Keeping Your Firm from Malpractice Traps

It's Not Just the Lawyer's Job!

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Introduction

It can and will happen to you
Especially if/ when the economy tanks

We can argue about whether or not the practice of law is a business or a profession or a combination, but it is beyond dispute that **the practice of law is a service industry**. Time and again I have seen lawyers sued ostensibly because their work was not up to the standard of care, but in truth, they were sued because the client did not think that the lawyer cared about them as a client. As law firm administrators, you would all do well to remind your lawyers, as painful as it may be for these professionals to hear, that their business depends upon the goodwill of clients, and that not every client who gets a good result feels good about their lawyer. Feelings about how the client was treated often shape whether the client even feels that they got a good result, or got a result which was worth the fee they paid or were asked to pay. You are not the professional administrator at Disneyland or some other amusement park, and your customer (the client) isn't always right, but your practice will not thrive if your clients do not feel valued. Client value starts with how the clients are treated when they open the front door, when they call on the phone, when they have to leave a message or send an e-mail or interact with anyone at any level of the firm, including but not limited to the lawyer. Client satisfaction is a difficult goal, especially in a profession where sometimes our clients are engaged in adversary proceedings, but client satisfaction should be among your top priorities for everyone at your firm. If everyone at your firm treats each of your clients with respect and has as their goal client satisfaction, you will reduce the chance that your firm will be sued for malpractice. That is especially so if you stress good and repeated communications with your clients, both by lawyers and by non-lawyers. While paraprofessionals can handle much of the routine communications, don't allow lawyers in your firm to fall into the trap of believing that they are too busy to communicate with

the clients and that the clients will be satisfied if they only hear from the paraprofessional. If that is going to be the case, discuss that with the client in advance.

With that admonition, there are several particular areas about which I would warn you in the hopes that you can avoid malpractice claims.

Cybersecurity

Wiring scams –

Slightly misspelled email addresses with instructions

Changes in instructions (e.g. "no, wire it, don't mail as earlier discussed")

I am not a cyber security expert, but those people are out there

Have a cybersecurity audit (hardware and software and firm practices)

There is literature and are anecdotes out there which prove it is worthwhile, especially if you are handling other people's money transfers

Educate **all** staff members, lawyers included

...the weakest link may be the least educated staff member

...or the most, senior, overworked or distracted lawyer

Wiring hints: insist on both written and oral instructions and insist that your people find out in advance who is authorized to give oral instructions and how they can be reached and who can be reached and how to confirm that the oral instructions are genuine. Redundancy is a safety net

Phishing ...when in doubt, don't open anything

Client Confidentiality

Do all your staff members know the rules?

Do they know that they are not supposed even to acknowledge that the firm represents that client without the client permission?

Do they know that they are not supposed to discuss details of cases outside the office *even if client or witness names are not used*?

That also includes especially **elevators**, rest rooms, smoking areas, eating or meeting places in your office.

Your staff needs to be reminded, and perhaps retrained from time to time

Conflict Avoidance System

Difficult to administer because lawyer compensation, and ego, may depend upon not rejecting a potential client.

It works best if you have clearly defined rules

Because no set of rules can anticipate every potential problem, ideally the decision to accept or reject a potential conflict should be made by someone whose compensation is not at risk

Are you wondering why this is a malpractice topic? You should not

Lay people (clients, adversaries and especially jurors) are only too quick to ascribe improper motives to lawyers and their firms

Malpractice plaintiff attorneys relish linking their claims with an assertion of conflict of interest (or ethical violation, such as a conflict)

Depending upon the size of the firm, and the number of different practice areas in which it engages, your system may need to be updated and surely needs to be computerized

But are you putting all the right information into your system?

Related parties, principals and major stockholders, even potential witnesses may need to be considered

How many people are involved in reviewing conflict data?

Can the "busy" lawyers really be counted on to review daily updates?

Here vendors can audit and suggest systems, and you decide what makes sense

If the lawyers in your firm say "that costs too much" quote me in saying that

> *"Lay people (clients, adversaries and especially jurors) are only too quick to ascribe improper motives to lawyers and their firms and therefore malpractice plaintiff attorneys relish linking their claims with an assertion of conflict of interest"*

Monitoring, Supervision and (even) Intervention

Many lawyers are too busy, or think they are, to supervise and monitor their staff and/or your systems *I don't mean to take lawyers off the hook, but I suspect all of you know what I just said is true*

So that means it may be up to you to do the monitoring, including the difficult task of monitoring the lawyers

Examples:

(a) can your tickler system be tricked or bypassed?

(b) is your dual calendar system really being monitored by more than one person?

(c) are the paraprofessionals actually following your firm procedures?

You can't check every entry or work done by each employee, but you can have a routine of random spot checks or audits, which can be explained as not singling out anyone but rather assuring best practices

(d) are the lawyers doing the things your systems require:

heeding the tickler system

inputting or reviewing the necessary data for conflict clearance

filling out their time entries on a contemporary basis

making contemporaneous notes of their interactions, especially with clients

Research by lawyer malpractice insurers, and my personal experience tells us that from the standpoint of jurors in attorney malpractice cases, if a dispute arises as to what was said to or by the client or to or by the lawyer, if the lawyer does not have contemporaneous notes, the client is likely to be believed

sending engagement agreements or letters

declining matters, or ending representations in writing

What system do you have for evaluation, and for communication of evaluations to staff; is it in writing and regularly done, not just scheduled to be done?

Does your firm have systems for lawyer evaluation? Lawyer mentoring?

And this can be a problem with compensation models

Does any of your monitoring, and mentoring, focus on mental health, to include signs of deteriorating physical health, problems with home life, mood changes especially with the lawyers…

If you don't have a mandatory retirement age for lawyers, what system do you have that allows someone in the firm to tell the lawyer that he or she has lost a good number of miles per hour on their fastball

Meaningful Continuing Legal and Paraprofessional Education

Mandatory CLE for lawyers - yes there are requirements but are they being met strategically

ABR pet peeves:

1. The lawyer who seems surprised that the deadline for getting all their hours in is in October each year, or that October comes right after September; *can you please just plan ahead, counselor?*
2. The lawyer who falls half an hour short of their ethics requirements for the year, and walks out of an ethics seminar after the first half-hour, most of which was just introductory.
3. The personal injury litigator who finds himself or herself without enough hours in October and so they sign up for a seminar on how to file a patent application!

Imagine if that personal injury lawyer gets sued and is required to produce a record of their continuing legal education for the last two years and there is almost nothing in their field that they attended?

Remember that mandatory CLE hours are <u>minimums</u> - encourage your lawyers to plan ahead, attend relevant CLE's, and encourage the lawyers to consider attendance at regular CLE's important for lawyer development, not just a mandatory obligation

To save time and money, you can arrange with Virginia CLE or private vendors for in-house continuing legal education programs Your malpractice carrier may even sponsor one for you

But what about your paraprofessionals?

providing routine in-house seminars about best practices is valuable to make sure that the firm's policies on paper are in fact being carried out in practice

what good are best practices on paper if in actuality your staff was handed a booklet with firm policies and never given an opportunity to discuss or review or even be reminded of those practices?

if there are seminars, and even local seminars to which you can send your paraprofessionals it will he help to assure that they feel valued

some CLE programs are designed for paraprofessionals, especially paralegals

some continuing education programs, although geared towards lawyers, will give discounts for paraprofessionals also to attend

providing these opportunities, or educational opportunities for your paraprofessionals might incentivize better performance

Resources

The Virginia State Bar resources.

