Hey Lawyers! The CYA Letter – You’re Doing it Wrong

By: Alex Diaz

Recently, I visited my optometrist for my annual eye exam. After a standard examination, she suggested that I have my pupils dilated. Since I was in a rush to get back to the office, I politely declined.

My optometrist then advised me of the risks associated with declining the examination, and I was immediately presented with an “Against Medical Advice” form, indicating that I had been informed of the risks associated with not undergoing the procedure and that I agreed to hold the doctor harmless if problems indeed developed as a result of my decision.

Although just moments earlier I had casually declined the examination, upon being presented with the form, it occurred to me that if it was important enough to my optometrist that my
decision be accompanied by a written waiver to “document the record,” perhaps I ought to reconsider. So I did, and had the examination performed.

What does my trip to the doctor’s office have to do with the practice of law? Plenty. Although handled more brusquely than I would recommend to my clients, we can steal a page from medical professionals.

As a firm that specializes in legal malpractice defense, all too often, our lawyer-clients fail to send their own clients the proverbial “CYA letter” where a client fails to take the lawyer’s advice. Why is that the case, considering every lawyer’s advice to his non-lawyer friends is “get it in writing!” Why the hesitation?

There is a mistaken perception that such a letter can create tension in an attorney-client relationship, or otherwise introduce distrust into the relationship. Many attorneys believe that a CYA letter draws a line in the sand between what the client wants to do, and what the attorney recommends. The reasoning behind this line of thinking is the notion that the sole purpose of a CYA letter is self-serving. However, consider sending what we call the “CYA-letter-that-isn’t.”

The CYA-letter-that-isn’t certainly helps to protect an attorney from future liability by documenting a client’s refusal to accept the attorney’s advice. In addition, however, as physicians have learned, this type of letter can help convey the gravity of a client’s decision to ignore your advice. A thoughtful and thorough CYA letter should stress to the client that a particular strategy or decision is important, and that the failure to follow the recommended course may cause irremediable damage. This may cause the client to consider your advice with a greater degree of care and attention. This type of letter can also be used to help manage the client’s expectations, both as to the eventual outcome of a case, as well as the expenses involved.

Consider, for example, that the opposing party has served a proposal for settlement that you believe the client should accept. You discuss the proposal at length with your client, either in person or by phone. You advise the client that the proposal should be accepted and the ramifications of rejecting it. However, no written communication is ever provided to the client confirming that discussion, including the risks associated with rejecting the proposal, or why you believe he should accept the proposal. Notwithstanding your advice, your client rejects the proposal for settlement and later an adverse verdict is rendered, exposing your client to a substantial attorney’s fee and cost award.

Many lawyers believe that the client would never complain at some later date that the attorney’s advice and counsel regarding the proposal for settlement fell below the standard of care since it was discussed at length. Yet, suits involving the acceptance or rejection of proposals for settlement are common. Without appropriate documentation, in a later malpractice action, the client will invariably testify either that the conversation did not take place or that the lawyer failed to appropriately convey the potential consequences of accepting or rejecting the proposal.

In this example, had the lawyer sent the CYA-letter-that-isn’t, it would have greatly reduced (or eliminated) the likelihood of successful prosecution of the later malpractice action. What is equally important in many instances, however, is that your apparent need to “document the file”
may cause the client to further assess your advice. In many instances, clients have reconsidered their original course of action and acceded to counsel’s advice. Ultimately, this inures to the benefit of both the lawyer and the client.

When writing the CYA-letter-that-isn’t, explain to your client in practical terms why the issue is important, the ramifications or a particular course of action, and the available options. Do so in a cordial, relaxed, and personable manner befitting your relationship with your client. Never condescend. At the same time, however, be certain to note where the client is thinking emotionally, rather than logically.

All of our clients are lawyers; they are comfortable in a courtroom - except when they're on trial. So, let's take a page from medical professionals and document important strategies or decisions with an appropriate letter that may well cause the clients to reconsider important recommendations that are not being followed for all the wrong reasons. You may prevent an unfortunate but inevitable outcome - as well as a second lawsuit!

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**Considering Mindfulness**

By: Siri Thanasombat

Long considered a fringe notion, mindfulness – the simple yet profound and often difficult practice of bringing awareness to the present – has become a popular trend. Mindfulness meditation is more often being offered as a support tool for all those seeking to work more effectively in the world. Meditators have come out of the closet, and their numbers are growing. Reports of the benefits of mindfulness abound. This flurry of discussion has led to a deepening of the conversation among researchers, practitioners, advocates, and skeptics about the nature of contemplative practices and their benefits. If the purported benefits of mindfulness prove to be true, no profession is in greater need of them than lawyers.

