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16 Attorney Liability Risk Management

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I. [16.1] SCOPE OF CHAPTER

This chapter identifies the basic kinds of risk management systems and procedures that will reduce the threat of malpractice claims, bar grievances, and third-party claims.

This chapter refers to the Illinois Rules of Professional Conduct of 2010 (RPC). The Illinois Rules of Professional Conduct are not always the same as the corresponding rules of other state and federal jurisdictions. Counsel is advised to consult the rules applicable to the jurisdiction in which he or she practices.

II. [16.2] NEW BUSINESS SCREENING AND INTAKE

Some clients are more likely than others to bring a malpractice claim or present other professional responsibility problems for the lawyer. Some kinds of cases present a greater risk for errors and omissions. Before agreeing to accept a new matter, counsel should evaluate the risk of an eventual malpractice claim resulting from the engagement. Even when risks are identified, declining the engagement may not be necessary if counsel can control the factors that could create a dissatisfied client or lead to counsel making an error or omission. Sometimes, however, the best risk management policy is simply to say no.

A. [16.3] Identification of Ethical Issues

One of the first steps an attorney should take in determining whether to accept or decline a new matter is to identify potential ethical issues, such as the presence of a conflict of interest. If the representation of the potential client would be adverse to a present or former client or would be materially limited by the lawyer's relationship with another client or third party or the lawyer's own interests, the firm may be required to decline the representation. Sometimes, the representation may be accepted, but only after full disclosure of the conflict to the potential client, current client, or former client and after receiving the consent of the affected party or parties.

RPC 1.7, which deals with conflicts of interest among current clients or between a current client and the lawyer, provides:

> **(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**
>
> **(1) the representation of one client will be directly adverse to another client; or**
>
> **(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**
>
> **(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:**

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

RPC 1.9, which deals with conflicts of interest between current clients and former clients, provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Even if there is no conflict with a present or current client, a lawyer should be careful during the initial interview or consultation with the client. RPC 1.18 identifies a lawyer's duties owed to prospective clients. RPC 1.18 provides:

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Under the provisions of this rule, if a lawyer declines the representation and the potential client has disclosed confidential information to the lawyer, this information is protected by the attorney-client privilege, and the lawyer may be disqualified from representing parties adverse to the prospective client in the same or a substantially related matter as if the lawyer had represented the client. *King v. King*, 52 Ill.App.3d 749, 367 N.E.2d 1358, 10 Ill.Dec. 592 (4th Dist. 1977).

If actual or potential conflicts are identified, the attorney should consider entering into an agreement with a prospective client that would limit the potential for future disqualification. A lawyer may ask the client to agree in writing that the lawyer conducting the initial interview will obtain only the information needed to evaluate whether an ethical problem exists.

Under some circumstances, a prospective client may be able to sign an acknowledgment that no confidential information has been disclosed regarding the subject matter of the potential representation. If the lawyer has not received any confidential information, there should be no basis for disqualification if the lawyer later represents an adverse party regarding that matter.

When asked to represent multiple clients in the same matter, the lawyer should carefully consider whether these clients have interests that are inconsistent with each other. If a conflict exists, or is even perceived, the lawyer could face a motion for disqualification as well as a possible forfeiture of fees.

The concept of adversity is much broader than many lawyers believe. Moreover, conflicts are not limited to situations of present, direct adversity. For example, under RPC 1.7(a), a lawyer has a conflict when "there is a *significant risk* that the representation of one or more clients will be *materially limited* by the lawyer's responsibilities to another client." [Emphasis added.] This requires a lawyer not only to look at the present situation, but also to consider future circumstances.

Difficulties most frequently arise out of three situations: (1) when one client has a claim or potential claim against another client; (2) when there is a significant disparity in the relative merits of the clients' cases; and (3) when the clients have different goals, ideas, or attitudes toward the legal matter at hand. In each of these situations, the lawyer will be hard-pressed not to favor one client over another, and some client is likely to feel shortchanged if problem areas are not identified and addressed at the outset of representation.

Inasmuch as multiple representation generally is in the lawyer's own economic interest, explaining its advantages to the clients usually comes easily. For example, shared legal expenses or costs, better control of the legal problem, and the comfort of not being in it alone come readily to mind. It is in the explanation of the risks that lawyers often fall short, but a candid explanation of the risks of potential clients is in the lawyer's own economic interest.

