners" are not attorneys. Yet these "financial planners" prepare complex estate plans often without the use of attorneys. Insurance salesmen have created their estate planning designation called a Certified Life Underwriter (CLU) so they can engage in estate planning. A CLU is not recognized as equivalent to a legal degree and the holder of the designation is not legally permitted to practice law. Nonetheless, since the state bar does not enforce the unauthorized legal practice of these non-attorneys, attorneys in these areas must conduct seminars to educate the public. Most of these non-attorney seminars charge far more than attorneys. Some people have reported fees quoted as high as $4000 to do a revocable trust that an attorney might do for $600.

Seminars can be given by attorneys on any subject. They might be on social security, worker's compensation or taxation. An attorney must comply with state regulations regarding attorney advertisements, but nonetheless they can be done. Seminars can become an important marketing tool, especially for new attorneys.

Many attorneys create a working relationship with a senior center or community organization to give regular seminars to their members. This usually works out to be beneficial for the attorney. It is not uncommon for an attorney at a large seminar to get 10 or more clients, that in the estate planning fields could be $10,000 or more of legal fees.

VII. REFERRALS

One of the most successful forms of marketing is the courting of referrals. It is a unique aspect of the human personality that if asked to make a referral most people will attempt to do it even if they really do not know anyone. In such an instance, referrals are simply based upon the attorney's reputation. People may want to help a person when such help can be easily given, or they may simply not want to appear ignorant or "out of the loop." In any event, people try to give referrals whenever they can do so. An attorney can generate a fair amount of new clients by developing enough name recognition that he will be referred simply because of that name recognition.

All attorneys have heard the cliche that they should join social organizations. In reality this does not generate business for new attorneys. Most social organizations have specific prohibitions against discussing or conducting work on their premises. There are two reasons behind these prohibitions. If the organization is a private club, conducting business in it might expose the club to a discrimination law suit. Many women and minorities have successfully sued private clubs claiming that they were really business organizations. In such instances where it has been shown that business has been conducted in the club, the courts have found discrimination in not allowing minorities to join.

A more common reason for denying business to be conducted on the premises is for the comfort of the members and to prevent them from being pestered. In any event, joining an organization does not usually result in the attorney getting access to the members for the purpose of marketing.

The best way for the attorney to obtain referrals is to introduce himself to persons who can pass on the referrals. For example, an attorney who has served in the military has an automatic "in" with the various veterans' groups that are very good about referring work to veterans. Even if the person is not a veteran, a relationship can be courted with the organization, such as through doing seminars for the group that will translate into eventual referrals.

Another source of referrals are bartenders, especially for drunk drivers. Bartenders hear a lot of problems relating to the human condition. Bartenders have been referred to as the poor man's psychiatrist, that might be true. In any event, when a patron has a problem, such as a drunk driving charge, a bartender is usually among the first to know. The bartender is often among the first people to be able to recommend an attorney. It is not uncommon for attorneys to give a stack of their business cards to the bartender for distribution to patrons. There is nothing wrong with a bartender recommending an attorney as long as the attorney does not pay for the recommendations. Many bartenders make the recommendations, as stated above, because they want to be helpful to the patrons. Bartenders realize that if they appear unresponsive or uncaring to their patrons, they will lose business.

VIII. PART-TIME PUBLIC WORK

It used to be that an attorney just out of law school would enter public service, such as assistant district attorney or public defender, for several years before entering private practice. Opportunities for these jobs have disappeared. The large increase in the number of attorneys, competition for work in the private sector and affirmative action have resulted in fewer and fewer public attorney jobs becoming available each year. Most public attorneys view their jobs as a career, not as a stepping stone into private practice, with the result that there are few permanent jobs available for the new attorney.

While there may not be permanent jobs available with the public, there occasionally are part-time or contract jobs available with public agencies. These jobs generally pay a straight hourly rate and are without benefits. The two advantages of these jobs are that they provide a small but steady source of income for the attorney and they provide a degree of visibility to the attorney that translates into name recognition.

Two examples of how this works are as follows. Alpine County, California has a contract for an assistant attorney to provide 1800 hours of legal services per year. The contract is bid and there are no benefits beyond the contract payment. The attorney to whom the contract is given sets his own schedule and is paid $40,000 per year. The attorney is permitted to maintain a private practice on the side. In Douglas County, Nevada, the county's education attorney has a contract for 20 hours per month at $1,100 without benefits. The attorney charges $150 per hour for his private clients. The $1,100 per month from the county covers the office rent and operation expenses, other than secretarial. Therefore, the attorney is able to maintain himself during months of low income.

IX. CONCLUSION

Attorneys can no longer assume that simply because they are attorneys they are in demand. The fact is that paralegals are often paid more than starting attorneys. For example, the Judicial Assistant (legal secretary) for the District Court of Douglas

County makes $48,000 per year; that is more than the county pays its starting assistant district attorneys.

To survive as an attorney, it has become necessary for attorneys to look upon their practice as a business and to market it as such. To paraphrase Abraham Lincoln, the only thing an attorney has to sell is his time that means himself. To sell anything, the item must be marketed. The purpose of this chapter is to acquaint the attorney with some of the different marketing avenues available to the sole practitioner in order to maximize his income.

CHAPTER 6

BILLING AND COLLECTING FEES

I. INTRODUCTION

Unless an attorney works for the government or a tax-exempt legal services corporation, the attorney and the law office will need to collect legal fees for services in order to pay bills and survive. There are a few instances where wealthy people become attorneys and form tax-exempt organizations and work for free. It is interesting how many of these people subsequently run for public office, usually Congress, touting their free legal work as proof of feeling their constituents pain. For most attorneys, however, they can survive only by selling their legal services. The only asset that an attorney has on which to trade is legal knowledge. When someone uses that legal knowledge, they should compensate the attorney. While an attorney is working for one client, the attorney cannot be working for another. A law practice is a one-to-one relationship between the client and the attorney. The attorney has nothing to sell but his ability and time and when they are used on behalf of a client, the attorney should be compensated.

As a very practical matter, most new attorneys have huge students loans for which payment must begin within nine months after graduating from law school. In some cases, these payments may begin even before the attorney has passed the bar exam or opened an office. The average student loan ranges between $25,000 and

$45,000. If a married couple both have student loans, their combined obligations may easily exceed $80,000. In fact, over $100,000 is not uncommon: the full price of a nice home in most parts of the country. Student loans usually are the greatest financial burden of most attorneys beginning their law practices.

When a client fails to pay on time or, heaven forbid, refuses to pay at all, the attorney can be forced into immediate financial chaos. The payment of an attorney's bills is not contingent upon the attorney's clients paying him. Regardless of whether an attorney is paid by his clients, the attorney must still pay the staff, office rental, student loans, and all other personal and professional debts.

An attorney's practices and procedures must be both understood and implemented to maximize collection of attorney fees. There is nothing inherently wrong in collecting fees for work that has been done. Some people, ignorant of how the legal profession works, think that when an attorney charges $150 per hour that the attorney earns and collects that amount each day. The fact of the matter is that the average attorney, in private practice, earns around $35,000 per year. There are many attorneys in California, for instance, that earn in the mid-$20,000's. The hourly fee covers attorney "down time," the time the attorney is not doing billable work such as when he is doing pro bono, office management, attending CLE programs or simply has no client. Whatever the fee the attorney charges, that fee should be recovered or the attorney simply will become an unincorporated public charity providing legal services for free. Such is nice if the attorney intended for this to happen; otherwise it is a personal and financial disaster for the attorney.

II. RETAINERS

A retainer is a payment at the start to assure representation by an attorney. There are two types of retainers an attorney can obtain from a client. The first type is a nonrefundable retainer and the second type is a refundable retainer.

A. NONREFUNDABLE RETAINER

A nonrefundable retainer is one that is not returned to the client, even if no legal work is done. A nonrefundable retainer is a payment to the attorney to guarantee that the attorney will be available to handle matters if called during a 365-day period. A nonrefundable retainer has been called a minimum fee because it is immediately earned by the attorney the moment attorney and client enter their agreement. Nonrefundable retainers are seldom used by sole practitioners. The average person has no need to keep an attorney on retainer. Nonrefundable retainers are almost exclusively the province of the most prominent attorneys. Only attorneys who have their pick of clients usually have the ability to demand retainer agreements. The clients of these attorneys want to have the best attorneys in their field available to service their interest at any time and are willing to pay handsomely for that privilege. Organized crime figures, for example, will offer nonrefundable retainers to the top criminal attorneys to represent them at a moment's notice if they are arrested. Nonrefundable retainers are of great service to the client. A prominent attorney might not want to represent in a case that he feels is a loser and might refuse to take the case if there was not a nonrefundable retainer agreement. No attorney wants to be associated with a losing case, and the more the prominent the attorney the greater that feeling. A prominent criminal attorney without a nonrefundable retainer might refuse to represent a former client again after a losing case, whereas with a nonrefundable retainer the attorney would not be able to refuse.

B. REFUNDABLE RETAINER

The second type of retainer is the one that all attorneys should use in addition to any nonrefundable retainer. This is the refundable retainer. Just as the nonrefundable retainer is considered a minimum fee, the refundable retainer is considered a mere advance of the fee. A refundable retainer is not earned by the attorney until the attorney has done work for the client. The rate at that the retainer is used is determined by the attorney fee agreement. A fee agreement that charges $150 per hour will have a $600 retainer depleted after four hours of work by the attorney. Whenever an attorney agrees to represent a client on an hourly basis, the attorney should get a reasonable retainer.

A retainer agreement should require that the client maintain a fixed minimum in the account. Therefore, if the fee agreement calls for a $600 retainer, once the attorney does $300 worth of work, the client should contribute $300 to the retainer account to maintain the required balance. The attorney should always have the minimum amount in the retainer account to cover future work. In reality, this could be considered to be a security deposit since the client is usually required to maintain a balance to guarantee future work.

It is important to get a retainer. If a case is not important enough for the client to pay a retainer, the attorney should consider not taking the case. This is a different situation from a contingency case: the attorney expects not to be paid until judgment and then only if he wins. In an hourly or flat rate situation, the attorney expects to be paid, win or lose. If the client is unable or unwilling to pay a retainer, the client may be unable or unwilling to pay the fee after the case is over. It is important to ascertain at the initial interview whether or not a potential client is the type who would not pay the attorney or who would attempt to "stiff" the attorney after the case is over. The best way to do so is to ask for a retainer and see how the idea is received.

Almost all billing disputes occur after a case is over. At this time the attorney usually submits the final bill to the clients. It is then that the client usually first objects. Studies show that attorneys who require their clients to pay and maintain retainers have a lower number of fee disputes than attorneys who do not use retainers.

Any refundable fee must be segregated from all other funds of the attorney. All states require the attorney to have an attorney trust account as discussed in the Trust Account chapter. Failure to segregate the trust funds is a violation of the Canons of Professional Responsibility, exposing the attorney to professional discipline and jeopardizing the safety of the client's funds. As the attorney does legal work for the client, the attorney earns the legal fees. The attorney will tend to bill the client and if the client does not object to the bill, the attorney will transfer the amount of the bill from the client's trust account into the attorney's personal or office account. If the client objects to the legal services being billed or the amount, the attorney is only permitted to withdraw the amount not in dispute and to keep the contested amount in the trust account until the dispute has been resolved by litigation or arbitration.

III. BILLING

Billing should not be considered by an attorney as merely sending a statement for cost of work done to a client. Billing, as a concept, should be viewed as one of the marketing strategies of the office. Billing is one of the most important practical aspects of a law practice and any other profit making business as well. Without money coming in to pay the bills, no business can survive. In the real world a law practice must collect more than it spends in order to make a profit and be a success. An attorney should concentrate on strategies to increase cash inflow and thus increase the practice's success.

The very first thing that any attorney should do is stop dispensing free advice or at least cut back on doing it. There are many attorneys who advertise free consultations in the hope of getting new clients. This can work reasonably well when the consultation is limited to special fields of law such as bankruptcy, family law, etc. The fact is, however, that most people who seek free legal advice do not have a case for that the attorney could receive a reasonable fee. Much of the free advice that an attorney gives is on small matters for that the person could go to small claims court and handle himself. For the most part, giving of free advice by an attorney seldom leads to the recipient becoming a client.

Nonetheless, many attorneys believe giving free legal advice pays for itself in the long run. If an attorney decides to give free consultations, he should decide the manner in that it should be done. Many attorneys believe that no free legal advice should be dispensed over the phone. These attorneys believe that the client should be forced to come and have the free consultation in person so that he will feel morally obligated to retain the attorney sitting across from him if the person has a case. Other attorneys believe that an initial free consultation should be done over the phone, if possible. It is usually possible in just a few minutes for an attorney to determine if a caller has a case in that he could assist, whereas most personal consultations take between 15 and 30 minutes. If the attorney feels that the caller actually may have a case in that he could be of assistance, the attorney can offer an appointment for the caller to come and discuss it. It would make no sense to have the person come for a free consultation if the attorney will not ultimately be hired. Whatever type of free consultation is employed by the attorney, the point to remember is that the attorney is not being compensated for the time spent in these consultations. Therefore, the attorney must manage the consultation in a manner to avoid spending unnecessary time in determining whether or not the client has a case in that the attorney can be of assistance.

Another billing concern that many attorneys have is how to treat legal advice given to friends. As stated before, the attorney has only his time to sell. A mechanic may talk shop over a drink, but no work is done until the mechanic looks under the hood. An attorney, however, does legal work every time he speaks on a legal matter. Once a person hears the attorney's advice and acts on it, that person has benefitted. For this reason, an attorney should bill friends for the legal advice or work given. A point to remember is that when an attorney gives advice or does work for a friend, the attorney is not doing work for someone else who would pay for the service. Friends usually want to hire friends and refer business to friends. Attorneys are no different from the average person when human relationships exist. It not uncommon for an attorney to feel odd or ill at ease in charging a friend for legal service. Often in a situation where the attorney represents a friend, he will charge him less than the hourly rate. The attorney usually tells the friend what the attorney's normal hourly rate is and what would be charged for the representation. Even between friends, there should be an attorney fee agreement. If a friend thinks that the agreement is unnecessary, it should be explained that the state canons of professional responsibility require it and that the attorney could be disciplined for not having such an agreement even if the attorney was representing his own parents. If the friend refuses to sign a fee agreement, the attorney should not take the case for the same reasons that an attorney should not take a case if a client refuses to pay a retainer.

