

# 10 Steps to Reducing the Risk of Malpractice Claims

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# Introduction

- Systems: objective criteria, consistently applied
- Focus on claim prevention, not just malpractice prevention

# Risks are Growing

- According to the Ames & Gough Lawyers' Professional Liability Claims Trends 2014, there are several alarming risks for attorneys:
  - Although claims frequency has been constant for a few years, claim severity is increasing, with a greater number of claims with reserves of \$500,000 or more
  - More insurers have paid or participated in a claim of \$100 million or greater
  - The first and second most frequently alleged malpractice errors are conflicts of interest and procedural errors: which are preventable!

# Claims are Harmful

- Many claims against lawyers lack merit
- Harmful even if meritless
  - Publicity
  - Money
  - Pride
  - Conflicting interests

# Discontent within the Legal Profession

- Not all those people who went to law school like the reality of practicing law
- Being a lawyer is hard work: physically, mentally and emotionally
- Many people graduate, get jobs in private practice, and find that it is much harder and less rewarding than they anticipated
- Debt, pride, perceived stigma, lack of clear career alternatives make it difficult, if not impossible, to leave the profession after discovering this dissatisfaction

# Public Dissatisfaction with Profession

- Consumers of legal services have heightened and often unrealistic expectations
- Easy Access to Justice rules make it is easier than ever to file a malpractice claim or bar grievance
- Until TARP, lawyers were the most maligned professionals in America – now we are 2nd after investment bankers

WHAT CAN AND SHOULD YOU BE DOING TO  
PREVENT CLAIMS?

WHAT KIND OF ADVANCE PLANNING REALLY HELPS  
WHEN YOU GO ON THE DEFENSIVE LATER?

WILL YOU STILL HAVE TIME TO PRACTICE LAW?

# Step 1: Use Appropriate Screening

- Objective: to identify problem clients
- Problem clients don't get better over time
  - Start as challenging relationships . . .
  - . . . end as malpractice claims
- Many malpractice claims do not arise out of an actual error
  - Miscommunications
  - Problem of expectations
  - This fact shows the importance of screening clients

# Step 1: Use Appropriate Screening

- Asking a starving man to watch what he eats
- Problem clients are often worse than no clients
- Long-term view – clients who don't pay or who are more likely to bring a claim cost your practice in the long run
- Goal: keep the good ones, throw the bad ones back.

# Step 1: Use Appropriate Screening

- Create objective, reliable criteria
  - How many attorneys involved before?
  - Number of times a party to litigation? Plaintiff or defendant?
  - What's the earliest deadline in connection with the matter?
  - What are the potential client's expectations? Are they realistic?
  - Can the potential client pay?
- What is the potential client's reactions to these questions?

## Step 2: Evaluate Conflicts

- Lawyers hate conflicts
  - Impediment to taking on new business
  - Perception that conflicts issues are always complicated
- Consequences of lack of attention to conflicts
  - Increases the risk of severity of a claim
  - Can alone lead to a punitive claim
  - Cost – in situations involving multiple clients, can lose both client relationships

## Step 2: Evaluate Conflicts

- Deal with conflicts right away, BEFORE the representation begins
  - Run the conflicts check
  - Resolve any issues
- Conflicts issues do not simply get better as time passes
- Conflicts cannot be undone
  - Once a conflict-laden representation begins, you cannot just give back the confidences and pretend it never happened
  - No going back to the way things were before

## Step 2: Evaluate Conflicts

- Establish systems
  - 100% compliance MUST be the goal.
    - The one that slips through the system is often the one that creates the most problems.
  - NO EXCEPTIONS
  - Must identify actual conflicts and make it impossible to open a matter when they arise.
  - Technology is your friend, but it is not be-all-and-end-all. A final analysis by the lawyer is always necessary.

