



# The Top Ten Causes of Malpractice – and How You Can Avoid Them

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Here is a list of our Top Ten Malpractice Traps for 2006, in no particular order, with advice on how to avoid them.

## 1) Missed Deadlines

Despite being the cause of a great number of problems for lawyers, missed deadlines is one of the easiest to prevent. Get practice management software and invest in training to use it accurately and fully! This simple investment of money (for the software) and time (for training) can ensure that you never miss another deadline. There are several market leaders, each with its strengths. Here are just three of the front-runners:

Time Matters® at [www.timematters.com](http://www.timematters.com)  
Amicus Attorney at [www.amicusattorney.com](http://www.amicusattorney.com)  
PracticeMaster™ at [www.practicemaster.com](http://www.practicemaster.com)

Get a rule/jurisdictional-specific product to calculate dates. The best are those that integrate the rules of your particular state or province, and allow you to set reminders or ticklers. Check with your state or province bar association for resources. In Colorado, for example, Law Tool Box at [www.lawtoolbox.com](http://www.lawtoolbox.com) offers a service that will mine the courts' database for deadlines and then e-mail them to you. You can then export them into Outlook, Time Matters®, or Amicus Attorney. There may be other programs that are specific to your jurisdiction.

Use a calendar system with one point of entry. I can't stress this enough. Avoid having a calendar at home, one at the office, and sticky notes all over the place. This "system" is a disaster waiting to happen. There is NO way you can keep track of all your appointments and deadlines unless it's all in one place. Software makes it incredibly simple to change dates of appointments and create recurring events (meetings every 3rd Thursday, for example). Use a calendar that is automated. This doesn't mean that you can't have a paper one, too. In fact, it's important to occasionally print a copy as a last-resort back up. Paper calendars aren't searchable – which is reason enough to have an electronic one! Speaking of back ups – you absolutely must back up your calendar regularly. Rotate disks because they will fail. Take the back ups off site.

Be sure you keep your calendars in multiple ways. If you have only a paper calendar, what happens when it gets lost or destroyed? Many malpractice carriers are requiring their insureds to maintain their calendar in multiple ways. This is a safeguard for a lost calendar, but can also address the problem of one person miscalculating a date. Be aware of the "Mack Truck Effect." Any one of us could be hit by a Mack truck. What happens if you, or one of your staff members, are suddenly incapacitated? Without software, it may be impossible to search for everything by the attorney (or staff person) responsible. If someone is ill or on vacation, you can quickly and easily determine what projects and matters they are responsible for and reassign tasks when necessary. Additionally, an electronic calendar makes it a simple matter to move a task from one day to the next. Use software to help you to keep track of "person responsible" or "others assisting." If you have a master calendar or docketing system to which everyone has access, it will be easier to keep things on track if someone is unavailable.

Conduct case reviews on a regular basis. Regularly meet with staff to discuss the status of all cases. This can help to eliminate specific deadlines (and even cases) from falling through the cracks. Additionally, staff will have a “heads up” about projects that need to be accomplished during the upcoming week. Let staff help you help clients – the more they know, the more they can assist you.

Take the time to learn about special features of your practice management software. See if your program has a feature known as “inactivity watch.” With a few clicks of a mouse, your software can alert you when a case hasn’t been touched within a certain period of time. What better way to ensure that you don’t let a case languish. This feature can also alert you so you can generate a “nothing’s happening” letter to the client. Features like Inactivity Watch can go a long way toward reducing stress caused by “Now what am I forgetting!” Also learn to use reminders and watches and triggers.

Set aside one night each week to plan your calendar for the upcoming week. Besides ensuring that you won’t miss court deadlines, this practice will also help you make sure you keep your promises to your clients. Look over everything you have to do. Outlook (as well as other programs) has a “tasks” component. Every time you have a new task, make sure you put it on your tasks list. If you are using a hand-held device, you can synchronize your calendar, tasks, contacts, etc. That way, you should always have your calendar and your task list with you. Assign each task a priority of 1, 2 or 3. 1 is given to tasks that should be done within the next week and will need to be put on your calendar for the upcoming week. 2 is assigned to tasks that are short term, but not immediate. 3 is assigned to tasks that should be done, but don’t necessarily have a deadline and aren’t a high priority. You may even want to assign a category of “Maybe/Someday.” These will often be the tasks that you never get around to, so be prepared and open to simply eliminating them. “Let them go” - and don’t feel guilty.

## **2) Lack of Professionalism**

During my travels over the years, I have had numerous opportunities to watch attorneys and law firm staff interact with clients. I am surprised at the number of times that I have observed an unprofessional interaction with a client where the attorney or staff person failed to appreciate the significance of the misstep.

Let me provide an example. An attorney works in a small community and is viewed as a community leader. This attorney has had long-lasting attorney/client relationships with a number of individuals in the community. These long-term relationships have allowed the attorney to develop a certain camaraderie and casual way of interacting with those clients. Now, imagine that a potential new client is waiting in the reception area and one of the established clients steps into the reception area unannounced to ask a brief question. The attorney sees the established client enter. He walks right up to the client and with a warm “Hello!” and a pat on the back, he begins discussing the established client’s legal matter right in the middle of the

reception area. The attorney does this because he knows the established client is comfortable with a public discussion.

Do you see the potential professionalism concerns with the described scenario? I believe there are at least two areas of concern. Certainly, I am concerned about the potential breach of confidentiality, or at least an extreme casualness with client confidences. However, I would like to focus on something else.

