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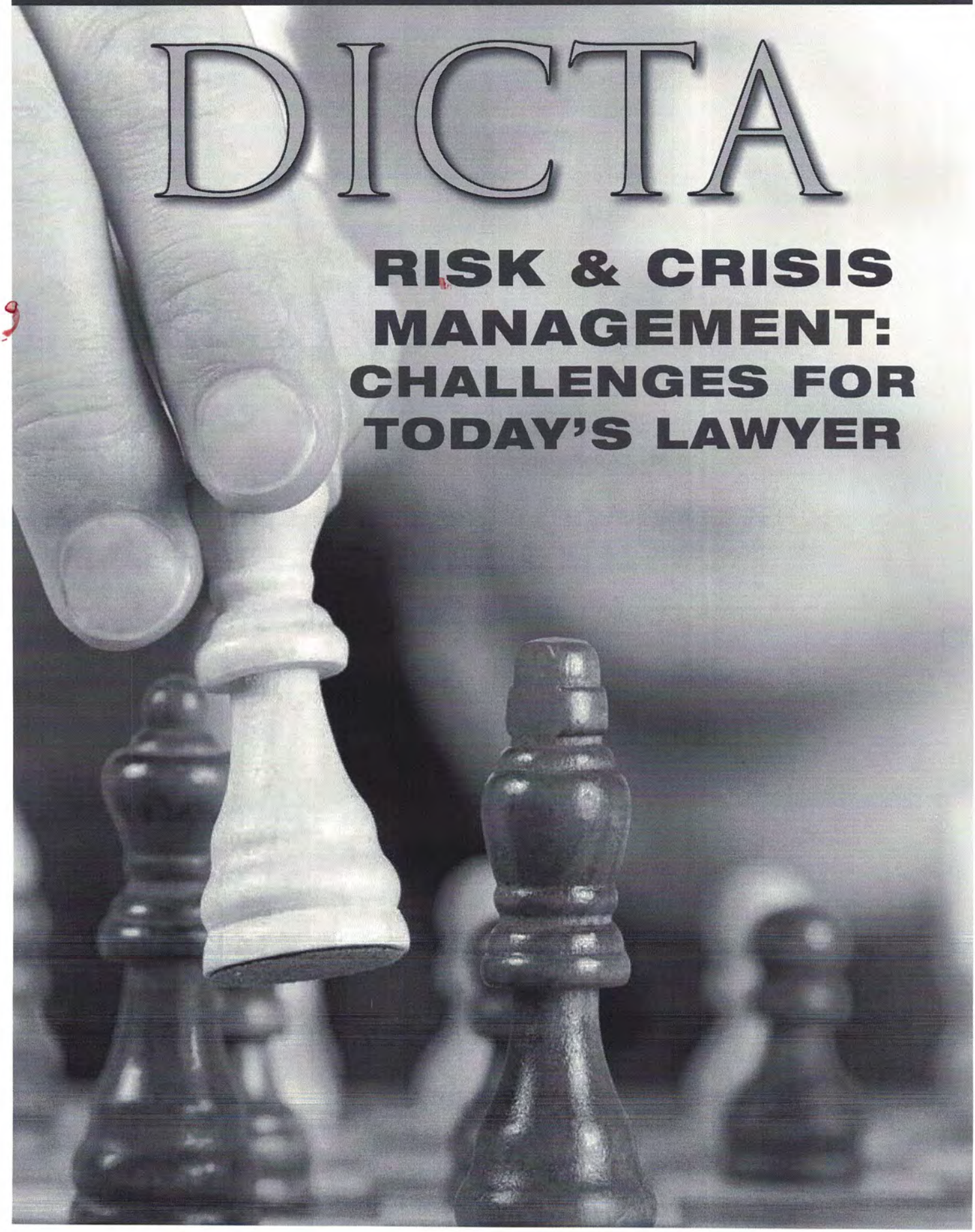

RISK & CRISIS MANAGEMENT: CHALLENGES FOR TODAY'S LAWYER

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I beg you take courage; the brave soul can mend even disaster! [1]

