



**LAWYER TO LAWYER MENTORING PROGRAM**  
**WORKSHEET O**  
**INTRODUCTION TO MALPRACTICE AND GRIEVANCE TRAPS**

Worksheet O is intended to facilitate a discussion about common malpractice and grievance traps and how to recognize and avoid common pitfalls.

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- Discuss common malpractice mistakes, particularly in the new lawyer's practice area(s), and share ways to avoid them.
- Discuss a lawyer's obligation to act competently, work diligently, and communicate effectively with every client. See Prof. Cond. Rules 1.1, 1.3 and 1.4.
- Discuss common grievance problems that arise, particularly in the new lawyer's practice area(s), and ways to avoid them. Discuss the attached article about malpractice traps and unintentional grievances. *The Top Ten Malpractice Traps and How to Avoid Them*, ABA Standing Committee on Lawyers' Professional Liability; Jason C. Blackford, *Avoiding Unintentional Grievances*, CLEVELAND BAR JOURNAL, July/August 2003.
- Give the new lawyer practical pointers on the types of practices in which s/he should engage to minimize client dissatisfaction and client complaints, including the best ways to communicate with your client and to involve your client in their representation.
- Share with the new lawyer your firm's procedures to ensure that the law firm staff does not inadvertently disclose client confidences. Discuss the tips in the attached article, Kirk R. Hall, *Not So Well-Kept Secrets*.  
<http://www.abanet.org/legalservices/lpl/downloads/secrets.pdf>
- Suggest resources that the new lawyer can consult for making important ethical decisions, including the following:
  - Identify the procedure for obtaining in-house ethics advice (if you are in an in-house mentoring relationship).
  - Provide suggestions for finding outside ethics counsel and when such action is recommended.
  - Identify other helpful ethics materials, where they can be found, and the importance of supplementing general ethics resources with independent research on Ohio disciplinary case law when the ethics resources reviewed are not based on the Ohio Rules of Professional Conduct.



- Identify ethics inquiry services of bar associations.
  - Discuss procedures for requesting or researching ethics advisory opinions of bar associations or the Ohio Supreme Court Board of Commissioners on Grievances and Discipline.
- Discuss the reasons for maintaining malpractice insurance and considerations for choosing the right policy. Discuss the attached *Checklist for Purchasers of Professional Liability Insurance* of the ABA Standing Committee on Lawyers' Professional Liability. <http://www.abanet.org/legalservices/lpl/insurancechecklist.html>
- Discuss the best time to involve a malpractice carrier into a claim against you for malpractice liability or ethical misconduct.
- Discuss the impropriety of asking your client to sign a fee agreement which provides for arbitration in the event of a fee dispute, malpractice claim or ethical misconduct allegation. Discuss the propriety of settling claims for malpractice with your client. See Prof. Cond. Rule 1.8.
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## RESOURCES

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Ohio Supreme Court Board of Commissioners on Grievances and Discipline Ethics Advisory Opinions [http://www.sconet.state.oh.us/BOC/Advisory\\_Opinions/](http://www.sconet.state.oh.us/BOC/Advisory_Opinions/)

American Legal Ethics Library <http://www.law.cornell.edu/ethics/>

LegalEthics.com [www.legalethics.com](http://www.legalethics.com)

NeoEthics: Law and Insurance Resources for the ABA's Tort Trial and Insurance Practice Section <http://www.edicta.org/NeoethicsBucklin/Neoethics.htm>

practicePRO by the Lawyers' Professional Indemnity Company <http://www.practicepro.ca/>

sunEthics <http://www.sunethics.com/>

The Top Ten Causes of Malpractice – and How You Can Avoid Them, ABA Techshow, 2006. <http://www.abanet.org/lpm/lpt/articles/tch12062.pdf>



American Bar Association Standing Committee on Lawyers' Professional Liability:  
Understanding Your Insurance Coverage  
<http://www.abanet.org/legalservices/lpl/insurancecoverage.html>

## **OHIO RULES OF PROFESSIONAL CONDUCT**

### **I. CLIENT-LAWYER RELATIONSHIP**

#### **RULE 1.1: COMPETENCE**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

#### **RULE 1.3: DILIGENCE**

A lawyer shall act with reasonable diligence and promptness in representing a client.

View comments at

[http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1\\_3](http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_3)

#### **RULE 1.4: COMMUNICATION**

(a) A lawyer shall do all of the following:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) comply as soon as practicable with reasonable requests for information from the client;
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5 (e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

- (i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;
- (ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

#### **NOTICE TO CLIENT**

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

\_\_\_\_\_  
Attorney's Signature

#### **CLIENT ACKNOWLEDGEMENT**

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

\_\_\_\_\_  
Client's Signature

\_\_\_\_\_  
Date

View comments at [http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1\\_4](http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_4)

### **RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**



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**(h)** A lawyer shall not do any of the following:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice or requiring arbitration of a claim against the lawyer unless the client is independently represented in making the agreement;
- (2) settle a claim or potential claim for such liability unless all of the following apply:
  - (i) the settlement is not unconscionable, inequitable, or unfair;
  - (ii) the client or former client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;
  - (iii) the client or former client gives informed consent.

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View complete rule and comments at

[http://www.supremecourtfohio.gov/rules/profConduct/profConductRules.pdf#Rule1\\_8](http://www.supremecourtfohio.gov/rules/profConduct/profConductRules.pdf#Rule1_8)

# The Top Ten Malpractice Traps and How to Avoid Them

**Trap #1: Missing Deadlines.** Calendaring errors remain a leading cause of malpractice claims. Common mistakes include data entry errors, failing to use file review dates, absence of a back-up calendar and procrastinating until the last minute to file documents. To avoid this trap, an office must have at its organizational core an office-wide calendar and practices in place regarding its use. The system should contain the following characteristics:

- Be easy to use, maintain and teach to new personnel
- Include some redundancy, either through multiple paper calendars or the computer
- Contain an off-site calendar backup in the event of a fire or other disaster
- Have the capacity to crosscheck between the master calendar and the back up calendar to catch calendaring errors
- Have at least one docket date for every open file to ensure that all files are reviewed regularly
- Include tracking procedures that enable the firm to identify who made any given entry
- Make all attorney and non-attorney staff accountable

A standard calendaring system sets forth all items to be calendared, the frequency of reminder dates, the applicable deadlines for the various types of cases the firm handles and the firm's own deadlines for events it considers critical. For example, a firm might require all lawsuits to be filed no later than three months prior to the running of the statute of limitations. When the office accepts a tort claim, for example, support staff knows that a 3-month date (which indicates the imminent running of the statute of limitations) must be calendared. Critical firm deadline dates of this type will dictate the calendar entries made by the staff. Of course, it is the attorney's responsibility to calculate those important dates, and it is recommended that the attorney place his or her initials on the file intake sheet to identify who is responsible for the calculating of a particular date.

**Trap #2: Stress and Substance Abuse.** It takes just one dysfunctional attorney to ruin a firm's reputation and add significantly to its malpractice claims history. All too often the problem is compounded by inaction on the part of the law firm. Certain practices can reduce the chances of encountering such a problem.

*Improved Communications Among Firm Members* Does your firm have an open door policy? Can problems be discussed confidentially within the confines of the firm? Too many attorneys today view partnership as a purely economic relationship and feel no sense of loyalty to one another. In this setting dysfunctional or troubled attorneys have no one in whom they can confide. Monthly meetings, sharing advice or insights on a matter and getting together in non-work settings can help build effective and satisfying working relationships.