An attorney must send statements to his clients at least monthly. Almost all ethics cases made against an attorney are based upon failure to keep the client informed on the status of their cases. In fact, very few ethics cases actually involve mismanagement of a case but are simply the result of frustration of the client in the inability to communicate with the attorney. The monthly billing statement, even if nothing has been done for that a charge can be made, at least will keep the lines of communication open.

Many attorneys believe copies of all pleadings received or that were prepared since the last statement should be sent with the bill. It satisfies the client that the case is proceeding. Certainly the client would be inundated with copies of the paperwork in a big case.

Another point to remember is that an attorney can only take money from a client's refundable retainer for work done after a bill has been submitted and the client has not objected. Therefore, if the attorney has done $1,000 of work, that attorney still cannot take it out of the trust account until the client has been billed and has not objected to the charge.

If the attorney waits for long periods of time before submitting bills for services rendered, problems tend to arise. Clients begin to believe that the attorney is not charging for the services rendered and will object to subsequent billing for the services.

The other situation is more onerous to the attorney. The attorney is not permitted to commingle trust funds. By not promptly billing for his services the attorney is commingling funds because his funds (funds due him that have not been billed) are mingled with trust funds that belong to his client (trust funds he has not earned yet).

As discussed in the Trust Account chapter, the IRS may audit attorney trust accounts to determine that they are not being used to defer taxation. The result is that if an attorney unreasonably leaves money earned in the trust account and does not claim it on the tax return, the attorney may be subject to underpayment-of-tax penalties.

A final consideration in billing is to not overwork a case. An attorney owes a duty to his client to settle a case when a reasonable opportunity exists to do so. Taking a case to trial to gain trial experience is not a good reason to pursue a case. Every attorney will acquire trial experience in time. It is more important for an attorney to do what is best for the client rather than to pursue his own interest. A good settlement for a client is often better than fighting the case at trial and risk recovering nothing.

The attorney should never settle a case without the client's consent, even in the situation where the client has given the attorney the written authority to settle on terms that the attorney thinks reasonable. The attorney should always present all settlement offers, even in criminal matters, to the client and explain all of the options. The attorney may make recommendations but should never insist on a course of action. An interesting point for an attorney to bear in mind is that the client seldom sues the attorney for malpractice and seldom sues over the bill when he has participated in the settlement.

IV. ATTORNEY LIENS

There are many states that allow the attorney to have a fee lien on the property of the client. Sometimes the lien is limited to the settlement in a particular case. In some states it will be against all of the property owned by the client until there is a resolution of it. Usually in a lien situation the attorney must thereafter commence a suit within a specific period of time after the lien is filed or the case is concluded with judgment. In some states that lien period for filing is six months. In most states the attorney must file a notice of lien to perfect the lien, and the lien stays in effect until the case is concluded. If the client wins and receives a judgment, the amount of fees claimed by the lien are held in trust by the attorney or the court until a hearing determines the correct amount to be awarded the attorney.

Any discussion of fee agreements would be incomplete if the attorney did not discuss with his client what happens if he is fired during the middle of his representation. If an attorney is on an hourly fee arrangement, there is no problem. The attorney simply submits his bill for the work done to that point, and the client is responsible to pay it.

If the attorney has agreed to a flat fee, he can only collect for the reasonable value of the provided legal services at time of dismissal. An attorney in a flat rate situation is not able to collect for the full amount owed because he did not complete the work and thus had not earned all of it. Instead, the attorney receives the reasonable value of the rendered legal services based on a percentage of how far he had worked on the case. Example: The attorney had completed 50% of the case. The attorney will probably get half of the agreed fee. Courts or fee arbitrators would look at it that way, or they would put an hourly fee value on the work that had been done and charge accordingly. In neither event will the attorney ever collect more than he would have received under the actual fee agreement itself. In fact, if another attorney is hired, the courts or arbitrators will reflect on the value of work the discharged attorney performed versus the amount of work by the new attorney in completing the case.

Concerning a contingency fee agreement for a fired attorney, the discharged attorney is entitled to recover the reasonable value of the provided legal services based on his contract percentage of the actual award. Example: A discharged attorney was to receive 30% of the award. The case was settled for $500,000. There is a $150,000 fee award, and the value of discharged attorney's work is $50,000. The discharged attorney will never get more than the fee agreement suggests, and the recovery is also based on the amount that the other attorney is paid to complete the case.

Attorney liens may not be available in each state. An attorney must check the law in his state to determine if an attorney lien is permitted and the scope of the lien. The existence of a lien should be determined by the law of both the site of the fund and the site of recovery. In Gelfand, Greer, Popko & Miller vs. Shivener (1973) 30 Cal.App.3d 364, a contingency fee agreement was executed in Oklahoma; recovery was made in California. The California court applied California law to determine if a lien should apply when the fee agreement failed to mention it.

Under common law, there was a general possessory retaining lien that allowed an attorney to keep a client's papers or assets until the attorney's legal fee was paid. Many states have replaced the retaining lien or adopted an additional charging or special lien against monies recovered by the attorney in litigation. New York, for example, permits both the retaining lien and the charging lien to be imposed by attorneys. Adan vs. Abbott (1982) 452 NYS2d 476, 114 Misc 2d 735.

Absent statutory law or case law that permits the attorney to have a lien on the proceeds of a case or on property in the possession of the client, it is improper for an attorney to claim such a lien. When an attorney has a lien on the case or the property of the client, he has acquired an interest in the case. Such an interest violates the general rule that an attorney cannot have a personal interest in the subject matter or outcome of the action for that he had been retained. The exception to the general rule is for attorney liens permitted under state law in accordance with ABA Code DR 5-103(A)(1) and ABA Model Rule 1.8(j)(1).

A. RETAINING LIENS

A retaining lien, by its very nature, usually attaches to all papers, documents, pleading and other such matters that come into the attorney's possession by reason of his services. The lien by its nature will not cover items or property that come into the attorney's possession for a client that are unrelated to the legal services for that the attorney was retained. Example: Someone gives the attorney a gift to deliver to the client. The attorney is usually not permitted to claim a lien against the gift for any unpaid legal fees.

Many attorneys, specifically in the criminal area, insist on security for the payment of their fees. These attorneys require that their clients present land, cars, or jewelry or get cosigners as security for payment of the fees to be incurred. This is an example of the working of retaining liens. The usage in a particular state requires conformity with the law of the state where the property of the lien is located.

By its very nature a retaining lien attaches to all property, papers, documents and money of a client coming into the attorney's hands during the course of the client's representation. By virtue of the lien the attorney acquires the right to retain possession of the above items to secure payment of the fees and expenses due as a result of the legal representation.

In situations where the client is in need of the documents or property held by the attorney but is unable or refuses to pay the attorney fees, the client has two options available. The client may seek a court order through a subpoena duces tecum to require the attorney to provide the property, records or pleading for the client's use upon the client furnishing adequate security for the payment of the legal fees. In short, the client trades the new property as security for the held property.

In the situation where the client disputes the fees rather than merely being unable to pay them, the retaining lien remains until there is an adjudication on the merits and scope of the lien. In most states allowing a retaining lien, summary proceedings are often available to adjudicate these issues, In addition, some states have created fee arbitration boards to adjudicate the matter quickly. Foor vs. Huntington Nat. Bank (1986) 27 Ohio App.3d 76, 499 NE2d 1297.

Not all states recognize retaining liens. There is movement throughout the United States to void retaining liens. The argument is that they legalize blackmail. In a case during litigation, the client may lose the case by being unable to prepare if the attorney is permitted to retain files until payment. Nonetheless, as long as state law permits, an attorney should use the lien to assist in payment.

A retaining lien is different from the ordinary lien in that it cannot be actively enforced by judicial proceeding. In Upgrade Corp. vs. Michigan Carton Co. (1980) 87 Ill.App.3d 662, 410 NE2d 159 the court recognized that despite the existence of a statutory lien for attorney fees in Illinois, attorneys still had the protection of the retaining lien even though active judicial enforcement of the lien was not available. In the same vein, Frazee vs. Frazee (1983) 104 Idaho 463 recognized that an attorney retaining lien is passive in nature and not enforceable by a foreclosure or sale.

A retaining lien is usually only valid against property actually in the hands of the attorney. Where an attorney is not in possession of the money, papers or other property of the retaining lien, he will not have a valid lien. United States vs. Fidelity Philadelphia Trust Co, (1973) 459 F2d. 771.

An attorney who has a valid retaining lien on property loses it once the property leaves his possession. In Eiduson Fuel & Hardware Co. vs. Drew (1977), a New York court held that an attorney's retaining lien on a stock certificate terminated once the attorney lost possession of the certificate.

Oklahoma limits the scope of an attorney lien to money held by a client for that specific direction for use was not made. In State ex rel. Oklahoma Bar Assn vs. Cumming (1993), the court upheld Oklahoma's disciplinary rule that money or property entrusted to an attorney for a specific purpose is not subject to a retaining lien. In this case, the client had deposited money to cover projected deposition costs that the attorney attempted to hold as a retaining lien. The court held that the attorney could not do so.

A retaining lien only attaches to the extent of services that have been actually rendered. The retaining lien does not attach to property held by an attorney that has not yet been earned. This situation arises when an attorney is given a retainer and a creditor of the client wishes to attach it. Courts have agreed that a client cannot avoid attachment of his assets by giving them to an attorney as a retainer. Until the attorney actually earns the money that he is holding, it is not his. The attorney is merely a fiduciary for the client in much the same manner as a bank. For this reason, excess money or property being held by an attorney is not subject to an attorney retaining lien.

B. CHARGING LIEN

In addition to the attorney retaining lien (in some states in place of it) there is the "special" or "charging lien." The requisites for a charging lien may be imposed by state law or may arise out of an agreement between the client and the attorney. the attorney is to receive a portion of the judgment recovered or proceeds therefrom provided it appears that such judgment or proceeds are the security for his fee. An attorney's charging lien vests in the attorney the right to recover money from the client in a particular manner. Thereby he is compensated for the legal services rendered in obtaining the recovery.

A charging lien is generally viewed as an equitable assignment to the attorney of the revenue derived from the attorney's efforts. The attorney charging lien enjoys a paramount priority over other claims. As a matter of equity, the charging lien bestows upon the attorney the right to have costs and fees due as a result of legal representation secured to the attorney either in the judgment rendered or in a separate suit.

By its very nature a charging lien is confined to the fees and costs due for the legal services provided by an attorney in a particular action that obtained a judgment or settlement. An attorney cannot included in a charging lien the value of the work he does in seeking to be relieved as the client's attorney; the lien attaches only for services that benefit the client. An attorney's efforts to be removed from a case do not benefit the client. The fact that the lien does not attach for such work does not mean that the attorney cannot sue the client for the value of such work, only that settlement or judgment proceeds will not for such work.

Most states impose the charging lien by statute. The procedure for perfecting the lien must be studies for each state where the lien will be used. Most states require that an attorney seeking to perfect a charging lien file a notice of lien. The notice of lien usually must be received by the client and the opposing parties within a specific period of time, or the lien is lost. An example of this is in the Illinois case, Rhpades vs. Norfolk & W.R. Co. (1979). An attorney charging lien was denied because the law firm filed the claim four days after being discharged by the client. Most states require that notice of the lien be filed before the end of the proceeding and, as Illinois did above, require the attorney be the client's attorney at the time of the filing of the lien. An unperfected charging lien may be effective between the client and the attorney but not third parties without knowledge of the lien. An attorney should develop the habit of filing a notice of lien in every case where a charging lien is permitted. It will at some future time prevent the attorney fee portion of the judgment being attached by the client or lost in bankruptcy.

The charging lien will terminate and be deemed waived as to proceeds that the attorney knowingly allows to be paid to the client or to a third party without raising any objections by virtue of the lien. The attorney cannot stand on the equitable right to have a charging lien; he must take steps to preserve the right to the lien.

In Florida, charging liens have been recognized since the mid-1800's. Florida requires that there be a contract between the client and the attorney, either express or implied. The contract must contain an express or implied understanding that any recovery by the client will be used to assist in the payment of the attorney fees and costs. To have a charging lien in Florida, the client must either avoid payment of or dispute the amount of the attorney fees. The Florida charging lien is imposed once the client does an act evidencing an intent to avoid payment altogether of the legal fees or he objects to the amount claimed.

Invoking the charging lien in Florida is usually not a major issue. The attorney receives the settlement or judgment check. In disbursing proceeds to the client, the attorney usually will present the bill. At this time, the client will raise any objections to payment. If there are objections, the attorney will assert the charging lien. Florida has no requirements for perfecting a charging lien beyond that of timely notice to the client and opposing parties, if reasonable.

As with any other equitable right, a charging lien is based upon natural equity that a plaintiff should not be allowed to take or receive the entire judgment derived as the result of the attorney's legal representation without paying the attorney.

Minnesota follows the general rule that an advance payment for attorney services to be rendered will not be attached as a charging lien. The charging lien by its very nature attaches only to the recovery or settlement of a case as a result of the attorney's efforts. The attorney may still sue the client for unpaid legal fees; it is just that the attorney charging lien will not attach to advance payments that have not been earned, St. Cloud Nat. Bank & Trust Co. vs. Brutger (1992) 488 NW2d 852. Because of its equitable nature, an action by an attorney against a client to enforce a charging lien does not entitle the client to a jury trial, Rosenman & Colin vs. Richard (1988) 850 F2d. 57.

In Colorado there is no common law attorney lien. It is replaced with a statutory lien that is basically the same. Under Colorado law, the attorney has a retaining lien on the client's papers until the legal services have been paid. In addition, an attorney in Colorado is given a charging lien on any judgment that the attorney obtained or assisted in obtaining in favor of the client (People vs. Brown (1992) 840 P2d. 1085). People vs. Smith (1992) 830 P2d 1003 states that although the charging lien exists in Colorado between an attorney and client, it will not be enforced against a third party unless a notice of lien is filed. This means that in Colorado, creditors of the client along with a bankruptcy trustee of the client can attach the entire judgment unless the attorney has perfected his lien by filing a proper notice.