Fee Dispute Resolution	*General Number (voice mail only)*	(804) 775-9423
Lawyer Assistance / Well-Being	*Lawyers Helping Lawyers*	(804) 644-3212 24-Hour Help Line: 1-877-545-4682
Legal Ethics Hotline and Opinions	email	(804) 775-0564

The American Bar Association Law Practice Management section and its publications

https://www.americanbar.org/groups/law_practice/

Your malpractice insurer: hotlines, free advice, seminars, programs

ABR particular malpractice concerns/advice:

Report potential claims as soon as they are even possible; your carrier may be able to offer advice that will fix the problem or help extricate you from it

Make contemporaneous notes of interactions, especially with clients

Send engagement agreements or letters

Decline matters, and end representation, in writing

Keep activity logs of client visits, deliveries, especially random ones

Two rules about suing clients for fees:

1. Don't do it.
2. Don't forget rule no. 1

Seriously, you benefit from clearly setting out fee and cost expectation in writing, and making sure that the client is current

Litigators need to know that a non- suit is not a magic bullet

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Preventing the Top 10 Malpractice and Ethics Mistakes

What You Should Know

1. MISSED DEADLINES:

No matter how strong your case or persuasive your argument, it won't do you any good if you miss the deadline to make it. Missed deadlines remain one of the most common malpractice mistakes, both because attorneys fail to accurately calendar or because they fail to react to their calendar. A computerized calendaring system with "ticklers" that are sent to every attorney and staff member working on a case is a great first step, but any system is only as good as the information put into it and the people using it. Do not rely on support staff to know the rules that apply to scheduling deadlines. Be certain staff is adequately trained and supervised concerning calendaring, especially on atypical cases. When a case comes in, be aware of any rules that apply to calendaring deadlines, especially statutes of limitations that can be fatal to a case. It is good practice, for example, to file a case proactively so that discovery responses that may identify additional defendants are returned before the statute runs, and those defendants can be added. Establish protocol to enter scheduling orders into the calendaring system, and prevent confusion by removing dates that have been replaced by new orders.

2. CONFLICT OF INTEREST:

While a conflict of interest isn't a basis for a malpractice claim in and of itself, even the appearance of a conflict can lead to ethics complaints or exacerbate malpractice claims. A comprehensive conflict checking system will allow you to identify potential issues and address them head on. Most lawyers know to check for conflicts between or among former and current clients and adverse parties, but it is good practice to also check for conflicts with fact and expert witnesses, staff, and other interested parties who may not be actual litigants. It is also good practice to run conflicts checks each time a new litigant is added, or discovery reveals new potential conflicts. Once a potential conflict is identified, have a procedure for disclosing, discussing, resolving, and waiving (if possible) conflicts. Communication is key – address potential or actual conflicts directly so no one is blindsided later on. For particularly complex situations, consult your Bar ethics committee or Board.

3. SUING THE CLIENT:

Law firms should be particularly careful about suing clients for unpaid legal fees. This often provokes a Bar complaint or malpractice counterclaim, particularly where there is room for the client to complain about a bad result. The best practice is to ensure that issues relating to legal fees are addressed up front and throughout the representation so that a client's account never becomes delinquent. Be clear with your clients about their objectives and how much it will likely cost to obtain them. Discuss how a client intends to pay your fees, a sizeable cash retainer, credit, a gift from a relative, a payment plan. Be sure to regularly send itemized bills (generally every month), and regularly demand payment. If a client is struggling to pay as agreed, discuss this with the client and determine whether there is a problem the firm needs to address, such as dissatisfaction with service, confusion over charges, or a need for a revised payment plan. Staying on top of billing issues is the best way to avoid the difficult business decision of whether to sue for unpaid legal fees.

4. ENGAGEMENT AGREEMENTS:

It is good practice to use detailed engagement agreements, even with well-established clients. An engagement agreement is an excellent opportunity to clearly discuss with your client the scope of the representation, both what you are agreeing to do for the client and what you are not. The more comprehensive the agreement, the better. Obtain agreement in writing as to how fees will be collected, how often and by what method you will communicate with your client, and how any disagreements will be resolved. Engagement agreements are not a mere formality, they are an excellent tool to avoid malpractice and ethics complaints.

5. DABBLING:

While it is tempting to take any and all business that comes through your door, this can be a recipe for malpractice disaster. Be certain that you have the necessary expertise, time and resources to handle each representation, or can associate with a lawyer who can help guide you. If you feel out of your element, it makes sense to refer clients to attorneys more suited to the representation. It is far better to miss out on some possible legal fees than to find yourself in over your head on a matter you were not prepared to handle, possibly facing malpractice allegations or even discipline from the Bar. If you would like to expand your areas of practice, be sure you have the time and resources to devote to getting up to speed.

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6. NEGLECT:

It is human nature to focus on things we enjoy and ignore things that present challenges. As lawyers, we cannot afford to indulge this desire. It is far better to present your client with "bad news" – whether an unfavorable ruling or an inadvertent mistake – while there is still time to take action to repair or improve the situation. Good client relationships develop when the client feels informed and included in the legal process. Discuss with your clients how they prefer to communicate: phone calls, emails, and letters. Be available to your clients, and always see that their communications are returned with 24 hours, even if it is just a quick call from your assistant letting the client know you received the message and will address the situation shortly. Take the time to document communication. It is good practice to send a follow-up email detailing phone or in-person conversations so that there is no confusion about what was discussed (or if there is confusion, it can be addressed). The file should indicate the work you have done, your analysis, all discussions you have with your client, and all decisions made and decided against and why.

7. BUSINESS INTEREST:

Exercise caution when making a decision to become involved in a business venture with your client, especially when providing legal services in connection with that business. It can be tempting to take a business interest in lieu of fees, but it may lead to conflicts and allegations of overreaching or improperly motivated legal advice. If there are any problems with the business interest, all of your conduct as a lawyer will be scrutinized. The same is true when handling legal matters for a client when you are also a member of the client's board of directors, officer, or shareholder. Importantly, there is often no coverage under legal malpractice policies for non-legal services, or for legal services in connection with a business interest of the lawyer.

8. TRUST ACCOUNT:

For many lawyers, the "business" side of law seems both daunting and baffling. Failure to properly maintain your trust account can lead to malpractice and ethics complaints and even loss of license. Be sure to understand the ethical rules governing trust accounts, and have solid accounting procedures in place. While delegation to those more skilled with numbers is okay, be sure that you, as the attorney, review and approve monthly trust account reconciliations. Have procedures in place to prevent mishandling of funds, such as limiting check signing authority, separating delegation of receipts and reconciliation, and requiring two signatures for checks over a certain amount. Regular audits by a CPA familiar with lawyer trust accounts can help you spot potential problems in your system that could make you susceptible to fraud or abuse of funds.

9. MISREPRESENTATION:

As lawyers, we endeavor to zealously advocate for our clients, which often includes spinning facts in ways that benefit our position. There is a difference between a creative argument, however, and outright misrepresentation. While the intent is likely to help or protect your client, misrepresentation causes a loss of credibility with opposing counsel and parties, the judge, and even your client. Depending on the severity of the misrepresentation, it could cost you your law license. Be absolutely certain that you are above reproach in representations made to your clients, opposing counsel and parties, the court, investigators, creditors, government agencies, and all others.

10. SCREENING CLIENTS:

Attorneys reporting claims routinely comment that they knew they should never have agreed to the problematic representation. If you get an "off vibe" from a potential client or situation, listen to your instinct and decline the representation. Be especially cautious if the potential client has unreasonable expectations, has had another lawyer (or several) before coming to you, wants to micromanage the representation, seems to have a personal vendetta rather than a legal issue, or is rude or offensive to you or your staff. Sometimes concerns can be identified, addressed, and alleviated. Oftentimes, however, it is best to simply decline the representation rather than take on a client or legal issue that is not a good fit with your practice.

Many attorneys get in trouble by not understanding and reviewing all the rules that apply.

Top Ten Malpractice Traps AND HOW TO AVOID THEM

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Here is the ALPS list of legal malpractice concerns for 2014 with tips for avoiding each problem.