The Committee wishes to thank Mark C. S. Bassingthwaighe, J.D., Loss Control Specialist and Robert D. Reis, Risk Manager from Attorneys Liability Protection Society, A Mutual Risk Retention Group for their considerable contributions to this article's second edition.

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You may also consider appointing a fair-minded and well-respected partner as an ombudsman for intra-firm problems and conflicts. Sole practitioners can find this support by seeking out other lawyers similarly situated, though confidentiality concerns and other business and ethical constraints require caution in this type of a situation.

**Workloads.** Stress can push predisposed attorneys into clinical depression or cause other mental health problems, including anxiety disorders. Although it may be impossible to remove stress completely from the workplace, it is possible to manage and reduce the level of stress.

Does the firm measure attorney worth solely on billable hours or the number of open files being handled? While such a system may be necessary to some degree, it can not and should not be the sole measure of one's value. Caseloads should be reviewed periodically to ensure a fair division of labor. Reasonable limits should be placed on the number of files or cases that may be handled at one time.

Are firm members able to take personal time off without feeling guilty or without being penalized? Firm members should feel some flexibility insofar as being able to take the occasional hour or so for a child's school activity or to run a personal errand that cannot be handled after hours. Instituting a policy requiring attorneys to take vacations away from town and away from files and clients can contribute significantly to maintaining morale and ensuring enthusiasm in the workplace.

Sensitivity and accommodation for the attorney who is dealing with the added stress of personal crises is mandatory. During this period, reduced workload or other adjustments should be made. Stress should not be ignored. Everyone has a breaking point.

**Know the Signs of Substance Abuse and Depression.** Symptoms of substance abuse include frequent Monday morning tardiness, missing deadlines, neglecting mail and phone calls and missing appointments. There is a slow but steady deterioration in work product and productivity and an increase in frequency of excuses in personal relationships. Apparent behavioral changes could include drinking, defiance, impatience, intolerance, unpredictability or impulsiveness.

Other apparent behavioral changes associated with depression include inappropriate anger (often in men), tearfulness, self-criticism, distractibility and lack of interest in pursuing activities that once brought pleasure, difficulty concentrating and forgetfulness.

**Seek Help from Professionals in Cases of Mental Health Problems or Substance Abuse.**

Most attorneys acknowledge that substance abuse and mental health issues can increase tremendously the risk of a malpractice claim and can devastate families, professionals and entire social circles. Unfortunately, far fewer will take the risk to intervene and help a colleague find help unless or until the problem has reached crisis proportions. By the time that point is reached, the neglect, misconduct or mistake has occurred and the cost to the firm could be substantial. In the presence of indicia of mental health issues or substance abuse, one should be encouraged to seek professional help. These problems are treatable, particularly if recognized and dealt with at an early stage. For substance abuse issues, state bar

committees are a good place to begin. Typically, they are a committed group of people who have faced similar challenges successfully.

**Trap #3: Poor Client Relations.** Every malpractice claim begins with a dissatisfied client. Poor client relations and conflicted working relationships can transpire into malpractice claims with amazing haste. Inadequate attorney-client communication usually is at the heart of the problem. Typical mistakes include failure to obtain client consent, failure to inform a client of a case development or failure to follow the client's instructions. Many client relationship errors can be avoided by adopting a simple, commonsense approach to working with clients.

- Explain clearly to each new client orally *and in writing* the purpose for which the firm was hired, the fee arrangements, the reporting and billing procedures and the client's obligations.
- Listen to the client. Clients may want to pursue non-litigation avenues. Time should be taken at the beginning of the attorney-client relationship to identify clearly the client's goals or objectives.
- Realistic client expectations should be encouraged. Clear and documented explanations about the services to be performed or not to be performed are crucial. Legal procedures should be explained in simple, clear language so the client understands what to expect from the representation and has a clear timetable in mind.
- Maintenance of good client communications requires the prompt return of all telephone calls, keeping appointment times with clients and not keeping them waiting, sending regular case status reports and reporting negative information promptly. If the client is copied with correspondence or pleadings, the client must be informed as to their meaning and purpose. Assignments should be completed on a timely basis. If an unforeseen delay arises, it should be explained and a revised expected completion date should be given. Clients should be billed regularly and all charges should be explained fully. Clients should be encouraged to provide ongoing feedback on the quality of the representation they are receiving.
- All discussions, recommendations and actions taken, including a decision not to accept a client, should be documented.
- Letters of closure should be used at the end of the representation to document what was accomplished.
- Support staff should be taught the importance of courtesy, timeliness, professionalism and confidentiality when dealing with clients. Staff provides the interface between attorneys and clients. If staff is depressed, overworked, feel taken for granted or dissatisfied generally, it is important to understand that negative messages, however unintended, are being sent to clients.

#### **Trap # 4: Ineffective Client Screening**

After being served with a malpractice action, attorneys will often mutter "I knew I shouldn't have taken on that client." These "problem" clients are often the result of ineffective client screening. Successful practitioners augment their "gut feelings" with standardized office-wide screening procedures. A firm wide policy of screening each prospective client according to a predetermined set of standards is critical. Each member of the firm is responsible for the clients the other members bring to the firm. With a standardized and effective screening process, potential disaster clients may be identified and avoided.

A set of screening questions subject to review and modification goes a long way toward weeding out undesirable clients. A periodic review of problem cases to decipher warning signs of potential danger also makes sense. Since screening needs vary greatly by practice area, it is wise to check with experienced and respected practitioners in the geographical area in which one practices to see what aids are being used and for what other practitioners are screening. It is also a good practice to analyze the office screening procedures periodically, perhaps annually, to see that they are netting matters and clients desired, match firm expertise and style and will be profitable for the firm.

- ***Do you have the time to take on the new case and give it the proper attention that the case deserves?*** If not, say no.
- ***Do you have the expertise necessary to handle the case?*** Don't dabble! There is no such thing as a simple will or a cut-and-dried personal injury case. If you are not prepared to handle the difficult cases in a given area of practice, do not accept the seemingly simple things. Often you fail to see where the problems are. Yes, you can develop the expertise given sufficient time, but keep in mind that sufficient time will be far more than meets the eye at first glance and the client will not be willing to pay for your education.
- ***If this is a contingency fee case, do you have adequate funds to take the case?*** You want to avoid being placed in the situation where case management decisions are being dictated by economics instead of by legal judgment.
- ***Can the client afford your services?*** If not, say no. A fee dispute is in the making if you accept a client who is on a different financial footing. Minimally, collection is likely to become an issue, and if you are compelled to collect the fee, the odds of facing a malpractice claim increase significantly.
- ***Is the prospective client a family member or friend?*** Don't be fooled. First, if the work is not satisfactory, favor or not, even the family member or friend will sue. Accepting work under this situation is foolhardy. Second, if you are unqualified to represent a stranger in a particular matter, likewise you are unqualified to represent a friend or family member. Don't be pushed into something you are uncomfortable handling.
- ***Has the prospective client brought you the matter at the eleventh hour?*** If so, say no. If you do not have adequate time to perform a thorough investigation, you run the risk of missing a possible claim, failing to identify a defendant or letting the statute of limitations run. You don't want to end up paying for your client's procrastination.
- ***Has the prospective client had several different attorneys?*** Heed the warning light! The client may wish to avoid paying fees, may be impossible to satisfy, may be bringing a case all others before you believed lacked merit or will be impossible to resolve satisfactorily.
- ***Does the prospective client behave irrationally or appear confrontational?*** If you are unable to work effectively with someone during the initial interview, it is unlikely to get better over time. The difficult client all too readily becomes the angry client who will not hesitate to bring a suit.

