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A A R E B C

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LOSS PREVENTION BULLETIN

ISSUE NO. 36

DECEMBER 2003

This issue contains a single item which originally appeared in the Illinois Bar Journal, Vol. 90 #10, October 2002. It is reprinted here with the permission of the Illinois Bar Journal. Copyright by the Illinois State Bar Association. The article should be of interest to all newly called members of the Bar as well as those who have been in practice for awhile, notwithstanding the U.S. references.

Your comments on this and the previous Bulletins are solicited, as well as your suggestions for items to be dealt with in future Bulletins.

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■ Bulletin #156

October is a fine and dangerous season in America.... a wonderful time to begin anything at all.

– Thomas Merton¹

As another October begins, and another class of lawyers prepares to take their oaths, it's time for some tips about malpractice avoidance for new lawyers. Here are 10 easy steps toward claims, ARDC (State disciplinary committee), beefs, and general career havoc:

1. Practice with jerks

Choose your companions from the best; Who draws a bucket with the rest Soon topples down the hill.

– William Butler Yeats²

Think about your first lawyer job as the next phase in your legal education – because it is. Here you will learn not just your area(s) of expertise, but also how to handle clients, how to organize your time, how to get paid for your work. Just as you picked the best law school you could afford, pick the best lawyers or firm you can to mentor you in this critical phase of your development – even if this means less money. The good habits you learn will last a lifetime, while bad habits, once learned, are not easily changed.

Because learning from others is much easier than figuring things out yourself, don't start your solo practice right out of law school. Learn from a seasoned lawyer for a while, even if it pays peanuts.

Watch out for lawyers and firms with a "cowboy" culture, who encourage you to act like you know it all and discourage you from asking questions or admitting that you need help. The only thing you will learn there is how to hide your errors. This brings us to Mistake #2.

2. Lie about and hide mistakes

Mistakes are a fact of life. It is the response to error that counts.

– Nikki Giovanni³

A cautionary tale: Bright New Lawyer discovers that she has made a ghastly mistake. After many sleepless nights, New Lawyer hatches a plot to cover up the error, or to "fix" it secretly by unethical means. Sooner or later, the truth comes out and – surprise! The mistake could have been fixed if it had come to light right away. Or, the mistake wasn't a mistake *at all* – but the unethical "fix" lands the lawyer in a world of hurt with her firm, its malpractice carrier, and the ARDC.

Mistakes happen. When they do, get help *right away* from a more experienced colleague in your firm. If you have ideas about how to solve the problem, so much the better, but don't procrastinate, hoping the magic solution will come to you. Call upon the expertise of the lawyers around you. Maybe the problem is not a problem after all. Even if it is, there may be a remedy you have not considered.

Suppose the worst: You have, indeed, made a grievous error, for which there is no cure. At least your firm will

know that you were on top of the situation *and* resisted the temptation to lie or cover up.

By the way, the manner in which your colleagues handle your mistakes should give you a pretty good idea about whether this is a firm in which you want to practice for the rest of your lawyer-life.

3. Be a jack of all trades

Be not a jack of all trades, but a master of one.⁴

By all means, explore the different areas of practice. Your ultimate goal, though, should be to find one or two on which you will focus.

It's getting harder all the time to be a "general practitioner" and keep up with changes in many different fields of law. Malpractice carriers see plenty of claims involving lawyers who dabble in unfamiliar practice areas. Many lawyers think that anyone can do a simple divorce/closing/whatever. Even if this were true, dabblers lack the experience to know if a matter is truly "simple" or requires greater expertise.

Concentrating your practice will help you market your services. Your special knowledge makes you stand out from the crowd, whether you are bucking for partner at a firm or trying to attract clients.

Finally, it's just more fun to practice if you don't have to invent the wheel every day. You can concentrate on learning the finer points of your special practice areas and improving all the time.

4. Fail to set appropriate expectations

Ah! Let not hope prevail, lest disappointment follow.⁵

You can do a technically brilliant job and still end up with an unhappy client – claims people see it all the time.