1) Failing to Know or Properly Apply the Law

A report entitled "Profile of Legal Malpractice Claims 2008-2011," published in 2012 by the American Bar Association Standing Committee on Lawyers' Professional Liability, provides a statistical analysis of claims data collected from various lawyer- owned and commercial insurance companies for the period January 1, 2008 through December 31, 2011. This report is full of data such as the percent of claims by area of law which reported personal injury real estate attorneys as leading the pack having been responsible for 20.33% of reported claims. The report also provides data on claims by type of activity and by number of attorneys in the firm. The most troublesome activity, accounting for over 28% of claims, was the preparation, filing, or transmittal of documents such as deeds, leases, contracts, wills, trust, and formal applications. Firms of 1 to 5 attorneys were responsible for 66.03% of all claims.

The report also calculated the percentage of substantive claims that arose during the study period which turned out to be 45.07% and as a risk manager, which I find concerning. This means that over 45% of reported claims were based on failure to know the law, failure to properly apply the law, failure to know or ascertain the deadline, inadequate discovery, a conflict of interest, a planning error, and failure to understand or anticipate tax consequences, among others. These types of errors are difficult to address through the sharing of a practice tip because substantive errors arise out of an attorney's abilities. They are not a result of a failed office procedure. A risk manager can help an attorney develop a more effective calendar system, or tighten up file documentation. But it is far more difficult to discuss and address what in reality is often simply bad lawyering. That said, here are a few suggestions that if taken to heart can help reduce the risk of your making a substantive misstep.

The first practice tip is one that you probably have heard repeatedly – don't dabble. Truly, there is no such thing as a "simple will" or "simple contract." What first appears as a simple contract in reality may be a trap for the unwary because the attorney may not be aware of a unique and not widely known local law that significantly affects a contract's terms. Sometimes work appears simple when it is not, all due the reality that the attorney doesn't know what questions to even ask. If the work your client requests is beyond your comfort zone or outside of the areas in which you regularly practice, don't accept it. If you can't say no and do accept it, be sure to seek guidance from an attorney knowledgeable in that practice area in order to ensure that you have adequately addressed the client's matter.

A second tip is to prioritize CLE for all members of the firm. Far too often attorneys attend CLE at the last minute, taking whatever program is available regardless of whether the program applies to the attorney's practice. Also, it is not uncommon to see attorneys doing something other than staying focused on the CLE presentation or even spending the bulk of the event outside of the meeting room. With alternative formats such as videos, teleconferences, and web presentations now widely available, attorneys are even freer to pay only half-hearted attention to the presentation since it is so easy to work on something else during the CLE. A better approach to CLE is as follows. Take CLE that is appropriate for your practice area. Seek out quality programs and get as much from the experience as possible. Listen attentively, ask questions, and read the supplemental materials after the program has ended. Further, don't overlook

educational opportunities that focus on research or legal writing skills which are fundamental to the practice of law.

2) Failing to Document Scope of Representation

I know lawyers get tired of hearing it and risk folk like me get tired of always having to say it; but there is real value in documenting scope of representation on every new matter. Please note that I did not say with every new client, I said with every new matter. Now, I don't mean to suggest that every time a call comes in from some longstanding client that you, as their lawyer, should shoot off a new contract or engagement letter. By no means do I wish to suggest that. I am suggesting, however, that anytime a new file is opened for a client, new or longstanding, one would be well served by taking a few moments to document the scope of representation on that new matter.

Many attorneys respond to this advice by sharing that they object to sending engagement letters to their longstanding and or well-known clients. They argue that doing so would be too formal and would detract from the attorney/client relationship. I could buy into this rationale if such clients never sued their attorneys. Unfortunately, longstanding clients, life-long friends, and even family members do sue their attorneys. In fact, some of our largest losses have come from claims that were brought by such clients. Here's the spin. There is no rule that requires an engagement letter to be a lengthy three page contract full of legalese. A simple thank-you note or confirming email indicating that the usual fees will be charged along with a reference to the nature and scope of the work to be done can suffice.

Then this next argument is made. With flat fee work, such as transactional work, more time would be spent drafting and sending an engagement letter than is warranted. After all, the work itself is usually completed within a month and often sooner. In response, it is uncanny to note the number of times that a planned one-month transaction ended up taking far longer. Unforeseen complications abound, particularly in repetitive transactions such as real estate closings in an area where many transfers are taking place.

Of course, we also need to recognize that memories can be short, including our own. Who wants to be in a dispute with a client over what you were or weren't asked to do? When this type of dispute does arise, few clients remember that they said they only wanted to pay their attorney to do certain tasks and not every possible action that might have been indicated. Again, a short letter or confirming email can do wonders. This documentation not only confirms your understanding of what the client's needs are, thus avoiding the running with assumptions misstep, but can even be an opportunity to ask if there is anything else you might be able to assist the client with. What harm is there in asking for additional work?

Given what we're seeing in claims coupled with more and more attorneys moving into limited scope representation, I would also encourage you to consider documenting what you are not going to do. If there happens to be a workman's compensation component to a personal injury claim and you have no intention of handling that piece, put it in writing! The same could be said for those of you who handle divorces or obtain large settlements of any type but also have no intention of advising those clients as to any tax ramifications that might arise. If you are only being retained to provide a second opinion, document that you have no obligation to file suit on

the client's behalf. It's all about documenting that the client was made aware of what you will and will not be doing. Further, where called for, you might also consider documenting that you advised them to seek the services of someone who can assist them on those issues that you won't be.

Non-engagement letters are as important as engagement letters for the opposite reason. Engagement letters document representation and define its scope. Non-engagement letters document that there is no representation. Send these letters any time a case is not taken and the identity and address of the individual are known. One or two standard non-engagement letters placed on the computer for use by all members of the firm can significantly ease the word processing burden which is the major reason firms cite for not using this type of letter. These letters should never discuss the merits of the case or state the exact date of any applicable time limitations. Why take on added liability when there is no compensation?

In those situations where only a name is given, keep a written record of the phone call and non-engagement discussion in a non-engagement file. These records can be as simple as writing a note on the phone message slip and placing it in a miscellaneous advice or non-engagement file. After a client fails to get an action filed prior to the statute of limitations running and the resulting a claim boils down to the client's word against the attorney's word, having a phone record or a copy of a non-engagement letter that documents the discussion becomes invaluable.

Finally, it is always a good idea to document that the representation has ended and inform the client that the file is about to be closed, or that the file relative to a particular matter for an on-going client will be closed. A letter of closure sent at the conclusion of representation can meet this need quite effectively. At its most basic level this letter simply confirms for the client that everything you said you would do has now been completed. It is one more way to make certain that no assumptions are in play on either side. This letter can serve several purposes beyond documenting that the attorney and client understand and agree that representation has ended. The letter provides the opportunity to inform the client, in writing, about the continuing responsibilities that flow from the matter. For example, if you form a new corporation for a client, you should use the disengagement letter to clarify who will be responsible for maintaining the corporate records and accomplishing the annual filings necessary to maintain corporate existence. Similarly, you should remind estate-planning clients that they should review their plans with you, or another attorney, every three to five years to make sure no significant change has occurred in their personal circumstances and/or the applicable estate tax laws. This is particularly important for the one-time client with whom you may lose contact.

The letter of closure may also help sort out potential future conflict of interest problems. The documentation of the termination of the attorney/client relationship for a former client may allow you to move forward with representing another client in opposition to the former client in an unrelated matter. Permanently retain copies of all closure letters in a closure letter file for this very reason.

The letter of closure also provides the opportunity to inform the client of the firm's file retention/destruction policy and can serve as a cover letter for the return of original documents to the client. It also assists in marketing by giving the firm a chance to say to the client "thank you for bringing the business to the firm." Use of a closure letter need not be burdensome. Design and

place several templates in the word processing program for use by the entire office. For on-going clients these letters can be as simple as a thank you note card. The time spent handwriting a brief thank you note that documents the conclusion of the current matter will be marketing time well spent.

