Risk Managing Maternity Leave

Don't expect to be cut any slack from the courts and don't expect any breaks from opposing counsel is how Sylvia Hsieh describes the difficulties faced by "expecting" lawyers in "Managing Your Practice During Maternity Leave" (*Lawyers' Weekly USA*, 2002 LWUSA 589, 9/2/02). The article provides a good overview of how some lawyers are coping with maternity leave and prompts us to offer some risk management advice on the subject. This advice is offered from the perspective of the solo practitioner, but the hazards addressed should be considered in risk managing any firm's maternity leave policy.

The Risk

It is difficult for any lawyer to be absent from the office for even brief vacations let alone the 6-12 weeks maternity leave can require. In larger firms careful planning obviates much of the risk inherent in a long absence of a single lawyer. This flexibility, however, diminishes with the size of the firm and the solo practitioner requiring a lengthy period of leave is partic-ularly vulnerable to loss of business, malpractice claims, and professional responsibility issues. Lost files, missed deadlines, missed court appearances, unsatisfactory client communications, client confidentiality breaches, and billing and cash disbursement mistakes frequently occur during a lengthy absence. The answer to these risks is malpractice avoidance and prevention.

Maternity Leave Malpractice Avoidance

Avoidance: Steps taken to evaluate substantive areas of practice or methods of practice and decisions made about whether to avoid or eliminate certain areas of law because of the malpractice risks and exposure involved.

Hsieh reports that many lawyers either in anticipation of pregnancy or after becoming pregnant avoid the risk of malpractice by downsizing their practice, not taking litigation matters with close deadlines such as personal injury cases, not taking criminal cases, concentrating on family and transactional law matters, developing an appellate practice, offering legal research services, and not taking new matters close to the expected date of birth. To be effective, malpractice avoidance decisions should be made well in advance of maternity leave. Think it through now and implement decisions in a timely manner.

Maternity Leave Malpractice Prevention

Prevention: Development and implementation of effective systems, procedures, and techniques to manage the risk involved in the practice of law.

The key malpractice prevention procedure for maternity leave is a plan for a smooth transition to a backup lawyer ready and qualified to perform required services during the leave. In larger firms this is relatively easy and the professional responsibility issues of client confidentiality, client communication, conflicts, client trust accounts, and fees are usually manageable. For the solo practitioner none of this is easy. The answer most often recommended is to have a plan for the solo practice to cover lengthy absences, expected and unexpected. A gloss of recommendations from several commentators on an effective plan follows:

Find A Backup Lawyer

Reach agreement, preferably in writing, with a trusted lawyer to backup your practice during defined absences; *e.g.*, maternity leave, vacations, and extended illness.

For Kentucky practices the backup lawyer should be a licensed KBA member in good standing with appropriate qualifications for your practice, unlikely to have conflicts with your clients, and with professional liability insurance.

> **"If you really want something you can figure out how to make it happen."**
> *Cher*

The agreement should define the duration and scope of the backup lawyer's authority. Is the backup to handle all client matters? Only matters in litigation? For how long – short term or long term?

Consider making arrangements for the backup to handle your client trust account. One way is to make the backup a signatory on the trust account. A better way is a special power of attorney that permits the backup to act for you only in specified circumstances.

The agreement should cover when and how much the backup is to be compensated. Consider such things as the time spent on the matter by you, the backup, and whether a case is on a contingency fee basis. Identify the source of funds from which the backup will be paid; *e.g.*, accounts receivable, settlements, or fees received for the backup's services only. It is almost certain that Kentucky Rule of Professional Conduct 1.5(e) on fee sharing will apply. Be sure to comply with its disclosure and client consent provisions that in some cases require written consent.

Client Considerations

Backup arrangements may be implemented only with client consent. The best practice is to notify clients in advance of these arrangements. Many lawyers do this in a letter of engage-ment acknowledged in writing by the client. This has the advantage of in-place client consent for a backup to take over a matter without delay. Some lawyers send a letter to clients shortly prior to taking maternity leave informing them of the forthcoming absence, explaining the backup arrangements, and asking for client consent. In either case the backup lawyer should always notify clients immediately upon taking over to avoid any misunderstandings.

Protecting client confidentiality is the paramount concern in backup situations. In sudden emergencies such as the death of a lawyer it is permissible for an unassociated lawyer

to inspect the deceased lawyer's client files without client consent to the extent necessary to identify clients and determine matters that require immediate attention. Given the long lead-time in planning for maternity leave there should be no sudden emergency. There is ample opportunity to get client consent for backup service and avoid any question of breach of confidentiality by an apparent interloper.

Your Risk Management Actions Prior to Taking Maternity Leave

The goal for every lawyer going on a lengthy absence is to be sure all active cases have up-to-date files, are accurately calendared, and in a posture to be continued without interruption. This is best accomplished by completing a detailed case management plan for every active matter that includes a description of work done and a schedule for accomplishing remaining work. This also helps to determine how fees could be shared with the backup.

In a perfect world, every practice has a written law office procedures manual or standing operating procedure – in this world few do. If your practice does not have written procedures, you should prepare them for your backup before going on maternity leave. Cover the following information at a minimum and be sure to share it with the backup well before your absence:

✓ Calendaring and conflict check systems.
✓ Case management plans.
✓ Client contact and notification information including telephone numbers and mailing list.
✓ Computer system including passwords, backup systems, and software employed.
✓ Office file plan.
✓ Billing practices including status of accounts receivable and special situations.
✓ List of office equipment used in the delivery of legal services.
✓ Insurance program to include professional liability and general liability coverage.
✓ Employee information.

According to Hsieh most lawyers on maternity leave continue to work as much as possible and develop various ways of coping with their maternity needs. They have cell phones and computers handy even in the hospital. After birth they work from home as much as possible, hire contract lawyers to cover for them, upon retuning full time take the baby to work, and even move from downtown offices to suburban offices closer to home. These coping methods work but during the leave period carry the increased risk of something getting lost in the shuffle between the lawyer and her backup.

Hiring a contract lawyer during maternity leave as a backup is essentially the same as having a backup agreement with another lawyer and should be risk managed

accordingly. For more information on risk management and professional responsibility issues when hiring contract lawyers read the Bench & Bar article, "Barrister In A Box – Contract Lawyers in Kentucky," available in the Avoiding Malpractice section on our Website at www.lmick.com.

Good risk management will ease your mind during one of the most important times in any woman's life. We are here to make sure that you have available the professional liability insurance coverage you need for all the contingencies of practicing law including blessed events. We are also here to work with policyholders to be sure their risk management plans for maternity leave provide them and their clients the security they deserve. We are only a call away if you need help.

Sources for this article include Sylvia Hsieh, "Managing Your Practice During Maternity Leave," Lawyers Weekly USA, 2002 LWUSA 589 (9/2/02); Eric Berkman, "Most Solos Lack an Estate Plan for Their Practice," Lawyers' Weekly USA, 99 LWUSA 647 (7/12/01); and "After the Fall, What Happens to Your Practice?" Lawyers' Mutual Insurance Company of California Bulletin Summer 1998, Vol. 13, No.3.

"Don't agonize. Organize."
Florynce Kennedy

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