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- *Does the client have unrealistic expectations?* You cannot guarantee results nor obtain a million-dollar judgment on a simple slip and fall. Do not take on clients whose expectations are simply unobtainable.

### Trap #5: Inadequate Research and Investigation

The ABA has reported that substantive errors account for over 46% of malpractice claims. Common errors include failure to know or properly apply the law, failure to know or ascertain a deadline, inadequate discovery or investigation and planning or procedural choice errors.

Many of these errors can be prevented through careful, methodical research and procedures. It is important to review carefully the work of all staff, including contract attorneys and other professionals. The attorney of record is responsible ultimately for the work of these individuals. Experts should be consulted if uncertainty about a point of law exists. Lawyers should take the time to study and keep abreast of new developments in the law and should check closed files in the face of new statutory and case law that might affect clients' positions and rights. Association with expert counsel on significant matters outside one's practice area is crucial.

As the law changes, the standard of care does not decrease. Lawyers must continue to study the law by reading, attending seminars, seeking expert consultation and by researching particular issues that need to be addressed by clients.

### Trap #6: Conflicts of Interest and Conflicts of Matter

Conflicts of interest and conflicts of matter can arise from a variety of situations. Each firm must establish stringent procedures for identifying and resolving situations in which these unexpected conflicts may arise. Practitioners should be wary of these situations.

- Representation of two parties, such as a divorcing couple, an estate and its beneficiaries or a buyer and a seller who announce "we agreed to the property settlement and we just want you to write the agreement."
- Representation of opposing theories of law for different, but similarly situated clients, i.e. a "conflict of matter" situation.
- Representation of opposing sides of an issue, even though the clients are not involved with one another, such as Exxon and Greenpeace.
- Personal involvement in a client's business interests.
- Service as a director or officer of a client company.
- An unclear statement of non-representation in situations where a clear conflict of interest exists.
- Conflicts arising from law firm acquisitions and lateral hires.

Lawyers must be vigilant about the possibility of conflicts of interest and conflicts of matter in undertaking representation. The following guidelines offer some helpful hints.

- Establish a conflict system to disclose conflicts as early as possible.
- Avoid suing former clients.
- Take only one side of any case or transaction. Confirm this in writing.
- Avoid becoming a director, officer or shareholder of a corporation concurrent with acting as its lawyer. Reject offers of remuneration in the form of stock.
- Avoid joint representation in potential conflict situations if there is any risk of an actual conflict materializing.
- If any possibility of conflict exists, seek permission from each client to disclose your representation and its effect on all clients before accepting representation. Absent permission, withdrawal is the only option.
- If you intend to engage in a joint or multiple client representation, give full disclosure to all clients regarding potential and reasonably foreseeable conflicts of interest and their ramifications. Discuss the effect of both potential and actual conflicts upon your representation of all clients. Advise the multiple clients that there is no confidentiality between them on matters concerning the joint representation. Advise multiple clients to seek the advice of independent counsel on the issue of whether joint representation is appropriate. Obtain the written consent of each of the multiple clients after full disclosure and before continuing the representation.
- Strongly urge consultation with independent counsel in cases of actual conflict. Seriously consider not proceeding with representation if the clients refuse to consult with independent counsel regarding the issue of joint representation. Have independent counsel acknowledge in writing the fact of having been consulted with regard to a multiple representation situation.
- Do not work for a real estate commission, which is based on percentage, while being asked for your legal opinion regarding a transaction or project.
- Do not represent clients with potentially inconsistent defenses or differing liability in civil or criminal cases without written disclosures, as described above, and the clients' written consent. If their potential conflicts become actual conflicts, you cannot represent them jointly, even with their informed, written consent.

Memories alone are insufficient to record and check potential conflicts of interest and conflicts of matter. Law practices need systematized procedures for documenting and analyzing potential conflicts for every new client and new matter accepted by the firm. A two-part system is recommended.

The first part should provide for a method of matching names, which can be accomplished either manually or by computer. Large firms should have a computerized system. Additionally, firms with more than one office need a database with matters and names from all offices, as well as communications capability to access the entire database from any office. The database, whether consisting of index cards at the receptionist's desk or a computer program, should include many parties. The list found at the end of this chapter, developed by the Professional Liability Fund that insures all Oregon attorneys, is the best quick reference discovered.

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The second part should include a practice of circulating a "new matter memo" to all professionals and support staff whenever the firm accepts a new case. This serves as a good conflict of opposing theories check. The memo should include the following information: identification of all parties; identification of the intake attorney, all relevant administrative details, a statement of the case and a description of the work to be performed. In addition to serving as a further updated conflicts check, circulation of this information allows everyone in the office to pool resources and thus contribute to the efficient handling of the matter. It also serves as a warning against accepting a subsequent matter that would require advancing a theory or position that would be contrary to the new client's interests.

A current and complete database enables the firm to identify and advise clients of relevant changes in the law affecting their cases. Such a system also permits the firm to analyze the strengths and weaknesses of certain practice areas and to address them through education, improved planning and revised procedures.

It is important to remember that a conflicts-checking system is only as good as the people who use it. It must be used rigorously and consistently to be effective. The database must be checked and updated every time a new case is accepted. New matter memos must be circulated and returned to the intake attorney in a prompt fashion and must have affirmative documentation confirming their review by all attorneys and staff.

### Trap #7: Inappropriate Involvement in Client Interests

A lawyer's inappropriate involvement in a client's entrepreneurial interests raises conflict of interest issues and is increasingly a significant basis for legal malpractice. This involvement can take several forms.

- Acting as director or officer of a client company.
- Investing in client securities.
- Becoming involved in one-to-one business deals with a client.
- Accepting stock from a client in lieu of a cash fee.
- Agreeing to contingent cash fees.
- Soliciting other investors on behalf of a client's enterprise.

Problems caused by these activities are many, including: (1) inadequate or nonexistent directors' and officers' insurance for the lawyer acting both as outside counsel and director of a company; (2) vicarious liability of the law firm for the acts of a firm member serving as a director or officer of a client company; (3) higher standard of care and due diligence imposed under federal securities laws on a director who is also the company's lawyer, as compared to a director who is not the company's lawyer; (4) weakened defense to a malpractice claim by third parties in cases where a lawyer is also a director of the company and (5) serious conflict-of-interest issues arising out of a lawyer or law firm's personal involvement or investment in a client's business interests.

Robert E. O'Malley, vice chairman of the Board and Loss Prevention Council for Attorneys' Liability Assurance Society, suggests six commandments for lawyer involvement in client interests.