California upheld a contractual law firm security interest lien on a client's recovery by the law firm in Bluxome Street Associates vs. Fireman's Fund Ins. Co. (1988) 206 Cal.App.3d 1149. The lien was not permitted as an equitable charging lien but simply as a contractual lien. The attorney who represented the client in the suit that was the subject of the law firm's security interest and over the subsequently filed lien created his own lien for fees, and a judgment creditor of the client also filed a lien. The law firm's lien was given priority over these subsequent liens even though there was no notice that the law firm's lien had been filed and even though the notice of the subsequent liens were filed.

V. COLLECTION

The area of fee dispute has engendered much controversy over the years. An attorney is not supposed to sue his client for payment of money. Nonetheless, if the attorney does not sue and the client does not pay, how is he supposed to get his money and earn a living? In a situation where the attorney has received the settlement for the client or the client has been paying the fees in advance, the attorney will give an accounting to the client and a bill stating how much is owed. If the client objects to the bill, the attorney is required to pay to that client all of the money that is not in dispute and take as payment for his attorney fees the amount of money from the client trust account that the client agrees is owed to the attorney. The amount of money on that the client and the attorney do not agree remains in the client trust account until there has been a resolution.

A. ARBITRATION OF FEE DISPUTES

There are two ways of accomplishing this. (1) The client can seek fee arbitration (in many states it is mandatory if the client requests it, and the attorney is required in some states to inform his client of that right), or (2) the attorney can sue his client in court for a determination of what amount is owed. The client can also sue in court and not go through the arbitration, but that is an unnecessary burden on the client.

A real situation comes into play where the client does not have any money and has not, as yet, paid any money to the attorney. There is also the arbitration provision where the attorney sends the client the bills, the client objects, and they arbitrate. The attorney can also go ahead and sue.

Generally arbitrations reduce the requested fee by one-quarter to as much as one-half, although one-third seems to be about the average. In an arbitration, the attorney will have as an arbitrator a practicing attorney usually appointed by the county bar association. The arbitrator will look at the evidence, see how much time the attorney has spent, evaluate the nine items previously discussed and determine how much should actually be charged. If it appears the attorney has been "churning" the case, the fee award is going to be reduced considerably.

B. SUING THE CLIENT

Unless an attorney is required by his own state law to enter binding arbitration with a client over attorney fees, the attorney can sue the client for unpaid attorney fees. Suing a client is never a popular thing to do. When viewed carefully, however, little is really lost by suing a client. When things have deteriorated to an extent that the attorney is considering suing, he has already lost the client for all future work.

Notoriety is often cited as a reason for an attorney not to sue a client. That argument, however, cuts both ways. If an attorney refuses to deny complaints by a client who seeks not to pay because of alleged improper billing or malpractice, the attorney is impliedly agreeing to the complaint. If the complaints are true, the attorney should forgive the bills and hope the client will not sue him for malpractice. When the charges are not true, the attorney must sue to keep his good name. In Bakersfield, California, an attorney sued a client in small claims for $500 in legal fees. The attorney charges were $175.00 per hour and the total preparation and hearing took four hours. When asked why she sued rather than forgive the fee, the attorney replied, "I would have had the client keep the matter between ourselves, but she (the client) was telling people I had overbilled and did not handle the case properly. I heard this from several persons. Therefore, I felt that I had to do so to protect myself and my reputation." The attorney lost from a financial standpoint, but she cleared her name and removed any cloud on it when she was awarded judgment for $500.

Every fee agreement should have a clause that bestows attorney fees on the prevailing party in the event of a lawsuit. Some attorneys omit this provision in the hope that it will deter the client from using and possibly winning a malpractice suit. That might be a good reason to not include the clause in the fee agreement if the attorney does not have malpractice coverage or conducts a sloppy practice.

In most instances, the clause will benefit the attorney. Many states do not permit an attorney to collect attorney fees for collecting a judgment on his own case. The attorney, after winning the case against his former client, will not be compensated for the time spent in getting the judgment. When an attorney fee clause is in the retainer agreement, he can hire another attorney to get the judgment and the client will have to pay the attorney fees when a favorable judgment is won..

One of the most important things to remember is that an attorney should not sue a client who is judgment proof. If the client is broke or going into bankruptcy or the likelihood of a recovery is slight, the attorney should not waste time suing the client. Obtaining a judgment on a defendant with no assets is a waste of time and if an attorney must pursue the action, it is a waste of money as well.

CHAPTER 7

TRUST ACCOUNT

The easiest and surest way for an attorney to become subject to discipline is to mismanage the client trust account. In every state trust complaints and violations are taken seriously by the state bar disciplinary organizations. There are two reasons for the intense regulation and discipline of an attorney for trust account irregularities. The first reason is that no attorney should be misusing his client's trust funds. To do so is a clear violation of the fiduciary duties owed to the client. The second reason is that trust account violations are extremely easy to prove. An attorney's trust account is a paper generator. There are monthly statements and cancelled checks from which the state bar can reconstruct the history of the account without any assistance of the attorney.

There is a high possibility that any attorney mismanagement of the trust account will be discovered. The attorney should bear in mind that most states require that the banks in which the accounts are located to notify the state bar whenever they suspect mismanagement by the attorney. One real example: The attorney received a draft in settlement of a case. He deposited the draft into his trust account and wrote a check to his client. A draft is not the same as a check. Under federal banking law, a draft is not to be credited to an account until it has been collected. In the past the bank previously treated the draft as a check and credited it immediately. This time it did not do so, and several of the attorney's trust account checks bounced. In addition, it caused other trust account checks to be paid with other clients' money. The draft did clear, and the bank apologized to the attorney. Its past policy of treating drafts as checks had caused the attorney to believe that it would continue to do so. The attorney's real problems began when the state law required the bank to report all problems with the trust account to the state bar, even when the problems were generated by bank mistakes. The state bar investigated, even though the draft problem was corrected. The state bar discovered a dozen minor irregularities in accounting, none of which cost the clients any money. Nevertheless, the attorney's trust account was placed under direct supervision of the state bar.

A trust account is required whenever an attorney takes possession and control of property or money of a client. The attorney, who is only holding property belonging to a client, is governed by the common law rules of agency and partnership and the more restrictive state bar rules. In many states, a state bar disciplinary action for mismanagement of a trust account does not relieve the attorney of liability or prosecution under the state's civil or criminal law. There is a trend among the states to merge the common law rules and the attorney disciplinary rules regarding trust account mismanagement. In any event, the point to be remembered by an attorney is that satisfying common law rules will not automatically satisfy disciplinary rules, and vice versa.

Nearly every state has adopted rules requiring an attorney to establish an Interest on Lawyers Trust Accounts (ILOTA). Under the ILOTA Act, the attorney is required to open an interest-bearing trust account for clients' funds. In most ILOTA states, the attorney is required to deposit all short-term client funds into that account; client funds to be held for long periods of time may be deposited into a separate account in each client's name. Some states require all client funds to be deposited in the ILOTA account regardless of the length of time they are to be held. The interest from an ILOTA account is paid to the state bar, not to the attorney or to the clients. This interest is used by most state bars to fund legal service programs for the poor or disadvantaged. In California, the state bar pays the monthly fees for the ILOTA accounts; however, the attorney pays the service fees. No service fees are ever charged against the client trust funds.

The attorney trust account is a different bank account from any other account of the attorney. It must be separate and identifiable as a trust account from any general office, payroll or personal account of the attorney. The account should be labeled "Client Trust Account," although some attorneys use the designation "Clients' Funds" or "Clients' Special Account."

Whatever name is used must be printed on the checks to give notice to the world that the funds are trust funds. A problem arose when an attorney did not have the proper label printed on the check. The attorney was sued and had a prejudgment writ of attachment issued. The attorney had a trust account but did not have the check labeled. Therefore, the plaintiff did not know that the account was a trust account. The plaintiff thought that it was the attorney's personal account and attached it. The attachment was later set aside, but only after it caused many problems to the attorney and the attorney's clients. These would have been avoided had the checks been labeled.

The trust account should always be in a local FDIC insured institution. Such accounts are insured up to $100,000 per account. In the last few years, many savings and loans and some banks have failed. Only in those banks which were federally insured were the depositors protected. If the attorney wishes to use a noninsured bank, he should get the consent of the client. Even so, unless the bank is chosen by the client, the attorney would probably be liable for the loss of client funds if a noninsured bank fails. Use of a bank in a foreign country is extremely dangerous because the account might not be insured, or could be insured in non-American dollars or even be subject to a government freeze. It might be easier to get money into a country than to get it out. Example: A student's wife owned an apartment house near the Acropolis in Athens, Greece. It was against Greek law to take money out of the country. Therefore, the student had to have the rent paid outside the country in a complicated procedure.

Having a federally insured client trust account is not enough. The attorney's deposits cannot exceed the amount of federal insurance. Many attorneys have found themselves in serious problems as a result of the failed savings and loans. To the extent that their deposits in the trust accounts exceeded the insured limits, the attorneys were responsible to provide the difference. The alternative is simple: have as many client accounts as necessary to have all client funds insured. For example, assume that an attorney with $600,000 in client funds has only one insured account. In this account, the first $100,000 is insured and the remaining $500,000 is uninsured. In contrast, another attorney has six separate client trust accounts of $100,000 each all of which are insured.

In terms of managing clients' trust accounts, the same situation exists. All checks are kept in the checkbook until the managing attorney signs them and removes them himself. This is a major matter of malpractice liability. Failure to maintain good trust account records is a leading cause of discipline for attorneys. Often there is a situation where an attorney might commingle the trust account with the office operating account. There have been many sanctions in this area, so trust accounts must be kept totally separate from personal and from office managing accounts.

It is important to keep the number of persons who can draw on these accounts to a minimum (i.e. the attorney managing the trust account and perhaps other partners in the law firm who are related to that particular account or client). It is important not to have lay persons (legal secretaries) able to write checks. They should have no access to the checks. The checks should only be prepared by an attorney. If they are prepared by a lay person, like a legal secretary or office manager, they should remain in the book until the attorney signs them and removes them himself. This prevents the lay person from taking the check outside the book and forging or altering it in any fashion. These are basic procedures, but ones that must be maintained, or a serious liability risk will occur.

The trust statements must be reconciled monthly. Where the attorney does not prepare the reconciliation, he must personally review it. Remember, in most states the state bar will be notified by the bank of any suspicions regarding improper actions. It is much better for the attorney to catch a potential problem before a suspicion is reported to the state bar.

Many states require that the attorney keep the trust fund records for several years, usually five. In some states there is no statute of limitations for a disciplinary complaint like there is for a civil or criminal complaint. In these states, records should be keep forever, or at least until retirement. In addition, it is a good idea to keep the records for at least six years for federal tax purposes. Most state bars permit their disciplinary agencies to conduct surprise inspections on client trust accounts. The state bar can invade the office at any time and demand access to the trust records. If the records are not available immediately, that alone is a ground for discipline. Where a firm merges with another or closes business, an attorney may wish to make photo copies of the records for safe storage. An attorney who merely works for a firm that closes business might not be able to get access to the firms records later.

The easiest way to get into trouble regarding a trust account is to commingle it with the attorney's personal funds. The only funds permitted in a trust account are funds belonging to the client and funds in dispute. Under the law, once an attorney does work, he must send a bill to the client. If the client does not object to the bill, the attorney is permitted to withdraw the amount to pay the bill from the client's trust fund. If the client objects to the bill, the portion in dispute must remain in the account. Some attorneys keep the money they are owed in the trust account in an effort to keep it free from a creditor's attachment. Unfortunately, the creditors can seek an accounting of the assets in the trust account. This results in an invasion of the clients's privacy and is a separate ethical violation for the attorney.

Occasionally an attorney places employee payroll taxes in the trust account. This is an improper act because the payroll taxes should be in a separate account. To combine the accounts simply makes the accounting more difficult and permits the IRS and state taxing board to seize the entire account for unpaid taxes. The attorney would have a difficult task of getting the client's money back from the government.

An attorney must always pay the money in a client's trust account to the client upon request. There are very specific exceptions. An attorney is permitted to delay the distribution until all checks and drafts drawn against the account have been paid or cleared. The attorney should never take a chance and distribute funds based on a check or draft deposit until that check or draft has cleared. If a distribution occurs prior to the clearing of a check or draft that is subsequently dishonored, the attorney has wrongfully distributed other clients' money: the attorney has given the client money belonging to another client. If the client cannot return the money, the attorney will be surcharged for the money and remain liable for its repayment.

Regarding trust account responsibility, the attorney must understand the difference between checks and drafts and how they relate to the banking industry. Checks are normally presumed good and are automatically accepted for deposit, unless rejected within a certain number of banking days after deposit, usually seven. In other words, the attorney can call the bank after that time and determine if the check cleared and disburse funds from the cleared check. In contrast, a draft is not automatically accepted under any circumstances. A draft is credited to the trust account only when it has actually been paid or the issuing bank guarantees payment to the attorney's bank. This can cause problems if a draft has been used as a settlement in a case. Occasionally an insurance company will not authorize payment of a settlement draft until the signatures on the settlement documents have been verified. There could be a delay of several days or weeks before the draft is ultimately credited to the attorney's trust account. The bank might notify the state bar about the delay in having the draft approved, engendering a state bar audit of the trust fund.

Checks can be drawn against a cashier's check immediately after deposit, if necessary. A cashier's check is usually as good as cash and is a guarantee by the issuing bank that it will be paid. The issuing bank will stop payment on a cashier's check for only one of two reasons: lost or stolen.

A potential area of controversy arises if the attorney has the authority to endorse checks on behalf of the client. It is fairly common for an attorney to be granted a power of attorney to sign a client's name on all releases, checks and drafts. A severe problem arises when the client subsequently claims that he did not understand that such a right was being granted. The burden is on the attorney to prove that the client was fully aware of the scope and purpose of the power of attorney. This issue usually arises after the attorney signs a settlement for a client who subsequently attempts to have it set aside or sues the attorney for malpractice in settling without discussing the settlement with the client.