The regular and consistent use of these three letters can and will reduce your exposure to a malpractice claim. Whether the letter defines scope of representation up front, documents the absence of an attorney/client representation, or documents that representation has ended, together these forms help to clarify and define the professional relationship and the attorney's responsibilities and this is where their value lies. Clients are far less able to run with assumptions like alleging that their understanding of scope of representation was far broader than your understanding. In the end, these letters begin to place some boundaries or limitations upon your ultimate exposure should a malpractice claim ever arise. For this reason alone, the time spent drafting a well-written engagement letter and letter of closure is worth it. Our claims attorneys will look for these types of documents in every claim file in which they become involved. They are that important.

3) Allowing a Statute of Limitations Date to Run

Allowing a statute of limitations (SOL) to run on a client matter continues to remain an extremely common malpractice error. If statute of limitations dates are an issue in your practice, here are a few things to keep in mind.

- Independently verify facts relevant to the SOL date and identify the correct defendants from reliable sources in every instance. Verify accident dates from police reports. Ascertain who is the owner of the vehicle involved – it may not be the driver of the other vehicle involved in the accident. Thorough investigation from reliable sources is the only way to ensure accurate information. Clients and persons to whom they talk, for example physicians, may not be dependable sources of information. In addition, relying on the client's memory is fraught with danger. This is particularly true when declining representation. Do not specify when a SOL will run in a non-engagement letter if you are solely relying on client memory. If they are wrong, or you aren't given all of the facts, you will be wrong too.

- Make certain that an attorney is always responsible for determining when the SOL will run. Although many attorneys will claim otherwise, the reality is support staff often routinely establish SOL dates and attorneys review the dates for statutory accuracy. Not having anyone independently confirm the accident date often leads to a missed statute. It is imperative that all persons involved with establishing dates understand the importance of thorough investigation, make a determination as to the reliability of information obtained and have a working knowledge of the statutes and their application in the various state and federal courts. In sum, an attorney should be entirely responsible for establishing SOL dates in every instance.

- Use reminder dates for all critical date calendaring. There is never a good reason to claim surprise when it comes to an approaching SOL deadline. Place reminder dates in

the calendar well in advance of approaching deadlines to give yourself more than sufficient time to complete the necessary work in a thorough and professional manner.

- If you decide to withdraw from a case, try to do so at least six months prior to when the SOL will run. Inform the client of the withdrawal in writing and clearly advise the client of the applicable SOL deadline. Waiting until the last minute to withdraw increases the likelihood that the client will end up missing the SOL date and subsequently turn to you for recovery. In this case, specifically stating when the SOL will run is advised because thorough investigation of the matter has already occurred.

- Institute a diary system that allows you to review each and every file every thirty to forty-five days. A disadvantage to computer calendaring systems, docket control cards and file setups is that they create an unwarranted reliance upon their accuracy. People create the calendar, the docket cards and the file and mistakes happen. Redundant systems can simply multiply the error. The most thorough method to use to avoid mistakes is to review the file on a routine basis. When doing so, be certain to double check dates, independently verify all key facts, prepare necessary documents well in advance of approaching deadlines, and contact the client so that they don't feel forgotten about.

- File suit and follow up with service of process in a timely manner. Never get to within thirty days of the SOL without having filed suit. Last minute filings are playing with fire. Do not put off the paperwork or service of process hoping to reach a settlement at the last minute. Unexpected events such as illness, computer failure, an incorrectly calendared date, office vandalism, and accidents are additional examples of what sometimes goes wrong. If problems such as these or others arise, you have no room for error. Play it safe and smart. Timely file and follow up with service of process. If you discover you have named the wrong defendant (for example, the defendant was a person not a corporation), you will still have time to remedy the situation.

- Standardize the firm's calendaring procedures and develop a calendaring guideline that sets forth all critical dates that might arise at the firm and describes the desired approach to responding to these dates. Standards can include the type of acceptable primary and redundant system an attorney or staff member might use individually and should require data entry into the firm's various master calendar and docket systems. Standardization allows staff personnel to calendar confidently as they back up each other, allows the firm to monitor compliance to calendaring guidelines, provides assurances that no deadlines will be missed due to regular use of reminders by all, and provides an assurance that filings occur well ahead of deadline dates. Each attorney in a firm is ultimately responsible for what the other attorneys at the firm are doing. Standardization adds an extra level of confidence.

4) Failing to Communicate – It's all in the Details

MRPC Rule 1.4 Communication is one of those rules that seems clear on its face. We all know that as lawyers we are to keep our clients reasonably informed about the status of their matters as well as to promptly comply with reasonable requests for information. There's nothing unexpected there. Most also know that the rule further states that a lawyer shall explain a matter

to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Maybe I'm just not seeing it, but all this seems rather straight forward to me. If it were that simple, however, why do attorneys continue to face disciplinary complaints and malpractice claims in the numbers that they do for simply failing to communicate? Perhaps there's more to the rule than what is generally remembered.

As I consider the implications of this rule, I have found it helpful to analyze the rule from a slightly different perspective than what's commonly done. So often, what we remember the rule as saying is taken at face value and discussed from the perspective of what needs to be communicated and when. One often hears of the importance of returning phone calls in a timely fashion, forwarding to the client copies of all relevant documents, providing regular and detailed billing, and personally visiting with the client to explain the status of a matter sufficient to allow the client to make informed decisions when deemed necessary. While all of this is quite important, I would like to come at the rule from the perspective of who gets to decide what. This helps me keep roles straight and remember who has employed who, which is key given other language in the rule which isn't as often recalled.

Beyond what is set forth above, Rule 1.4 also states that a lawyer shall inform the client of any decision or circumstance that requires the client's informed consent under the Rules. Now, Rule 1.2 Scope of Representation comes into play as do several conflict rules at a minimum. In addition, the Rule tells us that a lawyer is to reasonably consult with the client about the means by which *the client's objectives* are to be accomplished. For me, this language shifts the emphasis of the rule. The rule is no longer about sharing what you think the client needs to know; but rather it is really about what does your client reasonably expect to be told throughout the course of representation. I believe there is real value in shifting the focus away from what you, as the attorney, thinks should be shared and moving it toward what any client would reasonably expect their attorney to share.

With all this in mind, what are the ramifications of this rule day to day for the practicing attorney? Certainly promptly returning phones calls, timely responding to client requests for information, forwarding copies of documents, and the regular sending of detailed bills are a given. But there is more. An attorney should keep clients informed of <u>all</u> court dates, <u>all</u> filings, and <u>all</u> offers to settle or mediate. Also, don't overlook telling clients about any changes to your contact information such as a change in your address, phone number, or email. Yes, perhaps a shift in perspective wasn't necessary to develop this list thus far; but I will share that many attorneys regularly struggle with following through on just these basics. Typical rationalizations or excuses include the client doesn't really need to be bothered with this, I know what my client will say or decide anyway, I don't have the time to tell them, the client doesn't want to be billed for the time it will take, etc. In short, attorneys start to run with assumptions and rationalizations when it comes to the basics of effective communication and this can be a dangerous play.

However, with the shift in focus in mind, how might this list of suggested practices expand? Consider scope of representation. As an attorney being hired to handle litigation for a financial institution, it is easy to understand how one might focus solely on the litigation. On the other hand, the client who has hired the attorney may be expecting their attorney to see the "big picture" and keep them informed about everything in play to include issue spotting. What if there is a regulatory reporting and/or compliance issue peripheral to the litigation? If the attorney is

not up to handling the related issue she must say so because the client will often reasonably expect their attorney to not only issue spot but to take care of the related matter or at least inform them of anything that the attorney is not competent to or perhaps prepared to handle so that appropriate attention can be given to that peripheral issue. This is one reason why documenting scope of representation is critically important with all clients. Again, it is all about considering what clients would reasonably expect to be told.