And the legal profession is responding. Law schools, lawyers, and judges are reviewing the research detailing the benefits of mindfulness meditation: reduced stress, lower blood pressure, increased empathy, improved performance on exams and during arguments, more ethical decision-making, and more satisfying and effective client counseling conversations. More and more lawyers are practicing mindfulness to assist in handling the stress of legal practice and to improve performance.

**What is mindfulness?**

It is the intention to pay attention to each and every moment of life, non-judgmentally. The key aspects of mindfulness involve purposeful action, focused attention, grounded in current experience, and held with a sense of curiosity.
Mindfulness or mindfulness meditation is one of the most widely adopted, and one of the most widely studied, of a number of contemplative practices that assist people in becoming more aware of their thoughts, emotions, and physical states. Researchers in the growing field of cognitive science describe mindfulness as paying attention, in a particular way, with an attitude of compassionate or friendly non-judgment, with the intention of increasing one’s capacity for awareness in the present moment. It’s a universal approach that can improve the experience of any activity and enhance a capacity inherent in everyone. It allows the individual to better concentrate and to approach each moment with fresh eyes. It not only increases one’s sense of well-being; it also can assist an individual in choosing her responses to environmental stimuli instead of simply reacting instinctively.

More and more often, mindfulness meditation and other contemplative practices are being offered and embraced by lawyers, judges, administrators, and policymakers during workshops, retreats, and CLE or CJE programs.

How is mindfulness different from other forms of contemplative practice?

Mindfulness is a practice of present moment awareness. Mindfulness increases one’s ability to see things as they arise clearly without judgment. Mindfulness facilitates both focusing and widening one’s attention as we become aware of ourselves and the world around us. The "goal" is to be more fully present in our lives.

What are the everyday benefits of mindfulness meditation?

Practitioners of mindfulness meditation often report greater joy for the simple things in life and greater engagement in their lives. Many of the side effects of mindfulness meditation found in scientific research include a decrease in psychological symptoms such as anxiety and depression as well as greater stability in physical symptoms, such as blood glucose levels and blood pressure.

While mindfulness research is not yet entirely conclusive, its growing acceptance has already fostered innovations in legal education and spread some of the benefits of mindfulness to a larger portion of the profession.

Including Mindfulness in Legal Practice

Even beyond recent research indicating that there are positive changes in brain functioning as a result of mindfulness practice, the case is strong for including mindfulness training for lawyers, starting in law school and continuing beyond. In addition to an ongoing and well-documented well-being crisis in the profession – high rates of depression, suicides, and substance abuse – critical changes in our profession and challenges from the outside highlight the need for increased self-awareness.

Contemplative practices that increase our capacity for personal and relational awareness, combined with ethical leadership among lawyers, are doors to greater well-being and effectiveness that are open to anyone willing to try them. They assist us in becoming the
lawyers we have dreamed of being, and the ones our communities and our society have always hoped we would be.

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Preemptive Strategies Young Attorneys Can Take to Avoid Being the Target of a Legal Malpractice Action

By: Risa Kleiner and John Sullivan

Whether at a national law firm or your own solo practice, beginning a legal career is no easy task. Young attorneys face several challenges including making a good impression at their new place of work, meeting billable hour requirements, learning the law, servicing clients, and developing business. The pressure of these challenges combined with the inexperience of young lawyers can lead to mistakes which can lead to legal malpractice claims. Below are three strategies that can help young attorneys to avoid being the target of a lawsuit.

**Screen Your Prospective Clients**

It can be difficult for all lawyers, especially those beginning their careers, to turn down clients. However, failing to screen prospective clients can have drastic consequences, including disputes over fees or litigation. There are several steps that one should consider to screen clients before accepting a new client.

First, review your past and existing clients to ensure that accepting this new client will not violate the conflict of interest rules. Conflict of interest continues to be one of the most frequent causes of legal malpractice claims. Many of these claims can be avoided by applying a uniform system to identify potential and actual conflicts of interest for all new clients.

Second, ensure the client can afford the representation by informing him or her of the fees and costs anticipated throughout the representation. If necessary, request a retainer fee before commencing work on the matter.

Third, determine whether the representation makes financial sense for the client. Avoid representations where the fees and costs incurred likely will be more than the costs recouped. Such a result will often result in an unhappy client.

Fourth, if the prospective client was previously represented by an attorney on the same matter, determine why the relationship ended and why the client is seeking your counsel.