Counsel should not make the mistake of failing to disclose a significant risk in the belief that the problem may never materialize. Problems addressed at the outset of representation often can be resolved. If the difficulties are of a type that cannot be initially resolved, they will only fester through time and neglect.

B. [16.4] Screening New Clients

Experience shows that many claims may be avoided by systematically evaluating potential new business from a risk management perspective before it is accepted. A good argument can be made that bad clients are the number one cause of legal malpractice actions. Thus, malpractice avoidance begins with careful client selection. A bad client is one who poses an unreasonably high risk of suit against the lawyer by the client or someone else. The risk may arise out of basic dishonesty, recklessness, desperation, or a plain and simple predisposition to sue. Whatever its root, the lawyer who fails to recognize a serious risk and deal with it appropriately is likely to be sued.

The attorney-client relationship is consensual. One need not agree to represent every individual who walks through the door; neither must one handle every matter through to its conclusion. Counsel should make a realistic evaluation of client risk and respond to the situation in an appropriate manner.

Counsel should adopt a written procedure for screening and evaluating every new client and matter. If the firm is a sole proprietorship, the solo lawyer must rely on his or her own judgment to evaluate potential clients and cases. For firms of two or more lawyers, the judgment of another can help identify potential problem clients or matters. For this reason, the acceptance of a new

client or matter always requires the approval of another partner. In larger firms, a designated partner (other than the lawyer seeking to bring in the new business) or a committee of partners should have this responsibility. In the absence of the designated lawyer or committee member, a backup individual or group should be designated to make this decision.

No surefire way exists to detect every risky client, but as discussed in §§16.5 – 16.9 below, there are a number of clear risk factors to watch out for in any potential client.

1. [16.5] Prior Relationships with Other Attorneys

If the prospective client has used other attorneys in the past, it is useful to determine why the client is not returning to the same lawyer for the new matter. For example, the other attorney may have reviewed the case and determined that it did not have sufficient merit. If the prospective client has had prior consultation in the matter for which the representation is sought, there is even more of a problem. Counsel should find out why the prospective client decided not to use his or her other prior attorney. The prospective client, for example, may have disputed the former attorney's handling of the case or the fees charged for legal services. Lawyers should be wary of clients who have a history of not paying legal fees or embroiling attorneys in fee disputes. Other risky clients are those that have filed bar grievances against prior attorneys or made claims of legal malpractice.

2. [16.6] An Evasive Commitment To Pay Attorneys' Fees

Even if a prospective client does not have a history of disputing the legal fees of former attorneys, it is risky to undertake the representation of a client who refuses to make a commitment to pay attorneys' fees or to pay a sufficient retainer or advance on fees. The reason for the unwillingness to make a commitment to pay fees may indicate an intent not to pay fully the fees incurred or an inability to pay the fees as they are earned. The risk is not only that the lawyer will provide services for which he or she will ultimately not be paid, but an attempt to collect the unearned fee could result in a claim or bar grievance by the client.

3. [16.7] Unreasonable Expectations

Lawyers need to make every effort to ensure that the client's expectations, particularly in terms of results or time within which to achieve results, are realistic. Overstating the value of a case serves only to increase the likelihood of disappointment with the ultimate result and the probability of a dispute over fees or a claim of malpractice. If counsel does not achieve the result that the client is led to expect, the client will naturally believe that counsel did not fully earn his or her fee or that the services fell below the standards of a competent attorney.

If the client has unrealistic expectations at the outset, the lawyer can attempt to adjust these expectations. If the client is genuinely able to adjust his or her expectations as to what is reasonable, the risk of disappointment and of claims arising out of this disappointment is reduced.

Lawyers should attempt to give the client an estimate of the chances of success. For example, one might estimate a 60-percent chance of winning before a judge or jury. In this instance, the lawyer should also explain what that means: that given ten identical cases and an equally good

rendition of services by the lawyer, six of the cases will be winners, and four will be losers. Because of the uncertainty of the outcome of trials, there is no way to know with absolute certainty whether the case will be won or lost. As with any estimate, such as an estimate of the total fees that are expected to be charged at the conclusion of the matter, the lawyer cannot emphasize too strongly (or too often) that the estimate is just that and not a guarantee or promise that the fee will not exceed that amount. This should be stated to the client in writing whenever an estimate is given to the client and whenever the estimate is discussed.