The trust account includes all money belonging to the client. It includes funds advanced by the client for costs, unearned fees and settlement payments. Reimbursements for costs the attorney advanced are not paid into the trust account because they are owed to the attorney. Payment for services already performed are not deposited into the trust account because they are attorney funds and to do so commingles the account. If a client's check covers both earned and unearned fees, the check should be deposited into the account with the earned share being immediately paid to the attorney.

The attorney is required to render an accounting on the trust account to the client. This accounting should take place at least every month that there is a transaction affecting the trust account. Remember, no withdrawal from the client trust account should take place without first sending the client a statement outlining the reason for the withdrawal; if the client does not object, the withdrawal could go forward.

One area that often causes problems with attorneys is reporting to federal or state taxing agencies about finances and clients. Attorneys, as other professionals, are required to report to the IRS all cash deposits over $10,000 made by clients. In addition, many states also require reporting to local law enforcement. This reporting is to avoid tax evasion and to ensure that no unreported kidnapping or bribing occur. Transactions involving foreigners must be reported to the IRS to ensure that appropriate taxes have been withheld. Failure to make the required reports exposes the attorney to personal liability for unpaid taxes by the client.

Another sore point affects the criminal attorney. Prosecutors, both federal and state, are using the RICO statutes to seize payments made to criminals' attorneys claiming that the money is the fruit of a criminal activity and thus seizable. Many criminals' attorneys have been sanctioned for failure to expose their financial records believing that such records would be used against their clients.

An unfortunate situation occasionally occurs when money is found to exist in a trust account without adequate explanation: no one knows who owns the money. This usually occurs when the managing attorney or bookkeeper dies without having adequately explained the accounting system. A large amount of money may imply that the attorney was hiding funds in the trust account to avoid taxes. There are two ways of handling this situation. The money can be paid into the court or a separate trust account can be established for it. If no claim is ever made, it will probably be paid to the state bar. Whatever procedure is adopted, it must be cleared with the state bar, thereby initiating state bar supervision of the trust account for a period of time.

Trust accounting usually involves two ledgers. The general ledger is the term applied to all of the individual client trust accounts handled under the one major bank account. In addition to the general ledger, there must be a client ledger to reflect the individual accounts that compose the general client trust account. Example: An attorney has five clients for whom the attorney is holding trust funds. The general ledger has a total of the five individual trust accounts. The attorney must also maintain client ledgers, a breakdown of the general account into five separate accounts for the clients. The monthly statement from the bank is recorded on the general ledger. The balance of the general ledger account must equal the total of all of the individual client accounts included in the account. If there is a difference between the general account statement and the attorney's total of the individual trust accounts, he must reconcile the accounts and discover the cause of error. Until he does, the attorney is subject to discipline. Usually, the difference in accounting is the monthly service charge that might be subtracted by the account and that the attorney must contribute from his own pocket.

Any attorney with employees should get fidelity bond insurance for the office. This insurance protects the attorney from embezzlement by any employee from the trust account. At first blush, I am sure the average attorney would consider this a waste of money because no one would ever hire an employee whom they could not trust.

Trust is the prime requisite for embezzlement. The embezzler must be trusted in order to get into the position to be able to embezzle funds. A classic example of how embezzlement occurs in a law office took place with a medium-sized firm in Bakersfield, California. The office manager had worked for the firm for 15 years and gradually assumed the duties and responsibilities of the position. As office manager, the woman was responsible for bookkeeping and writing small checks on the office account. She would also prepare checks for the attorney's signature to pay clients from the trust account. With complete control and access to the checkbooks she was able to juggle the accounts for several years. The office manager embezzled over $250,000. She was caught simply by a fluke. The office manager was running an errand when a client arrived for a check. The attorney wrote the check himself and did not tell the office manager because it was not part of her responsibility. Because the office manager did not know that a check had been written, she did not transfer money from another account to cover it. When the check bounced, the attorney checked the records and "discovered the iceberg." The office manager was prosecuted and found guilty of embezzlement. She was sentenced to a couple years incarceration but was released in a few months. While ordered to make restitution, she never could. The attorney did not have a fidelity bond and had to pay the clients from his own pocket. The worst part from the attorney's prospective was the notoriety caused by the case because it cost him several clients.

Even the IRS is concerned with how an attorney handles his trust account. The IRS's training publication TPDS MARKET SEGMENT SPECIALIZATION PROGRAM directs its investigators on auditing attorney's trust accounts. An interesting note is that the IRS states that the material is not to be cited as authority for setting or sustaining a technical position even though it is a training instrument. In other words, the IRS will use the document when it supports their position but will not recognize it when it goes against their position. While this position may appear sound to the IRS, in the legal world most federal courts and the Tax Court will find the IRS bound by its interpretation of tax law as propounded in this publication. The purpose of this publication is to train IRS agents to audit and investigate attorneys who maintain large client trust funds. Although, not expressly stated, it can be assumed that the IRS will provide the U.S. attorney with any information discovered that will lead to criminal prosecution of a client.

CHAPTER 8

USING PARALEGALS

I. INTRODUCTION

To many people the sign of a successful attorney is the size of the attorney's staff. This includes the expected secretary, occasional receptionist, optional file clerk and appreciated paralegal. The paralegal is a relatively new addition in the legal profession. The best way to describe the paralegal is a cross between a legal secretary and an attorney. The traditional legal secretary is a secretary specially trained to provide the unique secretarial services needed by an attorney. The most important attribute of a legal secretary is the ability to understand and complete the standard legal forms needed in a practice and to understand the procedures and requirements of legal drafting so the documents of the attorney can be properly typed.

The role of a paralegal is an extension of the legal secretary. The paralegal should possess all of the knowledge of the legal secretary and perform work that normally requires the expertise of the attorney. By their very nature, paralegals improve the cost efficiency of an office and improve the client's access to professional, competent legal services.

An attorney's understanding of when and how to use a paralegal in his practice effectively is often of critical importance in the operation of a well-run and successful practice.

II. ADVANTAGES OF USING A PARALEGAL

By their very nature and training, paralegals can be used in any area of the law and can contribute to the successful operation of a legal practice. Data show, however, that nearly two-thirds of paralegals work in the field of litigation. Use of paralegals in litigation, especially civil litigation, is hardly surprising since most attorneys also practice in this area.

The main advantage in using a paralegal is that the legal housekeeping chores of a case can be turned over to a legally trained person. This relieves the attorney of mundane and time consuming tasks so that he can turn his attention to the larger tasks facing the practice.

A paralegal alleviates pressure on the attorney through the proper delegation of authority. Example: A paralegal is used in discovery matters in the litigation area. The paralegal often assembles the discovery material that the attorney decides should be produced, makes the appropriate copies and performs the service. This is a time consuming activity that does not justify the attorney's normal hourly rate but is too important to be left to the average legal secretary.

Probably the most common use of a paralegal is to prepare tentative motions and responses for the attorney. Much litigation drafting is boiler plate, using standard points and authorities. Answers to complaints, for example, can be a specific denial or a general denial. The paralegal can prepare for the attorney's review a rough draft of the proposed legal pleading. The attorney will make changes to the document, but it will take less of his time to change the paralegal's document into one acceptable to the attorney than for the attorney to draft it himself. This gives the attorney more time to work on other cases.

Probably the most under-recognized aspect of a paralegal is that he provides the attorney with an alternative body. This is extremely important in litigation, especially when in court. It has become commonplace for an attorney to have a paralegal alongside him at trial. The paralegal will take notes on what the attorney is saying and what the other attorney has said. The truly astute paralegal will prepare suggested questions for the attorney on matters that have taken place. It is human nature for the attorney in court to be concentrating on the case as he has prepared it. The paralegal, because of detachment, will often have a fresh perspective on the case and see things the attorney has missed. In addition, if something important develops and the attorney cannot get a continuance, the attorney can immediately send the paralegal out to attend to it. Example: A case involved the quieting of title on an oil and gas lease. The opposing attorney sought a temporary restraining order claiming that the issue of title had been settled as a collateral matter in action in another state. The attorney felt this was untrue but even a temporary delay would cost his client dearly. The attorney sent the paralegal to get a copy of the other state's decision while he remained to argue the motion.

The paralegal went to an attorney's office across the street and called the attorney for the action in the other state. The court's judgment in the other state was faxed to the paralegal who took it to the attorney. Upon presentation to the court, the attorney was able to defeat the restraining order. Without the paralegal, the attorney's client would have had the restraining order on the property for 10 days, until the hearing on the preliminary injunction.

Another use for a paralegal is in the area of legal research and the maintenance of the law library. A law library may be the most costly yearly expense of a law firm. Yet, unless it is kept current, it loses its value to the attorney and becomes a liability. Many treatises and legal form books have weekly or monthly supplements. These supplements must be put in the books in an orderly fashion. If a supplement is missed or put in the book out of order, the book becomes unreliable. It is dangerous to use a treatise that has not had all of the updates put into it. One of the most common complaints of law before judges is that the attorney's research has been incomplete with the authorities having been overruled by subsequent case law.

Many legal secretaries fail to understand the importance of maintaining a law library. It is not uncommon for the secretaries simply to leave a stack of supplements in a law library for someone else to install. It takes a great deal of time to place the supplements in the books; many secretaries simply do not know how to do it. It is not uncommon for an attorney to use a treatise in a library and to see both the new supplement and the page to have been replaced side by side. It takes a person with a grasp of the importance of legal research and a knowledge of how it should be done to do it. One of the prime purposes of a paralegal is to do legal research on topics directed by the attorney. The paralegal will want the library maintained to a maximum to make the legal research the best possible. This is added impetus for the paralegal to maintain the library.

III. DOCKET MANAGEMENT

One of the most important tasks that a paralegal is given is that of docket and calendar management. The most common cause of malpractice actions against attorneys is for missing filing deadlines and statutes of limitations. The maintenance of a good docket and calendar system is mandatory for any litigation law office. Despite its importance, docket and calendar management is both repetitive and boring. It is necessary to have a competent, well-trained manager who understands and appreciates the importance of good docket management.

The paralegal, in addition to the attorney, should monitor the calendaring of expiration dates for statutes of limitations in all cases, discovery deadlines, tax return dates for all probate estates and clients for that the law office prepares returns and all hearing dates. The paralegal, as a result of his legal education, can tell when and what documents should be prepared in response to particular scheduled motions. The paralegal is an important safety check to remind the attorney when responses are due to be filed in a timely fashion. Avoiding one major malpractice case is worth a paralegal's salary in the savings of lost clients, bad publicity and a court judgment.

ATTORNEY SUPERVISION

In response to the explosion of the use of paralegals in the legal profession, the American Bar Association has created a Standing Committee on Legal Assistants to help manage and regulate their use in the legal profession. The ABA has adopted the following definition of a legal assistant, that includes paralegals:

> "Persons who, although not members of the legal profession, are qualified through education, training, or work experience, are employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function that involves the performance, under the direction and supervision of an attorney, of specifically-delegated substantive legal work, that work, for the most part, requires a sufficient knowledge of legal concepts, such that, absent the legal assistant, the attorney would perform the task."

Just as the ABA certifies laws schools, its Standing Committee certifies paralegal and legal assistant programs to assure a minimum legal standard of competency.

Model Rule 5.3 specifically requires that attorneys oversee their legal assistants. It reads as follows:

> "Rule 5.3 Responsibilities Regarding Nonlawyer Assistants.
>
> With respect to a nonlawyer employed or retained by or associated with a lawyer.
>
> (a) A partner in a law firm shall make reasonable measures giving reasonable assurance that the person's conduct is compatible with professional obligations of the lawyer.

> (b) A lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer, and
>
> (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> > (1) the lawyer orders, or, with the knowledge of the specific conduct, ratifies the conduct involved, or
> >
> > (2) the lawyer is a partner in the law firm in that the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rule 5.5(b) states that an attorney is not permitted to "assist a person who is not a member of the bar in the performance of an activity that constitutes the unauthorized practice of law." However, the comment promulgated under the Rule makes it clear that it does not apply to paralegals working under the direction of an attorney. Specifically, it states that the Rule "does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them so long as the lawyer supervised the delegated work and retains responsibility for the work."

V. LIMITATIONS ON USE OF PARALEGALS

While paralegals can do a lot for an attorney, they cannot do everything. The Model Code of Professional Responsibility was adopted by the American Bar Association in 1969 and was replaced with the Model Rule of Professional Responsibility in 1983. All states have adopted either one or the other act, with modifications, as the rules for governing the legal practice of attorneys in the state.

Paralegals are not members of the bar. Therefore, they are not subject to the same legal sanctions for unethical conduct, disbarment or suspension that can be imposed against attorneys. Nonetheless, the attorney hiring or using the paralegal is responsible for the unethical conduct of the paralegal. The Model Code, in its Preliminary Statement, imposes that duty as follows:

> "Obviously the Canons, Ethical Considerations, and Disciplinary cannot apply to nonlawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their nonprofessional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client."

The Model Rules adopted in 1983 went even further in defining the attorney obligation to oversee and manage the paralegals used in the practice. Model Rule 5.3' comment reads in pertinent part:

> "A lawyer should give assistants appropriate instruction and supervision concerning the ethical aspects of their employment... and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional responsibility."

As stated above, all states have adopted either the Model Code or the Model Rules for governing attorneys in their state. Therefore, they are required to supervise their paralegals and are responsible for the actions of their paralegals.

There are certain matters that paralegals are not permitted to undertake even if their attorney attempts to delegate such authority to act in those areas. Model Code Canon 3 specifically bars paralegals from acting "in matters involving professional judgment. Where this professional judgment is not involved, nonlawyers...may engage in occupations that require a special knowledge of law in certain areas." Ethical Consideration 3.5 goes further to state: "A lawyer often delegates tasks to...lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product."

Probably the greatest concern that the legal profession has with the use of paralegals is the maintenance of clients' confidences. Clients know that an attorney cannot divulge their communications or information without being sanctioned, possibly to the extent of losing their license. With the use of paralegals, a concern exists because paralegals have no license to lose. In an attempt to address such client concerns, Canon 4 of the Model Code and its Ethical Considerations were adopted. Ethical Consideration 4-2 states, "It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees... This obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved." Furthermore, Ethical Consideration 4-4 states, "A lawyer should endeavor to act in a manner that preserves the evidentiary privilege...He should avoid professional discussions in the presence of persons to whom the privilege does not extend."