Finally, trust your instincts. If you feel the client or the representation will cause more harm than good, do not take on the representation.

**Obtain A Written Fee Agreement For Each Matter**
If, after conducting the initial screening described above, you decide to take on the representation, enter into a written fee agreement with the client. While a fee agreement may not prevent a legal malpractice claim, it can help support a stronger defense in the event a claim arises. A good fee agreement makes clear who the attorney is representing and defines the scope of the representation. This can be helpful in defeating claims by non-clients and claims for failure to perform work outside of the scope of your representation.

Understand what types of representations require a written fee agreement. ABA Model Rule 1.5 provides that “the scope and representation and the basis or rate of fees and expenses for which the client shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing representation.” However, it requires a contingent fee agreement be in writing. Many states also have laws governing when written fee agreements are required.

Be aware of what provisions are required to be in the attorney-fee agreement. For example, contingent fee agreements in California must contain a statement that the contingent fee is not set by law and is negotiable between the attorney and client. Failure to include the negotiability statement can render the agreement voidable at the client’s option. This could result in a lawyer who does obtain a great result for his client having to forfeit the negotiated percentage of recovery and receiving only quantum meruit.

Avoid the temptation to simply draft a fee agreement and send it to a client. Although not required by the standard of care, consider having in depth discussion with the client as to how the representation will proceed and to ensure that the client understands all the provisions and terms of the written fee agreement. This is especially important when requesting the client to sign a conflict waiver. At the conclusion of the discussion, or if necessary, after the client has had the opportunity to consult with independent counsel, the client should sign the written fee agreement.

Avoid Avoidable Mistakes

Like other professionals, lawyers will make mistakes. However, there are steps that lawyers can take to avoid particular mistakes.

Two of the most frequently alleged mistakes are failing to timely file pleadings and failure to calendar. Missed deadlines can result in a client losing the right to assert a claim. When that happens, the client often blames the attorney. To prevent this, lawyers should consider recording important dates on two calendar systems. They should also have a system in place that ensures that every deadline is calendared at the earliest opportunity as well as a system of cross-checks built into the calendar system to avoid individual error. At law firms, everyone should utilize the calendar system uniformly.

Lawyers should avoid practicing outside of their area of expertise. ABA Model rule 1.1 defines competent representation as requiring the legal knowledge reasonably necessary for the representation. This does not necessarily mean that an attorney who specializes in employment litigation could not represent a client in a breach of contract litigation. However,
that same attorney should think twice before agreeing to provide legal advice regarding the drafting of a will or trust.

Slow down. With emails and text messages making lawyers available to their clients twenty-four hours a day, it is important to not fall into the trap of responding to a client’s or prospective client’s inquiry without taking the time to analyze and understand the issue. Instead, lawyers should take the time to do the necessary research and read through a client’s file thoroughly before sending a response. Failing to slow down take the necessary time to formulate a response to a client or opposing counsel results in mistake. Do not hesitate to let a client know that you are looking into the issue and will get back to them shortly. This lets the client know that you have not forgotten about them and are working on their matter.

Lawyers are not perfect and mistakes happen. However, these three strategies can assist young attorneys to avoid being the target of a legal malpractice lawsuit.

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Using Social Media Effectively and Ethically

By: Cassie E. Preston

We’ve all been there before… how do we get a hold of and use to our advantage an opposing party’s social media activity, posts, and/or photographs? These days, it’s pretty standard for opposing parties in litigation to dig through social media. But, how do you obtain and use social medical effectively and ethically? For example, can you compel production of social media posts and photographs? What about a party’s Facebook logon information and password? Can you advise your client to “clean up” his or her Facebook page in preparation for litigation?

Social media allows users to share posts and/or photos in real time with the public or select followers. A user can make his or her account public, or make the account private such that only authorized persons can follow the user and view his or her posts and photographs. When it comes to the Federal Rules of Civil Procedure, the discovery of social media posts and photographs has its limits.

One of the key indices of discoverability under Federal Rules of Civil Procedure Rule 26 is relevance. The United States District Court for the Eastern District of Louisiana recently encountered the question of whether there is a meaningful different between social media posts and other types of discovery that we are accustomed to seeing. In the Court’s view, the answer was “no.” Farley v. Callais Sons, L.L.C., 14-2550, 2015 WL 4730729 (E.D. La. 8/10/15). In this case, the defendant filed a motion seeking an order compelling plaintiff to produce:

“All of his Facebook activity and records subsequent to the alleged incident on May 24, 2014, including, but not limited to … a signed copy of the Facebook

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Affidavit of Authorization requested in [defendant’s] Request for Production of Documents No. 25.”

