Risk Management 2018

“There once was a man in a hot air balloon”
“I promised to meet a friend for lunch and I am late. But I don’t know where I am. Can you help me?”

“Certainly. You are in a hot air balloon, approximately 50 feet above the ground. Your location is 45 north latitude and 50 west longitude.”

“You must be a lawyer.”

“Well, the information you gave me is precise and correct . . . and of absolutely no use to me.”
“You must be a client.”

“Well, you made a promise you do not know how to keep. You don’t know where you are or where you are going. The fact of the matter is you are in precisely the same predicament as before we met.”

“But now, your problems are somehow my fault.”
“And Grayson Allen is a cheater.”
Introduction

**Bad News:**

Claims Increasing

**Good News:**

Public Perception Declining

"Wait! First, his attorney."
Rules of Professional Conduct

• The “New” Rules

• If you haven’t already, get a copy and read them

• Compliance is a good risk management strategy

• Compliance does not insulate you from liability

A. Competency in Area of Practice

Rule 1.1: Competence

• (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
A. Competency in Area of Practice

Rule 1.1: Competence

• (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

A. Competency in Area of Practice

Mandatory Continuing Legal Education

New Attorneys → 32 hours over two years

Old Attorneys → 24 hours over two years
A. Competency in Area of Practice

Rule 1.1: Competence

- (c) A lawyer shall not intentionally:
  1. fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
  2. prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Rule 1.3: Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not neglect a legal matter entrusted to the lawyer.
- (c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.
A. Competency in Area of Practice

Percentage of Claim by Type of Error

- Client Related: 16%
- Intentional: 12%
- Other: 2%
- Substantive: 44%
- Administrative: 26%

A. Competency in Area of Practice

ERRORS BY GROUP

**ADMINISTRATIVE ERRORS**
- Failure to Calendar: 11.14%
- Failure to React to Calendar: 3.48%
- Failure to File: 4.21%
- Procrastination: 4.82%
- Clerical Error: 1.45%
- Lost File: 0.66%

**INTENTIONAL WRONGS**
- Malicious Prosecution: 4.19%
- Fraud: 4.16%
- Libel: 1.51%
- Civil Rights: 1.73%

**CLIENT RELATION ERRORS**
- Failure to Obtain Client Consent: 9.19%
- Failure to Follow Client Instructions: 5.59%
- Improper Withdrawal from Representation: 1.45%

**SUBSTANTIVE ERRORS**
- Failure to Know Deadline: 6.83%
- Planning Error: 7.66%
- Failure to Know Law: 9.47%
- Inadequate Investigation: 8.96%
- Record Search: 4.73%
- Conflict of Interest: 3.35%
- Tax Consequence: 1.84%
- Math Error: 0.76%
A. Competency in Area of Practice

Administrative Error
– Pitfalls to be avoided include:
  • Human error
  • Insufficient processes
  • Infrastructure issues
  • Communication breakdowns

Avoiding Administrative Error through Docketing Control Procedures
– Best Practices include:
  • Enter appearances and deadlines into docketing software immediately upon learning of it
  • Scheduling reminders at sufficient intervals
  • Training staff and restricting access to docketing systems to trained staff
  • Contingency plan for staffing problems
  • Parallel or backup docketing system (have an associate monitor docket as well)
A. Competency in Area of Practice

Substantive error

ABA ➞ 47% of claims
NYS ➞ 31% of claims

Claims by area of law:
- Personal Injury – plaintiff 20%
- Real Estate 16%
- Family 10%
- Personal Injury – defense 10%
- Estate 9%
- Collections – bank 8%
- Corporate – business 6%
A. Competency in Area of Practice

Areas of Practice

- Criminal 4%
- Corporate/ Business Organization 6%
- Collection & Bankruptcy 7%
- Bus., Transaction/ Commercial Law 6%
- Other 12%
- Personal Injury 22%
- Real Estate 20%
- Defense 3%
- Family Law 10%
- Estate & Trusts 10%
- Appeal 5%
- Post Trial 5%
- Trial 13%
- Settlement 15%
- Pre-Trial 15%
- Commencement of Action 47%

Litigation Activities:
A. Competency in Area of Practice

Penalties for Ethics Violations vary from censure to disbarment.

Cooperating with the grievance committee can help, lying will hurt.

*In re Ruden*, 265 A.D.2d 25 (2d Dep’t 2000)

*In re Carlin*, 259 A.D.2d 98 (2d Dep’t 1999)

*In re Morgenstern*, 260 A.D.2d (2d Dep’t 1999)

*In re Agola*, __ A.D.3d __ (4th Dep’t March 31, 2015)
A. Competency in Area of Practice

Referral to competent attorney

To fee split or not to fee split, that is the question . . .