4. [16.8] Evidence of Dishonesty or Lack of Integrity

A client is not likely to treat his or her lawyer better or differently than the client treats others. A person who lies and cheats with others will do the same with his or her own lawyer. The consequences are serious. Such a client is likely to make unfounded allegations of legal malpractice or charge other types of professional impropriety. A dishonest client creates a substantial risk of liability similar to that under Federal Rule of Civil Procedure 11 or Illinois Supreme Court Rule 137, which provides for sanctions against a lawyer who files a document with the court without having made reasonable inquiry to determine that it is well grounded in fact and is warranted by existing law. In addition to potential sanctions, the lawyer runs the risk that others will perceive that he or she is participating in any impropriety of the client. People with whom the client has often dealt with will perceive his or her lawyer as a coconspirator and sue the lawyer for fraud.

A client's motive for pursuing a case or taking a position may also create a high risk of claims against the lawyer. The goal of the legal system is just compensation. If the client wants more than a reasonable amount of money to compensate him or her for the injury, the client poses a heightened risk because he or she is not likely to be satisfied with a reasonable recovery. Goals such as revenge, punishment, vendetta, vindication, or what the client perceives to be "justice" are unlikely to be achieved. Clients who seek these goals should be avoided because they rarely will be satisfied with the outcome of a case and may redirect their anger from the opposing party to the lawyer.

5. [16.9] Personal Characteristics

Sometimes, prospective clients come to a lawyer with personal characteristics that should trigger red flags. These characteristics include personal instability. Clients who have changed employment frequently are more likely to be unstable than clients with steady employment histories. Clients who depend on the use of alcohol or drugs present a serious risk of lack of stability. A desire to control the lawyer's actions and an unwillingness or inability to attend to one's responsibilities in the matter are also indications of a risky client.

C. [16.10] Screening New Matters

Sometimes, even if the client does not pose a high risk of an eventual claim, the legal matter might present such a threat. A common example is a matter that is outside the lawyer's general area of practice. RPC 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

At the time of the initial client intake, every lawyer should make a critical assessment of his or her competence in the legal area and must be prepared to decline the case or pursue one of the other ethical options discussed in §§16.11 – 16.14 below. Not only should the lawyer consider the complexity of the case and area of law, but he or she should also question whether the case is simply too big or too complex for a particular practice and whether it conflicts with the needs of other clients.

Statistics show that a large percentage of malpractice claims arise out of cases that are outside the lawyer's primary area of practice. This is because the lawyer may not be familiar with special deadlines, notice requirements, or procedures in this practice area. Under these circumstances, client rights may be lost or damaged before the unwary lawyer even learns of certain dangers. There also may be issues involving the proper jurisdiction for the filing of the case and statutes of limitation and procedural requirements of foreign jurisdictions.

If a lawyer determines that a matter is outside his or her primary area of practice, the lawyer has four options: (1) refuse the case; (2) refer the case; (3) associate with competent counsel; or (4) become competent in the requisite area of law.

1. [16.11] Refusing the Case

If a lawyer declines to accept the representation, he or she should inform the client of the declination at the earliest opportunity and should make this known to the client in writing. Sending a nonengagement letter to a declined client will prevent any misunderstanding about whether the lawyer has undertaken to represent the client and reduce the risk that the client will later claim that the lawyer failed to take some action that caused the client a loss. See §16.29 below for a discussion of nonengagement letters. See §2.20 of this handbook for a sample form of a nonengagement letter.

