

Advisor

An update on issues regarding liability protection for the legal profession.



The Significance of Risk Management Questions on the Insurance Application

Statistics show that about half of all legal malpractice claims are allegedly caused by errors or omissions that may have been prevented had appropriate risk management safeguards been followed. This percentage has remained relatively constant since the American Bar Association (ABA), in 1985, began publishing the *Profile of Legal Malpractice Claims*, a periodic study of national legal malpractice claims data. The latest study, the fifth of the profiles, was published in September 2008 and is based on data collected from 2004-2007.

Recognition of the importance of good risk management procedures in law firms is reflected by a series of risk management questions on most applications for lawyers professional liability insurance. The Florida Lawyers Mutual application includes three such questions. The following is a summary of those questions and their importance to the underwriting decision.

Deadline Control

Over one quarter of all claims (28%) reported in the 2008 ABA Profile, originated from deadline/calendaring errors. These are procedural/administrative errors that lend themselves well to preventive measures.

Good deadline control procedures include:

- Dual calendaring. Redundancy is the key, including timely back-up of your electronic

master calendar. If you use a variety of calendar systems – PDA, paper, computer – check them against one another to verify the information is complete and up to date.

- Be comprehensive. Good deadline control goes far beyond simply calendaring statutes of limitation. All matters have a deadline even if it is internally created by the need to meet your client's expectations.

Conflicts of Interest

Claims alleging conflicts of interest account for about five percent of all claims, according to the 2008 ABA Profile. Client intake procedures are not the primary cause of conflict claims. Rather conflicts of interest are most often included as part of substantive malpractice claims. According to the 2005 *Profile of Legal Malpractice Claims*: "The conflict may not have given rise to the claim, but colors it and makes it much more difficult to defend."



Conflict waivers are also at the root of some claims in which disgruntled clients may allege that they were not fully informed of the consequences and even may use the waiver to show that there actually was a conflict. Here are some steps that may help you avoid conflict situations:

- Screen new clients and screen new matters for existing clients, for conflicts of interest.

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Application Questions *continued from page 1*

- Document full disclosure of conflicts or possible conflicts.
- Conflict waivers should be in writing and signed by all parties.
- Avoid holding a business interest in a client's business/venture.
- Follow written office procedures for law firm mergers, acquisitions and new hires.

Client Communication Letters

One of the biggest complaints clients make about lawyers is that they do not communicate with their clients. The following letters and agreements are simple ways to help you provide excellent service to your clients and to help protect yourself and your client from misunderstandings.

Engagement and Fee Agreements

This is the contract for services to be performed and should always be in writing. It should specify what you will not be doing as well as what you will be doing. It's also important to clearly define the client and, if applicable, any non-clients. New matters for existing clients should be formalized in writing, which may be a quick email.

Notice of Declination

These are simple one-page letters/notices that can save you from a malpractice claim. Million-dollar legal malpractice claims have been won for the lack of a simple written declination. Write a declination letter or give a declination notice to any potential client with whom you meet. Keep all the letters in

one folder so you can find them if a problem arises.

File Closure

Use a closure letter; one or two paragraphs will suffice. The closure letter may help you avoid exposure to a claim of continuing representation, and it is an excellent way to conclude, by reminding the client of what you accomplished on their behalf. The following is an example of what a closure letter might include:

- Thank the client for allowing you to represent them.
- Tell them the file/matter is being closed.
- Tell them to notify you as soon as possible if they believe something remains to be done.
- Attach or make reference to your file retention policy, reminding clients to pick up original, irreplaceable items.
- Tell them you would be happy to represent them again.

Conclusion

Every law firm, no matter its size, will benefit from a written office policy and procedures manual that includes, but is not limited to, these risk management initiatives.

More detailed information is available from Florida Lawyers Mutual Insurance Company at www.flmic.com. 



Record Retention & Destruction

Firms should have a record retention policy that includes procedures for all written and electronic materials and communications, including emails. The amendments to the Federal Rules of Civil Procedure, known as the E-Discovery Rules, make a formal, written records retention policy all the more critical.

The policy should be communicated to the client in writing. A good way to do this is to include the retention policy as part of the engagement agreement and to remind the client of it at the conclusion of a matter, in the closing letter.

Communicate the policy to clients in writing.

Among the major considerations in development of a records retention policy:

- Your firm's practice area;
- Applicable regulatory constraints;
- The professional liability statute of limitations (with caution).

It is prudent to extend the file destruction date well beyond the statute of limitations for legal malpractice. There may be circumstances that prevent or delay a client's legal malpractice claim from being time-barred as well as circumstances that determine the commencement date of the applicable limitations statute. For example, the client or others in privity with the client may be a minor or under another legally recognized disability; or the client may not know, or be unable to reasonably discover, the alleged legal error or omission and the resulting loss or damage. Additionally, the professional liability statute of limitations may be tolled by reason of concealment (non-disclosure) or fraud.

Apply the retention policy consistently. Although you may decide to make an exception and retain a file past its destruction schedule if you have any

indication that your client is dissatisfied with your representation or if you are aware of one or more circumstances, including but not limited to, matters involving your representation that might eventually result in some damage or loss to the client. Otherwise, it is advisable to follow the retention policy. Should it be necessary, it may be difficult to defend destruction of materials outside the parameters of the records retention policy.

The development of a written records retention/destruction policy that you communicate in writing to your clients at the commencement and the conclusion of representation will help manage the record retention process.

If a record retention policy is excluded from the engagement agreement and the concluding letter, it will be necessary to obtain each client's written consent to destroy the file. There may be portions of the file that the client wants to retain for income tax or other valid reasons. Electronic storage may be a practical alternative to destroying closed files.

The following should be retained indefinitely:

- Original documents or items, if you cannot return them to the client.
- Records of trust fund receipts and disbursements.
- Copies of correspondence to the client regarding disposition of the file along with an index of items destroyed and maintained.

Here are a few pertinent cases:

Cherney v. Moody, 413 So.2d 866 (Fla. 1st DCA 1982). In the opinion, the court stated: "Without belaboring the point we feel that an attorney's fiduciary relationship with a client and the Florida

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Bar's Code of Professional Responsibility would be ill-served by a holding which permitted an attorney to avoid a counterclaim for malpractice by awaiting the running of the statute of limitations before filing suit for the collection of fees"

In *Edwards v. Ford*, 279 So.2d 851, 853 (Fla. 1973), the Florida Supreme Court stated: "We find it impossible to rationalize how an injured client can be required to institute an action within a limited time after his cause of action accrues if he has no means of knowing by the exercise of reasonable

diligence that the cause of action exists"

Brooke v. Shumaker, Loop & Kendrick, LLP, 828 So.2d 1078 (Fla.App.2002). The court held that the statute of limitations did not commence to run when a default judgment was entered but when the client learned, contrary to the lawyer's advice, that a debt was not dischargeable after the bankruptcy court deemed it not dischargeable. 🌴

Further reading: "When May I Destroy My Old Files?" The Florida Bar, LOMAS. (<http://www.floridabar.org/tfb/TFBMember.nsf/840090c16eedaf0085256b61000928dc/f48127510e77e68b85256f800050dc30?OpenDocument>)

FLORIDA LAWYERS MUTUAL INSURANCE COMPANY provides Risk Management services as a benefit to the legal profession.

For further information, contact: Lucia Duggins, Risk Manager, luciad@flmic.com.

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