So now we can expand our list of ramifications to include the following. Clients should be told what the scope of representation is and also what it isn't; they should be informed of their rights, especially in criminal matters; the ramifications of any actual or potential conflict issues should be fully explained to clients prior to their agreeing to representation; and client permission should be obtained for granting extensions of time to adverse parties, stipulating to evidence or testimony, agreeing to continuances, and for making and/or rejecting settlement offers. Clients expect to be told when their matter has concluded and what, if anything, they must yet do. Whether through inability or oversight, clients must also be informed of a failure to take action on the client's matter or that their case has been dismissed. Clients do reasonably expect to be informed about any and all of the above whether it's good news or bad.

When thinking about communication, this shift in perspective helps to keep the emphasis on the client and the fact that we, as the attorney, are in the client's employ. Many decisions are for the client to make. This reality does not in any way, shape or form minimize your role as the attorney. In fact, I believe this perspective helps to elevate an attorney's role. Consider the word "counselor" in light of Rule 1.4 and ask yourself what might that word mean in daily practice? For me it means that a lawyer is to advise the client about the legal and practical aspects of any given matter. She is to identify and evaluate alternative solutions pointing out the positive and negatives of each. The goal is to enable the client "...to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." (*See Comment 5 to Rule 1.4 of the ABA Model Rules.)* This intended outcome does require that we approach communication from the client's perspective. With all clients, ask yourself just what does the client need to know to be able to make intelligent decisions? As the attorney, if this question is never asked and answered with every client, you are taking an unnecessary risk that can and will at times lead to disastrous outcomes in the malpractice and disciplinary arenas.

Let's take this point one step further. Assume that you have taken on a regular run-of-the- mill divorce client. Should you discuss the option of conducting electronic data discovery? A number of attorneys simply never raise the issue. Some don't see the need. Some see it as cost prohibitive, and some simply have no idea how to do it and/or no intention of ever going there in their own practice. Now focus on the client, haven't these attorneys actually made a decision that properly belongs to the client? I would argue that indeed they have. In fact we have reached a time where a follow-up attorney, who was hired to review a file of one of these attorneys after their client did experience an eventual unintended consequence from their attorney's failure to discuss let alone conduct electronic data discovery, may actually tell the client that not only does he view the situation as a failure to communicate but there may also be a viable malpractice claim here.

I can't create a list of everything that an attorney should tell a client. I can only give examples of things to think about and a perspective from which to begin to address the issue. What clients

expect to be told will vary with every client and on every matter. Talk with your clients and try to determine their expectations from the outset. The bottom line is this. Clients do expect to be fully informed and attorneys have an ethical obligation to meet that expectation. Here's the kicker, however. Your communication efforts must be handled in a way that seeks to assure that the client understands and comprehends all that is being communicated about all that must be decided. Forwarding copies isn't enough. This is how a jury is going to see it so once again, it's all in the details.

5) Failing to Properly Manage the Client Relationship

Most attorneys are more than able to effectively manage their client's legal matters. Files are appropriately documented, substantive work progresses as expected, and resolution is reached in a timely manner. Unfortunately, competent lawyers who do good work and get fine outcomes can still find themselves facing a malpractice claim. Even worse, when they do, a few of those claims will eventually be resolved with a loss payout. Keeping this in mind, I find it curious that in my fifteen years in the malpractice insurance industry, I have never heard of a single malpractice claim that arose out of work for a satisfied client. I can also share that I have personally spoken with a lawyer who did blow a statute of limitations date on a significant matter. After informing his clients of this misstep, they responding by stating they would never dream of filing a malpractice claim against the firm and they never did. The interesting part of this story is that those clients continued to bring additional work to the firm after the misstep.

Why do good lawyers who get good results still get sued? And why would someone not sue their lawyer after a critical deadline was blown? My personal belief is the difference in outcomes has to do with the professional relationships that exist between attorneys and their clients. If a lawyer poorly manages the client relationship, the end result of obtaining a good outcome may still not be satisfactory to the client due to how the client felt he was treated throughout the course of representation. On the other hand, a lawyer who excels at managing the client relationship but makes an unfortunate legal misstep can find that she has been forgiven. Well managed client relationships can, in rare instances, work wonders and it's all about effective communication.

Mistakes such as failure to obtain client consent, failure to keep the client informed, failure to provide sufficient information to allow the client to meaningfully participate in the decision making process, and failure to follow the client's instructions are all too common. Many client relationship errors can be avoided by adopting a simple, commonsense approach to working and communicating with clients. Allow me to share a few ideas in that regard.

- Clearly explain to each and every new client the fee arrangement, billing procedures, and the client's obligations. This should be done both orally and in writing in order to provide an opportunity for your new client to voice any questions or concerns that he might have. As you explain the fee arrangement, ensure that the client has a thorough understanding of what the total cost of representation might be. To draw a parallel, no one in their right mind would ever agree to purchase a new car after only being told what the monthly payment was going to be. Everyone wants to know what the total price is and how long those payments are going to last. Clients want the same kind of information from their lawyer but they don't always say so. When they don't, they may run with an assumption

about what the total bill will end up being. What if their assumption is way off? If or when that happens, you've got a problem.

- With all new matters, including those of repeat clients, document the scope of representation. This documentation does not need to be in the form of a formal contract every time. A letter of clarification or confirming email may suffice. The goal is to establish realistic client expectations and, more importantly, make certain that the client has a thorough understanding of what you are going to do and what you are not going to do. The reason it is critical for you to provide clear and documented explanations about the services you will perform is that memories are short, including your own. Always explain legal terms and procedures in plain language so the client understands what to expect. Finally, don't overlook the importance of establishing a clear timetable as to how the matter will move to completion.

- Listen to your clients. They have hired you and you are handling their legal matters. Clients don't always wish to pursue litigation or cut the best deal. Sometimes actually getting divorced isn't what should happen. Take time at the beginning of the attorney-client relationship to clearly identify the client's goals or objectives. Learn what the true problem is. Ask questions. Consider and propose alternative directions or solutions. Let clients participate in the decision making process and feel some control in resolving their legal issues. Again, you are in their employ. There is value in trying to determine how you can best serve their needs.

- Practice effective client communication skills. This does mean that you should promptly respond to all client inquiries including their calls, provide regular case status updates, timely report negative information, and are on time with client appointments. If you send the client copies of your correspondence or pleadings, tell the client about the meaning and purpose of what you have sent. Complete all tasks on a timely basis. If an unforeseen delay arises, provide an explanation to your client as soon as possible. Tell them the reason and provide a revised expected completion date. Be sure to bill your clients regularly and fully explain all charges. Ask for and be receptive to clients providing ongoing feedback on the quality of the representation they are receiving.

- Be personable. Pleasant conversation or a little levity when appropriate can demonstrate that you are invested in the client as a person. Clients will feel that you view them as more than just a money source. For business clients, learn as much as you can about the client's business or industry. The more a client gets to know you and you them, the easier it will be for that client to place confidence and trust in you and your legal advice.

- Use a closure letter at the end of representation to confirm that you have done all that you said you were going to do and, by virtue of its sending, also confirm that your clients understand that you have concluded working on their specific matter. This letter is also an opportunity for you to remind your clients of any additional obligations they may have, thank them for their business, inform them of your file retention policy, and state that you remain available to assist with any future legal need.

- Teach your support staff about the importance of courtesy, timeliness, professionalism, and confidentiality when dealing with clients and make certain that you practice what you preach. Don't minimize the importance of treating your staff well. Remember, your staff is the interface between attorneys and clients. If staff members are depressed, overworked, feel taken for granted, or are dissatisfied generally you will have problems. The reality will be that negative messages, however unintended, will reach your clients.

- Finally, consider ways to let your clients know that they are important to you and then implement those ideas. For example, keep all public spaces, to include conference rooms, neat and free of client materials. Close doors so that no one will over hear your conversations with clients. Don't allow yourself to be constantly interrupted when meeting with clients. These types of nonverbal messages can speak volumes. Consider letting them know that your time with them is the priority. As you meet your clients in the reception area you might begin to get in the habit of telling your receptionist something along the lines of "Please hold all calls. The next hour belongs to Ms. Jones." Of course, this isn't going to be said for the sake of your receptionist; it's said for your client's sake and that kind of sentiment and statement can work wonders.