- Do not permit any partner or employee of the law firm to serve as chair, president, chief executive officer, chief operating officer, chief financial officer or general partner of any publicly held client.
- Do not permit any partner or employee of the law firm to be a director or officer of a start-up company that is financing itself with an initial public offering where the law firm is securities counsel to the company or the underwriter.
- If the law firm is acting as securities counsel to the issuer or the underwriter in an initial public offering under the Security Act of 1933, neither the firm itself nor any partner or employee of the firm should invest in the underwriter's original allotment (as distinguished from the aftermarket).
- If the law firm is acting as securities counsel to the issuer in any public offering under the Security Act of 1933, the firm should not agree to accept any part of the stock in lieu of a cash fee.
- If the law firm, partner or employee of the firm owns securities of a company that is about to make an initial public offering, the law firm should not act as securities counsel to either the issuer or the underwriter, unless such securities are redeemed prior to the offering or are "locked up," so that there is no possibility of a quick windfall profit for the firm or any of its partners or employees as a result of the public offering.
- If the law firm is acting as securities counsel to the issuer or the underwriter in any public offering under the Security Act of 1933, the firm should avoid any advance agreement whereby a substantial portion of its fee is explicitly contingent on the marketing of the offering.

### **Trap #8: Lack of Adequate Documentation of Work**

Insufficient documentation of work accounts for many of the client relations and missed-deadline errors associated with legal malpractice claims. Simple office procedures can prevent many of these errors from occurring. Each firm or practice should have in place a system for checking the accuracy and content of all outgoing documents, such as letters, briefs, contracts and motions. The system should include provisions for cross-checking of these matters by more than one person.

Good file management should include maintaining a file on all documents prepared or received by the lawyer for each client matter. Telephone messages and memoranda should also be logged for future reference. Daily filing procedures help to ensure that information is not lost and is available when needed. Office files should be reviewed regularly to avoid missing deadlines and to ensure that the system is performing as intended.

As the practice of law keeps pace with our evolving paperless world, the importance of administrative details - the seemingly menial side of a law practice - becomes more important, not less. Consideration of how electronic files will be stored, backed up, kept secure and retrieved is essential to an efficient office operation. Consciously designing a uniform computer filing system, reviewing it regularly and updating it often to assure that files are maintained confidentially and retrieved easily, is critical. Making certain there is a relatively current back up copy of all data and programs, which is

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kept at all times in a secure place outside the office, is mandatory in this evolving paperless computer driven world. Adhering to these measures will permit prompt resumption of work should a catastrophe occur, and will assure attorneys' compliance with their obligations to safeguard client information.

### **Trap #9: Zealous Efforts to Collect a Fee**

Fee disputes are at the heart of a significant percentage of all legal malpractice claims brought against attorneys each year. Typically, the attorney sues the client for unpaid fees and then is countersued for legal malpractice. In some cases, merely mailing a final bill triggers a threat of legal malpractice. In order to avoid fee disputes, use of the following rules in billing and collecting fees for legal services is important.

***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 who ultimately will not be able to pay his or her legal bill. If you represent such clients, you will be torn between putting in the required number of hours and minimizing the final costs. Learn to say "no" to these clients.

***Written fee arrangements:*** Consider documenting fees and the scope of work to be done in all matters. Doing work without a written agreement should be extremely rare. Each engagement letter or contingent fee agreement should contain a clear explanation of the legal fees that will be charged for the work to be performed. Any restriction on the scope of work must be detailed in this agreement. In addition, be specific and itemize the types of out-of-pocket expenses for which the client will be responsible, such as filing fees, court costs, expert witness fees, photocopying charges and computer research. Clients are often astonished by the amount of out-of-pocket expenses incurred on their behalf. Finally, it is inadvisable to adopt a new fee structure or draft a subsequent fee agreement while the client's matter is pending.

***Bill on a monthly basis:*** Attorneys who charge an hourly fee should always bill the client on at least a monthly basis, unless the client has specifically requested another arrangement. 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. For improved client communication and satisfaction, it is good practice to send a zero balance bill on occasion, along with a note indicating why no charges were made in a particular month, and advising that you are proceeding on the case.

***Detailed billing statements:*** Provide detailed billing statements that describe the work performed by each attorney or paralegal on a daily basis and how long it took. Entries such as 20 hours for "research" are unacceptable. Rather, the entry should read "research state case law on piercing the corporate veil."

***Daily time entries:*** Every attorney and paralegal that bills on an hourly basis must record his or her time on a daily basis. Keep a time sheet or pad of paper next to your desk on which you record your work or make regular entries in the computerized timekeeping system. It has been proven that attorneys fail to record all of their time more often when regular timekeeping is not required. Require each attorney to submit his or her time sheets for the preceding week every Monday morning.

**Review all bills:** The attorney responsible for the case or matter should review each bill for errors before it is mailed to the client. In addition to looking for errors, an ongoing assessment of the charges and the value received for the work should be made. If the time expended was greater than what would have been spent by an attorney with experience in the area, consider writing off some of the time.

**Copy the client on all meaningful correspondence and other materials relating to the client's matter:** Ask yourself who is more likely to pay his or her bill? Choice A: the client who has not received a single sheet of paper from the attorney in three months. Choice B: the client who receives informational copies from the attorney on a regular basis. It is equally important, however, to avoid forwarding a mass of paper to the client that confuses rather than communicates. Be sure the office and the client understand from the outset what communication is necessary and desirable. Follow the agreed upon plan, straying only to send more not less, and never allowing a copy to go to the client that is not explained by prior developments or an attached note.

**Take prompt action on accounts in arrears:** This is the single biggest mistake that attorneys 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 cannot pay a fee today is not likely to pay it tomorrow. The key to being paid is no secret. The key is doing the unpleasant, that is, working on past due bills early and with conviction.

First, the firm's partners should review all past due accounts on a monthly basis. Be sure that engagement letters and contracts of employment state the consequences to the client for failing to stay current with the legal fees, such as withdrawal conditions. Next, the partner responsible for a matter in arrears should contact the client and inform him or her that the firm will withdraw from the matter or enforce the other stated conditions if the past due fees are not paid within a stated grace period. Although courts place many restrictions on withdrawal, the vast majority of clients with fee payment problems who start off paying slowly become even slower as time goes on. Exercising the firm's withdrawal or other options early in the matter is far more likely to produce the desired results.

Beware of clients who promise you money "next month." It usually does not materialize. The moral of the story is that it is better to withdraw and cut your losses when you are owed \$1,000 than wait in hopes of payment only to find yourself suing later to collect a \$10,000 arrearage.

Some firms have begun to accept credit cards for fees. This may be a good option but should be examined carefully. Among other concerns, there is the need to account for the issuing bank's fees. For example, if an advance for fees is charged to a credit card and the credit is given to the client by depositing it into the client trust fund, the trust fund must equal the gross amount of the card charge, not the net you will receive. In some cases this will necessitate a deposit in addition to what is received on the account from the bank.

**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 a recent case, a sole practitioner sued his client for \$9,000 in legal fees and received a counterclaim for an amount in excess of \$250,000. In the vast majority of these cases, the attorney ends up dropping his fee suit to get rid of the malpractice claim.

**Collect retainers:** If you are having difficulty collecting fees on a regular basis, require a retainer fee up front. If the client takes his or her business elsewhere because you were realistic in setting the fee and in asking for a significant percentage of the fee as a retainer, this may be a client you are better off not having. The area with the largest accounts receivables is family law. The family law attorneys who are most successful in being paid promptly have well-crafted retainer agreements which require the client to maintain a certain amount on deposit and allow the attorney to withdraw if fees are in arrears.

**Have another attorney do a thorough, objective file review:** There are times when, regardless of having obtained a retainer up front, an increasing number of unforeseen hours is spent on a case that outstrips the initial retainer funds. If this occurs, and even if the client has no intention of paying, it is a good idea to have an independent attorney (preferably a senior member of the firm or a member of the local bar skilled in the practice area and in duties owed clients) review the case to assess whether due diligence was performed. 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.

