BY DAVID D. DODGE

Keep Malpractice at Bay

with Knowledge of Ethics Rules

A lawyer starting out today can expect three malpractice suits in her lifetime.

Surprised? That was a statistic mentioned at a recent ABA annual meeting in a session sponsored by the National Organization of Bar Counsel. Speakers from the malpractice underwriting industry not only foresaw increased claims as the economy deteriorates. They also singled out business transactions with clients and conflict-of-interest charges, especially against intellectual property lawyers, as two areas creating the most malpractice claims.

With these facts in mind, let's take a look at some ethical rules.

ER 1.7[1] deals with conflicts of interest and prohibits a lawyer from representing a client if that representation may be materially limited by the lawyer's own interests. Read the rule. It's at page 501 of the 2002 Arizona Rules of Court, published by West. It deals with various situations, including a lawyer:

- loaning money to a client
- borrowing money from a client
- entering into a business relationship with a client
- referring clients to an enterprise in which the lawyer has an interest

Similar problems may arise in cases in which lawyers take an equity interest in a client instead of charging a fee. These situations need to be avoided but, if they can't, the client needs to have the advice of independent counsel before agreeing to the arrangement.

Now let's take a look at ER 1.2(c) (see page 493 of your 2002 Arizona Rules).

It provides that a lawyer may limit the objectives of the representation if the client consents after consultation. This is usually done as part of a written engagement letter defining the scope of the representation, including defining which constituent (if it's a corporate client) you are representing and in what capacity.

Limiting the scope of a lawyer's representation to avoid potential conflicts that might otherwise result with a present or former client finds support in the Restatement[2] and in a recent opinion from the New York City Bar.[3] The New York opinion noted that with the large number of clients at many law firms, many situations occur in both litigation and transac-

tional matters in which a lawyer who does not have a conflict of interest at the inception of an engagement may develop one, either unforeseen or unforeseeable, as the matter progresses.

Although these situations will always be a problem, lawyers need to be aware of the fact that by confining the scope of their representation for a given client, they can frequently avoid foreseeable conflicts with other parties they have represented. But there are times when limiting the scope will not be effective: When the limitation is inadequate to protect the client, and when the lawyer must be adverse to the interests of one client to advance the interests of the other.

Other ways to avoid potential claims of conflict of interest are to limit the receipt of confidential information from prospective clients and to avoid misunderstandings with a nonengagement letter. The names of potential clients and the people to whom the lawyer sends such letters should be entered into the lawyer's conflicts database with either a date or a file number so that a copy of the letter can be found later if needed.

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endnotes

1. Rule 42, ARIZ.R.S.CT.
2. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 121, cmt. c(iii) (2000).
3. Association of the Bar of the City of New York Commission on Professional and Judicial Ethics, Formal Opinion 2001-3.

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