6) Failing to Address and Properly Resolve Conflicts of Interest

Much of what is written regarding conflicts of interest is directed toward justifying the need for conflicts checking systems, describing how to use those systems or identifying what information must be tracked in them. There doesn't seem to be much written about what to do once a conflict has been identified. The focus here is to discuss accountability for the conflict of interest decisions that attorneys must make.

What should happen if there is a match with a name in the conflicts database? The conflict concern should initially be brought to the attention of the intake attorney. In firms that routinely and systematically check for conflicts, this happens. But is this action in and of itself sufficient? I would suggest that it is not, at least for some of the conflict "hits" that arise and here's why. An identified conflict will occasionally put the intake attorney in a potentially precarious situation. With some matters there is going to be no bright line rule upon which to draw in deciding whether it is permissible to move forward after a conflict has been identified. Add into this mix a potentially significant legal fee and the dilemma becomes clear. When faced with a potentially serious conflict concern and a potentially significant legal fee, reasonable minds may not always make responsible decisions. Personal desires and financial pressures can sometimes cloud one's thinking. Unfortunately, and for this reason, leaving all conflict resolution decisions entirely up to the intake attorney's discretion may result in exposure for the law firm. Firms are sometimes surprised to learn that a significant conflict concern arose and the intake attorney moved forward on his own when he should not have. There was no accountability to the firm for conflict resolution. There has to be, and there is, a better way.

If there is a match with a name in the conflicts database and it is not immediately apparent that the firm is conflicted out, the conflict concern should be brought to the attention of the intake attorney and the partner or departmental chair responsible for conflict resolution. The vast majority of conflict hits will result in a relatively immediate sign-off as the intake attorney can readily explain why the name match is not a concern. For those situations that are not clear, it is

essential to have a non-involved attorney who is a trusted member of the firm act as the conflicts resolution attorney. Not only will the conflicts resolution attorney be able to counsel the attorney who may have the conflict, she will also be able to make the ultimate conflict decision on the part of the firm, if necessary. This attorney should be a senior member of the firm who can rise above concerns over immediate cash flow and examine the proffered representation in light of what the ultimate benefit to or concerns for the firm may be.

In some instances, seeking the advice of ethics counsel may be warranted. Some firms have an in-house ethics counsel. For those firms that don't, looking outside of the firm may be necessary. A call to a law school ethics professor, bar counsel, a malpractice insurance defense practitioner, or another colleague are all reasonable suggestions. In addition, a review of the applicable rules of professional conduct will often provide further clarification.

However, even given the above, some attorneys will still argue that the overall risk doesn't justify the effort. To them I would say, "Have you considered the exposure issues that may come into play on a conflict of interest malpractice claim?" The result of some conflict of interest claims is that the firm must disgorge its fee related to that matter. You cannot profit from a matter that you should never have been involved in from the start. Legal malpractice insurance policies do not cover disgorgement of fees and the fees in question can be substantial.

Even more troublesome is the issue of notice to a malpractice insurance carrier. Conflict of interest claims do not arise overnight. Attorneys are often aware of a potential problem when clients are troubled by how their matter is progressing. If one or more insurance renewal periods pass during the time of client discontent or if coverage is placed with a different carrier in the interim, the malpractice insurance carrier may deny coverage. Why? From the malpractice insurance carrier's perspective, the firm was aware of an act, error or omission that could reasonably have been expected to be the basis of a claim or suit that was not reported in a timely fashion under the terms of the policy. Read your malpractice insurance policy carefully and pay particular attention to the notice requirements.

A related issue concerns the use of waivers, particularly in joint representation. Some time ago I was asked to review several different sample Consent to Joint Representation forms that a firm was using with their estate planning clients. What I found was troubling. To set the stage, this firm was accustomed to providing coordinated estate planning services to families in situations where such a plan was called for. In other words, they were involved in multigenerational joint representation. Now I have no problem with this initially as there is nothing inherently wrong with joint representation in and of itself. My problem was with what the firm tried to do with their waiver documents.

In one of the forms, the firm sought to inform their joint clients that a potential conflict existed. So far so good because disagreements on key decisions may arise after the representation has begun. Unfortunately it went downhill from there. The waiver went on to state that each client will be treated as if they were being represented by separate counsel and that, absent authorization, no secrets would be shared between clients even if the resulting plans were incompatible or that the plan of one client was detrimental to one of the other clients. Now I've got a problem with that!

To make matters worse, this waiver went on to state that each client had the right to loyal and diligent representation. While an accurate statement, in the context of the waiver document that the statement was placed, I don't see how an attorney could view the keeping of secrets in joint representation or the drafting of documents that may end up being detrimental to one or more of the jointly represented clients as meeting the definition of loyal and diligent representation. I also don't think any of the firm's clients would either, particularly if and when one eventually discovers that they were the one harmed by their own attorney's act of drafting estate planning documents that ultimately proved to be detrimental to their interests. As the attorney, you don't get it both ways.

The way that I see it is this; one can't be partially loyal. The duty of loyalty is to be *equal* among all clients, period. It's an all or nothing kind of thing. Should one of the clients insist that a confidence be maintained and as a result an incompatibility in the overall estate plan arises in some fashion, it's over. You are out as the attorney and out for all. Don't try to pick one family member to continue on with, drop the rest, and maintain the secret. Not only would this be unethical (See MRPC Rule 1.7 Conflicts of Interest: Current Clients) but a viable malpractice claim may very well be on the horizon.

This is one of the risks inherent with joint representation. Significant conflicts can and sometimes will arise. When they do, the attorney often must completely withdraw. At ALPS, we have seen viable claims where an attorney lost contact with one of the joint clients in a personal injury suit and yet carried on with the representation of the remaining client. Often attorneys will attempt to justify such a decision by arguing that too much, in terms of time and money, was invested in the case and they were not about to walk away from that kind of an investment.

The decision to remain or withdraw cannot be based upon what would be best for you as the attorney. This will eventually be viewed as your putting your own financial interests above the best interests of your clients. This decision should be solely about what's best for, and only for, the clients. If proceeding with the representation of the remaining client/s could in any way be detrimental to the one client you no longer wish to represent, you're out. There are very few exceptions to this outcome. The same is going to be true in joint representation of any type; but of particular concern due to claims activity, is when attorneys attempt to jointly represent clients in a business transaction, a real estate transaction, or in a divorce. Tread carefully in these practice areas.

I do understand the temptation to try and anticipate conflict problems and avoid the necessity of having to withdraw by obtaining waivers in advance. It can be very hard to walk away. While waivers are valuable and quite necessary at times, one must also understand that waivers aren't a fix it all solution. Even though I am certain that a number of clients have signed consent to joint representation forms just like the one discussed above, that doesn't necessarily make that waiver effective. Consent, informed as it may be, cannot make a nonconsentable conflict consentable and, for me, that's the bottom line. Again, you don't get it both ways. Nonconsentable conflicts do exist regardless of how much you might wish otherwise.

7) Passive Management: Is Anyone Actually Steering the Ship?

I have worked with over eleven hundred law firms over the years and it certainly seems to me that a number of smaller law firms around the country are being passively managed. Is this a problem? Well yes, it very well could be.

Now I define passive management as reactive decision making or making decisions only when absolutely necessary. Often in such firms the managing partner is serving on a part-time basis without compensation and their primary responsibility is to address staff related issues and administrative functions when deemed necessary. The reality is that in a firm being passively managed no true firm leadership exists. From a business perspective, no one is steering the ship.