The professional limitations on paralegals not exercising professional judgment still permits them to do a great deal for the attorney. Specifically, paralegals are permitted to interview witnesses, communicate with clients (which also includes conducting interviews), conduct investigations, speak with court personnel, perform legal research, and draft preliminary pleadings. Such conduct does not violate any professional canon, rule, or ethical consideration as long as the paralegal acts under the direct supervision of the attorney. The attorney cannot assign case management or client communication to the paralegal.

With the above exceptions, a paralegal is not permitted to engage in any activity that involves professional judgment on the part of an attorney. This limitation is defined rather broadly to mean that a paralegal may not render legal advice or counsel to a client. The paralegal can take a message and relay a client's questions to the attorney but may not render his own opinion or answers to those questions. An interesting exception to this limitation has developed regarding court appearances by paralegals. Some states, but not all or even a majority, permit paralegals to appear in court. Such states usually limit the court appearances to uncontested cases or administrative law cases. Usually the written consent of the client must have been obtained prior to the appearance. Even if such a requirement does not exist, it should be obtained anyway from a malpractice standpoint.

PARALEGAL ASSOCIATIONS

There are two major national legal assistant and paralegal associations in addition to numerous state and regional associations, the National Federation of Paralegal Associations (NFPA) and the National Association of Legal Assistants, Inc, (NALA).

The NFPA is an association composed of both state and local paralegal associations. The NFPA has adopted an "Affirmation of Professional Responsibility" that declares that its paralegals should strive to maintain the highest standards of professional competence and ethical conduct. Its members agree to preserve client communications and confidences and to "demonstrate initiative in performing and expanding the paralegal role in the delivery of legal services within the parameters of the unauthorized practice of law statutes."

The NALA has adopted both a Code of Ethics and Model Standards and Guidelines for Utilization of Legal Assistants. The NALA Code of Ethics states that its members shall be governed by the ABA's Code of Professional Responsibility. The Code also prohibits its members from engaging in the unauthorized practice of law by such acts as accepting a case, setting fees or giving legal advice. The guidelines of the NALA set minimum qualifications for its members and recommend how its members should be used in a law office. The NALA has developed a two-day examination for certification as a Certified Legal Assistant.

An attorney seeking to hire a paralegal should, as with any other employees consider the paralegal's training and education and any certification and membership in reputable paralegal organizations before making an offer of employment.

CHAPTER 9

AUTOMATION IN THE SMALL LAW PRACTICE

I. INTRODUCTION

The sole practitioner is always looking for a way to reduce overhead yet still remain competitive. The best way for an attorney to do so is to use the advantages that automation offers the sole practitioner. The law office itself, despite its look, has not really changed much in the last 100 years. Many of the same devices and procedures used today were used then. The difference is in the office equipment: the machines, how they are used and how fast they operate. A secretary 100 years ago would still understand the basics of most of the machines in today's office and quickly be able to understand the uses of the new machines, such as copiers and optical scanners. A legal secretary of the early 1900's would still recognize the forms of legal pleading and procedure and many of the same procedures for filing and docket management.

The best example of stability of office technology is the telephone. Most law offices (at least in big cities) had telephones 100 years ago. The difference between the old phone systems and those today are the many specialty services that are available. These services, such as call forwarding and call waiting, are commonly used but are primarily for specialty use. One of the most important changes in the phones for the law office is that it is now possible to have a multiple-line system. This permits one handset to answer several phone lines. Just a few decades ago, if a person wanted two or more lines, the person had to have a separate phone for each line. It was a standard comedy routine in the silent pictures for the comic to become enmeshed in the many phone lines in the office of the time.

While recognizing the basic law office of today is similar to that of the past, it is necessary to understand that the improvements of today's office technology permit operation with greater speed, reliability, and freedom of operation. An attorney who understands what business machines can do for the practice can structure the office in a way to meet demands of the practice inexpensively and efficiently.

II. COMPUTERS

The day of computers in the law office first came upon the scene in the late 1970's; however, it was not until the mid-1980's that computers became common. Today every law office should have a computer. Computers offer the services of word processing, bookkeeping and docket management. All of these functions are important to the attorney, but the most important function is that of word processing.

Word processing on a computer permits an attorney to create a document and store it in the memory of the computer or on a computer disc. The document thereafter can be reloaded on the computer at any time, edited and printed again in its new form. What this means is that an attorney can create a master document file for every pleading, contract or other document drafted by him.

From these master documents, new documents can be drafted and tailored to the requirements of new clients without retyping the entire document. In the 1970's and through the mid-1980's, a law firm without a computer had a drawer or drawers of a file cabinet labeled "Form Drawer." The attorney would have copies of every document drafted by the office. Whenever a similar document had to be drafted, the attorney would take a document from the file drawer and make a copy of it. On the copy the attorney would write the changes that he wanted. In some instances, the attorney would write out the pleading in long hand and cut out the portions of the copied document that he wanted inserted in the new pleading. Other attorneys would dictate the new pleading to a tape recorder and state what portions of the copied pleading should be included in the new pleading. This was the age of the "cut and paste" method. This was the standard method of operation for law offices until the age of the computer.

The computer revolution of the law office corresponds directly with the development of word processing equipment. In the 1970's, the top of the line office equipment was the IBM Selectric typewriter. This was an expensive electric typewriter, but with no word processing capability. In the late 1970's, IBM created the first popular word processor in its MagCard system. The MagCard saved a document on a magnetic card approximately 3 inches wide by 6 inches long. Unfortunately, the MagCard system did not have a screen, and it was difficult and time consuming to edit documents on the magnetic card. Despite this fact, the MagCard was very popular, although expensive. IBM followed the MagCard with its System-6 word processing system. This was the first major word processing system with a screen. The System-6 had limited computer functions for accounting and billing. The System-6's real value was in word processing. With the screen, an operator for the first was able to engage in full word processing. The System-6 was extremely expensive, in the range of $20,000. At this price, only the most successful law firms could afford the System-6. In just a few years there were major revolutions in small computers and word processors.

In the mid 1980's, many companies developed dedicated word processors for around $500. These systems, manufactured by many companies such as Brother, Smith-Corona and Panasonic, were reliable and more importantly they were much less expensive than full-blown computers. These systems, of that only Brother and Smith-Corona are still marketed, had a screen, a daisy wheel printer and a 3.5 disc drive. At the time, these machines were perfect for the sole practitioner. A full-blown IBM 286 computer at that time cost between $3,000 and $4,000 thousand dollars and a laser jet printer cost over $2,000. These dedicated word processing systems could do the same word processing work for a few hundred dollars.

Throughout the 1980's and through the early 1990's, the office computer system cost about $5,000. In 1993, there was another major step in the computer revolution: the IBM model 286 standard for personal computers was replaced with a more powerful machine called the IBM 386, and within a few months an even more powerful 486 machine came on the market and within months powerful Pentiums appeared. The 286, 386, 486 and Pentiums designations referred to the computer chips and motherboards that operated the machines. The same chips were used in the computers of other manufacturers with the result that computer prices dropped considerably.

It makes no sense for an attorney to purchase a dedicated word processor when a complete Pentium system, including monitor, whether an IBM machine, an IBM clone, or a comparable system from another manufacturer, can be purchased for around $1,500. In addition basic laser printers, which print at 6 pages per minute, can be purchased for around $500 and color ink jet printers which print at about 1 page per minute, can be purchased at prices beginning at $150.

If a modem is connected onto the computer, the attorney can utlize Lexis or Westlaw for computerized legal research. A computer will also handle the law firm's computerized billing with the appropriate software.

In addition, a computer for the office, an attorney may consider a laptop as well for personal use. The laptop computer certainly offers a great deal to the attorney. A laptop permits the attorney to work anywhere, especially in a law library. This makes drafting of legal pleadings easier and more convenient. A used laptop is an excellent tool for the attorney without having to invest a lot of money. It is possible to get a laptop with a modem so that the attorney can communicate with the law office’s computer over the phone.

A gimmick being marketed to attorneys are computer notebooks to keep track of phone numbers, appointments and the like. This is a waste of money. A laptop computer can do all of that as well as regular word processing and other computer functions. The cost difference, used or otherwise, is not enough to justify a computer notebook over a lap top.

One of the great uses of computers in the law office is the modem ability to transfer files. A computer that has a modem has the ability to both transfer and receive files. Several courts, such as those in Los Angeles, have adopted systems for computer filing. Computer filing gives an office the knowledge and assurance that submitted filings have actually been received and docketed. Courts love the idea of computer filing because it reduces their filing and record keeping procedures. In time, hard copies of filings will not be required. Computers that have modem ability will cost more than computer card word processors, but they can also communicate with any other computer with a modem. This opens the entire computer Internet to the small law office.

For the last ten years, the rule of thumb has been that $3,000 will normally be sufficient to create an up to date law office. With that amount of money, an attorney can usually equip an office with about 90% of the computer power presently available. For 100% of such computer power presently available between two to three times that amount would have to be spent. For most law firms the extra expense of the additional power is not worth the investment. Past experience has shown that computer systems reduce in value so quickly that paying first rate prices for additional power is often not worth it as such power often become available in the near future for significantly less money. For instance, in most cities, a complete Pentium computer system, with a 133 megahertz chip and 1.6 gigabyte hardrive (including monitor) can often be purchased for between $1,100 and $1,400.

As a price comparison, $3,000 in 1995 would have purchased the following:

1. Pentium 120 MHZ processor (the higher the MHZ the faster the processing).
2. 16 Megabytes of RAM (the more RAM the more flexibility in running programs as many programs require a certain amount of RAM such as Windows 95).
3. A 1.6 gigabyte hard drive (when 286 systems first came out 60 megabytes was considered a lot; now 16 times that amount has become near top of the line).
4. High resolution monitor.
5. RAM cache of 256 K, a high speed video card with 2 megabytes of video memory.
6. CD-ROM drive.

By accepting less in terms of speed and memory, it is possible to still get a quite serviceable system. For about $800, a reduced system using a Pentium 90 MHZ system, 8 Megabytes and a 1 gigabyte system, video card with one megabyte of memory and the same CD-ROM and monitor can be purchased.

The most important determining factor in purchasing a computer is what programs it will run. Quicken and Lotus, two of the most popular accounting programs, can generally be used on the most basic 286 system. Even WordPerfect 5.0 can be used on most 286 systems. Therefore, with little expenditure (between $300 and $500), an attorney can equip a basic office. However, as more is asked from the system, the price increases. The new Windows 95 program requires 12 Megabytes of RAM and more than 100 Megabytes of hard disc memory, which means only an advanced 486 system will suffice. Another fact is that for communicating with another computer a modem is necessary. The faster the modem, the faster the material will be processed. The price for modems has dropped from hundreds of dollars to, in many cases, a 33.6 bps modem for less than $100. The standard is now a fax\modem (one which transfers information directly to a computer or allows the computer to serve both as a fax machine) which has 33,600-bps. The state of the art is now the 56,800 bps modem which also permits the user to speak over the phone line while the fax is in use (provided both the sender and receiver are similarly equipped with the 28,800 bps modem). Older modems which operate at 9,600 or 14,400 baud should be avoided because the few dollars saved is not worth the aggravation and delay in transmitting information. A 33.6 kps modem is the best buy, at this time. The speed which a 33.6 kps provides for transmitting materials over the net is more than suitable for the average law office. Problems exist with the faster modems because, at this time, is there no standardization as to format. The faster modems cost over $200 and can only communicate at the higher speed with same type manufacturer’s modem. If a 58.6 kps modem attempts to communicate with another manufacturer’s modem, it drops down to 33.6 kps or even 28.6 anyway.

CD-ROMS

Computer research can be done through both LEXIS or WESTLAW which have been around for twenty years. Such research can usually be accomplished on any 286 system with a modem. The next stage of computer research is through the use of a CD-ROM. The technology behind a CD-ROM is relatively easy to understand. All of the information is stored on a laser disc (much as a computer disc) which can be accessed by the attorney. The information on the discs replace the conventional library generally for a slightly less price than the comparable books. For example, Shepard's 19 volumes of its <u>CALIFORNIA CITATIONS</u> sell for $1,275 plus another $425 for a monthly supplement for one year as compared to its CD-ROM price for the same information of $1,195 with a once a month supplement for the first year. Matthew Bender's <u>CALIFORNIA FORMS FOR PLEADING AND PRACTICE</u> actually gives a free CD-ROM version with the purchase of its books for $2,695 or sells them separately for $1,495.

One of the advantages of a CD-ROM in the law office is often its relationship with on-line services. CD-ROMS are used for day to day matters with on-line services being consulted for recent changes. If a firm leases a West CD-ROM package, the subscriber gets access to WESTLAW without having to pay the normal monthly subscription or monthly use fee. Augmentation of the CD-ROM is usually $4.00 per minute plus 17¢ local phone charge plus 34 ¢ per minute for modem charge. LEXIS-NEXIS also offers its CD-ROM subscribers access to LEXIS for $4.42 per minute. In comparison, LEXIS offers a special on-line program to small law firms, who elect not to subscribe to its CD-ROM, which charges a flat of $135 per month for unlimited access to geographic locations and for another $25 nationwide searches can be performed.

III. COPIERS

The sole practitioner will need a copying machine. There has been a marked reduction in the price of copiers along with the introduction of lines directly targeted to the small office. A full-service copier, with reduction and enlargement ability, automatic document feed, collator, and high speed can be purchased for about $2,000, whereas a few years earlier the cost was several thousand dollars more.

The small office can purchase a name brand such as the Sharp Z-58 for around $600 complete. This machine does not have the automatic paper feed or collator function but produces cheaper copies. For the sole practitioner, this machine and similar machines from other manufacturers can offer an inexpensive and effective copying service for the office. The cost for operating such a machine is usually between one and two cents per sheet.

In contrast to purchasing a machine, many cities have printers or office supply companies that provide copying services. The price charged for these copies often runs between 3¢ and 5¢ per page. Where there must be multiple copies of many paged documents, such as appellate briefs, a sole practitioner might prefer to use such a service.