**Call the client:** Far more success results from personal telephone calls from the attorney to the client than from letters from the accounting department or collection agency. Even if the client steadfastly refuses to pay the bill, at least you have made a good faith effort to collect and if there is any client dissatisfaction, most likely your conversation has yielded that information. 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.

**If you decide to pursue collection activity, never do this work yourself:** One of the most important services provided a client in an attorney-client relationship is the objectivity of a knowledgeable third party whose goal it is to protect his or her client's interests. Avail yourself of the benefits of an attorney-client fee dispute specialist who can be objective and mediate concerns that may arise.

### **Trap #10: Unwillingness to Believe You May be Sued for Malpractice**

In spite of all the publicity that legal malpractice claims have received in the past few years, many attorneys believe erroneously that either because they perform adequately for their clients, or they know their clients so well, they will never be the targets of a malpractice claim. Trends in the frequency and dollar value of claims suggest otherwise. At present attorneys in private practice have between a 4 percent and 17 percent chance of being sued for malpractice each year depending on the jurisdiction and the nature of their practices.

As the law becomes more complex, the standard of care does not decrease. Lawyers must continue to study the law through reading, attending CLE seminars, consulting with experts on difficult legal issues and researching issues that need to be addressed by their clients.

While you may be one of the lucky ones who are not targeted for malpractice during your career, you cannot count on it. The key to minimizing your risk is to be acutely aware of the malpractice exposure of each and every case you take on. Only by recognizing your malpractice risk and by implementing effective prevention procedures will you lessen the chances of becoming a malpractice statistic.

by Jason C. Blackford

## Avoiding Unintentional Grievances

The corporate fraud excesses that have come to light in recent years have raised the level of lawyers' concern with professional ethics. Congressional legislation has forced the Securities and Exchange Commission to set forth very strict guidelines for attorney conduct when representing publicly held companies.

Most of these complaints to certified grievance committees do not involve violations of the Code of Professional Responsibility but result from inadequate attorney-client communications, poor law office management and ignorance by the attorneys of their responsibilities. These problems can be easily avoided. Unfortunately, the grievance committees are still charged with the responsibility of investigating these complaints. The purpose of this article is to assist lawyers in avoiding unintentional breaches of the Code of Professional Responsibility.

**I. Default Under A Child Support Order.** An attorney admitted to practice in Ohio is subject to an immediate interim suspension from practice if there is a final and enforceable determination that the attorney is in default under a child support order. See, Rules for the Government of the Bar, Rule V, Section 5(A)(1).

R.C. §4705.021 requires the child support enforcement agency to advise disciplinary authorities of the attorney's non-support. A certified copy of the entry of default under a child support order is conclusive evidence of that default. Reinstatement is permitted when there is a certified copy of a judgment entry reversing the determination of default under a child support order or a notice that the attorney is no longer in default under the child support order. This

reinstatement does not terminate any pending disciplinary proceeding.

**2. Failure to File Income Taxes.** The willful failure to file income tax returns is a violation of Disciplinary Rule 1-102(A)(6) and warrants a suspension from the practice of law (*Office of Disciplinary Counsel v. Bowen*, 38 Ohio St.3d 323, 528 N.E. 2d 172 (1988); *Office of Disciplinary Counsel v. Roetzel*, 70 Ohio St.3d 376, 639 N.E.2d 50 (1994)). In a more recent case, a lawyer was suspended for failing for 10 years to report and remit 941 liabilities owed on his secretary's earnings. He also filed fraudulent W-2 forms and did not report or pay amounts for the secretary's coverage by the Ohio Unemployment Compensation system. This constituted a violation of Disciplinary Rule 1-102(A)(3), (4) and (6). The Supreme Court concluded that the lawyer had basically converted over \$40,000 that he should have paid on his secretary's behalf and had tried to conceal the theft with false documentation (*Office of Disciplinary Counsel v. Bruner*, 98 Ohio St.3d 312, 2003-Ohio-736). File those returns and pay those taxes!

**3. Referral Fees.** A lawyer who pays "kickbacks" or makes gifts to an in-house counsel in exchange for receiving work as the corporation's outside counsel is in violation of Disciplinary Rule 2-103(B) (*Ohio State Bar Ass'n. v. Zuckerman*, 83 Ohio St.3d 148, 699 N.E.2d 40 (1998); *Ohio State Bar Ass'n. v. Kanter*, 86 Ohio St.3d 554, 715 N.E. 2d 1140 (1999); *Office of Disciplinary Counsel v. Linick*, 84 Ohio St.3d 489, 705 N.E.2d 667 (1999)).

Disciplinary Rule 2-103(B) prohibits a lawyer from compensating a person or giving anything of value for the recommendation or the securing of employment as an attorney.

Furthermore, Disciplinary Rule 2-107(A) prohibits a division of fees by lawyers not in the same firm without, *inter alia*, the written disclosure of the terms of division, the identities of the lawyers and the prior consent of the client. The division of fees should be in accordance with the services provided by each attorney. By written agreement with the client, all attorneys must assume responsibility for the representation. Disciplinary Rule 3-102 states, with limited exceptions, a lawyer should not share legal fees with a non-lawyer. For example, it is ethically improper under Disciplinary Rules 3-103(A) and 5-104(A) for a lawyer to accept a fee from a financial services group for referring clients in need of financial services (Board of Commissioners on Grievances and Discipline, Opinion 2000-1 (Feb. 11, 2000)).

**4. Legal Malpractice Protection.** Disciplinary Rule 1-104 requires attorneys who do not maintain legal malpractice insurance in the minimum amounts of \$100,000 per occurrence and \$300,000 in the aggregate to inform their clients in writing of this fact. Further, they are to secure their client's written acknowledgment of this fact and maintain a copy of the written signed notice for a five-year period after the termination of the representation of the client. The Disciplinary Rule specifies the exact language that must be used in notifying the client and the client acknowledgment. Any lawyer failing to maintain the minimum legal malpractice insurance must follow through with the requirements of Disciplinary Rule 1-104(A)-(C). There are exceptions for government attorneys and house counsel.

**5. Threatened Criminal Action.** A

lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter (Disciplinary Rule 7-105(A)). Such conduct not only can be a violation of the Code of Professional Responsibility but can also lay the basis for civil action against the lawyer making the threat.

6. **Competence.** It may surprise many lawyers that the Code of Professional Responsibility requires a level of legal competence. Canon 6 provides that "a lawyer should represent a client competently." Disciplinary Rule 6-101(A) states that a lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle without assistance from a lawyer who is competent to handle it.

Ethical Consideration 6-2 urges that a lawyer keep abreast of current legal literature, participate in continuing legal education programs and concentrate in particular areas of the law. Ethical Consideration 6-3 permits a lawyer to accept employment if in good faith he expects to become qualified through study and examination, so long as the "preparation would not result in an unreasonable delay or expense" to the client. The requirement of competency will be enforced by the Board of Commissioners on Discipline and Grievance and the Ohio Supreme Court. See, *Cincinnati Bar Association v. Harmon*, 17 Ohio St.3d 69 (1985).