This seems to be particularly true in smaller firms for any number of reasons. The managing partner may have concerns over how his or her actions may be perceived by the other partners. Such concerns might be a fear of be perceived as playing favorites, as being overly protective, or unduly harsh. Other managers avoid tough decisions altogether perhaps with the naïve hope that the problem will eventually go away if it is ignored long enough. Heaven forbid anyone ever question the propriety of a decision! Sometimes the underlying problem may be as simple as a fear of jeopardizing the partner-to-partner friendships that originally brought the group together. Of course there will always be those few who simply have no idea what to do with the problem at hand. Worse yet are those situations where the entire group of attorneys decides to manage by consensus. This is the ultimate when it comes to the lack of a ship's captain because in these firms decisions are made at the speed of molasses if they are made at all.

There is a downside to passive management due to associated malpractice concerns and this is where the problem lies. Consider a situation where a partner is seriously depressed as a result of going through a difficult divorce. As this divorce drags on financial pressures mount and the attorney begins to demonstrate a growing reliance on alcohol. Now personal friendships and even loyalty come into play and this attorney, who may be developing a true impairment, receives support from his peers at the firm. Although personally supporting this attorney through a personal crisis is admirable and quite appropriate, if the professional side of this personal crisis is not also responsibly managed malpractice claims can and will arise. For example, should this attorney's files be reviewed or his calendar checked once any warning signs start to appear? That would seem prudent given that impaired attorneys often end up neglecting client matters; but this often won't happen in a passively managed firm.

As the above demonstrates, one real risk of passive management is in a firm often failing to proactively address the professional side of any developing crisis. Yes, when faced with a malpractice claim most of these firms respond by having management in whatever form it exists step in; however it is often too little, too late. The unfortunate outcome ends up being a change in the makeup of the firm and this change is not always limited to the firm divorcing itself from the problem attorney. Accountability for the situation naturally falls on the managing partner, which can result in a firm split or dissolution.

In contrast to this, actively managed firms are proactive and they take additional steps in an attempt to prevent possible claims from arising. In response to the situation described above an actively managed firm might conduct file review at the first sign of trouble, perhaps assign a mentor, or the attorney of concern could be granted a temporary reduction in workload until he gets his life back on track. These ideas are reflective of methods that would professionally

support an attorney who is struggling. If substance abuse, as an example of a full-blown impairment, becomes a known and legitimate concern, additional steps such as requiring successful completion of an addiction treatment program as a necessary condition of remaining with the firm become essential. Certainly this is a more difficult road to go down; however the hoped for outcome would be to maintain the overall integrity of the firm coupled with the eventual recovery and retention of a valuable firm asset, the subject attorney himself.

If certain aspects of a passive management style exist at your firm, consider strengthening your firm's management and leadership capabilities. Steps that might be taken include formalizing a management position by creating a job description and having an open and honest discussion about the degree of authority that will be given to this individual. As part of this process also make certain everyone agrees to respect that authority whenever it is exercised. A firm should always recognize the importance and value of the management position, whether full time or part time, with an appropriate level of compensation. Consider management training if no one at the firm has a complete set of management skills. There are resources available at a variety of price ranges from well-written books to intensive off site courses that last several weeks. If no attorney at the firm has an interest in managing the firm, consider hiring an experienced manager and, again, make certain to give this individual the necessary level of authority to fulfill his or her duties otherwise it's just going to be wasted time, energy, and money.

I am a firm believer in having strong leadership and effective management within organizations. Within the law firm setting not only will this contribute in lowering exposure to malpractice claims, but I also believe that it will significantly impact any firm's financial bottom line in the most positive of ways. That said, remember this. According to our ethical rules we are our partner's keepers and when it comes to the success or failure of the business, firm attorneys will sink or swim together. Isn't the better option to have someone actually in charge of steering the ship if for no other reason than to try and avoid ever having to sink or swim together? Personally, I'd rather be on the ocean than in it. How about you?

8) Forgetting to Take Care of One's Self

Allow me to share a little good old fashioned, plain Jane, down to earth advice that is simply this: *don't forget to take care of yourself.* It sounds simple, and we all have heard it from parents, friends, colleagues, kids, and perhaps most often from a significant other. My travel experiences these past fourteen years have underscored the importance of this advice and my wife continues to remind me of it every time I head back out. She seems particularly concerned that I get out of hotels to enjoy some sun. Seems I get a little sullen without enough sun and fresh air. Perhaps so. I'll keep at it.

I really do believe that taking this advice to heart can make a world of difference in our lives and also be an effective risk management tool. During risk visits over the years, I have had employees ask me to talk with an attorney about helping her learn to say "no" so that her workload might finally drop to a reasonable level. The staff at these various firms was always concerned about an attorney's overall well-being due to the unreasonably heavy workload that was self-inflicted. I have also had a number of attorney spouses ask me to let their attorney husband or wife know that from my perspective (as a risk manager) taking a vacation is a good thing. Please understand and remember that stress-related physical health issues, addictions, and

even mental illness (particularly depression) are significant problems within the legal profession and I truly believe that such health issues arise, in no small part, due to an attorney forgetting to prioritize the taking care of one's self.

I have spent time on the phone with an attorney who was unable to make a decision and thus unable to work any further on a matter that had a deadline only hours away. His personal stress level had reached a point where indecisiveness and immobility were the eventual outcome. He simply could go no further and he literally walked out of his office later that day and has never returned. Unfortunately, this response of immobility is not uncommon. At ALPS, we handled our fair share of malpractice claims that arose due to the fallout of unaddressed high levels of attorney stress and often these claims do resolve with a loss payout.

Absent a proper balance between our personal and professional lives, all kinds of risks potentially come into play to include stress, burnout, indecisiveness, apathy, forgetfulness, and/or a loss of the various types of personal and emotional support systems upon which we rely to function effectively. Any one or combination of these risks can easily create a situation that is ripe for attorney negligence or worse. So then, what does "taking care of one's self" mean? For me, it means eating right and trying to find time to exercise three or four times a week. It means doing what I can to leave work issues at the office so that when I have time with my family I can fully invest in them. I have come to learn the importance of not jeopardizing my relationships with any of my most valued and effective support systems.

Taking care of self also means taking a vacation now and again, at least once a year. It means finding some quiet time for reflection and rest, as well as time to pursue personal interests. Cooking is one of the things that I need to do in order to stay sharp, to stay balanced, as it allows me to get to a different place in my head. I find comfort and am able to relax in a busy kitchen and this physical space has become a special place for my wife and I to talk and just be together.

I am unable to tell you how to best find balance in your own life. We are all individuals with our own unique interests, needs, and desires. I can tell you that the benefits are worth the effort that it will take. Not only will you reduce your exposure to a malpractice claim, but I also believe that it will help keep both your personal and professional life meaningful and fulfilling. Neither side will weigh heavily on the other because both aspects will be in balance and that's the goal. It is so easy for work to override personal needs. Try not to let that happen by remembering to take some time for you.

9) Getting too Comfortable with the Attorney/Client Relationship

I suspect it would come as no surprise to learn that many of the files that come our way after a malpractice claim has been reported are somewhat lacking when it comes to thorough documentation. If we had found in the file what should have been there, a number of claims might have been resolved far more favorably than they otherwise were. This is why risk managers focus so much of their efforts on educating insureds about the need to thoroughly document client files. Allow me to address one of the reasons why I believe attorney files are missing certain types of documentation shared with the desire to help you avoid ever having to face a similar situation.

In my consulting over the years with thousands of attorneys who practice in firms located in Alaska to the Virgin Islands, I have been pleased to discover that the overwhelming number of attorneys in practice are competent, well intentioned professionals. To speak in the vernacular, our insureds are "good folk." That said, some of these attorneys have been through a claim at some point in their professional lives while others, even a number who are nearing retirement, have never been sued. I've always been curious as to the reasons why some attorneys get sued and others do not. Certainly dabbling in unfamiliar practice areas, attorney impairment, burnout, poor client selection, and even poor client communications explain some of the claims but not all.