The potential new client worries me. I have watched similar scenarios on several occasions, and every time the new client has a concerned look on his or her face. Why? Everyone believes that attorneys can be relied upon to keep everything confidential. It is a pillar of our profession. Yet, the prospective client just watched an attorney act in complete disregard of the established client's confidences. It really does not matter whether the conversation was confidential. The potential new client cannot easily discern what is confidential, and is likely to assume that everything should be confidential. The result is that you have no idea that your new client may have doubts about your professionalism. The client's concern about your professionalism can become a concern about your competence. These concerns make the client more likely to file a disciplinary complaint or malpractice claim.

Email is another place where being casual can be dangerous. At a minimum, you must check your spelling and your grammar, and make certain that your e-mail has a signature block at the end. Why? Again, imagine a client for whom you are acting as divorce counsel. In all likelihood, given the nature of divorce proceedings, this client will reach the end of your professional relationship feeling emotionally beaten. Now, also assume that during your representation this client received emails that were poorly written and rather cryptic. This client will tend toward what all clients do when their case doesn't end quite as expected. The client simply will try to put everything in perspective. It may be natural for this client to ask himself, "What went wrong?" Unfortunately, the client received your unprofessional emails, and now is thinking, "Why didn't I see this before? My own fifth grader can write better than my attorney can. She's incompetent and my loss is her fault!" Again, unprofessional behavior leads to the client questioning your competence.

Finally, you should consider the effect created by poor housekeeping. Some of us in the legal profession view a messy and cluttered office almost as a badge of honor. These messy attorneys seem to believe that clients view the stacks of files as reflecting positively upon the attorney's workload, implying that the attorney is in demand. The reasoning extends to the desired conclusion that the client was lucky to have this particularly busy attorney agree to handle the client's matter. While this may or may not be true, what is the client's likely response when the matter takes an unexpected turn for the worse? The client is likely to conclude that the unexpected turn resulted from the attorney not devoting adequate time to representing the client. The attorney's messy office only serves to confirm the belief.

Certainly, it will take extra effort to keep offices clean, to enforce a rule concerning appropriate dress, to continue emphasizing the importance of confidentiality, and to insist upon courteous

and civil behavior from everyone in the office at all times. In short, it takes a real effort to emphasize professional behaviors and attitudes on a daily basis. Nevertheless, I strongly want to suggest that the effort is worth it. Professionalism really is about making an implied statement about your competence. In short, professionalism reflects competence. The two necessarily go hand in hand.

### 3) Stress and Substance Abuse

Stress can a killer – literally. I hear lawyers often say – “I like what I do, but I never seem to have enough time to do it all” or “I don’t have enough time to spend with my friends and family doing the things that are truly important to me.” Take a step back and look at what you’re doing to manage your time. A great book for this is “Getting Things Done” by David Allen. This isn’t your run-of-the-mill time management book. It actually helps you to manage the paper flow. Keep a running list of everything you have to do. If you use an electronic “To Do” list, it’s easy to search for things, move them around to a different date, categorize them by priority, etc. It’s also easy to schedule reminders and ticklers. You want to strive for a “mind like water.” Write everything down that you may want to do – even if it’s far in the future and you may never do it. That way, you can relax knowing that you’ve captured everything there is to do. If you think you might want to take a trip to China some day, write it down. You can always assign it a very low priority so it doesn’t show up on your “urgent” list when you look through your To Do list. When you write absolutely everything down, your mind is clear to concentrate on the task at hand. You can’t give your full attention to any task if there’s a part of you worrying about what else you should be doing (or what else you’ve forgotten to do). Include personal To Dos in your list as well. If you have your list in electronic format, you can always filter your personal tasks out if you’re at the office at unable to work on them.

Sit down and figure out where your time goes. Then decide what you’re not getting done and make sure that activity gets onto your calendar. Use your calendar program to plan for “Professional Reading” or “Business Development.” You may decide that you’ll spend one hour on professional reading every other Thursday. With a calendar program, it’s very easy to make one entry, and then create a recurring activity for that entry. You won’t ever get to that professional reading unless it’s scheduled on your calendar!

Every lawyer I know wishes they had more time to spend with friends and family doing things they really want to do. If you find you never have time for personal pursuits, it could be because they’re not on your calendar! Try this – make a list of the major categories in your life. It might include things like Work, Family, Health (Exercise), Home (Repair, etc.), Spirituality, Finance, Education, etc. Next come up with some activities under each category that you wish you had time for. Now take a look at your calendar and slot some time for each category. Now go back and select specific things, by category, that will further your goal. For instance, you may decide that spending more time with family is important to you. Schedule one hour each Tuesday for family time. That hour might be spent researching a family vacation, taking your spouse to dinner, spending one-on-one time with your son or daughter, or whatever. If you list personal To Dos by category (Family), it should only take a few seconds to pick something each week so you

are furthering your personal goal of devoting more time to family. If you find you never have time for something, it could be because it's not on your calendar! As mentioned, this also applies to office tasks, such as professional reading or reorganizing your office.

Get and keep good staff. Good staff can make all the difference in your practice by greatly lightening your burden and allowing you to spend time doing things you should be doing. Get your clients to bond with staff. Have your staff meet new clients when they come into the office. This helps clients put a name with a face and make them feel more comfortable. If clients have bonded with staff, they are much more likely to call them for routine things (like copies of documents). Make sure your staff has the basic equipment they need. It doesn't have to necessarily be "state of the art." It should, however, be adequate for their needs. Also get them the training they need. They'll be more productive, your clients will be better served, and your staff will be more likely to stay around. While your staff shouldn't be giving legal advice to your clients, they may be able to provide copies of documents from the file, inform clients when documents have been received, etc.

Hire outside help when it's appropriate. It is difficult to practice law, run a business, and find time for things like researching new case management software or security systems. Hiring a consultant can save you time, as well as help you to make better choices that will benefit you and your clients.