7. **Communication.** One of the major problems for lawyers in their dealings with their clients is the failure to communicate. Laymen inexperienced with the judicial process are concerned about the status of their cases and require frequent updates and explanations. While a client's case may be just another matter to the attorney, the client's lack of knowledge regarding the status of the case may create uncertainty and undermine the attorney-client relationship. Unfortunately, grievance committees are inundated with calls from clients complaining that their attorney does not reply to their telephone calls. When the grievance committee or Disciplinary Counsel contacts the lawyer, the lawyer is incensed that the client has gone to the bar association or to Disciplinary Counsel.

The two simplest things a lawyer can do to forestall such an unwelcome call from a bar association or Disciplinary Counsel is to 1) return all phone calls from the client and 2) keep the client advised with routine written status reports. There is dicta in *Disciplinary Counsel v. Mauk* (1987), 32 Ohio

St.3d 164, requiring a lawyer to provide the client with the attorney's address and telephone number.

8. **Surreptitious Recordings of Conversations Without Notification or Consent.** How often have you thought how helpful it would have been to have recorded that conversation with opposing counsel? The act of recordings by attorneys of clients, witnesses and opposing counsel without their consent or notification may violate Disciplinary Rule 1-102(A)(4). The only exception is when the context of the circumstances does not rise to the level of dishonesty, fraud or deceit.

The burden is on the attorney to justify the surreptitious action on a case-by-case basis (Board of Commissioners on Grievances and Discipline, Opinion 97-3 (June 13, 1997). See also, American Bar Association Formal Opinion 337 (1974)). The only exception noted was for federal or state prosecuting attorneys acting within strict limitations conforming to constitutional requirements. Recordings can be made with the consent of all parties to the communication.

9. **Failing to Have a Trust Account and**

**Commingling of Funds.** There are few breaches of conduct which receive more consistent penalties from the Supreme Court than lawyers who fail to establish a separate escrow account for their clients' funds and property. Disciplinary Rule 9-102 requires a lawyer to deposit all clients' funds in one or more identifiable bank accounts in which no funds belonging to the lawyer are deposited.

Where a lawyer uses his trust fund to receive personal as well as client funds and to pay personal bills and business expenses, Disciplinary Rule 9-102 is violated (*Ohio State Bar Ass'n. v. Kanter*, 86 Ohio St.3d 554, 715 N.E.2d 1140 (1999); *Dayton Bar Ass'n. v. Rogers*, 86 Ohio St.3d 25, 711 N.E.2d 222 (1999); *Disciplinary Counsel v. Phillips*, 81 Ohio St.3d 80, 689 N.E.2d 541 (1998)). The recent U.S. Supreme Court decision in *Brown v. Legal Foundation of Washington* (2003) has upheld the IOLTA trust account system and eliminated any argument to the system's validity.

10. **Improper Advertising.** The Ohio Code of Professional Responsibility regulates lawyer advertising in Disciplinary Rules 2-

*Continued on page 41*

101 through 2-105. In advertising legal services, it is improper for an attorney or a law firm to list settlements or verdict amounts obtained in past cases. Statements such as, "Trip/fall sidewalk-brain injury, a One Million Dollar verdict" or "Dog bite, \$50,000 settlement" are misleading, self-laudatory and may be unfair (Board of Commissioners on Grievances and Discipline, Opinion 2002-7 (June 14, 2002)). A list of settlement and verdict amounts lacks information as to the strengths and weaknesses of cases, severity of damages, information as to credibility of witnesses, availability of insurance coverage, or other factors that would influence the settlement or verdict amounts.

Board of Commissioners on Grievances and Discipline, Opinion 2002-6 (Dec. 1, 2002) found it was improper for a law firm's web site home page to include quotations from clients describing the nature of the legal services provided, responsiveness of the law firm and other non-substantive aspects of the firm's representation. Such client quotations are client testimonials prohibited by Disciplinary Rule 2-101(A)(3). Furthermore, these may be misleading to the public under Disciplinary Rules 2-101(A)(1) and (C) depending upon the content of the quotation.

**11. Advancing Expenses.** A lawyer, while representing a client in contemplated or pending litigation, shall not advance or guarantee financial assistance to the client (Disciplinary Rule 5-103(B)). There are exceptions which permit a lawyer to advance or guarantee expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence. The repayment of these costs of litigation may be contingent upon the outcome of the matter.

**12. Continuing Legal Education.** A lawyer may be suspended from the practice of law for failing to meet the continuing legal education requirements (*In re Report of the Commission on Continuing Legal Education* (2000), 88 Ohio St.3d 1468, 726 N.E.2d 1006). The failure to meet the continuing legal education requirements also violates Rule X of the Rules for the Government of the Bar. See also, *Office of Disciplinary Counsel v. Richardson*, 95 Ohio St.3d 499, 769 N.E.2d 824, 2002-Ohio-2484 (2002).

**13. Contingent Fee Agreements.** Revised Code Section 4705.15 requires that all contingent fee contracts must be in

writing and signed by the attorney and the client. The attorney must provide a copy of the signed contingent fee agreement to the client.

Furthermore, R.C. 4705.15(C) requires that if the attorney is entitled to compensation under a contingent fee agreement, a signed closing statement shall be prepared and provided to the client at the time of or prior to the receipt of the compensation under the agreement. This closing statement must specify the manner in which the compensation of the lawyer was determined together with any costs and expenses deducted by the attorney from the judgment or settlement involved and any proposed division of attorney's fees, costs and expenses with referring or associated counsel. A failure to memorialize a contingent fee arrangement in writing may subject the attorney to discipline (*Office of Disciplinary Counsel v. Richardson*, 95 Ohio St.3d 499, 969 N.E.2d 824, 2002-Ohio-2484 (2002)).

A lawyer will violate Disciplinary Rule 2-106(A) if he enters into a contingent fee agreement with a client and then attempts to obtain a fee based on an hourly rate (*Office of Disciplinary Counsel v. Watson*, 95 Ohio St.3d 364, 768 N.E.2d 617, 2002-Ohio-2222 (2002)). In that same case the Supreme Court found that the lawyer violated Disciplinary Rule 1-102(A)(4) and (5) when he filed a civil suit against the client and did not disclose the contingent fee arrangement.

In the field of legal ethics the attorney is his own client. The bar associations make available avenues to answer a lawyer's questions concerning professional ethics in a real world setting. Too few lawyers take advantage of this service.

It is also advisable to request another lawyer to review one's office procedures to see if there is any inadvertent violation of the Code of Professional Responsibility. With increasing professional liability premiums, an audit of one's practice may not only be an ethical responsibility but an economic necessity. Many bar associations, including the Cleveland Bar Association, have ethics committees to assist lawyers in handling ethics questions in their practice. ■



Jason C. Blackford, a partner of Weston Hurd Fallon Paisley & Howley, is a member of the Cleveland Bar Association's Ethics and Professionalism Committee.

# Not So Well-Kept Secrets

## Office checkup will prevent unintended breach of client's confidence

BY KIRK R. HALL

Clients trust that the information they pass on in confidence to their lawyers will not fall into the hands of others.

But is there a basis for that trust? Is your office being maintained and operated in a way that assures the protection of client confidences?

The answers have potentially high stakes. Failing to protect client confidences and secrets not only violates professional conduct rules for lawyers, but also may cause the loss of attorney-client and work product privileges, and result in serious malpractice claims, as well.

Take a walk through your firm's offices—listen to what is being said and look at what is open to view.