IV. OPTICAL SCANNERS

As mentioned above, a 486 computer can operate an optical scanner. This is a machine that appears similar to a copier. Once the document is scanned, it is stored in the computer like any other data. The computer can then print it or transmit it to another via a modem whenever the attorney wishes.

A computer scanner replaces the need of a secretary to type information into the computer's memory. Many documents that would take a prohibitively long time to type can be put into the computer in minutes. Optical scanning permits every attorney to create a first rate library of computer documents.

An optical scanner would be necessary for any attorney desiring to file documents electronically. The exhibits that accompany most filings are usually copies of other documents. To transmit them via modem, the documents must first be filed in the computer. The document cannot be typed into the computer and still remain an authenticated copy. The fast and correct manner of transmission for the exhibits with the pleading is to scan the document into the computer. Once in the computer's memory, it can be transmitted the same as any other document. When the receiving computer receives the document, an exact copy of the exhibit will be printed.

Optical scanners, as with all other computer equipment, have increased in reliability and dropped significantly in price. It is possible to purchase at a discount store (such as Cosco or the Price Club) a high quality optical scanner for under $600. An optical scanner sold at the computer store will usually run around $1,100. There are hand-held computer scanners as well, but for a law office it would be better to have a full page scanner.

An optical scanner is not something that an attorney needs every day, and it would not make sense to invest a lot of money in them. One alternative is to go to a business supply store that offers scanning services; however, it will be cost prohibitive if there are a lot of documents to scan. Another alternative is for two or more attorneys to share the cost of the machine. Between several attorneys the machine will be used enough to pay for itself without inconveniencing anybody. A used optical scanner can also be purchased and become a reasonable investment if the cost of it is split among two or more attorneys.

V. PRINTERS

If the attorney has a computer system, then he needs a printer. There are three types of printers available for computers: dot matrix printers, ink jet printers and laser jet printers. Laser jet printers are the top of the line. Laser jet printers can print documents in color, are fast and also more expensive. Competition has dropped the starting prices of basic laser printers which do only black ink. The starting prices begin at around $450 and print speed is usually around 6 pages per minute. Dot matrix printers use ink ribbons. The technology for dot matrix printers has improved remarkably and can provide reasonable quality printing. The dot matrix printers of just a few years ago are still quite acceptable for professional work. The cost of a dot matrix printer is $150 or more.

For starting attorneys, the best buy in copiers is the ink jet printers. These printers cost between $150 and $300. Besides cost, these copiers also copy in color which many of the laser jet printers, costing twice as much, fail to do. The ink-jet printers are not as fast as the laser jet printers usually doing only one to three pages per minute as opposed to the laser jets' six or more pages per minute. Also the ink jet printers use water soluable inks which may smudge especially when a highlighter is used. The quality of the ink jet printer varies among manufacturers. Consumer Reports in September 1995 rated printers and found that both the Epson Stylus inkjet printer ($520) and Canon BJC-4000 ($350) were superior to Hewlette Packard Deskjet printers. The prices for these printers have now be reduced in half.

A starting practitioner should consider a color ink jet printer or a used laser jet rather than a new laser jet.

VI. WORD PROCESSORS VS. TYPEWRITERS

In most instances a typewriter is now passe. A law office should have a good inexpensive typewriter available for special uses but not day- to-day use. Whenever a law office prepares a document for a client it should be on a computer or a word processor. Having such a document on a word processor serves two purposes: it creates a master document for use with other clients, and it provides quick editing without retyping the document after each change.

Typewriters are occasionally used in a law office to complete printed forms, type labels or address envelopes because typewriters can perform these functions more easily than a computer or word processor. There are now typewriters with limited memory. These are called "memory typewriters." These typewriters are equivalent to the earlier dedicated word processors. Such typewriters can be a great assistance to the attorney because of their portable nature. An attorney can bring the typewriter with him when attending a meeting with a client. At the meeting if documents have to be drafted or amended the attorney may do so on the spot. Changes can be done on a laptop computer, but the attorney has to take the disc elsewhere to have the document printed. The use of a dedicated system permits the document to be printed immediately after changes have been made. The Brother and Smith-Corona word processing machines are popular for just this reason. The machines weigh about 20 pounds and are a single unit. The machines have a screen and a daisy wheel printer and are easy to use. The information is stored on regular 3.5 computer discs. The new WordPerfect 6.1 has the ability to convert data from many dedicated word processors into WordPerfect, that thereafter will be compatible with other computers. This ability allows attorneys with dedicated word processors to upgrade to a full blown computer system without having to replace the old system.

VII. UNIFIED COMPUTER SYSTEMS

The trend in office marketing is to sell a complete system. The technology behind a copier, fax machine and optical scanner is basically the same. As a result some computer companies, such as Canon, produce a computer system that contains a machine that does all the functions of a copier, fax, modem, printer and optical scanner. There is no doubt that such a system is easier to operate and will take less room. The real question is whether or not it is worth it. The cost for this type system is between $3,000 and $4,000 dollars.

An attorney can create his own system new for around $2,500 depending on the quality of the printer selected. The optical scanner "inputs" into the computer; the computer then directs the printer. Another thing to bear in mind for the sole practitioner is that the rapid development of technology may result in further reductions in price.

Purchasing a system carries with it the risk that rapid technology advancements may reduce the resale of the system. Before purchasing any unified system, the attorney should check to see the resale value of the system, if there are any used systems for sale, and what it would cost to create a similar system piecemeal at either retail or used prices.

VIII. VOICE MAIL

The basic answering machine is a must for any law office. The importance of the service that a basic answering machine furnishes is beyond reasonable dispute. The next stage of development for the answering machine is to combine the machine with a computer to generate "voice mail." Many people have dealt with voice mail without knowing the name of the service.

Voice mail in its simplest form is an answering machine that directs the caller to push a series of buttons in order to direct his call to the person who handles the types of questions or matter posed by the caller. There are two types of voice mail. The first type informs the caller of the available options that will be triggered upon pushing a particular button. Generally, if no button is ultimately pushed a live person will answer the line. On the other hand, many companies using this system will not have the phone answer until a button is pushed.

The major complaint against voice mail is the lack of human contact. After going through all the procedures of pushing buttons and listening to the machine, the caller still probably will not speak with an attorney but will instead leave a message.

The use of voice mail by a sole practitioner is not an especially good idea. The prime marketing asset of a small practice is the one-to-one nature of the practice. As the firm takes on the more impersonal nature of the large office, the firm loses that close feeling of contact with the clients. For the larger firm, the loss of the personal feeling is to an extent unavoidable. There simply are too many attorneys and other variables in the large firm for the client to feel special to the firm and therefore, if an attachment develops, it is only to the individual attorney handling the case. Bearing this in mind, voice mail can be useful and even expected by clients of a large law firm, but it will not be appreciated by the clients of a small firm.

CHAPTER 10

SPECIALIZATION OF THE PRACTICE

I. INTRODUCTION

This chapter deals with what areas of law an attorney will emphasize in his practice. The term specialization is different in use from legal specialization certification. This chapter is devoted to the practical considerations of choosing areas of specialization. This is a fundamental decision and is often overlooked by the attorney.

Most law schools do not prepare an attorney for opening an office and getting involved in the regular practice of the legal profession. There are law schools now that offer courses on law office management and a few that even require them. For the most part, however, the average law school graduate has no idea what areas of law he intends to practice at the beginning of his career. The result of this lack of knowledge can be frustrating to the attorney and seriously affect the direction of his legal practice. Many attorneys feel trapped in their type of legal practices. They continue in the fields they initially chose because they have developed an expertise. They derive little personal satisfaction from their practice.

To develop a flexible legal practice requires a conscious desire to do so. The knowledgeable law student will begin laying the basics for such a practice in law school by taking a wide variety of law courses and will clerk to get a feeling for many disciplines of the law. Unfortunately, this usually does not happen. Most law students take the required courses in law school and the elective courses are chosen in areas the student sees as being lucrative. There is little consideration as to whether or not he wants to practice in a specific discipline for the rest of his career. Many law students never clerk in law school or do so in an office that practices no more than one or two legal areas. The average law student fails to develop a depth in aspects of the law that allow him to choose a particular field of practice upon admission to the bar.

Traditionally, new attorneys often entered public service for a few years after graduating from law school. These attorneys joined the district attorney's office, county counsel's office, federal government or other governmental service. These new attorneys developed their skills while getting paid and learning that areas appealed to them for their career Most new attorneys not entering government service joined private law firms for several years to develop their legal skills.

Government employment for attorneys has been seriously curtailed. In the last 20 years there has been a quantitative explosion of attorneys. There is now serious competition for all entry level jobs in the private and the government sector. For the first time in the history of American law, more new attorneys are entering sole practice than are entering government service or joining existing law firms. This creates a large number of newly trained attorneys without a background in how to get started.

Over half of all new businesses fail within the first five years. This is not necessarily true for the professionals but that does not mean they are successes. An attorney who operates his legal practice in a sloppy manner or who chooses to practice in an area in which there is little local demand will not be a marked success. A survey by the California State Bar shows that nearly 60% of its attorneys earn less than $40,000 per year, with a large number earning between $20,000 and $30,000. One of the prime factors determining the earnings of an attorney is the type of law that he practices and whether or not he specializes.

II. CHOOSING THE INITIAL FIELDS

A. LOCATION

For the attorney just opening an office, there often is little choice in the type of law he must practice. Until the attorney develops a name and reputation in a community, the attorney must usually take whatever comes into the office. The attorney must always bear in mind the professional requirements to handle all cases is the standard of an expert in the field.

Location of the office often is as important as the choice of the type of practice and the attorney's own initial knowledge. An attorney who is a specialist in taxation may find little in that field if the practice is located in a small rural community. The demand for expertise may not be there. On the other hand, an attorney experienced in oil and gas law might find a real demand for such expertise in a community that is centered around the oil and gas industry. An attorney versed in the agricultural law might not find a niche in a major city. Success of an office often depends greatly upon the location of the office in connection with the type of law practiced.

Therefore, before an attorney opens an office, he should consider how the legal expertise that he brings to an area will be received. It is not uncommon for competent attorneys to move into a area and not be a success. If the potential clients do not need the type of law the attorney practices, the attorney will not be used.

From a marketing standpoint, a new attorney should study the local phone book to ascertain the number of attorneys present in the area and the types of law they practice. If it becomes obvious that the attorney can successfully fill a needed niche, he should consider it. One of the worst things an attorney can do from a specialization point of view is to pick an area for that there is little demand on a local level. Occasionally, an attorney can achieve such fame and notoriety that clients outside of the area will use his services. Usually such attorneys are successful criminal attorneys or highly successful civil litigators. For the attorney just opening a practice without such fame and fortune, it would be unreasonable for him to expect to develop such a successful practice immediately.

B. RESPONSE TO OTHER FACTORS

1. PAYING BILLS

Being the best attorney in town does no good if the attorney practices in a field that is not needed. This sentiment alone states what an attorney in private practice must face. The attorney must select an area of law that will generate business in an acceptable amount. Almost every attorney became one in order to earn a good living. There are a few attorneys born to wealthy families who became attorneys for other reasons (such as entering politics), but most attorneys became such to earn a good living.

Most attorneys want to practice in an area where they will earn a good living. Many attorneys have graduated from law school with huge debts (student loans). In fact, the average student loan debt is between $30,000 and $65,000. In addition, if married and each spouse has student loans, the debts may well exceed $125,000. The problem arises because debts for student loans cannot, except in rare instances, be discharged in bankruptcy. They must be paid or the attorney will have his credit rating impugned without having the liability for the debt discharged.

The importance of having to earn money immediately in order to pay their debts is a prime motivating factor for attorneys to open a quickly successful practice. As a result, attorneys often choose areas of practice initially with the idea of paying their debts and not with the idea of developing career satisfaction. Years later the attorney can find himself in what he may consider a dead-end practice.

One of the most stable areas of law is family law. In California, for example, over 60% of all civil filings are related to family law. The practice of family law includes divorce, property settlement and child custody. In family law cases, the attorney cannot take a contingency fee. Therefore, the attorney will never have the potential of a huge fee award. A good family law attorney will earn a good living. The drawback with family law is the emotional trauma attendant with its practice. In more than in any other field of law, in every contested case emotion usually will play a larger role than reason . Family law attorneys often have a higher rate of ulcers and attorney burnout than other types of attorneys.

Another stable area of law is the field relating to drunk driving. In recent years, many states have adopted legal limits of alcohol. A person operating a vehicle while over the legal limit of alcohol will be found guilty of a serious offense. In addition, many states have adopted laws calling for the immediate suspension of a driver's license upon the driver failing an alcohol related driving test. The result of these laws is that more drunk driving and license suspension cases are being taken to trial. While the laws make it easier for a district attorney to get a conviction, it opens the possibly for plea negotiations on sentences by attorneys. In many cases, the value of the attorney is not in beating the ticket but in negotiating the sentence.

Bankruptcy is an area to that new attorneys often gravitate. Being a statutorily created field, it is an area they can enter with minimum exposure for malpractice. Nearly everything done in a bankruptcy case is under the direction of the bankruptcy judge and the trustee. An attorney can limit quite significantly any exposure for malpractice by receiving permission from the trustee and judge for all major acts. In addition, Chapter 7 and Chapter 13 bankruptcies are relatively easy to do and yield a good source of income.

One type of practice for a new attorney is usually a loss leader is will drafting. Most attorneys will charge $50 or so to draft a will for a client. The cost for doing the will usually has no basis in the time the attorney must spend interviewing the client and preparing the will. Charging more for the will usually costs the attorney a client. In such instances, the client will discover that another would have done the will cheaper. In addition, many states have adopted statutory will forms, that are sold in stationary stores, in that the testator can simply fill the blanks and execute it in front of witnesses. Such statutory wills are valid everywhere if properly executed in the state where signed.

Attorneys have traditionally done cheap wills in the hope that they will handle the probate of the estate. Such have become a potential source of malpractice liability for the attorney. In some states, attorneys have been found liable for malpractice for not suggesting a probate avoidance vehicle, such as a revocable trust, rather than a will. As stated above, an attorney will be governed by the standard of an attorney practicing in that field. Most estate planners will discuss probate avoidance with a client before executing a will. If a new attorney does not do so, he might be subject to the costs incurred in probating the estate if the heirs of the estate can show that the testator would have executed an estate plan avoiding probate if it had been suggested. This program's CLE course on Estate Planning II discusses probate avoidance vehicles.