Practice the lost art of delegation. Many lawyers are poor delegators, for a variety of reasons. Some don't delegate because they're afraid if they ask someone else to do something, that person will forget to do it. Another reason may be they're afraid that no one else can do it as well as they can. Yet another reason may be that it will take longer to explain to someone how to do it than it does to simply do it themselves. Or it may be that the task looks overwhelming and they're not sure where to start. If it looks overwhelming, break the tasks into specific projects and assign a time line to each sub-project. There is probably some part of the task that can be delegated to someone else, even if it is a phone call asking for the hours of a retail store. If you don't have a staff person to delegate to, consider hiring an outsider to handle the task. For instance, you may want to hire someone to prepare the bills, or assist you in researching new billing software.

If you're afraid that someone else will forget to do a task you've delegated, try using the "to do" or "tasks" function of software programs. These allow you to go into detail about what needs to be done, assign each task a priority, assign a due date, and most importantly, assign the task to someone else. The tasks can be placed in categories according to the client name, type of project, or priority. The beauty of this is the task remains on your "to do" list, even though you've assigned it to someone else. You can then keep track of the progress. Even when they complete the task, it still remains on your list, but with a line drawn through it, until you remove it.

Keep your office systems simple. Find a system you can live with, and then stick to it. Many systems work, but you have to keep up with them! State-of-the-art technology isn't the solution

for everything. Know yourself, but be open to technology solutions. Use what you need, but don't use technology simply for technology's sake.

Lawyers are at greater risk than other occupations for depression, substance abuse and other ailments. Where can you get help? Call the bar association in your state or province. Many bar associations have groups that work with lawyers. Also check with the ABA Commission on Lawyer Assistance Programs (CoLAP), which maintains a national clearinghouse on state and local assistance programs at [www.abanet.org/legalservices/colap](http://www.abanet.org/legalservices/colap). Check out LawCare, where you can download excellent "how-to" materials on stress, depression, substance abuse, bereavement, and helping others manage stress at [www.lawcare.org.uk/freedownloads.htm](http://www.lawcare.org.uk/freedownloads.htm). LawCare is a confidential advisory service to help lawyers deal with the health issues and related emotional difficulties resulting from a stressful career as a lawyer.

#### 4) Conflicts of Interest

Conflicts of interest arise in a variety of ways. Every firm must establish stringent procedures for identifying and resolving situations in which unexpected conflicts arise.

Here are a few helpful hints.

- ◆ Be wary of representing two parties at once, such as a divorcing couple, an estate and its beneficiaries, or a buyer and seller who "just want you to write the agreement." In an attempt to avoid dual representation problems, some attorneys will agree to represent one of the parties and document that the other has been advised to seek independent counsel. The non-client elects to proceed without representation. Unfortunately, your conversation with the unrepresented party can establish an unintended attorney/client relationship and undo the precautions taken.
- ◆ Exercise caution when considering whether to sue a former client. Do not assume that the passage of time magically transforms a current client into a past client for conflict purposes. Generally, the rule is "once a client, always a client," unless you can document otherwise. A letter of closure very effectively documents the termination of client status.
- ◆ Avoid joint representation in those potential conflict situations where there is real risk of an actual conflict. Remember Murphy's Law – more often than not, the actual conflict will arise. If the actual conflict is one that cannot be waived, then your only option is complete withdrawal from representation of all multiple parties. In other words, in a potential multiple party representation, if you're conflicted out for one potential client, you're conflicted out for all.
- ◆ If any potential conflict exists, seek permission from each affected client to disclose your representation and its effect on all clients, *before* accepting representation. Absent each affected client's permission, withdrawal is the only option.

- ◆ If you intend to engage in joint or multiple client representation, fully disclose to each of the multiple clients the potential and reasonably foreseeable conflicts of interest and their ramifications. Discuss how both potential and actual conflicts will affect your representation of all clients. Advise the multiple clients that on matters concerning the joint representation, there is no individual client confidentiality among the jointly represented parties. Advise each of your jointly represented clients to seek independent counsel's advice on whether they should agree to joint representation. Do not proceed with further representation until each of your multiple clients gives you his/her informed consent to joint representation. The client's informed consent must be in writing and needs to set forth the client's understanding of all ramifications of joint representation. If an actual conflict exists from the outset, strongly consider not proceeding with the joint representation unless you are certain that the multiple clients have received independent counsel regarding the prospective joint representation.
- ◆ Avoid becoming a director, officer or shareholder of a corporation while also acting as the corporation's lawyer. Do not accept stock in lieu of a cash fee, and never solicit other investors on behalf of a client's business.
- ◆ Conflict checking systems are only as good as the people who use them. Use them rigorously and consistently, or they will be ineffective. Check and update your conflict database every time you consider a new case, no matter whether accepted or declined. Circulate new client/matter memos and return them promptly to the intake attorney. Make sure the memo affirmatively documents that all attorneys and staff have reviewed the memo for conflicts, and have indicated whether a potentially affected party consents to the representation.
- ◆ Finally, don't forget to review potential conflicts that might arise as a result of a merger between two firms or with lateral and staff hires.

Yes, being rigorous, consistent and thorough with your conflict checking system is time consuming. Is it worth it? Take a moment to consider the jury appeal of attorneys agreeing to jointly represent clients with conflicted interests. Hopefully you see my point.

## 5) Poor Client Relations

Law is much more than just the business of handling a legal matter for a client – it's a business of relationships. Clients want to hire lawyers who are competent, responsive, treat them with respect, and keep them informed. “My lawyer won't return my phone calls” and “I don't know what's going on with my case” are common complaints.