If you don't like what you see and hear, it is time to make changes in your office procedures to protect your clients' confidential information from unauthorized disclosure. Begin the assessment as soon as you enter the offices:

**Reception area.** Think of times you have been waiting in a doctor's office, and other patients or sales people have come in. It is a natural tendency to listen to what these people are telling the receptionist or nurse. The same thing is happening in your reception area.

Any discussion between firm lawyers and clients about their cases should be conducted away from the reception area, preferably in lawyers' offices or conference rooms.

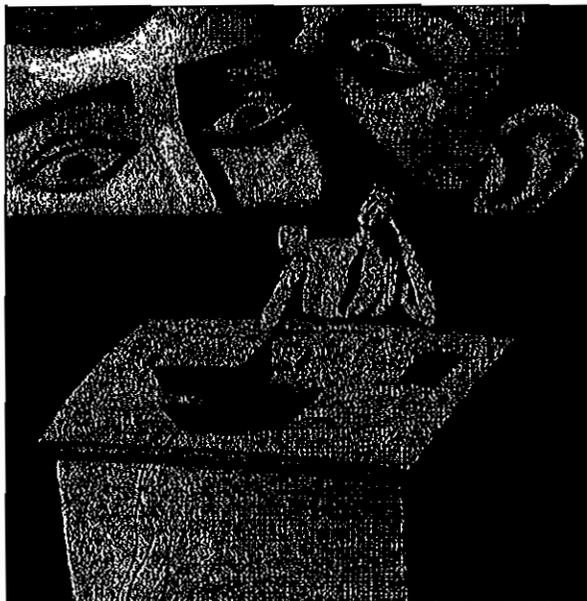
But discussions about cases can occur in other contexts, as well. For instance, a secretary or paralegal called to the reception area to retrieve materials being dropped off by a client often becomes engaged in a discussion about the client's matters. In such cases, the client should be guided to an area that offers privacy, especially if others already are in the

*Kirk R. Hall is chief executive officer of the Oregon State Bar Professional Liability Fund in Lake Oswego, the only U.S. provider of malpractice coverage owned by a mandatory bar association.*

reception area.

Does the firm's receptionist announce the name of the person holding for you on the telephone and the purpose of the call so that everyone within earshot can hear? Such a practice may give away important information. At a minimum, it may be better to use only the caller's last name.

What about outside the office?



Do you ever hear lawyers or staff discussing cases or clients in the elevator or sitting at the next table at lunch? Everyone at the firm should be reminded not to discuss any client matters outside the office.

**Files.** Are files left lying around in open view of visitors? Given natural curiosity, it can be very tempting to a visitor to read what is in plain view if the lawyer leaves the office even for a few minutes.

Clients should not be left alone even with their own files, which may contain information or notes that could be misconstrued. A secretary or paralegal who is meeting with the client should take the entire file when going to make photocopies.

Sometimes clients or other visitors may ask to use the phone. If this is allowed in your office, be sure the telephone is in an area away from any client files.

**Computer screens.** Does the computer at your firm's reception desk face visitors when they approach? Can any information on the

screen be read by someone standing at the desk? This is another way client confidences can be inadvertently divulged.

A computer screen should either face away from visitors or the terminal's dimmer switch should be used to blank the screen. Some software programs have features that will blank screens after as little as a minute without a keystroke being entered; all it takes is a keystroke to bring the screen back.

**Discarded paper.**

Most law offices never give their wastepaper a second thought because they trust their janitorial services. The Oregon State Bar Professional Liability Fund recently received a call, however, from a lawyer concerned about the fact that a box of a client's documents left sitting on the floor had been discarded by the janitorial staff.

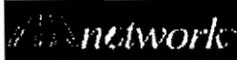
Many boxes of documents received from clients may look like discarded paper, so there should be some understanding with the janitorial service about what should and should not be touched.

Recently a group claimed that its members had gone through Dr. Jack Kevorkian's discarded trash and found what it considered damning information relating to one of Kevorkian's assisted suicides. Could a similar scenario unfold at your law office?

Many law offices now recycle paper. It may be wise to consider shredding it first.

The Professional Liability Fund office in Oregon, for example, contracts with a mobile shredding unit that routinely shreds all of its paper before recycling it. Small shredding machines can be purchased for less than \$100, which makes the safeguard affordable for even the solo practitioner.

During World War II, a familiar saying cautioned that "loose lips sink ships." Don't let a loose policy toward protecting confidential information put a hole in your law firm. This may be the time to institute new procedures to assure that your client confidences are safe. ■



[CLICK HERE TO RETURN TO PREVIOUS PAGE](#)

## **CHECKLIST FOR PURCHASERS OF PROFESSIONAL LIABILITY INSURANCE**

### **How to Use this Checklist**

This checklist is intended as a guide to be used in reviewing professional liability insurance applications and policies. The questions are divided into eight sections:

- [Application](#)
- [Declaration Sheet](#)
- [Definitions](#)
- [Coverage Agreements](#)
- [Exclusions to Coverage](#)
- [Defense and Settlement Provisions](#)
- [Limits of Liability](#)
- [Conditions of Coverage](#)

A policy may also contain attachments called "Endorsements." Endorsements change coverage on a firm-by-firm basis, either by adding, altering, or limiting coverage. This checklist treats endorsements under either Coverage Agreements or Exclusions to Coverage, depending upon whether the endorsement adds or excludes coverage.

Key issues to consider are listed under each policy section. These issues are followed by specific questions to answer for each policy that you consider.

Before using this checklist, read "Understanding Your Insurance Coverage" for a full discussion of the items included in the checklist.

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## **MALPRACTICE INSURANCE CHECKLIST**

### **Application**

Key issues to consider:

Is the application made a warranty or a representation to the contract?  
(That is, does the information contained in the application become a legal part of the insurance contract?)

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### **Declaration Sheet**

Key issues to consider:

What are the terms of coverage?

- What is the policy period?
- What are the limits of liability?
- What are the deductibles?
- Who is the "Named Insured"?
- Is there a retroactive date for prior acts coverage?

Does the declaration sheet:

Include a "retroactive date" (an effective date) for prior acts coverage (coverage for acts that occurred prior to the policy period)? (See [endnotes](#).)

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## Definitions

Key issuers to consider:

- Is coverage provided for all person for whom the insured is legally responsible?
- Are individual lawyers or nonlawyers covered for services not preformed on behalf of the firm?

Do the definitions of the insured include:

- Named Insured and predecessor firm(s)?
  - Former lawyers, partners, officers, directors and shareholders?
  - Current lawyers, partners officers, directors and shareholders?
  - Automatic coverage for future lawyers, partners, officers, directors and shareholders?
  - Former, current, or future non-attorney employees?
  - Independent contractors?
  - Attorneys in a "Of Counsel" capacity?
  - Others, such as heirs, executors, administrators, legal representatives, or assigns of insured?
- 

## Coverage Agreements

Key issuers to consider:

- Is coverage provided for all legal services performed by the firm?
- Does the policy cover all prior acts of the firm and of all the individual members, including employees?
- Does coverage exist for acts for other than "acts on behalf of the Named Insured," e.g. pro bono or "cocktail party" advice?
- Are the activities of members of the firm as officers or directors covered?
- Does the policy cover other business pursuits with clients of the firm?
- Are acts in a dual capacity as a lawyer and officer, director or business partner with a client covered?
- Does the policy provided coverage for innocent partners in cases where one member of the firm has not complied with the conditions?
- Is the definition of when a claim is made sufficiently broad?
- Are optional extended reporting periods available?

