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Proactive Steps to Mitigate Liability Risks to Your Practice

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So long as humans are practicing law, mistakes will happen; but well-prepared attorneys are proactive and take the affirmative steps to put themselves in a position to minimize the danger to the client and the case.

Plan in advance to avoid having to send a CYA letter later. It is important to remember the basics and review your practices so that your administrative processes do not lead to potential malpractice claims down the road. Remember to take the time to ensure that you and your administrative staff recognize the potential pitfalls before it is too late. Here are some practical tips:

1) Organize your documents. The days of overstuffed file rooms and file folders are over. In the last twenty years, the practice of law has progressively moved to digital file management. The last two and a half years certainly expedited the process in terms of attorneys and staff needing to share documents electronically. As the practice of law now relies quite heavily on the digital management of files, it is fundamental for you to have a system! If you do not have a system – get one! There are several reliable office management systems currently on the market and more popping up each day. For those concerned with the potential cost associated with a third-party's product, keep it simple. Take advantage of the operating system you use and create client folders, folder your emails, and use a standardized labeling system for your documents and your client documents. Although our workplace is increasingly digital, not every client has readily available digital documents. The file cabinet still endures. Make sure client files are accessible and accurate. And do not mark up the originals you receive from a client. Make a copy or have your client make a copy. Do not put yourself in the position of having to produce relevant documents that contain your work product. Your organized file will save you time and future headaches from clients and opposing counsel alike.

2) Calendar your dates. Part of keeping an organized filed is making sure your important dates are calendared. It seems simple but setting up and adhering to a calendar system is one very easy way to avoid a serious malpractice claim. Oftentimes a client may come to you and not know a precise date that their cause of action accrued. Their car accident was "about a year ago." They have been fighting over a contract "for the last few years." It is your duty to investigate the claim fully and mark down that date. You have an obligation to fully investigate the facts and circumstances of your client's case. Ziegelheim v. Apollo, 128 N.J. 250 (1992). The obligation becomes more important when you are working with multiple clients - keep a separate statute of limitations calendar. In those instances when, after investigating the client's potential claim, you still cannot ascertain a date of accrual – maybe a discovery rule cause of action - err on the side of caution. When it comes to the statute of limitations, it is always be better to be two months early than one day late. One administrative practice to prevent against this type of claim is to use client intake forms. Have the client fill out the who, what, when, where, and how. Just remember, you still have an obligation to make sure the information the client provided is correct.

3) Memorialize client conversations. The defense of a malpractice case always benefits from the existence of a document that can back up the facts. A client who cannot remember the specifics of a substantive conversation is no match for an attorney who memorialized that conversation. From a malpractice point of view, memoranda to file can act like a CYA in advance. A good habit to incorporate into client meetings and conversations is memorializing the subject of discussion once you hang up the phone. An email sent the same day to a client regarding the contents of your discussion can eliminate any "they said/they said" arguments flowing from an unhappy client. Even better than a memo to file can be a simple email to the client confirming the conversation. "Dear Client, as we discussed earlier…please let me know if you have any further questions." Clients, for the most part, are not attorneys. It can be difficult for clients to understand legal concepts the first time around. You might think you provided the client with a phenomenal example of causation and why their cause of action had no legal basis, but all the client may hear is that their case is gone.

4) Revise your retainer agreement. First and foremost, have a written retainer agreement with all clients. Secondly, make sure that the retainer agreement covers the specific legal matter that you are working on for the client. Take the time to explain to a client the specifics of the retainer agreement and provide the client with the opportunity to ask questions and understand what is contained in the document. Doing so places you in compliance with your professional obligations. Plus, since you have done #3 and memorialized what you discussed with the client, there cannot be any dispute as to the intention of the Agreement. The retainer agreement is the opportunity, at the onset of the relationship, to outline in detail the boundaries of the attorney/client relationship/representation. RPC 1.2(c) states "A lawyer may limit the scope of

the representation if the limitation is reasonable under the circumstances and the client gives informed consent." New Jersey Courts have held that "if the service is limited by consent, then the degree of care is framed by the agreed service." Lerner v. Laufer, 359 N.J.Super. 201, 217 (App.Div. 2003). Provided that the limited scope is explained and agreed to by the client, an attorneys have the ability to tailor the scope of their representation. So do it! There can exist a large gulf between what the client expects to be provided in terms of attorney services versus the services actually defined in the retainer agreement. The Retainer provides the attorney an opportunity at the outset to set client expectations. Do not assume that being overly inclusive or making generalizations of services provided will be beneficial. Remember, it is fine to work off of a form document, but you must not forget to tailor it to fit the client's specific purpose.

5) Manage expectations. Managing a client's expectations begins at the outset. While you can define the services provided to your client, managing expectations can often be difficult. Take the time to not only be an advocate for your client but also an educator. The litigation process and the legal basis for claims can be foreign to clients. By familiarizing the client with the process instead of simply forwarding discovery requests or motion papers you can reduce the second or third guessing that comes with unfamiliar participants. Clients can handle realistic expectations. Take the time to explain to the client the risks in their case, the potential for adverse outcomes, and as noted above, memorialize those conversations. By advising the client of the risks, your aim is to keep a client grounded in realistic expectations as to the end result. Managing client expectations goes further than just case evaluation; it applies to client communications as well. Set reasonable boundaries on client communication. A good standard is to never let a client communication sit for more than 24 hours without responding – even if that response is to set up a more convenient time to have a substantive discussion about their case. Of course, there will always be outliers who cannot manage their own expectations or abide by the boundaries established, but with your well-drafted retainer agreement, you have given yourself the availability to terminate the representation without damage to your client's case.

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