Another important consideration for a lawyer who is declining a legal matter is that he or she should not give gratuitous advice to the client. For example, the lawyer should not give an opinion about the merits of the client's case. Lawyers who have declined cases and opined that the cases were not meritorious have been held liable for giving erroneous advice when, relying on the attorney's advice; the client took no action until after the statute of limitations had already expired. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

Similarly, in *Lopez v. Clifford Law Offices, P.C.*, 362 Ill.App.3d 969, 841 N.E.2d 465, 299 Ill.Dec. 53 (1st Dist. 2005), an attorney gave incorrect legal advice with respect to how much time he had left to file the wrongful-death action in a letter advising the client that the firm would no longer represent that client. The Illinois Supreme Court held that it is "*prima facie* negligent conduct for an attorney to misadvise a client on such a settled point of law that can be looked up by the means of ordinary research techniques." 841 N.E.2d at 471. The court observed "that such incorrect advice would undermine the client's sense of urgency to seek replacement counsel and is likely to have much more dire consequences than no advice at all." *Id.*

While an attorney should inform a declined prospective client or a client whose case has not been filed at the time the representation is terminated that claims can become time barred if not filed within the time prescribed by law and that the client should contact another attorney as soon as possible if he or she wishes to proceed with the claim, there is no need to provide specific advice with respect to the merits of the case, the date on which the statute of limitations will expire, or any other issue.

2. [16.12] Referring the Case

If a lawyer chooses to refer a case, he or she may make the referral with or without seeking a referral fee. The Illinois Rules of Professional Conduct recognize that a lawyer may wish to keep the economic benefit of producing a client and not wish to perform services or assume shared responsibility for case management. RPC 1.5(e) provides, in pertinent part:

> **(e) A division of a fee between lawyers who are not in the same firm may be made only if:**
>
> **(1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;**
>
> **(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and**
>
> **(3) the total fee is reasonable.**

The rules permit payment of a referral fee as long as the client signs a document indicating the client's agreement with the payment of the referral fee, the share each lawyer will receive, and the fact that each lawyer assumes joint financial responsibility for the representation, and as long as the total fee is reasonable.

In terms of loss prevention, for purposes of malpractice liability, the forwarding lawyer becomes the partner of the receiving lawyer. Thus referring the case to a competent lawyer, and one with malpractice insurance, is critical.

3. [16.13] Associating with Competent Counsel

If a lawyer chooses to associate with another lawyer who is more competent in the necessary area of the law, the lawyer must be sensitive to the ethics rules that do not permit a lawyer to delegate responsibility to a lawyer outside the firm without the client's consent. RPC 1.2(e) states that, after accepting a client matter, the lawyer "shall not thereafter delegate to another lawyer not in the lawyer's firm the responsibility for performing or completing that employment, without the client's informed consent." Thus, key to association with competent counsel is disclosure. This disclosure should also include a complete explanation of the fee-sharing structure involved. As with the referral of cases, it is prudent to confirm that the associating lawyer is covered by malpractice insurance.

4. [16.14] Becoming Competent

It certainly is reasonable for a lawyer to want to continue to serve a client and not part with the opportunity to learn an unfamiliar legal area. Before choosing this course, however, the lawyer should advise the client of any lack of expertise. Under RPC 1.8(h)(1), a lawyer is not permitted to "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."

While most states permit a lawyer to limit the objectives of the representation if a client consents after disclosure, written confirmation of the limitation and consent should be obtained. Under RPC 1.2(c), a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." RPC 1.0 defines "informed consent," as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Thus, it is usually not enough that the lawyer and client agree that the lawyer will provide only limited services. The lawyer must also explain how that limitation might affect the client.

If additional expertise must be obtained, the lawyer should consider whether to charge the client for the extra time required to gain competence in the field. The lawyer should determine up front whether the client will pay for the lawyer's learning curve. Written acknowledgment of the arrangement is the key. Keep in mind that fees need to be reasonable, even if the client insists that the lawyer take a matter that is outside the lawyer's practice area. *See, e.g., In re Fordham*, 423 Mass. 481, 668 N.E.2d 816 (1996).

If the lawyer is required to spend a great deal of time learning a new area of law, the possible compensation may not be commensurate with the time expended on the case. The amount of time needed to learn the new area of law may also interfere with the needs of other clients. Additionally, the case may also be too large for the firm, potentially consuming the firm's resources so that the lawyer cannot properly handle the case.

There are other risks, such as the case's having insufficient basis in law or fact such that the lawyer may be subject to Fed.R.Civ.P. 11-type sanctions or a malicious prosecution claim.

D. [16.15] New Matter/Existing Client

Theoretically, existing clients have been screened initially so that new matters create less of a risk. New matters for existing clients usually do not require the same degree of care, although taking the extra precaution of screening new matters for existing clients does not require significant effort.