In the Native American Ojibwa tongue, the term for disaster is *whangdepootenawah:* "an unexpected affliction that strikes hard."[2] For many practicing lawyers today, such unexpected afflictions, or more commonly, crises that strike without warning, can make or break a law practice.[3] During the two plus decades I've spent practicing law and serving as a risk manager in both the public and private sectors, it became apparent that a large number of private and public-sector lawyers rarely, if ever, gave any serious thought as to how they would respond to any number of crises that could serve to threaten their clients' best interests, and disrupt or destroy their livelihood. They either assumed they were disaster-proof (due to investments in various insurance policies), or likewise wrongly assumed they could manage through the crisis. This explains, in part, the dearth of material written on the subject of lawyer risk management, as well as the scarcity of loss prevention continuing legal education programs for lawyers and their staff. Add to this the failure of many private and public- sector law firms to ensure that all new hires (lawyers and staff) are provided with formal orientations or training on basic client protection and loss prevention principles, and you have a recipe for disaster. Neglecting to plan for a crisis or disaster can result in a loss of credibility, business, and firm productivity, as well as lead to lawsuits, bar complaints, and all manner of woe for the unsuspecting and unprepared lawyer.

Risk Management

The notion of risk takes many forms. For the purposes of this writing, however, an emphasis must be placed on "legal risk." In a nutshell, legal risk is simply risk to which lawyers are exposed that can disrupt one's practice, yet be readily identified and hopefully mitigated. Because the law is forever changing, developing, and evolving (or in some cases, devolving), lawyers are faced with many unanticipated risks. We all know the aftereffects when an unclear law is clarified by the courts, or a law, rule, or regulation, though clear, is widely misunderstood or widely ignored, or the law changes entirely due to legislative action or court interpretation. Further, there is the risk of loss or disruption to a law practice due to natural or manmade disasters. Although legal risk is often specific to the individual firm depending upon its field of practice, nevertheless there exist certain risk management principles that can be universally applied to all manner of risk. These principles are: Risk Avoidance, Risk Acceptance, Risk Mitigation, and Risk Transfer.

Risk Avoidance: Risk avoidance is any action that avoids any exposure to the risk whatsoever. It may come in the form of refusing a new client with a legal issue the attorney feels unqualified to handle, the existence of a potential conflict of interest, the inability of the firm to take on more cases, or any other issue contrary to the best interests of the firm and its clients.

Risk Acceptance: Risk acceptance is a conscious decision the lawyer makes when viewing a prospective risk. It should not be confused with the defense "assumption of risk." Risk acceptance is by no means a default action or a decision based upon a lack of information or unwillingness to conduct due diligence, but rather a willingness to knowingly and intelligently assume a risk because it appears it can be managed (i.e., the rewards outweigh any potential downside). Risk acceptance can come in the form of proceeding with a certain litigation strategy, or deciding to take on a new client, or declining to exercise a novel defense in a case.

Risk Transference: Risk transference is the act of handing risk off to a willing third party and most commonly includes the use of hold-harmless clauses, contractual requirements to provide insurance coverage for another party's benefit, and reinsurance. For instance, some law firms outsource certain operations such as litigation or the handling of routine motions.

Risk Mitigation: Risk mitigation is the most common risk management strategy used by lawyers when an unavoidable risk looms. This strategy limits an entity's exposure by employing a bit of risk acceptance along with a bit of risk avoidance or a combination thereof. Risk mitigation measures can be directed towards reducing the severity of risk consequences, reducing the probability of the risk materializing, or reducing the organization's exposure to the risk to a tolerable or acceptable level. This could translate into pre-suit mediation, or dismissing a case and refiling it another day. For instance, the time to meet with a client who asks, "What is the chance I'm going to lose my case and what am I looking at if I do?" is long before the matter is set for trial.

Assumption of Risk:

When we hear the term "Assumption of Risk," what immediately comes to mind is a type of defense available for most personal injury and negligence lawsuits. In the context of this piece, however, I am referring to the legal risks a client is willing to take in order to achieve a desired outcome. Regardless if a firm's clients are public or private citizens, today's lawyer needs to fully understand and appreciate the delicate balance between the risk a client wishes to assume and the possible reward or detriment for assuming that risk. While it is not the job of the lawyer to eliminate risk, it is the lawyer's job to educate his or her clients on the legislative, regulatory, and litigation environments impacting their case, and to work collaboratively with the client to strike the appropriate balance of risk and reward. Of course, that balance must continually be revisited as external environments change and the client's risk threshold likewise changes.

