

# ACI's Advanced Forum on LPL/Legal Malpractice

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## Updates in Law Practice Risk Management

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CNA Global Specialty Lines

Tweeting about this conference?

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# Client Intake

Vigilance for the Wolf in Sheep's Clothing

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# Control Exposure by Rejecting “*Bad*” Clients

Why is it important to carefully vet potential clients at the client intake stage?

- Fiduciary duty
- "Best interests" of client
- Duties to Prospective Clients
- Privity



# The Cynical Perspective

Potential client → Client → Potential Plaintiff



*Privity is crucial because it is most often required for professional liability*

# Factors in Determining the Existence of an Attorney-Client Relationship

- Engagement letter
- Written communication evidencing attorney-client relationship
- Payment for legal services
- Free legal advice
- Limited representation
- *CLIENT'S* reasonable belief



# Engagement Letters – A Re-Introduction

An attorney seeking to limit the scope of an engagement must explicitly define the activities being undertaken

Attorneys must take care to advise the client as to the areas beyond the scope of representation and the potential need for the client to seek independent counsel (e.g. appeals, loan due diligence)



# Continuing to Document the Attorney-Client Relationship

- Awaiting Further Action Letters
- Non-Engagement/Declination Letters
- Critical Strategy Letters
- Matter Closure Letters



# The Importance of Matter Closure Letters

- Lets client know that matter is concluded, and provides an opportunity to clarify who is responsible for future follow-up items. Barnes v. Turner, 278 Ga. 788, 606 S.E.2d 849 (2004).
- Clarifies whether there is a continuing attorney-client relationship
- Marks a clear period in time after which the attorney is no longer responsible for the matter
- Treats matter as closed for conflict purposes. Important distinction!
- Statute of Limitations implications





# What if I Do Not Realize That I Have a “*Bad*” Client Until After the Representation Begins?

## **ABA Model Rule 1.16: Declining or Terminating Representation**

### Mandatory Withdrawal

- violation of Rules of Professional Conduct or other law
- lawyer’s physical or mental condition materially impairs ability
- client fires the lawyer

### Permissive Withdrawal

- withdrawal does not have material adverse affect on client
- client persists in course of conduct that is fraudulent/criminal
- client has used the lawyer’s services to commit fraud/crime
- client takes action that lawyer finds repugnant/fundamentally disagrees
- client fails to fulfill an obligation to lawyer and has been warned
- unreasonable financial burden or unreasonably difficult
- other good cause



# Administrative Errors

The Benefits of a Holistic Law Firm

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# Controlling Errors Arising From Administrative Staff

- In 1999, the Administrative Errors segment was at an all-time low for the study (16.43 percent)
- Since 1999, Administrative Errors segment has steadily climbed to reach its all-time high (30.13 percent), as of 2011

- Substantive Errors – 45%
- Administrative Errors – 30%
- Client Relation Errors – 15%
- Intentional Wrongs – 10%

Source: ABA Profile of Legal Malpractice Claims, September 2012



# Hypotheses for Trend

- Infusion of technology in law practice
- Failure to adopt uniformity
- Courts' adoption of technology
- Economy – Real Estate Claim Uptick
- Increased mobility of lawyers
- Increased mobility of non-lawyer staff
- M&A of law firms



# ABA Model Rule 5.3: Responsibilities Regarding Non-Lawyer Assistance

Lawyers in a firm must ensure that the conduct of non-lawyers in the firm is compatible with the professional obligations of the lawyer.

- **Lawyers with Managerial Authority in a law firm** - shall establish internal policies and procedures to provide reasonable assurance that non-lawyers will act in accordance with the Rules of Professional Conduct;
- **Lawyers with Direct Supervisory Authority** - shall make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer
- **Lawyers shall be held responsible for the conduct of a non-lawyer that violates the Rules of Professional Conduct if:**
  - the lawyer orders or ratifies the specific conduct involved; or
  - has managerial authority or direct supervisory authority in the law firm, and knows of the conduct at a time when its consequences could have been avoided but fails to take reasonable remedial action.



# Risk Control Techniques to Mitigate Administrative Error Claims

- **Calendar and Docket Controls**
  - Involve multiple layers of checks and balances
  - Systematic review by multiple personnel
- **Computerized Software**
  - Cannot replace hands-on management
  - “Data out” only as good as “Data in”
- **Employ Uniform Processes**
- **Avoid Legal “Dabbling”**
- **Train, Retrain, Retrain, etc.**



# Growing Area of Concern

## ABA Model Rule 1.6: Confidentiality

- **Every member of a law firm, including legal staff, has an obligation to keep client information confidential. Protected information includes:**
  - Confidences and secrets of a client
  - All information which pertains to the attorney-client relationship, even if not learned during the relationship and even if disclosure would not embarrass or be detrimental to the interests of the client
    - E.g., information regarding case strategy or evidence
  - Identity of client and other personal identifying information of the client
  - **Exception:** Information may be disclosed with client consent
- **New Risk: Social Media!**



# Avoid Suing Your Client for Fees

- If unpaid bills get too large, a fee action will be inevitable
- The firm will pay the costs of collection
- There will be a counterclaim for malpractice
- The firm will pay its deductible
- The firm will lose billable time
- Disgorgement