E. [16.16] Continuous Risk Assessment

Client risk evaluation cannot be forgotten after the initial interview. The true character (or lack of character) of a client may not be apparent until well into the attorney-client relationship. Accordingly, the lawyer must integrate a continuous risk assessment process into his or her

malpractice avoidance program. Client risk is always a matter of degree. The risk must be recognized, continuously monitored, and dealt with appropriately. Unpaid fees, unreasonable demands and expectations of the client, and other such matters should not be ignored. If the situation is sufficiently serious, the only appropriate response is to withdraw. Professional problems rarely get worse after termination of the attorney-client relationship.

If a problem arises during the attorney-client relationship, such as a client who accuses a lawyer of making mistakes that have resulted in harm to the client, the lawyer may be required under his or her malpractice insurance policy to give notice to his or her malpractice carrier or to disclose this as a fact or circumstance on an application for renewal of the policy. Failure to do so may jeopardize the lawyer's coverage.

F. [16.17] Accepting a Risky Client

After assessing the risk involved, the conclusion may be to accept the case, such as when the negative factors are marginal compared to the positive aspects. If a risky case is accepted, the lawyer should implement a plan to minimize the risk of an unhappy client. The lawyer might, for example, eliminate some of the negative factors by educating the client so that the client adjusts his or her expectations from the unreasonable to the reasonable.

Good communication with the client and documentation of these communications is always a good idea. See the discussion in §16.42 below. Effective communication might also help the client expect a reasonable outcome from the case. The client is less likely to express surprise at a result or claim that he or she would not have agreed to a certain course of conduct if the client was given the chance to object.

That being said, when encountering a prospective client who appears to be a high risk, the lawyer should keep in mind that it is both legal and ethical to say no to representation. It is better than saying at a later date, "I should have said no."

G. [16.18] New Client/Matter Intake Procedure

A lawyer should have a standard intake form for opening every new matter, and the form should be made available to all of the lawyers in the firm. The form should be completed during the initial interview with the client or when an existing client requests that the firm handle a new matter. The information on the intake form can be used for client screening purposes, drafting the engagement agreement, performing the conflicts check, and recording important dates and deadlines. Using a standard client intake form for recording information about the new client and the new matter reduces the risk that important information will be omitted from the law firm records.

The lawyer should have controls in place to ensure that files are not opened before conflicts are cleared and the new business has been formally accepted.

In firms of more than one lawyer, information about potential new clients and matters should be communicated throughout the firm at least weekly to help identify potential conflicts. This

could be accomplished by circulating to every lawyer in the firm, at least weekly, a list of potential new clients and matters so that the lawyers can call to the firm's attention any potential conflicts that may not be readily apparent.

Section 16.82 below provides a sample form of an extensive checklist of factors to consider when evaluating a new matter or client. Section 16.83 below contains a sample form of a checklist of the basic information needed from a potential client to determine whether to accept or decline the representation.

III. ACCEPTING/DECLINING REPRESENTATION — ENGAGEMENT AGREEMENTS AND NONENGAGEMENT LETTERS

A. [16.19] Engagement Agreements

Consistently using effective engagement agreements is a fundamental means of enhancing client communications from the outset of representation and for avoiding later disputes with clients.

With few exceptions, there should be a written engagement agreement for all new clients. There also should be an engagement agreement for new matters with existing clients, although the contents can be terser if the preexisting terms of the representation apply. An engagement agreement for a new matter with an existing client is particularly important when the work involved deviates significantly in complexity or risk from work previously done for the client or when the fee arrangement differs from prior fee arrangements with the client.

Counsel should ask the client to sign the engagement agreement, whether it is in the form of a letter to the client or a contract. A letter that confirms an oral agreement may not have the same force, but it is evidence of an understanding and is better than no writing at all.

At a minimum, the engagement agreement should identify the client. It should also identify the scope of the representation by denoting what tasks are being undertaken and, often as important, what steps are not being taken. The agreement should identify the attorneys providing the legal services and other staffing matters. Fee arrangements and costs to be charged to the client should be delineated. The mechanics of billing and the consequences of nonpayment should be addressed. If the representation involves possible conflicts of interest or other ethical questions, these issues also should be addressed in the engagement agreement.