Being competent in your practice isn't enough. The care and feeding of clients is also critical to a successful practice. Keeping clients satisfied provides a number of benefits:

1 - Practicing law will be more enjoyable

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- 2 – You'll get more referrals
- 3 – You'll have less stress
- 4 – There will be less likelihood of being sued for malpractice

Clients who like their lawyers are much less likely to sue for malpractice. "Friends don't sue friends." If you've bonded with clients, then later make a mistake, clients are much more likely to forgive you. An added benefit - studies prove that word-of-mouth is one of the best ways (if not THE best way) to attract new clients.

Technology is a double-edged sword. On the one hand, it can help you to keep track of important deadlines, promises you've made, and tasks to be completed. On the other hand, it has created an unrealistic expectation of immediacy. Clients send you an e-mail, and then call back in 5 minutes to ask why you haven't responded. Add to this the added challenge that you can now be reached via fax, e-mail, voice mail, pager, phone, cell phone, and instant message. The number one complaint clients have is "my lawyer won't return my phone calls." One of my favorite business card had the tag phrase on the bottom "I return phone calls." Now there's a lawyer who knows what clients want!

Let the client know when you typically return phone calls – ideally within 24 hours. When you're unavailable, have staff return the calls, but make sure your staff doesn't give legal advice. They can, however, call the client and see if there's anything they can help him/her with. "This is Suzanne Jones of Mike Smith's office. I see that you have left him two messages. Unfortunately, he is out of the office in trial. Is there anything I can do for you?" It may be something as simple as the client asking if the case has been set for trial, or asking if the other side has responded to interrogatories. To avoid telephone tag, try taking calls as they come in. If you can't talk, try to schedule an exact time to call them back. If you're going to be out, let your receptionist know. It's annoying for clients (and staff) to wonder if you will return to the office that day. Set reminders for follow up phone calls. You can take notes during the call, and even mark that the call was returned. Practice management software has a built in timer (as does Outlook through the "Journal" feature) to keep track of the time you've spent on the phone, and then automatically send your notes over as a time and billing entry. In a word – it's all about "communication, communication, communication."

Consider taking every new client to lunch (or coffee). Get to know them – not just when you're at a closing or you have a deal to discuss. If they can relate to you on a personal level, your working relationship will be greatly improved. I know lawyers who also try to do this opposing counsel. It's much more difficult to be "nasty" when you've interacted with opposing counsel in a social situation.

Provide your client with a notebook in which to keep everything they receive from your office. This shows that you are organized, and that you expect to be in touch regularly with the client. Customize the first sheet of the binder with their name, name of the case, etc. Be sure to include some business cards. Turn this into a marketing opportunity as well!

Be prompt when you meet with clients. No one likes to be kept waiting. It should be no surprise that your clients hate to be kept waiting, too. Think back to the last time you visited your doctor's office. Keeping clients waiting shows a lack of respect for their time, and can lead them to think that you are disorganized. Keep all of your appointments in one place. Ideally, this is an electronic calendar of some sort – and then synch it with your laptop and/or hand-held device. In this way, you're less likely to over schedule your time. Check your calendar last thing before you leave your office at night, and again every morning when you first wake up. That way you're less likely to miss an appointment.

Minimize interruptions when you are with clients. Don't take phone calls, read e-mails or do anything else when meeting with clients, or talking with them on the telephone. Clients are paying for your time, and they deserve your undivided attention. Again, make sure you haven't over scheduled yourself. Additionally, put your phone on "do not disturb" and turn off the annoying sounds that accompany new mail or reminders on your computer.

Survey your clients to ask how you're doing. We tend to think that "no news is good news." Don't assume that because you don't hear any negative comments that everything is going well. Sometimes clients won't tell you what they think, but they will gladly tell their neighbors, family, friends and colleagues. Lawyers generally think that their clients have a favorable impression of them. Since so much business is referred via word-of-mouth, wouldn't you love to know how what your clients think of you, in time for you to do something about it? You may want to conduct an "exit" interview at the close of the case. Questions such as: "Was I accessible?" "Were the fees what you expected?" "Was the cost high, but acceptable?" "Was the cost too high for what you got?" "Did we communicate clearly?" "Did we turn the work product around as quickly as you wanted?" "Were we good listeners?" "Was our staff competent and courteous?" "Did you feel you had enough input into the strategy of the case (decision making?)" "Did your bills adequately describe the work done and the costs involved?" "Did you understand our fee agreement?" are just a few of questions you could incorporate. Check out [www.zoomerang.com](http://www.zoomerang.com) to see how surveys can be conducted via the Internet. It's very simple. You draft your survey and put it on Zoomerang's site. Your client then goes to the unique URL and fills out the survey. You can include 1) Yes and No questions, 2) Multiple choice questions; and 3) Questions which require a text response. Zoomerang will even compile the results for you! It couldn't be easier.

Keep your promises. Make a commitment to do something, and then do it! Clients will respect you more if you under promise and over produce. The only way to do that is to keep track of what you've promised you'll do and by when you've promised you'd do it.

As we stressed earlier, learn to use the features of your practice management software – including "tasks" "to do lists" "reminders", etc. Have one point of entry for everything – ideally practice management software or something like Outlook. Write everything down when you think of it. Take one night each week to review everything you have to do (this was discussed earlier). If you have written everything down, and you review your lists regularly, you'll soon see that you won't have to apologize to clients nearly as often!