Does the policy provide coverage for:

- Professional services as a lawyer?
- Services as a notary public?
- Services as a title agent?
- An attorney or non-attorney who causes personal injury?

All prior acts of the firm and all members of the firm, including employees, when the insured, prior to the policy period, had not notified any previous insurance company of any act and the Insured had no reason to believe a breach of professional duty had occurred? (See [endnotes](#).)

Does this coverage include:

- Prior acts of attorneys for professional services before joining the firm?
- Prior acts of attorneys and the firm for professional services with the firm before inception of the policy?
- An attorney acting as a trustee, executor, administrator, guardian or conservator?
- Investment advice?
- Pre- or post-judgement interest, appeal bonds, and related costs?
- Claims first made and reported during the policy period?

If so, does the policy provide coverage:

- Regardless of when the error occurred? Or
- Only if the error, as well as the claim was made during the policy period?
- Claims first made after the expiration of the policy, assuming that the insured:  
(1) had reasonable knowledge that a wrongful act occurred and a claim might be made, and  
(2) reported the suspected wrongful act to the insurance company during the policy period?
- An optional extended reporting period?
- If so, for what period(s) of time is the extended reporting period available?
- Is there a separate, additional limit of liability?
- Are there limitations on the types of persons eligible?
- Are there stipulations that the extended reporting period option is exercisable only by the named Insured and not by "Other Insureds"?
- Within what time period after expiration of the policy must this option be exercised?
- Is the premium and availability of the extended reporting period guaranteed?
- Is the extended reporting period available if an insured's license to practice is revoked?
- An optional retired or non-practicing attorney's extended reporting period?
- If so, for what period(s) of time is the extended reporting period available?
- Is there a separate, additional limit of liability?
- Are there limitations on the types of persons eligible?
- Are there stipulations that the extended reporting period option is exercisable only by the Named Insured (and not by "other Insureds")?
- Within what time period after expiration of the policy must this option be exercised?

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## Exclusions to Coverage

Key issues to consider:

- Is the coverage excluded for any services crucial to the firm (e.g. securities, real estate)?
- Are the activities of members of the firm as officers or directors excluded?
- Does the policy exclude other business pursuits with clients of the firm?
- Are acts in a dual capacity as a lawyer and officer, director or business partner with a client excluded.
- Does the policy exclude coverage for claims brought by regulatory agencies?

Is the coverage excluded for:

- Dishonest acts?
- If so, is coverage afforded to innocent parties?
- Fraudulent acts?
- If so, is coverage afforded to innocent parties?
- Malicious acts?
- If so, is coverage afforded to innocent parties?
- Vicarious liability (liability acquired by law or by contract for the acts, errors or omissions of others)?
- Claims made by or against a business enterprise owned or controlled by an Insured?  
(Refers to claims by or against the business itself)

- Claims arising out of or in connection with a business enterprise owned or controlled by an insured? (Refers to third-party claims)
- Activities as an officer, director, partner, trustee or employee of a business not named in the policy? (Refers to an insured's activities as an officer, director, etc. of a business not owned or controlled by the insured)
- Acts in a dual capacity as both a lawyer and as an officer or director?
- Acts involving business pursuits with clients?
- Services as a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA)?
- RICO (Racketeer Influenced and corrupt Organization Act) claims?
- Activities as an elected public official?
- Worker's compensation claims?
- Advertisers' liability?
- Loss sustained as a beneficiary or distributee of a trust or estate?
- Bodily injury or property damage?
- Real estate claims?
- Claims by regulatory agencies?
- Notarization of a signature without the physical appearance of the signatory?
- Claims involving an insured versus another insured?
- Discrimination?
- Sexual harassment?
- Prior acts (acts committed before the policy period) where the insured had knowledge of or should have foreseen the claim?
- Investment advice?
- Securities work or SEC claims?
- Punitive damages?
- Fines, statutory penalties and sanctions?
- Business enterprises liable for contamination or pollution of the environment?
- Loss to nuclear reaction, radiation or contamination?

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## Defense and Settlement Provisions

Key issues to consider:

- Who selects defense counsel?
- Is the insured's consent required to settle claim?
- Is the agreement to defend claims sufficiently broad to offer full protection?

Does the policy provide for:

- Selection of defense counsel by the insurance company or by the insured? (See [endnotes](#).)
- If the insured has the right to select defense counsel, does the insurance company restrict this right in any way (e.g. by retaining the right to approve the choice of defense counsel in advance or the right to require the insured to revoke the selection)?
- The insured's consent required to settle a claim?
- If so, does the policy provide for a limit of payment by the insurance company if the insured refuses to settle?
- Arbitration of a coverage dispute between the insurer and the insured?

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## Limits of Liability

Key issues to consider:

- Are claim expenses included in the limits of liability?

- Are limits of liability per claim or annual aggregate?
- How are two or more related claims treated?
- How are claims against multiple Insureds treated?
- Are deductibles per claim or annual aggregate?
- Is a "loss only" deductible option available?

Does the policy provide:

- That claim expenses are included in the limits of liability?
- If so, does the policy provide a claim expense allowance?
- Limits or liability for each claim?
- Annual aggregate liability on a firm basis?
- That two or more claims arising out of a single act or series of acts are considered a single claim with a single set of limits?
- If so, does the policy provide that the policy year the first act is reported is considered the claim reporting date?
- That if a claim is made against multiple Insureds, all sets of limits from all applicable policies apply (rather than just one set of limits)?
- A per claim deductible?
- An aggregate deductible?
- That the deductible applies to:
- Loss payments only? Or
- Claim expenses and losses?

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## Conditions of Coverage

Key issues to consider:

- Is there a requirement to give notice to the insurance company of claims or potential claims?
- At what point does your claim get reported and to whom?
- Are there requirements concerning changes in the firm?
- Is the carrier experienced in professional liability claims administration?

Does the policy:

- Require timely notice to the insurance company of all claims and potential claims?
- Require the assistance and cooperation of the insured?
- In the event of any payment by the insurer, transfer the insured's rights of recovery to the insurance company (subrogation)?
- Provide coverage in excess of other available insurance?
- Provide coverage for innocent attorneys in cases where one member of the firm fails to meet the conditions of the coverage?
- Cover changes in the firm automatically until renewal?
- Provide for arbitration of the underlying malpractice claim?
- Is arbitration required?
- Is arbitration permitted?
- Is arbitration prohibited without the insurance company's consent?
- Provide at least a 30-day notice of cancellation by the insurance company?
- Provide at least 60 days notice of intent not to renew?
- Provide, if the policy is canceled by the insurance company, that the premium returned will be figured on a "short rate" or "pro rata" basis?
- Provide, if the policy is canceled by the insured, that the premium returned will be figured on a "short rate" or "pro rata" basis?

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## Endnotes

**Prior Acts Coverage:** In order to have a retroactive date on the Declaration sheet, you must have prior acts coverage. Prior acts coverage is an extremely important item. Make sure that, if at all possible, your policy covers all prior acts of the firm and of all of the individual members, including non-attorney employees. Your prior acts coverage may also be limited to acts on behalf of the Named Insurer only.

**Right to Select Defense Counsel:** The policy language may explicitly state the right of the insurance company to select defense counsel (e.g. "Selection of defense counsel will be a the prerogative of the Company"), or the right may be implied in the right to defend (e.g., "The Company shall have the right and duty to defend any claim").

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