## Step 2: Evaluate Conflicts

- A conflicts system is only as good as those who use it: the system does not work if the information provided is incomplete or inaccurate.
  - Name of the client (with identifying information – e.g. address, d/b/a, etc.)
  - Name of all adverse and potentially adverse parties (with identifying information)
  - Description of the representation

# Step 2: Evaluate Conflicts

- Establish Systems

- Screen for EVERY new representation, even if it is for an existing client.
- System for lateral hires
- Continue screening throughout the representation
  - Have new parties become involved?
  - Has there been a change in the status of your client or an adverse party? E.g. has your client acquired a new company?

## Step 2: Evaluate Conflicts

- The Rules divide conflicts into two categories
  - Multiple representation (two or more current clients)
    - Rule 1.7;
  - Successive representation (current client and former client)
    - Rule 1.9;

## Step 2: Evaluate Conflicts

- Existing client/multiple representation
- Model Rule 1.7;
  
- 2 Scenarios
  - New representation involves more than one client
  - Firm already represents an existing client in the same or substantially related matter

## Step 2: Evaluate Conflicts

- Don't overcomplicate it – use this simple test:
  - Will the new representation adversely affect another client?  
Would I do anything differently?
  - Is the conflict waivable?
  - Do you have informed consent?
    - Attorney must fully advise of the risks.
    - Consent should be in writing.
    - If these factors aren't met, attorney can be disqualified from representing both clients.

## Step 2: Evaluate Conflicts

- Former client/Successive representation
- Model Rule 1.9;
- Primary issue – Are the matters substantially related?
  - If yes, conflict → informed consent
  - If no, no conflict
- Shows the importance of properly closing matters and transitioning clients to former clients.

## Step 2: Evaluate Conflicts

- Perform Conflicts Checks In Every Case & For Every New Matter
  - Make conflict check mandatory for opening new files – use computer programs which cannot be circumvented
  - Document that conflict check was performed
  - Obtain written waivers of all actual or potential conflicts
  - Advise clients of any differences in representation between matters

## Step 3: Agreeing to the Fee

- Important to do this right at the outset because may have less flexibility to change the fee after the representation has begun.
- Courts carefully scrutinize mid-representation fee changes that favor the attorney
- No matter what, get it writing.

# Step 3: Agreeing to the Fee

- Alternative Fee Arrangements
  - Limitless variety – can be tailored to specific matters/clients
  - Numerous ethical issues
    - Be sure the client can terminate at any time before the matter is concluded
    - If terminated, unearned fees must be returned to client; Model Rule 1.16(d))
      - fees aren't all earned if paid upfront
      - may need to be sure to put unearned fees in a separate trust account rather than the firm's operating account.
      - put it in writing
      - Some jurisdictions have censured or suspended attorneys who have not followed these rules.

# Step 3: Agreeing to the Fee

- Alternative Fee Arrangements: Ethical Issues
  - Business considerations interfering with ethical obligations
    - Example: fee arrangements that cap the client's fee at a certain amount (fixed/flat fees, monthly retainers, etc.)
      - Commercial real estate client agrees to pay \$25,000 per year for all work
      - Attorney's hourly rate is \$250/hour
      - After 100 hours, the fee is used up if applying an hourly rate
      - So what happens after that point? What if it's only June and significant work is needed

## Step 3: Agreeing to the Fee

- Rules prohibit attorneys from allowing their financial interests to interfere with their obligations to clients
- Rule 1.5, Comment 5
  - An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client.

# Step 3: Agreeing to the Fee

- AFA's Best Practices: General considerations
  - Knowledge
    - Options, pros and cons, etc
    - Client's business and legal needs/goals
  - Experience
    - Work best for matters where the attorney has more experience
  - Trust
    - May work best for pre-existing clients
  - Collaboration (pre-engagement)
    - Detailed discussion ending with detailed written agreement
  - Communication (post-engagement)
    - Keep client informed of status and budget

# Step 3: Agreeing to the Fee

- AFA's Best Practices: Specific tips
  - Blended rates
    - Consider tiered system
    - Agree with the client on how the matter will be staffed; which work will be delegated to more junior attorneys or paralegals
  - Flat/fixed fees
    - Consider a “collar fee” or “true-up” provision that provides partial compensation if the actual fees are significantly above or below the agreed upon fee.
  - Must allow the client to terminate without financial penalty

# Step 4: Use Fee Contract or Engagement Letter

- Define the boundaries of the representation:
  - Who the client is;
  - Terms and scope of representation;
  - The fee;
  - The process for withdrawal;
  - Non-assignability clause;
  - Attorney's protocol document retention.