## 6) Substantive Legal Errors

A report entitled “Profile of Legal Malpractice Claims 2000-2003,” published in 2005 by the American Bar Association Standing Committee on Lawyers’ Professional Liability, provides a statistical analysis of claims data collected from various lawyer- owned and commercial insurance companies for the period January 1, 2000 through December 31, 2003. This report is full of data such as the percent of claims by area of law. In this area, personal injury plaintiff attorneys led the way accounting for 19.96% of the claims. A new group joining PI plaintiff attorneys in the list of top five practice areas of concern was personal injury defense attorneys who accounted for 9.96% of the claims. The report also provides data on claims by type of activity and by number of attorneys in the firm. The most troublesome activity was the preparation, filing and transmittal of documents, which accounted for 23.08% of the claims during this time. Firms of 1 to 5 attorneys were responsible for 65.45% of all claims. Remember, however, that the majority of attorneys work in smaller firms, and so this figure does not reliably forecast whether there is more risk associated with smaller firms.

Here, I would like to focus on the percentage of substantive claims that arose during the study period. As a risk manager, I am seriously concerned about the reported outcome and many attorneys respond with surprise upon learning the percentage. The percentage of substantive claims reported during this period was 47.28%! This means that 47.28% of reported claims were due to failure to know the law, failure to properly apply the law, failure to know or ascertain the deadline, inadequate discovery, a conflict of interest, a planning error, or failure to understand or anticipate tax consequences, among others. My concern is over the difficulty risk managers have in addressing this problem through traditional risk management techniques. Substantive errors arise out of an attorney’s abilities, not out of failed office procedures. A risk manager can help an attorney develop a more effective calendar system, or tighten up file documentation. However, it is far more difficult to discuss and address what in reality is often simply bad lawyering. That said, here are a few suggestions that, if taken to heart, can help reduce the risk of substantive claims.

The first practice tip is one that you probably have heard repeatedly – **don’t dabble**. Truly, there is no such thing as a “simple will” or “simple contract.” What first appears as a simple contract in reality may be a trap for the unwary, because the attorney may not be aware of a unique and not widely known local law that significantly affects the contract’s terms. Sometimes work appears simple when it is not, simply because the attorney doesn’t know what questions to ask. Stated another way, always remember that we don’t know what we don’t know and therein lies the problem. If the work your client requests is beyond your comfort zone or outside of the areas in which you regularly practice, don’t accept it. If you feel you must accept it, then be sure to seek guidance from an attorney knowledgeable in the practice area to ensure that you have adequately addressed the client’s matter.

**Prioritize CLE** for all members of the firm. Far too often attorneys attend CLE at the last minute, taking whatever program is available regardless of whether the program applies to the attorney’s practice. In addition, it is not uncommon to see attorneys doing something other than

staying focused on the CLE presentation, or even spending the bulk of the event outside of the meeting room. With alternative formats such as videos, teleconferences and web presentations, the attorney is even freer to pay only half-hearted attention to the presentation since it is so easy to work on something else during the CLE. The best approach to CLEs is as follows. Take CLE that is appropriate for your practice area. Seek out quality programs and get as much from the experience as possible by listening attentively, asking questions and reading the supplemental materials after the program has ended. Further, don't overlook educational opportunities that focus on research or legal writing skills.

Implement a **peer review** program that seeks to randomly select a few files of every attorney at the firm for review at least once a year. This is not meant to be a critical audit or a performance evaluation. This is about quality control. The review should focus on the entire course of representation. To "pass" the review, the file should document the conflicts check, the accurate entry of critical dates, client decisions, client communication and client satisfaction. There should be an engagement letter and a letter of closure. The file should be reviewed for timeliness of work, work product, billing decisions and procedural choices. The firm should not be looking for mistakes to criticize, but rather seeking to identify ways in which to improve representation or service in order to provide higher quality representation and service to the next client. A secondary benefit of this process will be that the firm may get a "heads up" warning as to a developing impairment with one of the attorneys such as neglecting a file due to depression, burnout or a dependency problem.

Now for a few one-line tips.

- **Verify the credentials of all new hires.** You will share in the responsibility for the consequences of their decisions.
- **Remember that friends and family members do sue** so don't agree to do a favor if you are not fully prepared to follow up in a timely and responsible fashion.
- **Prioritize personal time**, be it with family, friends or in other activities, so that you remain fresh and sharp professionally.
- **Listen and seek appropriate help** if ever a friend, professional colleague or family member raises concerns about your possibly being impaired, regardless of whether it's depression, an addiction, or anything else.
- **Maintain appropriate workloads**, as a sixty-hour workweek for fifty-two weeks a year will eventually lead to burnout or worse.
- **Consider the possibility** that when you say "no" to certain work this does not necessarily mean that no new work ever will come through the door.

Finally, keep in mind that bad news doesn't get better with time. If a mistake has occurred, deal with it immediately. Inform your malpractice carrier and let the client know. Sometimes the damage can be mitigated and sometimes the mistake can be corrected, but things only get worse if you miss an opportunity for repair. Most problems do not go away on their own, no matter how much we want them to.

## 7) Ineffective Client Screening

“Problem” clients can be a nightmare. We all hate to turn work away, yet sometimes that is exactly what you should do. Listen to your gut instinct. If you meet with a potential client, and they spend a lot of time discussing their “cause” – pay close attention. You may be able to help them to probate a will, avoid jail time, or draft a great contract. Rarely will you be able to help them with their “cause.”

Listen for clients who listen. If they don't listen to you in the beginning, they probably won't listen to in as the case progresses. Clients such as these can develop “selecting hearing.” They only hear what they want to hear. Explain that in order for their legal matter to come to a successful conclusion, they need to do their part, too. Clients tend to want to come into the office and drop their problems into your lap to solve. Help them to understand that this is a partnership. They may need to help you provide answers to interrogatories, compile receipts for purchases, etc.

Avoid clients who are dishonest, or leave out important facts. This only comes back to bite them (and you) in the end.