Even the finest legal work in the world can result in a malpractice claim if you fail to meet the *client's* goals. When you first meet your client, let him do the talking, so you can learn what his expectations are. Beware the client who wants miracles from you, blood from the other party, or some combination of the two. If you can't adjust the client's expectations to something more realistic, you may have to turn the client away – or recommend that the firm do so.

Don't set yourself up for failure with off-the-cuff predictions about that outcome of the matter, or the time and cost necessary to achieve it. Once you say that the matter will be dismissed on summary judgment, take six months, or cost the client \$5,000, the client will be disappointed with anything less. If you must give estimates, do so thoughtfully and conservatively. Don't come on like Super Lawyer – chances are that you can't leap that tall building in a single bound.

Do explain the legal process to your client, including all of the steps involved: "We'll start by filing a complaint, and then the other side will have 28 days to respond..." Encourage your client to ask questions.

Throughout the representation, set appropriate

expectations for your client. When bad things happen, give the client the news “early and often.” Doing so is required by the Rules of Professional Conduct – see, e.g., Rule 1.4 – but it also tells your client that you’re honest, and makes it less likely that the client will be shocked by a suboptimal outcome.

5. Allow a communication breakdown

*What we’ve got here is a failure to communicate.*⁶

Some lawyers think of letters confirming client instructions as weaselly, time-wasting CYA letters. In fact, they *are* CYA letters – they Confirm Your Assignment. They enable your client to make informed decisions about the matter, and they ensure that you are implementing the client’s wishes.⁷ And, yes, they are also essential to defending malpractice claims. According to a recent study, more than 15 percent of all malpractice claims arise from a lawyer’s alleged failure to obtain consent or to follow instructions.

Accordingly, make it your habit to confirm major client decisions in writing. Suppose you and your client agree that you will pursue her workers’ compensation claim, but forego a potential products liability claim because it seems unlikely to succeed. After the statute of limitations runs, however, your client sues you for malpractice, alleging that you failed to file the products claim. Had you written a confirming letter, you not only would have been able to mount a successful defense, but you probably would have avoided the claim in the first place.

If a client’s decision is against her best interests, or against your advice, be *extra* sure to document it with a letter. Say your divorce client rejects your advice to obtain a valuation of his wife’s business. “That costs too much, and besides, I trust her.” A year after the divorce, when he sees her driving around town in a Land Rover while he is living on mac ‘n’ cheese, it might be tough for him to remember that instruction. Moreover, your letter might cause him to reconsider his original decision. For some people, it’s not real if it’s not in black and white.

And of course, be sure to document all settlement offers and demands, and the client’s response. In the “heat of battle” at a settlement conference, you can’t send a letter, but you can write the offer or demand on a piece of paper and have your client sign it. At least, write the client a letter when you get back to the office.

6. Forget to share the love

Be good...and let who will be clever. – Charles Kingsley⁸

The days of blind grading are over. It’s not enough just to do good legal work – you must let your clients know you care about them and their matters. In fact, studies show that clients want a caring lawyer – even more than they want a brilliant one.

Don’t let your client wonder if you are neglecting her matter. Copy her on every piece of correspondence and all pleadings. Consider getting a stamp that says: “For your information only – no response required.” That way, you won’t even need to draft a cover letter for “FYI” copies. Calendar regular status reports to your client, even if – *especially* if – nothing is happening in the matter.

It should go without saying, but I’ll say it anyway: Return client calls promptly. Many claims and disciplinary complaints can be traced back to a lawyer’s failure to return calls. If you can’t call the client within 24 hours (at most), have your secretary return the call to advise when you will be available and to find out if immediate action is necessary.

Note: If you have yet to meet a single client, re-read the above section, substituting the word “partner” for the word “client.” Their expectations are very similar.