## Step 4: Use Fee Contract or Engagement Letter

- *Newell Recycling* case
- Issue: whether 4 or 6 year statute of limitations applied
- Holding: Where “complete contract” exists, 6 year SOL applies to action arising from that contract.
- Suggests that lawyers would be better off not having a fee agreement
- Better option is to use a simple engagement letter that includes the basic items.

# Step 5: Use Effective Calendaring System

- One of the most important steps you can take to avoid mistakes that lead to claims
- Although on the decline, these types of errors still make up 5-10% of all malpractice claims
- Technology is your friend

# Step 5: Use Effective Calendaring System

## ■ Tips

- At the beginning of every matter, calendar at least one deadline, even if it is merely date for initial bill, status report, follow up, etc.
  - Matters with external deadlines
  - Matters with internal deadlines
- Use periodic calendar entries as reminder to follow up and to work ahead.
- Designate a person to be in charge of calendaring all deadlines
- Find a user-friendly system.
- DON'T rely on your email inbox as a reminder system

# Step 6: Maintain Client Confidences

- 2 key steps:
  - Adopt protocols, practices, and procedures designed to protect client confidences;
  - Train attorneys and personnel on the procedures and the importance of maintaining client confidences.

## Step 6: Maintain Client Confidences

- This is not just a best practice, it is required by the Rules.
- Model Rule 1.6(a): “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted.”
- Model Rule 1.6(c): “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

## Step 7: Stay Informed

- Focus on early detection
- Use the internet
- Google alerts – every lawyer for lawyer and clients
- Can use “for fee” services
- Electronics/technology can monitor all of this

# Step 8: Deal with Problem Relationships

- Identify issues early:
  - Failure to pay a bill
  - Dishonest with you
  - Tell you they got a 2nd opinion
  - Make a complaint about the work
  - In a word look for change.
- These kinds of issues rarely get better with time.

# Step 9: Withdrawing from Problem Relationships

- When can, or must, you withdraw?
- Rule 1.16 of the Model Rules.
- Look at local rules and, in Georgia, Uniform Superior Court Rules.

# Step 9: Withdrawing from Problem Relationships

- Mandatory withdrawal (Rule 1.16(a)):
  - the representation will result in a violation of law, including the Rules of Professional Conduct;
  - the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
  - the client fires the lawyer; or
  - the lawyer knows the client is bringing an action or asserting a position without probable cause and for the purpose of harassment

# Step 9: Withdrawing from Problem Relationships

- Permissive withdrawal (Rule 1.16(b))
  - the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
  - the client has used the lawyer's services to perpetrate a crime or fraud;
  - An inability to work with co-counsel
  - the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
  - the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  - the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
  - other good cause for withdraw exists.

# Step 9: Withdrawing from Problem Relationships

- How to withdraw
- An attorney may not withdraw from a matter unless it can do so “without material adverse effect on the interests of the client.”
- Written notice to the client
- Cooperate with client and new counsel on transitioning the file
- Take care not to prejudice the client’s rights.

# Step 10: Close Old Files

- Primary Reason: impacts the tolling of the statute of limitations if there is an ongoing error
- Conflicts – makes a current client a former client for purposes of conflicts analysis
- Terminate duty – no obligation to disclose or provide information, such as a change in law
- Send a letter
  - Accounting of all funds received
  - Confirmation that representation has ended
  - Notice that firm no longer providing legal services
  - Description of document retention policies



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