Be careful when they have gone through a number of lawyers before they come to you. This can be a definite red flag. Be sure to ask them if they have been represented before, and what happened to cause that relationship to end.

Every time you talk with a potential client, whether on the phone or in person, get their name, their address and phone number, and the general nature of their case. If they won't give you their address, they're probably shopping and aren't ready to hire you anyway. To protect yourself, you must have their name and address so you can follow up with a non-engagement letter if you decide not to accept their case. You never want to put yourself in a situation where you get a phone call from someone claiming they spoke with you about their case “awhile ago” and asking you what you're going to do now that the statute of limitations is expiring next week. If you have been careful to draft non-engagement letters as you go along, this will go a long way to covering your ass(ets).

Set the stage for a good working relationship. Talk about money before it's an issue. Explain your timekeeping and billing procedures. Discuss the client's expectations and yours in the initial client interview. Ask them what result they are looking for and what they realistically expect will happen. In the event they don't get everything they want, ask them what they can live with. They may not volunteer that they think their case is worth a million dollars, when you

know it's not worth more than \$200,000. Keep a written record of their responses so everyone in your office has access to it. Ask them about potential "skeletons" in their closet. "Even if you think they are untrue, what statements might the other side make that would harm your case?" Keep this in a field in your practice management software so you can refer to it when appropriate. Ask them what method of communication they prefer - fax, phone, e-mail, etc. and the easiest way to reach them.

Make sure clients can pay your bill. Unless you're willing to do what I call "inadvertent pro bono work" – screen clients to be sure they can pay. Money is often a source of difficulty. Ask for a retainer up front, and make sure they understand that they must keep it replenished.

## **8) A Malpractice Counterclaim in Response to a Suit for Fees**

Fee disputes are at the heart of a significant percentage of all legal malpractice claims. Typically, a delinquency develops, the attorney sues, and then she is countersued for legal malpractice. Attorneys who have effective billing and collection practices avoid the necessity of considering fee collection suits, and thus have a reduced risk of a malpractice claim. Here are a few tips that can help prevent a delinquency.

- Don't accept clients who cannot afford your services. This always will be a losing proposition, because the client will be unable to pay the bill. Determine the client's ability to pay for the services *before* you take the case. You must have a thorough discussion about the fee. It's not enough to simply state that your hourly rate is \$175, because that figure is meaningless without an estimate of the number of hours involved. Once you start representing a client, it is hard to be excused from your duty to represent that client. Far too often, the lack of thorough client communication on fees and estimates causes the lawyer to become torn between working the required number of hours and minimizing costs. Learn to identify and say no to prospective clients who do not have the ability to pay.
- Have a written fee agreement for all new clients and all new matters. The fee agreement need not always be a three-page contract. For repeat work, a simple "thanks for stopping by" letter may sufficiently establish that your client understands the fee agreement. Your fee agreement should clarify the scope of representation and your fee structure. Scope restrictions should be detailed particularly in situations where you are unbundling your services. Where appropriate, be specific regarding the types of out-of-pocket expenses for which the client will be responsible – such as filing fees, court costs, expert witness fees, photocopy charges, computer research, long distance calls, etc. If possible, estimate what those expenses might be. Clients often are astonished by the amount of out-of-pocket expenses incurred on their behalf.
- Never let anyone record a time entry or expense for any person or entity before accepting that person as a client, and accepting that person's issues or needs as a new matter. This

step helps prevent unintentional creation of attorney/client relationships and the inadvertent creation of conflicts.

- Always bill monthly unless the client has specified otherwise. Avoid billing the client at the project's completion unless the total cost of the representation has been agreed in advance. The key to billing is to send bills and collect fees on a regular basis in order to avoid large, unexpected bills.
- It is *never* a good idea to make your firm's new fee structure apply to an existing matter that was opened under a prior fee structure. If you undervalue your work, that is *your* responsibility. We often find that fee disputes follow shortly behind the conclusion of a matter in which a firm tries to make its fee increases retroactive to existing open matters. Such fee disputes are not a guaranteed win for the attorney.
- Provide detail in your billing statements. The billing statements should describe the work performed on a daily basis, who performed it and how long it took. An entry such as 20 hours for "research" is unacceptable. Rather, the entry should read something like, "research state case law on piercing the corporate veil."
- The attorney responsible for the case or matter should review each bill for errors before mailing that bill to the client.
- Copy the client on all correspondence and other materials relating to the client's matter. These blind copies not only show your client that you want to keep him informed, they also serve indirectly as informal status reports. Ask yourself which client is more likely to pay the monthly bill: the client who hasn't received a single sheet of paper from the attorney in three months, or the one who regularly receives informational copies from his attorney?
- If you typically have difficulty collecting fees, try collecting a retainer at the start of a new matter. If the retainer causes the prospective client to take his business elsewhere, he probably is not a client worth having. Remember that a retainer is usually considered an advance payment, and thus is fully refundable (minus what may have been earned for work started or costs advanced) if the client decides to take his business elsewhere. Non-refundable retainers usually only work if the retainer's purpose truly is to have you available "on call" for legal services.
- Take prompt action on accounts in arrears. This is the single biggest mistake that attorneys make with respect to fee disputes. Often the client who can't pay your fee today isn't likely to pay it tomorrow, and the bill doesn't get smaller or easier to collect over time. In addition, many attorneys are surprised to learn that there are resources that discuss ways for a client to reduce the cost of legal services. One of the advised cost saving techniques tells individuals to delay paying their legal bills for as long as possible, because it's almost standard practice for an attorney to discount delinquent bills

– and that advice usually is accurate! So, you should be aware that some clients intentionally withhold payment in order to force a fee discount. Require timely bill payment, and withdraw if necessary. You deserve to be paid for your services.