Rule 1.5 (g) governs the instances in which a lawyer may refer a case to another lawyer and still share in the fee.

A. Competency in Area of Practice

Referral to competent attorney

Fees may be split when:

• The division is proportionate to the services performed by each lawyer, or the lawyer assumes joint responsibility for the representation;

• Client consents in writing to the division of fees and shares for each lawyer; and

• The total fee is not excessive.
Referral to competent attorney

Division of Services vs. Joint Responsibility . . .

• The referring party can only get paid for the work he or she actually performs unless, the originator agrees to remain jointly responsible for the representation and outcome.

• Joint representation creates problems of competency and diligence.

A. Competency in Area of Practice

Referral to competent attorney

If parties agree to joint representation:

• Both lawyers must remain abreast of the issues in the case;

• Both lawyers should review briefs and sign-off on arguments and strategy; and

• Both lawyers can be held liable for malpractice.
A. Competency in Area of Practice

Risks of Office Sharing

• Rule 7.5(c) – Prohibition Against Appearance of Law Firm Where None Exists
• Rule 5.1 – Responsibilities of Law Firms and Partners
• Rule 1.10 – Imputed Conflicts

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A. Competency in Area of Practice

Risks of Office Sharing

• Rule 1.0(h) provides:
• “Firm” or “law firm” includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.
A. Competency in Area of Practice

Risks of Office Sharing

• Lawyers sharing offices should use
  – Separate names and directory listings
  – Separate letterhead
  – Separate signage
  – Separate advertising

A. Competency in Area of Practice

Risks of Office Sharing

• Lawyers sharing offices should not share
  – Staff
  – Computer networks
  – Phone systems
  – Printers, copiers and fax machines, or
  – File storage locations where another attorney has access
File Closing Procedures

• Ensure orders and judgments filed;
• Return all original documents to client;
• File UCC-1’s and calendar renewal;
• Comply with terms of confidentiality orders re: discovery destruction;
• Confirm conflicts information for file updated;
• Deduplicate file;
• Create file inventory list;
• Calendar file destruction if allowed.

Document Retention Policies

• Rule 1.15 Requires Seven Year Retention of:
  – Records of deposits and withdrawals from trust, escrow and operating accounts;
  – Records of sources of funds deposited into accounts and descriptions of uses of withdrawals;
  – Copies of retainer and compensation agreements;
  – Copies of statements and invoices to clients;
  – Copies of payments to professionals retained by lawyers;
  – Copies of all retainer and closing statements filed with Office of Court Administration
  – Checkbooks and check stubs
A. Competency in Area of Practice

Document Retention Policies

• Further Considerations:
  – Client expectations about retention of documents;
  – Clients internal rules and industry regulations on file retention;
  – Return originals to clients;
  – Include policy in retainer agreement or engagement letter.

Protecting Your Practice:
Risk Management for Solo/Small Firms

New York State Bar Association

Buffalo, NY
November 18, 2009
B. Conflicts of Interest

- Increasing source of exposure
- Consent not always enough
- Subjective analysis
- Hindsight

Milbank, Tweed, Hadley & McCloy v. Chan Cher Boon

Law firm hired by Chan, the agent for Mrs. Leo in purchase of FOCO stock

Two stage deal worth $52,000,000

Swiss franc against dollar increases first stage to $56.6 million

Potential re-negotiations – Chan and Leo’s fall out and he fired
B. Conflicts of Interest

Milbank, Tweed, Hadley & McCloy v. Chan Cher Boon

Milbank advised that Chan is fired
Milbank advises it will not represent either Chan or Leo
Leo wants to proceed, but needs valuation
Milbank announces it is representing Chan
Leo’s lawyer warns Milbank

B. Conflicts of Interest

Milbank, Tweed, Hadley & McCloy v. Chan Cher Boon

The Court applies the “prophylactic” rule.
Damages can be speculative. No basis needed.
We just don’t like what you did!
B. Conflicts of Interest

Milbank, Tweed, Hadley & McCloy v. Chan
Cher Boon

Milbank represents Chan anyway
Chan, with Milbank’s help, blocks Leo from closing second stage
After maneuvering, Chan buys assets for himself
Milbank sues Chan for legal fees
Chan impleads Leo

B. Conflicts of Interest

Milbank, Tweed, Hadley & McCloy v. Chan
Cher Boon

Leo counterclaims against Leo and Milbank
Jury awards Leo $2,000,000 to Mrs. Leo
So much for the attorneys fees
C. Supervisory Responsibilities of Firms and Attorneys