There is another explanation behind some claims that is not discussed often enough and thus not fully appreciated for the risk that it truly is. And unfortunately, the longer an attorney is in practice the more likely this error might arise. In short, the misstep is one of excess comfort. The reasons behind the comfort trap vary. For some attorneys the routines of the practice become all too familiar and attention to detail starts to wane. With others, the realities of working with certain clients for many years leads to the creation of professional and even personal friendships which brings with it a higher degree of trust. This comfort with long-term clients is another reason why attention to detail sometimes similarly declines. The downside with comfort in our routines or with certain clients is that all too easily casualness follows and that's the problem.

Inattention to detail can and has led to legal missteps which eventually resulted in significant claim losses. It is failing to document scope of representation with repeat clients because, due to comfort with the relationship, the attorney assumed that the need for this type of documentation was no longer necessary. It's an attorney not wanting to risk offending long-term clients so engagement letters or closure letters drop off the radar. It's failing to continue to use checklists because the attorney has gone through the same series of steps so many times that this step has become a bother. It's trusting the relationship with the client so much that capturing and preserving the email record is viewed as a waste of time. It can even be an attorney not wanting to document a file with anything at all because she is "simply doing a favor" for a long term client, a family friend, or a staff member and the work is not viewed as true legal work. Watch out for that one!

Feeling confident in your practice and comfortable with your clients is a good thing as long as this level of comfort doesn't result in a related casualness with file documentation. When you begin to rationalize away the need to thoroughly document any given file you're setting a trap that truly can bite you at some point further along. If you ever find yourself moving in this direction, just stop a moment and think about what's going on. I can accept that the use of a formal contract each time a long-term client brings a new matter in may be viewed as offensive. The answer however, is not to simply take away that critical piece of documentation but to find an alternative way to get there. The use of a confirming email or informal letter of clarification can be quite effective at accomplishing the same goal. The bottom-line is that these "failure to document" missteps often come to light in one of those "word against word" disputes in a claim or disciplinary matter and we all know how attorneys fare when that happens, not well. Yes, thoroughly documenting every client file may take a little extra time; but should you ever find yourself facing a malpractice claim on any one of your files, trust me, you'll be glad you took that time.

10) Suing for Fees

Fee disputes are at the heart of a significant percentage of all legal malpractice claims brought against attorneys each year. Typically, the attorney sues his client for unpaid fees and is then countersued for legal malpractice. Sometimes merely sending a final bill triggers threats of legal malpractice. Given this, the following tips are shared with the intention of helping you avoid this situation entirely.

1. **Don't accept clients who cannot afford your legal services.** It is a lose/lose situation to take on a client who is overly concerned about fees and/or who ultimately will not be able to pay your bills. If you agree to represent such a client, you will place yourself in a situation where you naturally become torn between putting in the required number of hours and minimizing the final costs. Always try to determine whether the client can afford your services at the outset and learn to say no if and when they can't. This is one situation that doesn't get better with time.

2. **Written fee arrangements.** Every engagement letter or contingency fee agreement should contain a clear explanation of the legal fees that will be charged for the work to be performed. Any restriction of scope of work should also be detailed in this agreement. Be specific regarding the types of out-of-pocket expenses for which the client will be responsible such as filing fees, court costs, expert witness fees, photocopy charges, computer research, long distance calls, etc., because clients are often astonished by the amount of out-of-pocket expenses incurred on their behalf. Finally, it is never a good idea to try and adopt a new fee structure and write a subsequent fee agreement when a matter is pending.

3. **Bill on a monthly basis.** Attorneys who charge an hourly fee should always bill the client at least monthly, unless the client has specifically requested otherwise. Avoid billing the client at the project's completion unless the total cost of the representation has been agreed upon in advance. **The key to hourly billing is to send bills and collect your fees on a frequent basis in order to avoid large, unexpected bills.** No one likes getting those, even you.

4. **Detailed billing statements.** Provide detailed billing statements that describe the work performed by each attorney on a daily basis and how long it took. Entries such as "10 hours for research" are unacceptable. Rather, the entry might read "10 hours of researching state case law on piercing the corporate veil."

5. **Review all bills.** The attorney responsible for the case or matter should review every bill for errors before it is mailed to the client.

6. **Copy the client on all correspondence and other materials relating to the client's matter.** Ask yourself which client would be more likely to pay her monthly bill: the one who hasn't received a single sheet of paper from her attorney in the last three months or the one who regularly received informational copies from her attorney? Keeping your clients in the know does matter.

7. **TAKE PROMPT ACTION ON ALL ACCOUNTS IN ARREARS.** This is the single biggest mistake that attorneys seem to make with respect to fee disputes. Most attorneys joined the legal profession in order to practice law, not to collect delinquent fees. Unfortunately, the client who can't pay your fee today isn't likely to be able to pay it tomorrow. You are better off dealing with the delinquent client without delay and this doesn't mean you go and tell your bookkeeper to call and ask for a payment. You should visit with the client directly before the client gets too far behind.

   In a perfect world, the firm's partners should review all past due accounts on a monthly basis. Then with any developing delinquencies, the partner responsible for a matter in arrears should be asked to contact and inform the client that the firm will withdraw from the matter if the fee issue is not resolved promptly.

   Beware of clients who promise you money "next month." That's often one of those "fool me once shame on you, fool me twice shame on me" situations and the money never materializes. If you can, it is better to withdraw and cut your losses when you are owed $1,000 rather than to wait and later have to sue the client in order to try and collect $15,000.

8. **NEVER SUE FOR FEES.** Establish a strict policy against suing for fees. If you cannot work out a realistic payment plan with the client, consider other alternatives such as arbitration or mediation. If you are tempted to sue for fees, consider this: the counterclaim for legal malpractice usually seeks an amount far in excess of the legal fees in dispute. In the vast majority of these cases, the attorney ends up dropping the fee suit to get rid of the malpractice claim.

   This is of particular importance. Never sue a client who never had the ability to pay your bill in the first place. Accepting them was your mistake, not theirs; and they will often counterclaim. What other option do they have?

9. **Collect retainers.** If you are having difficulty collecting fees on a regular basis, require a retainer fee up front. If the client takes their business elsewhere because you were realistic in setting the fees and in asking for a significant percentage of the fee as a retainer, this is a client that you may be better off not having.

   The practice area with the reputation of having to deal with the greatest number of account delinquencies is family law yet there are family law attorneys who are quite successful in being paid promptly. These attorneys often have a well-crafted retainer agreement in place that requires the client maintain a certain amount on deposit and allows the attorney to withdraw if the client ever goes into arrears.

10. **If you are thinking about taking action to collect on a past due account, have another attorney do a thorough, objective file review first.** When it becomes clear that the client has no intention of paying, before taking any action to try and collect on the debt have an independent attorney (perhaps one in the office who has had no relationship with the file or a local member of the bar who does collections work) review the case to assure that there are no facets of the work that could be questioned and that the client's

matter was handled with the utmost diligence. The reason is that once a client is in your pocket for a significant sum, it is nearly impossible to be objective about the file and the work that you have done for that client. Understand that if and when that client file is put under the lens of a malpractice counterclaim in response to the collection action you started that file is going to be critically reviewed in every detail. There is value in knowing where the weaknesses are to enable you to make an informed decision about whether to try and collect on the debt.

11. **Call the client.** Far more success is met with personal phone calls from the attorney to the client asking for the bill to be paid than are met by sending letters from the accounting department or submitting the file to a collection agency for further work. Even if the client steadfastly refuses to pay the bill, at least you have made a good faith effort and it is likely that you will learn about any dissatisfaction the client may have with your work. Keeping in mind that the precipitating factor for a professional liability claim is the perception of the client more than the reality of the facts, information from the call may provide a good indication as to whether further collection efforts are warranted.

12. **If you decide to pursue collection activity, never do this work yourself.** One of the most important services provided by an attorney is objectivity. The client looks at their attorney as someone who is a knowledgeable third party and able to help protect their interests. Do something similar and send the matter to a specialist who can be objective and mediate any concerns that may arise.