- If a delinquency is brewing, the attorney must act by speaking personally to the client within the first ninety days. You will have far more success with personal phone calls asking for payment than you will with letters from the accounting department, or with collection calls made by members of your staff. At the very least, you will have made a good faith effort to collect the fee, and you might even learn about the client's dissatisfaction (if any) with your work.

Sometimes, regardless of effective collection practices, a significant delinquency develops and the possibility of suing to recover the fee is considered. While malpractice insurance carriers and risk managers will always advise you to never sue for a fee, some firms will still make to decision to proceed. In the interest of reducing the likelihood of a malpractice counterclaim, here are a few tips to keep in mind when considering this option.

- Have someone other than the attorney responsible for the file make the final decision as to whether to sue because once a client is in your pocket for a significant sum, it is nearly impossible to be objective about the decision. This independent attorney – either one in the office who has had no relationship with the file or a member of the bar who does collections work – should review the case to assure that there are no facets of the work that could be questioned and that the client's matter was handled with the utmost diligence.
- Don't make a decision to sue for fees based upon the following rationalization: "I did good work, I got a good result and I deserve to be paid." Instead, make a determination as to the client's ability to pay and if the client does not have the financial wherewithal to do so, walk away.
- Don't handle the fee suit yourself. Avail yourself of the objectivity of an experienced attorney whose goal is to protect your interests and remain objective throughout. This depersonalizes the matter for both sides and will reduce the likelihood of a counterclaim.

These suggestions are not meant to be the final word on effective collection practices. Following them will also not guarantee that you never will have a fee dispute. However, if you simply ignore these rules, you may very well give a disgruntled or unscrupulous client the opportunity to take a shot at your malpractice insurance coverage (via countersuit) once you have filed a fee collection suit. Play it safe – don't give them that opportunity.

## **9) Inadequate Documentation of Work**

Document everything you do. Send a letter or make a note every time you ask for something. That way, there's a paper trail and you can cover yourself. It eliminates misunderstandings and



it covers you in case there is a problem later. It may seem like an inconvenience, but you'll be glad in the long run. Something as simple as "This letter confirms that ..."

"Paper" your clients. Generally, send a copy of everything to the client. That way they know you're working for them. It will help to eliminate calls from clients who are simply checking on the status of their case. As mentioned earlier, clients want to be kept informed. Don't wait for them to call and ask how things are progressing. Regularly send copies of relevant documents to your client. Respond to e-mails with an "I'll check on this tomorrow" - or "I'm waiting to hear back from John Smith." You may not have the answer yet, but the client knows you're on top of it, and you're making progress.

Create a simple "plain vanilla" transmittal letter that can be generated automatically. By using document assembly programs, or practice management software, you can easily and quickly draft a letter (or e-mail) that you can use to transmit copies of documents, pleadings, etc. The client will be much happier to pay the bill if they know you've been working hard for them.

Confirm advice in writing. Whenever you give your clients advice they choose not to follow, get it in writing! To protect yourself, you may even want them to sign a copy of the letter outlining the situation and keep it in the file virtually forever. True story – a judge in Colorado Springs had a criminal defense practice before he sat on the bench. He represented a bad guy in a criminal matter. Later, he contacted his client and explained that he could have the conviction expunged. The client declined (maybe to save money and time). Later, Colorado institutes the "Three Strikes and You're Out Rule." Now, of course, the former client wishes he had taken his lawyer's advice and cleared the first offense from his record. The former client went after his lawyer (who was now the sitting judge). Fortunately, the judge had kept an original, signed copy of a letter to the client along the lines of "I advised you that I could do the work necessary to remove this offense from your record. You declined." – It was signed, and dated, and undoubtedly saved the judge a lot of time and worry.

Make sure your bills properly reflect the work you've done, and the time you've spent. Some states (Colorado is one) do not allow for "nonrefundable retainers." The client has a right to fire you, and if their matter is still in progress, you may have to prove what you've done and how much time you've spent in order to get paid. Even if you do contingency fee work, it's still a good idea to keep track of your time.

Develop and implement a file retention program. Make sure the client knows what happens to their file at the end of the representation. Be consistent between clients and files. You don't want to have to answer why the Smith file (with which there was a problem) has been completely destroyed, but the Jones file (same time frame and type of case) is still intact. Inevitably, there will be a problem surface with the Smith file and it will look like you deliberately shredded evidence of a problem.

The bottom line is, good practice management practices will help you get more clients, have more fun practicing law, make more money, spend more time on important pursuits, and help you sleep better at night!!

## **10) Coming Technology Traps**

Computers are wonderful tools. Their use allows law firms to be far more efficient than they would be without such tools. That said, computers, or more properly, how computers are used can create exposure for a law firm. The following are two technology traps to be aware of and information on how to avoid them.

### ***Metadata***

Metadata in and of itself is not generally a problem as long as electronic documents stay within a law firm. In fact, metadata can be quite useful to individuals who are collaborating on a document. Problems can arise, however, once electronic documents are sent outside a firm.

In case you are unfamiliar with the term metadata, it is extraneous information about an electronic document that remains attached to the document. Unfortunately, metadata is not always visible, and thus it is easy to overlook. As an example, metadata tracked with a document created in Microsoft Office (note: metadata is not unique to Microsoft products) includes your name and initials and the names of your company or organization, your computer, and your network server or hard disk on which you saved the document. In addition to this tracking information, metadata also includes other file properties and summary information, non visible portions of Object Linking and Embedding (OLE) objects, the names of previous document authors, document revisions, document versions, template information, hidden text, comments, macros, hyperlinks and routing information. This kind of information, once outside of a law firm, could be problematic. You might be unintentionally sharing confidential information. Perhaps your true bottom line in a settlement is discovered from a document edit history that has been restored after sharing a document with opposing counsel.