Under the Rules, you are your brother’s or sister’s keeper

- ethical issues
- substantive performance
C. Supervisory Responsibilities of Firms and Attorneys

- systems to review work
- procedures to respond to ethical issues
- leading by example

C. Supervisory Responsibilities of Firms and Attorneys

Vicarious responsibility

Rules
- ordered, directed or ratified
- supervisory authority and actual or constructive knowledge
C. Supervisory Responsibilities of Firms and Attorneys

**Tort**

- partner - joint and several
- P.C. or L.L.P. - personal or direct supervision
D. **Client Relations**

- Choosing a client
- Client expectations
- Clients’ rights
- Clients’ responsibilities
D. Client Relations

- Choosing a client
  referral source?
  prior attorneys?
  ability to pay?
  expectations?
  sniff test

Client Relations Do’s and Don’ts

- DO treat your client with courtesy
- DO keep appointments promptly
- DO return phone calls
- DO complete work as promised
- DO keep client informed
- DO explain clearly and in writing what you will do and what you will charge
- DO put all advice in writing
Client Relations Do’s and Don’ts

- DON’T make your client nag you
- DON’T create unreasonable expectations
- DON’T take any material action without express consent of client
- DON’T sue client for a fee (use fee dispute resolution)

Client Relations Do’s and Don’ts

- DON’T sue client for a fee (use fee dispute resolution)
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D. **Client Relations**

**Engagement**

- identify the client
- state the scope
- included and excluded issues
- billing rates and practices
- dispute resolution
- client acknowledgement

**Non-engagement**

- prompt notice in writing
- no advice on merits
- statute of limitations
- rights to see another lawyer
D. Client Relations

Disengagement

• reason for disengagement
• transfer of file
• billing issues
• client acknowledgement

D. Client Relations

Informed Consent

• full disclosure
• put in writing
• acknowledged by client
• updated as appropriate
D. Client Relations

Confidences and Privileges

- Confidence
  Broad based protection of any knowledge gained by attorney or his/her staff
- Privilege
  Statutory protection of actual advice given by lawyer to client under CPLR

D. Client Relations

Limiting Attorney Liability to Client
(when the relationship has gone sour)

- cannot do prospectively
- full consent
- recommend separate counsel
- advise malpractice insurer
E. Relations with Others

- Civility
- Relations within firm
- Partners

G. Billing and Collection

- Accurate records
- Prompt billing
- ADR for disputes
- Don’t sue clients
**H. Proper Documentation**

**Communications with client**

- engagement, conflicts, strategic decisions, analysis and development
- keep evidence of all communications
- maintain evidence of communications even after you surrender or close file

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**File Retention**

- 7 years: Bookkeeping and checking account records, retainer and closing statements

**Closing the File**

- check file to confirm all work done, original documents returned to client, etc.
- dispose of records “when lawyer has no other legal duty to keep the material”
Electronic Data

- backup system
- responsibility clearly defined

Escrow Accounts

- Fiduciary duty to hold funds of another separately (IOLA)
- Know rules and follow strictly
- Frequent source of disciplinary action
Conclusion

Follow the Rules . . .

Avoid malpractice and grievances

B. Conflicts of Interest

Conflict Procedures

• identify possible conflicts
• rules require a system
• current engagements
• past relationships
• current and future members of firm
• related entities
• all new engagements
• analysis by someone else
Program Schedule

9:10 - 9:35  Common Sources of Claims
9:35 - 10:25  Risk Management
10:40 – 11:55  Principles and Litigation Strategy
11:55 – 12:45  Insurance Coverage

Part II

D. Client Relations
E. Relations with Others
Part II

**F.** Docket Control

**G.** Billing and Collection

**H.** Proper Documentation

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**B. Conflicts of Interest**

**Conflicts Analysis**

who is the client?

- entity not individuals

- communicate clearly when entity and individuals involved
B. Conflicts of Interest

Interests of attorney

- affect lawyer judgment
- if conflict, need consent with full disclosure

B. Conflicts of Interest

Conflicts analysis
Transaction with clients e.g., investment in start-up
- fair and reasonable
- full disclosure
- recommend separate counsel
- written consent
B. Conflicts of Interest

Clients with adverse interests

• able to represent both
• consent of both
• full disclosure

B. Conflicts of Interest

Conflicts Analysis

• present and former client
  – confidential information
  – laterals with confidential knowledge
B. Conflicts of Interest

New Model Rules adopted in New York