7. Fail to “show your work”

We can lick gravity, but sometimes the paperwork is overwhelming.
– Wernher von Braun⁹

As math students, many of us worshipped the God of Partial Credit. Even if you got the wrong answer, you could get partial credit by establishing that you followed the right steps – by “showing your work.” This is a useful principle for lawyers, too. Some matters will not turn out well for your clients, but if you can establish that you followed the steps that a competent lawyer would take, it will help you avoid or defeat a malpractice claim. Make sure your file “shows your work.”

If you performed legal research, keep a list of citations and printouts of online searches. At a minimum, this will keep you from retracing your steps over and over again. If you’re drafting contracts, retain drafts with substantive changes in the file. Note the reasons for the changes on the drafts as you go.

Make it a habit to document your telephone calls. Use your computer, use your own “telephone conference form,” but use something. You’ll have a record of all client telephone calls if you pick up a pen (and use it) every time you use the phone. Heck, write it on the dinky little phone slip if you must. But write it somewhere.

8. Ignore the bottom line

Time goes, you say? Ah, no! Alas, Time stays, we go.

– Henry Austin Dobson¹⁰

Timesheets are hell, but nothing compared to the hell of trying to recreate an entire month’s work on the last day of the month with a grumpy office administrator breathing down your neck. Do them every day, as you go. Here’s added incentive: Studies show that lawyers who do their time every day earn 15 percent more than those who don’t.

Write the description of your services just as carefully as you would write a letter to a client. For some clients, the bill is the only status report they will ever read.

9. Ignore the frontline

Constant attention by a good nurse may be just as important as a major operation by a surgeon.

– Dag Hammarskjöld¹¹

When you are out of the office, with other clients, or just plain busy, your secretary is your ambassador to your clients – not to mention other lawyers at your firm. He or she can also be a valuable source of information about “how things get done” – whether it’s how to get the *good* pens or how to get your reply brief filed at the last minute. Be respectful and learn all you can.

Many of the best lawyers I know have had the same secretary for a decade or more – and they are quick to acknowledge the impact that these front-line people have on their practices.

10. Practice in a vacuum

One of the signs of passing youth is the birth of a sense of fellowship with other human beings as we take our place among them.

– Virginia Woolf¹²

Sometimes the *last* thing you want to do with the three hours of free time you’ve carved out of a harried week is chum around with other lawyers. Totally understandable – but try to make time to attend bar association events.

Are you practicing with jerks? Go and meet some lawyers whose habits you’d like to emulate. Are you finding your way in a new practice area? Go to a continuing education event – you’ll learn from the course *and* the lawyers you meet there. Want to find some colleagues you can call next time you have a question? You’ll meet them at bar events – and don’t be surprised if they start calling *you* with questions and referrals.

Law can be surprisingly isolating and lonely. Taking your place in a community of dedicated lawyers will help your practice and your psyche.

Attorney Karen Dilibert, former Vice President and Director of Loss Prevention with ISBA Mutual in Chicago, now works with Holmes, Murphy & Associates in Cedar Rapids, Iowa.

1. Recalled on his death, 10 Dec 68. Simpson’s Contemporary Quotations, compiled by James B. Simpson (1988).
 2. William Butler Yeats, “To a Young Beauty.”
 3. Of Liberation, st. 16, *Black Feeling/Black Talk/Black Judgment* (1970).
 4. Chinese proverb.
 5. Wrother, *The Universal Songster*, Vol ii, p 86.
 6. Donn Pearce and Stuart Rosenberg, from the movie *Cool Hand Luke* (1967). A prison correctional officer makes this statement just after administering a vicious kick to inmate Luke.
 7. See Illinois Rules of Professional Conduct, 1.2(a), 1.4(b).
 8. *A Farewell*.
 9. Chicago *Sun Times* 10 Jul 58.
 10. “The Paradox of Time,” st. 1, Proverbs in Porcelain (1877).
 11. News summaries, 18 Mar 56. From Simpson’s Contemporary Quotations, compiled by James B. Simpson (1988).
 12. “Hours in a Library,” Times Literary Supplement (London, November 30, 1916).
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