There are products available that will assist in the removal of metadata from documents prior to sending. Understand, however, that a perfect or total solution to the metadata problem does not exist. Metadata is useful and often necessary internally. A solution that completely removes metadata will significantly reduce productivity. The benefit of using metadata removal programs is that they allow you to create a “clean” version of a document that is separate from the original. Caution is in order; however, you must remember to pay attention when selecting which electronic file to send out.

Finally, for those of you using Microsoft Office 2003/XP, an add-in is available that will enable you to remove permanently hidden and collaboration data, such as change tracking and comments, from Microsoft Word, Microsoft Excel, and Microsoft PowerPoint files. More information is available at:

<http://www.microsoft.com/downloads/details.aspx?FamilyID=144e54ed-d43e-42ca-bc7b-5446d34e5360&displaylang=en>

Listed below are several companies and their metadata removal product name. This list is intended not to serve as an endorsement of any product. It is simply a starting place in researching metadata removal solutions to meet the needs of your law firm. If you are not already addressing the issue of metadata removal, now is the time to begin.

Esquire Innovations: iScrub  
Kraft Kennedy & Lesser: ezClean  
Payne Consulting Group: Metadata Assistant  
SoftWise: Out-of-Sight

### ***Delete is not Delete***

Deleted files don't go anywhere once deleted. Unless deleted files are appropriately overwritten, they remain available for possible discovery. This could be disastrous for a law firm.

At the end of the day all network users must abide by a simple rule while on the firm's network or using any computer that might touch the firm's network such as a Blackberry, PDA, laptop, or home computer that is used for business even on a limited basis. Again, the information on any of this hardware is potentially discoverable in a malpractice claim. The rule is this. If you are not comfortable having a personal or work related email read by a jury, an electronic note to a file read by the client, or your personal browsing history known publicly don't write the email or note and don't visit the Internet site. Clients have obtained copies of email that should not have been written, juries have been presented with incriminating email, and careers have been ruined once personal Internet browsing habits became known publicly.

For all practical purposes, users are recording everything that they do on a computer and erasing the record once created can be extremely difficult. Worse yet, electronic erases leave their own record of events. Responsible use of technology is the safe play.

### ***Portable Storage Devices***

Portable storage devices are here to stay; however, there is a downside to their use. Given the ever-increasing proliferation of these products, their rapidly growing storage capabilities coupled with their ever-shrinking size, the time has come to address the security concerns these devices create. Do not take this concern lightly. Portable storage devices can be a real threat and this isn't just about losing one that had confidential client information on it.

A greater concern is over the ability these devices give someone to covertly introduce programs and/or files to, or to remove them from, the network. Now, I'll admit that the covert introduction of programs to the network is not as serious a concern if the computer network is appropriately secured. While a program could be introduced behind the firewall, the security programs

running on the network will in most instances catch the intentional or unintentional installation of a virus or other malware.

The real concern for is the unauthorized and covert removal of files. Think how easy it would be for a disgruntled employee to download files to an iPod Nano and slip it into a pocket and walk out the door. What if someone offered to pay an employee for copies of electronic files? How would you ever know the data had been stolen? When you consider that the new iPod, just as one example, has a 60-gigabyte drive, the amount of data that could be copied and taken is quite large.

One approach of addressing the concern would be to consider banning or restricting the use of portable storage devices through a written policy. Established guidelines enable you to define what is appropriate and not appropriate in terms of what types of devices are acceptable and when or how they may be used. This would also allow you to establish a security policy that might mandate using only devices that are password protected and/or encrypted, require that only devices provided by the firm may be used in the office and that the devices must be signed in and out.

While it is possible to disable USB ports on some or all PCs within a firm or to restrict the use of portable storage devices to a read-only format, such steps are in most instances possible only through the use of third-party software. Fortunately, the number of products coming to market are increasing and getting better in terms of options and capabilities. My best advice, if you wish to go beyond just establishing a policy, is that you discuss the issues with your IT consultant and learn what your options are.

### ***Stolen Laptops***

What information would be compromised if your laptop were stolen? Would client confidences such as a pending merger, social security numbers or financial information be revealed? What about your own office passwords, dial in numbers, or network IP addressing schemes? If that's not enough, what about all your personal information such as passwords, user names, personal files, credit card numbers and who knows what. The list could go on and on. A lost or stolen laptop could be disastrous, particularly if sensitive files were not encrypted which is so often the case.

There is still one line of defense that could be deployed to try to mitigate the damage after the laptop is gone. Stealth software programs are available that enable a tracking center to locate your laptop (once reported as missing) whenever the missing laptop is connected to the Internet. In short, these companies work with the authorities and Internet service providers to track and recover your laptop. A few programs also allow you to retake control of your data even though the laptop is no longer in your possession. You are thus able to remotely recover, delete or encrypt sensitive files while rendering the missing computer useless by locking the keyboard and mouse.

If a lost laptop would be a nightmare for you, consider using this line of defense. The costs are reasonable. Several companies worth considering are listed below:

zTrace Technologies at [www.ztrace.com](http://www.ztrace.com)

Absolute Software at [www.absolute.com](http://www.absolute.com)

Stealth Signal at [www.stealthsignal.com](http://www.stealthsignal.com)

Given the number of laptops reported stolen each year, I would consider this money well spent if your laptop contains any sensitive information at all. A call to inform your client that your laptop was stolen and the client files were not encrypted is a call I would not want to make. This approach might make that call a little easier should the worst happen.