The United States District Court for the Eastern District of Louisiana found the discovery requests “intrusive.” The court stated, the question created was whether the manner in which something is communicated to a select group of people or “friends” matters under Rule 26. The Court refused to cast a wide net over all of plaintiff’s Facebook activity. The Court found the following information from plaintiff’s Facebook account relevant and discoverable:

“(1) posting by [plaintiff] that refer or relate to the accident in question; (2) postings that refer or relate to emotional distress that [plaintiff] alleges he suffered as a result of the accident and any treatment that he received therefore; (3) posting or photographs that refer or relate to alternative potential emotional stressors or that are inconsistent with the mental injuries he alleged here; (4) postings that refer or relate to physical injuries that [plaintiff] alleges he sustained as a result of the accident and any treatment he received therefore; (5) posting that refer or relate to other, unrelated physical injuries suffered or sustained by [plaintiff]; and (6) posting or photographs that reflect physical capabilities that are inconsistent with the injuries that [plaintiff] allegedly suffered as a result of the accident.”

The Court declined to compel discovery of plaintiff’s logon information and password, and the court would not compel the use of a blanket authorization by defendant to obtain plaintiff’s Facebook posts and photographs from a third party. Plaintiff was instructed to produce the information to his attorney, who would then decide what posts and photographs were relevant. Plaintiff’s counsel would thereafter produce the relevant posts and photographs to defendant with a declaration by plaintiff certifying his compliance with the court’s order.

Similarly, the United State District Court for the Eastern District of New York crafted a method of production of social media accounts. Giachetto v. Patchogue-Medford Union Free School District, 293 F.R.D. 112 (E.D. N.Y. 2013). Defendant filed a motion to compel plaintiff to provide authorizations for the release of all records from plaintiff’s social networking accounts, including but not limited to, her Facebook, Twitter, and Myspace accounts. The court refused to permit the defendant to use an authorization to obtain plaintiff’s social media posts from a third party. The court ordered that plaintiff would produce the social media posts and photographs to her attorney who would review the social media information for relevance and produce the relevant posts and photographs to defendant.

What if you want to avoid the discovery dispute and the issue of production before litigation even begins? Can an attorney instruct his or her client to “clean up” social media accounts prior to litigation? If your jurisdiction is Florida, the answer could be “yes.” On October 16, 2015, the Florida Bar Board of Governors approved the act of lawyers advising clients to remove photos, videos, and other information from the client’s social media accounts “directly related to the incident for which the lawyer is retained.” According to the opinion, which can be found at www/floridabar.org, “a personal injury lawyer may advise a client pre-litigation to change privacy settings on the client’s social media pages so that they are not publically accessible.” The

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opinion adds the caveat that there must be no violations of the rules or substantive laws governing the preservation of evidence. Further, the personal injury lawyer's guidance must be given pre-litigation.

In Virginia, the plaintiff and his lawyer were sanctioned where the lawyer’s advice was rendered after litigation began. In 2010, a Virginia jury awarded plaintiff $10.6 million in a wrongful death suit. The judgment was one of the largest wrongful death verdicts in Virginia history. Almost a year later, a Judge cut the jury verdict in half and penalized plaintiff and his attorney $722,000.00 in sanctions for an “extensive pattern of deceptive and obstructionist conduct.” According to the Judge, the spoliation began in 2009 when plaintiff’s counsel received a discovery request from defendants for the content of plaintiff’s Facebook account. Plaintiff’s counsel advised plaintiff to “clean up” his Facebook account, removing and destroying post and photographs of plaintiff drinking with other young adults that could potentially paint plaintiff in a negative light to the jury. It was this real time advice given during pending litigation that amounted to spoliation and ultimately led to the harsh sanctions handed down in Virginia. *Lester v. Allied Concrete Company, et al.*, 736 S.E. 2d 699 (Va. 2013).

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**NEWS AND ANNOUNCEMENTS >>**

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**YLD Spring Conference**

May 5 – 7, 2016

St. Louis, MO

**Social Media Team Update**

The Social Media Team is pleased to announce the new Social Media Policy! The purpose of this policy is to provide direction on appropriate and effective ways to utilize social media on behalf of the ABA YLD when delivering content, facilitating engagement, and communicating with both members and non-members. The policy includes such information as sample posts, proper use of our social media channels, and of course directions for using the online spreadsheet we set up to capture posts from across the division. The new policy can be found at:

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