A point for the attorney to bear in mind is that while paying bills is important, care must nonetheless be taken to avoid or lessen exposure for malpractice liability. In addition, the attorney should never feel trapped in a particular area of law, since it is now possible to practice two fields of law relatively easily.

2. FORTUNE AND LUCK

One of the most important factors in selecting a field in that to practice either initially or switching to after some time in practice is an intangible that can only be called luck or fortune. Occasionally an attorney will come across a case related to the type of law in that the attorney has previously practiced or that the attorney feels is interesting. The attorney then must make a decision on whether or not to take the case. Taking the case may change the attorneys whole career by changing the direction of his practice.

There are many attorneys who have become specialists in certain areas of the law simply because they initially took one case and it spawned others of a similar nature. A very successful attorney, for example, is a civil attorney who initially took one of the first cases on toxins against women. The result has been that for most of the rest of his career the attorney has been handling those cases only and has become, solely by accident, one of the top attorneys in the United States on the topic. Had that first client never entered the attorney's office or the opportunity presented itself, the attorney would have continued to be a successful attorney in general civil law but would never have attained the scope of financial success he has since reached.

III. DEVELOPING EXPERTISE IN NEW FIELDS

Most attorneys enter what can best be described as de facto specialization. This means that the attorney enters a private practice based upon areas of law he has studied or experienced. These attorneys remain fixed in these areas for their entire career. The reason is the natural human trait of intransigence. Most people, including attorneys, will stay in the same position or do the same work regardless of how unrewarding or dissatisfying, as long as they can earn enough money to pay their bills. Few people are willing to change careers or risk a loss of a paycheck by pursuing something new. This makes choosing the right legal field at the beginning or having the ability to acquire new proficiency and expertise in other legal fields highly desirable.

The Canons of Professional Responsibility require an attorney maintain his competency in his chosen legal fields. An attorney practicing in his first bankruptcy case is held to the same standard of legal competency as an attorney who has specialized for years in that type of case. This has forced attorneys recently out of law school to practice only in fields they have studied. In response to malpractice claims against attorneys who have not had sufficient training in areas of law they practice, many states (39 as of January 1995) have imposed continuing legal education (CLE) requirements.

In most states, an attorney is required to complete between 10 and 15 hours of CLE per year. The purpose behind mandatory CLE requirements is to force attorneys to maintain a certain level of legal competency. The side effect of a mandatory CLE program is that it has encouraged the development of some good programs that provide a means for attorneys who do not practice in a particular area to acquire the competent legal skills to do so. The best CLE courses are written and prepared by competent attorneys practicing in the field. Such courses cover all the issues and procedures to be faced by an attorney in the ordinary case that is filed. A CLE course does not take the place of a treatise, but a good course does serve as an excellent introduction into a legal field and its basic procedures. The best types of CLE courses are the ones that allow an attorney to enter into a field immediately by being premised upon a excellent presentation of the law.

This CLE program strives to be such a CLE program. The attorney is offered a variety of courses that will meet a state bar's continuing legal education requirements. This CLE program together with its individual courses are written from the standpoint of a practicing attorney helping other attorneys to practice in their field. Its books also have forms to help an attorney develop a form library for his practice. This CLE program strives to develop an attorney's practice by presenting him practical forms and recommended procedures.

The practical aspect of the CLE courses is that it proves the most economical and efficient means for an attorney to develop skills in a legal area. An attorney, for example, who had never handled a bankruptcy case could take a CLE course and quickly become adept in the field. CLE courses provide attorneys with the means to acquire post law school education and expertise sufficient to shift the scope of their practice into other fields.

IV. CONCLUSION

The purpose of this chapter is to help attorneys understand the importance of choosing a legal field of practice initially and to undertake subsequent movement into another field in a relatively easy step. At one time it was both difficult and dangerous for an attorney to attempt to practice in a field he had never studied. This is no longer the case. In fact, today the law develops so quickly that there are fields of law, such as computer law or literary law, that did not exist previously and may not even yet be taught in law schools. Attorneys should never feel trapped in a particular field of law. With the availability of CLE programs, it is possible to enter into new fields of law relatively easily.

CHAPTER 11

CONTINUING LEGAL EDUCATION AND CERTIFICATION

I. CONSTRUING LEGAL EDUCATION

Traditionally, once a person became licensed as an attorney, he was under no obligation to continue his legal education as a requirement to keep his license. It has long been understood or implied that an attorney by his own practice will be maintaining his competency to handle the area in which he normally practices. Nonetheless, in the last 20 years, most states (39 states as of January 1995) have adopted some type of continuing legal education program. Both the ABA Code of Professional Responsibility Ethical Consideration 6-2 and the Model Rule of Professional Responsibility 1.1 require an attorney to take reasonable steps to maintain his competency in his areas of practice. In addition, where there is an established peer review program (CLE), the attorney should consider using it.

Most states require the attorney to complete 10 to 15 hours of CLE per year. In some states, such as California and Colorado, an attorney is given the option to complete a minimum number of hours over a three-year period. In California it is 36 hours, and in Colorado it is 45 hours. All CLE states permit the attorney to wait until the end of the compliance period and then complete all the course hours. For example, most law schools do not require a student to take a course in bankruptcy, worker's compensation, admiralty or advanced estate planning beyond normal wills or trust. After being admitted into a bar, an attorney wishing to practice in such areas would not be competent. To gain that competency, returning to law school and taking a course is normally not feasible because that would interfere with the attorney's practice and would take an entire semester or quarter to complete. The best alternative is to take a good CLE course written and prepared by a competent attorney practicing in the field. Such a course would cover all of the basic problems and procedures to be faced by the attorney in the majority of cases. The new attorney could then enter practice in the new field quickly and competently.

There are different types of certification plans. In California, the attorney must actually take a tough examination. California's certification plan and categories are approved by the California Supreme Court. The California State Bar administers the tests. A written test is given. If the attorney passes, he can advertise as a specialist. There are very few attorneys that actually go through the requirements to become a certified specialist.

Another type of certification procedure is known as the self-designation certification plan, as used in New Mexico. Under this system, the attorney simply notifies the state bar that he spends at least 60% of his practice doing a particular area of law and has done so for the preceding five years. The attorney must continue to receive continuing legal education in that area to maintain that specialty. There are 62 fields of specialization in New Mexico, including general practice. An attorney can specialize in any of those areas, but is limited to specialization in that one area because at least 60% of his legal practice must be in that field.

A cross between the formal certification procedure of California (which involves a test), and the self-identification plan of New Mexico is the plan adopted by Florida. In Florida the certification program is monitored by a board (usually under direction of the Florida State Bar) with court approval. Under the Florida system, the attorney designates himself as a specialist in no more than three of 24 specialty areas, and in addition as a general practitioner. To qualify for this specialty designation, the attorney is required to have five years in practice and show substantial experience in the specialty area during three out of the last five years. He must continue to receive continuing education in these designated areas. His specialization certificate must be renewed every five years and is contingent upon satisfying the CLE requirements for maintaining that specialization. Someone who has an LLM degree in a particular specialty area may be presumed to meet the minimum standards for the specialization requirements. In addition, Florida also has a situation where any member in good standing of a state bar can obtain permission to designate up to three areas from the approved list in which to be called a specialist. The attorney must be engaged in practice for three years, and have substantial experience in that area, and have accumulated at least 30 hours of approved CLE credit in each designated area, and provide references from other attorneys.

The ABA has its own proposal. Instead of calling it a "certification as a specialist," it is called a "board recognized specialist." The ABA plan also requires certification by a test or examination. The adoption of testing requirements is decided by the particular state. Many states have adopted the ABA plan.

The potential value of a CLE course is that it offers the attorney the opportunity to learn enough to enter practice competently in a field he has not entered before. There are many areas of law that are optional to the law student. Therefore, there are courses which an attorney will not have taken in law school. After becoming an attorney, if he wishes to practice in a specific area, the best way to learn about that field is through a competent CLE program. Most states have adopted a CLE requirement to assist these attorneys to enter a new field competently.

In this CLE program, for instance, the attorney is offered a variety of courses that will meet the requirements for his state bar's continuing legal education program. This CLE program contains a broad spectrum of courses that are written by practicing attorneys for the areas in which they have practiced. The CLE program is heavily laden with the actual forms that the attorneys themselves use in their practice. This CLE program, together with its individual courses, are written from the standpoint of a practicing attorney helping other attorneys to practice in their field, and thus its books are designed to be form books to help an attorney to develop a form library for his practice. The design of this CLE program is different from many other CLE courses, which are basically lecture oriented and are simply a regurgitation of what had been learned in law school. This CLE program assists in the development of an attorney's practice through the use of practical forms and recommended procedures and presentation of practical knowledge in each particular field. The attorney is able immediately to get into the field and start earning money. The value of a good CLE course can be illustrated by an example in the field of estate planning. After taking this CLE course the attorney has the forms and the information necessary to become an adequate and confident practitioner in estate planning.

The main criticism lodged against some CLE courses is that they may not be needed. An attorney who is practicing in a particular area on a day-to-day basis is going to remain current in that area of law anyway. If an attorney is entering the practice of a different aspect of the law, he is not likely to buy a CLE course before taking a case in that area. The attorney will probably go the local law library and read the particular treatises. The last objection: Even though an attorney takes a CLE course, there is no guarantee that he has learned enough to be a competent attorney in all aspects of that field of law. Just because an attorney has taken a specific course does not mean that he will not be sued for malpractice.

In fact, a major area of criticism against mandatory CLE programs involves the requirement to study legal ethics. Virtually all states now test applicants on professional ethics in some fashion before licensing them to practice law. As a result, all attorneys have already taken an examination on professional responsibility in order to become an attorney. Attorneys as well as the average lay person know what basic standards are for professional responsibility and ethics, which really involves knowing the moral difference between right or wrong. A commonly voiced attorney complaint against mandatory CLE courses is that attorneys would rather spend their mandated time on CLE courses that are going to directly help their practice and earning money; few attorneys need to review their ethical standards.

As a practical matter, any time an attorney has a question on legal ethics or what should be done, he should call the state bar and ask for an opinion. By taking advantage of the state bar expertise, the attorney should never run afoul of the canons of professional responsibility. An honest mistake might lead to a private reprimand, but no attorney has ever been suspended or disbarred for an innocent or good faith violation of the canons of professional responsibility.

Two particular CLE courses have engendered more animosity and antagonism than any others. These are the requirements of a few states, such as California, that the attorney must take a minimum number of hours in substance abuse and eliminating bias in the profession. These requirements are of little benefit to most attorneys. A sole practitioner has no attorney working with another attorney and therefore there is no bias for the attorney to eliminate in the operation of the practice. Likewise, most attorneys do not use alcohol or drugs, so a course on eliminating substance abuse is also of little direct benefit. This does not mean that such courses would not raise the consciousness of attorneys but in terms of the attorney's ability to practice law, little is accomplished. Nonetheless, the CLE of many states, like California, requires that attorneys take such courses. These courses do help to understand the profession and to remind the attorney of his duty to maintain high standards and to report attorneys who are suspected of being impaired.

II. CERTIFICATION

One of the most controversial issues in legal practice today is legal certification. There are many states which have created certification programs for certain areas of law. There are other states that, like Nevada, are considering adopting a lawyer specialization program. There are both benefits and drawbacks in the adoption of such programs.

The basic questions that attorneys have with such programs concern the specific legal disciplines to be considered for specialty certification and the practical aspects of administering the program. In fact, most states limit each attorney's specialization to just one particular area of law on the state's approved list; the attorney must certify he practices in that specific discipline more than 50% of the time.

The fact that an attorney usually cannot be a specialist in more than one field can work against the attorney by negatively advertising lack of experience in other fields. Example: An attorney advertises as a specialist in taxation. A client needing corporate work might not use the attorney because of the inference that only tax work is done. This is similar to a person with a cut on his head wanting a brain surgeon when a general practitioner or a neurologist could do the work. The fact that the attorney is usually limited to advertising as a specialist in just one area can result in loss of work unless the attorney actually practices only in that one area.

Another concern that attorneys have voiced in the manner of certification is taking a certification exam. Most states require that the attorney actually take a certification exam. Any attorney can take the exam as long as the applicant certifies to the state that he meets the practice percentage for the subject (usually over 50%). For certification as a specialist, the attorney is given an examination to test his knowledge. The significance of getting a specialist certification is important because all states have some restrictions on how and when an attorney can advertise as a specialist. Generally, to be a specialist, an attorney should be able to prove it in some aspect, either through extensive education or through an examination. The rules on specialization vary from state to state and must be met in each state that an attorney is admitted and advertises. Example: An attorney has a Master of Laws in Taxation (an LLM) in addition to a JD degree, and considers himself a specialist. Unless the attorney has taken the California specialization exam in taxation, he cannot advertise as a tax specialist in California. He can, however, advertise the possession of a Master of Law in Taxation degree.

In comparison, Nevada does not have a specialization program, although it is considering implementing one. Nevada attorneys at this time can call themselves a specialist. Overall specialization is good. If someone takes the time and effort and has the desire to devote their entire practice or most of their practice to a particular area of law, they deserve to be recognized. The only problem the practicing attorney faces is in deciding which field to select. This is especially important where the attorney already possesses a Master of Law degree in the field.

A disadvantage for attorneys who have obtained a Master of Law should be mentioned: no state currently recognizes a Master of Law in a field as an automatic certification, although such proposals have been made. An attorney has spent a year or more getting a master's degree and still has to take a certification exam like someone without such education. In point of fact, it probably is better for a person with a master's degree not to get the certification. He can thereby advertise the possession of the master's degree and carry the strong implication of specialism. This frees the attorney with the master's degree to get certification in another field. Then the attorney can advertise: "John Smith, Master of Laws in Taxation and Certified Specialist in Corporate Law." It would not make good marketing sense for the attorney with a master's degree to seek certification in the same field as the master's degree if the state does not permit multiple specialties.