Attorney William H. Fortune warns against attorneys using language that the client reasonably interprets as guaranteeing a result rather than only promising to diligently and competently attempt to obtain a result. "Ordinarily, a lawyer's contractual obligation to a client will be considered an implied promise of diligence and competence. In some instances, however, a lawyer's words may be reasonably interpreted as guaranteeing a result (i.e., "Don't worry, we'll get your child back.").[4]

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Managing Risk:

Considering the complexity of today's legal environment, it is not feasible to attempt to provide an exhaustive list of areas that pose risk and potential liability to law firm and solo practitioners alike. However, some of the more common risks can be mitigated and/or eliminated by undertaking the following:

- Does the firm have periodic ethics and loss prevention continuing legal education programs for lawyers and staff?
- Does the firm have professional liability insurance and a tickler system in place to ensure there are no missed premium payments?
- Does the firm have an adequate law library, or access to electronic legal research software for its normal practice requirements?
- Does the firm communicate to the client verbally and in writing the fee or billing procedures and communicate with the client in general?
- Does the staff avoid discussing client matters in the "public" areas of the office (e.g., reception, kitchen, elevators, restrooms, etc.)?
- Do lawyers stay abreast of court decisions, the Tennessee Rules of Professional Conduct, and ethical opinions which disqualify lawyers from representation?
- Do lawyers explain to the staff how to manage difficult, demanding clients?
- Upon completion of a matter, is the client notified in writing that services are concluded?
- Do attorneys new to the practice of law or unfamiliar with a body of law refer cases to an associate or an expert if they lack the necessary expertise, attend CLE courses related to their fields of practice, keep current with the changes in the law, make a thorough independent investigation of the facts, and conduct reasonable legal research on all of the pertinent issues?
- Does the firm have a fail-safe conflict system within the office?
- Does the firm have a well-articulated policy on hiring to include qualifications, experience, integrity, motivation, and character?
- When it comes to office sharing, is there a written agreement setting forth all the terms and conditions of the shared office arrangement? Do receptionists answer the telephone in such a way to avoid giving the impression of a law partnership? If lawyers sharing offices refer to each other as partners, or go into each other's office at will, or discuss business in front of clients or visitors, an aggrieved client could reasonably assume their grievance is with "the firm" and not merely with the attorney they retained.
- When rendering pro bono services, does the attorney maintain the same standard of care and due diligence afforded paying clients?
- Does the firm have written procedures providing how the firm will manage risk and indicating the specific responsibilities of each lawyer and staff member for loss prevention?
- Do firm members or the solo practitioner possess a solid understanding of the federal, state, and local laws governing emergency preparedness and response, and how these laws and regulations will affect their clients' business and other interests? In many jurisdictions across the United States, Tennessee included, state and local government entities are empowered to suspend or limit the sale, dispensing, or transportation of alcoholic beverages, close places of amusement and assembly, and prohibit and control the presence of persons on public streets.[5]

Summary:

Managing legal risk need not be an arduous undertaking. By remaining ever vigilant, assuming a proactive rather than a reactive posture, and constantly assessing the needs, and wants of one's client, the attorney can go a long way in protecting both clients and his or her legal practice, thus minimizing the risk inherent in the practice of law.

[1] Catherine II of Russia, quoted at Thinkexist.com, Catherine II Quotes, http://thinkexist.com/quotes/catherine_ii/ (accessed June 17, 2017).
[2] The Ojibwa, also known as the Chippewa, were considered one of the largest and most powerful Great Lakes Native American tribes east of the Mississippi. Native Americans: Chippewa, http://www.nativeamericans.com/Chippewa.htm (accessed June 27, 2017). *See also* Ambrose Bierce, The Devil's Dictionary 204 (Am. H. 1983).
[3] Joseph G. Jarret & Michele L. Lieberman, *When the Wind Blows: The Role of the Local Government Attorney before, during, and in the Aftermath of a Disaster,* 36 Stetson L. Rev. 293 (2006).
[4] William H. Fortune & Dulaney O'Roar, *Risk Management for Lawyers,* 45 S. Car. L. Rev. 617 (1993).
[5] *Id.* at 640.