III. RECERTIFICATION AS AN ATTORNEY

One of the most infuriating proposals to surface within the legal profession within the last few years is the idea of recertification of an attorney. This means recurrent bar exams in order to practice law. All attorneys are aware that every time an attorney goes to another state to practice law, the attorney is required to take a bar exam unless he is fortunate enough to be admitted on motion. The attorney once again is being tested on the scope of his legal knowledge by the bar examination itself. The recertification proposal is ridiculous, but nonetheless it is being advanced as one way to assure that attorneys keep their qualifications in good order. The proposal will probably never be adopted or even seriously considered because of the problems in administrating it. In addition, there would be a very strong argument about equal protection and requiring recertification for all professions. What about doctors or architects? If they make a mistake, a building could fall down or a person could die on an operating table. The proposal itself is ludicrous. Nonetheless, an ABA poll showed that 32% of the attorneys who responded were in favor of some type of recertification. This shows the importance of attorneys remaining informed about what is happening in the legal profession to assure that their rights and interests are represented.

In addition to recertification, some federal bars are now requiring an examination in order to be admitted to practice in their federal courts. What is new is that there are some of the district courts across the country that are considering enacting federal bar exams as well. If an attorney is presently admitted to a state bar, the attorney should be able to be admitted under the federal bar in that state without having to take an examination. This would be especially true where the attorney is already admitted to practice before the United States Supreme Court or the Federal Appellate Court for that District. It seems ludicrous for an attorney with years in practice to have to take a bar exam in order to be admitted to the District Court in Rhode Island or Vermont, for example.

CHAPTER 12

THE OFFICE: VACATION AND CLOSURE

I. INTRODUCTION

One of the most important management aspects of an attorney engaged in private practice is how to handle the office during the periods of vacation and when the office is finally closed. It is important for an attorney to set up procedures and a plan for the office during vacations and emergencies (such as a robbery and loss of files or a sudden closing).

A legal practice does not require that the attorney be present every day. There are times, such as during trials, when he must be available. An attorney who claims that he can never take a vacation from the office does not wish to take a vacation. Many people become attorneys because they have a workaholic personality and being an attorney allows them to work constantly.

This chapter is devoted to the management strategies for the duration of an attorney's vacation or the termination of the practice. A large percentage of malpractice against an attorney arises during the periods of vacation or after an office is closed by retirement or the attorney joining another firm. What usually tends to happen during these periods concerns a pending client's case or a past case and the client cannot reach the attorney before a disaster strikes. The inability to contact the attorney in time to resolve the matter is the root of the malpractice action. Being on vacation or having closed the office does not relieve the attorney of the need to represent a client in a pending case or to protect the client from the consequences of past representation. These concerns are often cited by attorneys as reasons not go on vacation. The fear that the practice will fold while he is out of the office is an honest fear, but as with all fears its effects can be minimized. It is the purpose of this chapter to help the sole practitioner develop the procedures he needs so he can take a needed vacation or close the office without fear of malpractice liability. By doing so, the attorney will greatly increase the enjoyment and profitability of his legal practice.

II. VACATION

All but the diehard workaholic want and in fact need a vacation occasionally. The practice of law is sometimes tedious and often stressful. Attorney burnout has recently been recognized as a real condition in the practice of law. A recent survey of attorneys in California showed that, if given a choice to start again, over 40% would not enter the field of law. The main reasons cited for this feeling were long hours, stress and lack of job satisfaction. All of these factors can be reduced if a reasonable vacation scheme is employed.

In the United States, it is expected that a professional will take a vacation each year. A legal secretary or paralegal certainly expects to receive a vacation each year. In fact, some states actually require that vacations be given to permanent employees each year. The issue then becomes obvious, if the staff gets vacations, why not the attorney-employer as well?

The facts have been shown through several state bar surveys that attorneys who do not take vacations tend to have greater problems in their personal life. Certainly when an attorney does not take a vacation, he is not available for family outings and visits and a myriad of little personal trips that increase the satisfaction of life. The effect of this is a decrease in family bonding and increased familial disharmony. As a consequence of this, sole trial attorneys, the class most likely not to take vacations, have the highest rate of alcoholism, substance abuse, and divorce among all attorneys.

There are several things an attorney must do to arrange a vacation. Before vacation, he must notify all of his clients with legal actions pending of that fact. In addition, if the attorney has any cases approaching the date of discovery cutoff points, he must discuss the matter with opposing counsel. The last thing an attorney should do in this situation is go on vacation without so informing the opposing attorney. If a discovery comes in and the attorney is not available to handle it, the client's rights may be seriously affected. To avoid this situation, the attorney should send notice to both the court and opposing attorney of the vacation date. This has an advantage in that if the opposing attorney attempts to take advantage of the attorney's absence, the court will be able to recognize it for what it is, an act in bad faith, and act accordingly. An attorney in practice for any period of time will be able to recall situations where attorneys were forced to cancel scheduled vacations because the opposing counsel, not knowing of the vacation, had filed motions during this period of time and could not reschedule. In almost all these situations, the opposition always told the court that had they known of the vacation schedule they could have worked the motion around it but it was now too late. In notifying the opposing party of the vacation, the attorney might suggest that discovery be continued for the period of time of the vacation in order not to prejudice the opposing party. This offer, if made in good faith, will assure that the attorney will not be surprised or inconvenienced by motions during the vacation period.

An attorney, while on vacation should take advantage of the modern machines available to the office. One of the best machines a sole practitioner can have is an answering machine that permits messages to be retrieved remotely. If the attorney does not have a secretary, or the secretary is on vacation at the same time, the machine can have a message to the effect:

> "The law office of ..... is closed until ...... If you wish to leave a message, it will be retrieved today and answered as soon as possible. Please leave the date and time of your call with the message plus a phone number and time for returning the call."

The attorney can then retrieve the messages for each day and return the calls that are urgent. Many sole practitioners do not have secretaries and rely upon their computer systems and the answering machines to take the place of secretaries.

An alternative to the answering machine is to have "call forwarding" to where the attorney is vacationing or a message on the machine indicating where the attorney can be reached. This is not really conducive to a vacation: it directs all calls to the attorney on vacation. Many sole practitioners, however, feel that the ability of the client to reach the attorney at any time is a personal touch that assures client loyalty. For certain, it may at times disrupt the vacation and cause some familial disharmony.

The Cadillac manner for handling a vacation is for the vacationing attorney to enter an arrangement with another sole practitioner to handle any problems that arise during the vacation. Generally, this would only take a few hours per week for the covering attorney to handle the referred matters. Occasionally, however, there might be the need for an emergency appearance on a surprise motion or temporary restraining order. Having a covering attorney is a Godsend. In this mutual agreement wherein each attorney covers the vacation for the other, no money need change hands because of the mutual assistance. A message could be on the answering machine and possibly a sign on the door as follows:

> "The law office of ..... is closed until ...... If you wish to leave a message it will be retrieved today and the call returned as soon as possible. Please leave the date and time of your call with the message along with a phone number and time for returning the call. The law office of ....., phone number ......, has agreed to handle any emergency matters of the office during this period. If you need immediate assistance, then please call ...."

If the attorney has a secretary who is working during this period of time, the secretary can screen the calls. Any pleadings that arise needing immediate attention can be faxed to the attorney or to the attorney covering for the vacationing attorney.

The bottom line is that the client who feels abandoned or in the dark as a result of an inability to contact a vacationing attorney may take his business elsewhere. Procedures placed to keep in contact with the client during the vacation cement the client's loyalty to the attorney. At the same time, it will lessen the potential for malpractice by assuring that procedures are in place to handle important matters that may arise.

III. EMERGENCY LEAVE

The same discussion concerning vacation applies to an attorney's absence caused by emergencies: family emergencies or medical reasons. In the space of a person's working life, usually between 30 and 40 years, there will be periods of time when an office must be closed for reasons other than a vacation. By its very nature, an emergency leave is one that was caused by some type of unplanned, emergency situation. One of the most common situations involving emergency leave is the death of a family member. It is understood that the death of family member usually will supersede nearly any other event in the practice of law. Even a trial will normally be suspended for a few days for an attorney to attend a funeral of a parent or other close relative.

The management of the office in the case of a short term absence can be handled the same as discussed in the vacation section. A more detailed plan must be adopted and implemented, however, when the leave is the result of a medical condition or injury that disables the attorney for an extended period of time.

The best way for an attorney to protect his legal practice from the effects of a disability is to carry disability insurance. Disability insurance proceeds would replace the income lost by the attorney no longer being able to practice law. Because an attorney deals with his mind, it is more difficult for an attorney to collect for disability than the average person. A truck driver may become disabled if confined to a wheelchair; an attorney confined to a wheelchair may still be able to practice law. The same situation may exist if the attorney becomes blind; whereas a doctor might not be able to practice medicine and thus be disabled under the insurance policy. A disability insurance policy will pay the attorney a fixed amount during the time that the attorney is disabled. It is important to understand how disability is defined under the policy and when the payments would commence. Most disability policies will only make payment after the attorney has been disabled for a specific period of time and usually there are no back payments for the waiting period. The rates for disability insurance are based on the health of the attorney, the length of the waiting period and the coverage. Disability insurance usually only covers a person to age 65 or in some case age 70. After that age, social security is considered to apply.

An attorney with a long-term disability must expect to close his practice. If the practice is kept open, the argument can be made by the insurance company that the attorney is not disabled. In the case of disability, the attorney must arrange for all current clients to get new attorneys. Most state bars will have special masters or volunteer attorneys who will assist a disabled attorney in closing the practice. In the situation where the attorney is totally disabled or comatose, the state bar will manage the closure of the office if no one is available to do so. The steps to be followed in closing a sole law office during a disability are virtually the same as for closure of the office due to termination of the legal practice as set forth below.

IV. TERMINATION OF AN OFFICE

No one lives forever, not even attorneys. The actor John Barrymore went to see the great comic W.C. Fields, who was recovering from an illness. As Barrymore entered Fields' study, he saw Fields deeply engrossed in reading an old family Bible. Surprised at seeing the practiced reprobate reading a Bible, Barrymore asked, "What are you doing?" Fields looked up, took a deep drag on his fat cigar and groused, "Looking for loopholes."

All attorneys must face the reality that their legal practice will not go on forever. Usually, a legal practice terminates because the attorney retires. Most people work to get the resources to support themselves. After those resources have been obtained, most thereafter work only to enjoy themselves. Many surveys have shown that most people like the work that they do, but have no intention of working until the day that they die.

Retirement has become the major goal of most people. In 1934, when social security was implemented the average life expectancy was 65 years. It was expected that most people would die a few months after retiring. Nowadays, most people are expected to survive at least 10 years after retirement, and many people will live several decades past age 65. In fact, insurance company tables show that college graduates, including attorneys, will live seven years longer than nongraduates.

To retire, a sole practitioner should provide for his retirement. Social security may or may not be available at that time. The Democrats in Congress passed laws taxing 85% of social benefits to high earning recipients. Democrats have repeatedly proposed eliminating all social security benefits to persons with earnings over $40,000 per year along with raising the retirement age to 70. There, as yet, have not been any legal challenges to the constitutionality of Congress extending the retirement age on vested benefits or the taxation of vested benefits. At this time, most of the people who must wait until age 65 to receive their social security benefits had their rights vested, meaning that they had worked 40 quarters before Congress changed the law, the social contract with the American people. The legality of these changes have not been tested in the courts. Several public interest groups have stated that they are considering doing so.

An attorney who has worked for another firm may have a pension from that prior work. Most sole practitioners will, however, have to look to themselves to provide for their retirement. The first thing that an attorney should do is establish an Individual Retirement Account (IRA) to the extent that it is permitted under the current laws. Every sole practitioner should also build a personal retirement plan. If the attorney has a secretary or other full-time employee, that person must also be covered by the retirement plan. As a sole proprietor, an attorney has available several easy ways to implement retirement plans. The attorney can adopt a Simplified Employee Plan (SEP). In this plan the attorney simply pays the authorized maximum or less to the employee's designated IRA. A sole practitioner can also use the SEP for himself. The attorney can also establish a 401(k) in place of an SEP. In these retirement plans, the attorney's bank usually is willing to administer the plan. Plan contributions are tax deferred until the attorney retires. After retirement, the attorney pays taxes on plan withdrawals.

Another form of retirement planning is tax-free annuities. In a tax- free annuity, the attorney pays "up front" for a guaranteed income stream for life upon retirement. The annuity is purchased with after-tax income; so there is no initial tax saving. Sometimes the annuity covers both the attorney and his spouse. The payments when received by the attorney are tax free to the extent of the recovery of the cost for the annuity. After recovery of the annuity's cost the payments are taxable at the attorney's normal tax rate.

Upon retirement, the attorney closes the office: terminates. This usually means that the office assets, such as the library, office equipment and furnishings, are sold . Usually, the sale of assets are a distress sale, and the attorney receives only a fraction of what it initially cost. It some instances, it may make better sense to contribute the library to a non-profit law school or library for their sale and to contribute the furnishings and equipment to a charity. The tax deductions, for actual value, might actually be a better benefit that would be derived by an actual sale.

Occasionally, an attorney might be in a position to sell an existing practice. If the attorney has a long-term lease or owns the actual office location, the attorney might be able to sell everything as a package. Purchasing an existing practice has advantages in that existing clients do not tend to leave as long as they are satisfied with the new attorney. In this situation, the clients are the most important asset of the business. If the clients do not view the sale as a disruption of their business, such as having to go to another location, they tend to stay with the new purchaser.

When the office does close, the attorney is required to notify the state bar of the termination of the practice. In many states, an attorney upon retirement can seek inactive status and save a significant amount on his annual bar dues. Some other states waive the bars dues for attorneys over a certain age, usually 70 years of age, regardless of whether or not they are retired.

The attorney must notify all current clients of his retirement and make arrangements to deliver their files to them. The attorney for his own protection should make a copy of every file delivered to a client. Any files that the attorney retains should be kept in storage for the life of the attorney. The files can be culled of miscellaneous and useless paper work, but the core for the files must be kept.

The attorney must maintain some form of malpractice insurance to cover any claims made for the past work. In certain areas of the law, such as estate planning, malpractice may not appear for years or decades after the attorney has retired. A malpractice policy defends the attorney from such claims at a time in life when the attorney would otherwise be unable to recoup any judgment paid.

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