1. [16.20] Identity of the Client

The engagement agreement should specifically identify the parties represented. When the client is a corporation or other entity, the agreement should make it clear that the firm is representing the entity and not the individual to whom the letter is addressed.

It may be appropriate to specify a representative of the client from whom instructions are to be taken and through whom communications are to be directed. Any limitations on accepting assignments from representatives of the client should be set forth in the representation agreement.

2. [16.21] Scope of Services

The scope of representation and nature of the legal services to be performed should be set forth in the engagement agreement in some detail. It is also important to set out particular functions to be performed and to identify those matters for which the firm will have no responsibility. If the firm's involvement is going to be limited with respect to a particular matter or area of practice, this limitation should be clearly stated.

3. [16.22] Staffing

Anticipated staffing needs for the client's case should be set out in the engagement agreement letter, as should the person to contact with any questions.

4. [16.23] Responsibilities

The engagement agreement should specify the responsibilities of the client, such as providing necessary information, being available for consultations, depositions, and hearings, providing current and accurate addresses and telephone numbers, and cooperating when decisions need to be made.

The engagement agreement may include a proposed timetable of activities and points at which specific decisions must be made before further work is to be performed. Attorneys should avoid agreeing to unrealistic time deadlines and should always use qualifiers to allow for unforeseen delays.

5. [16.24] Fees, Disbursements, and Other Charges

RPC 1.5(b) provides:

> **(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.**

The engagement agreement should clearly state the basis or rate of the legal fee. If the fee is a contingent fee, RPC 1.5(c) provides, in pertinent part:

> **(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is**

calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

If the fee is hourly, the rate to be charged by each lawyer or class of lawyers, as well as that of each paralegal or other staff, should be specified. The representation agreement should also identify the kinds of costs for which the client will be responsible and state when the client is expected to pay these costs.

If the client makes an advance payment on hourly fees to be deducted from the advance payment, the engagement agreement should include a statement of the manner in which the funds will be handled. For example, it might state that the funds will be placed in a trust account, to be drawn on monthly after an itemized statement is sent to the client. But see also §16.28 below, regarding the requirements for engagement letters when one of three types of retainer is paid by the client.

It is important at the outset to identify the person or persons who will be responsible for payment of fees and the extent of their responsibility. This is particularly important in corporate matters when a corporation is newly formed or has few assets and for matters in which the lawyer is representing several parties. Each party who bears any responsibility for the lawyer's fees should sign the letter.

See §§2.16 – 2.18 of this handbook for sample forms of engagement letters.

6. [16.25] Arbitration/Attorneys' Fees

The Rules of Professional Conduct permit the arbitration of fee disputes. Serious consideration should be given to including in the engagement agreement a provision for the arbitration of disputes regarding attorneys' fees and delineate the responsibility for the cost of the arbitration. Counsel may also consider whether to include a provision for the arbitration of legal malpractice claims as well, although commentators do not agree on the desirability of arbitrating legal malpractice claims.

7. [16.26] Conflicts

The engagement agreement should address potential or actual conflicts, such as the representation of adverse interests or multiple parties. See the discussion of conflicts of interest in §16.3 above.

Under certain circumstances, the engagement agreement may seek the consent of the client to counsel's continued representation of another party in the event that a conflict arises at a later time. The Rules of Professional Conduct neither expressly permit nor disallow present waivers of potential future conflicts. But if such a waiver meets all of the requirements for the waiver of a contemporaneous conflict of interest, there would seem to be no reason why it would be either unethical or ineffective.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-372 has concluded that

> **it is not ordinarily impermissible to seek such prospective waivers; that the mere existence of a prospective waiver will not necessarily be dispositive of the question whether the waiver is effective; that such waiver will ordinarily be effective only in circumstances in which the lawyer determines that there is no adverse effect on the first representation from undertaking the second representation and that the particular future conflict of interest as to which the waiver is invoked was reasonably contemplated at the time the waiver was given.**

The ABA Standing Committee on Ethics and Professional Responsibility has withdrawn Formal Op. 93-372 and has replaced it with ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (May 11, 2005), which is based on the 2002 amendments to the ABA Model Rules. Under the 2002 amendments, new Comment 22 to Model Rule 1.7 expressly addressed the subject of a client's giving informed consent to future conflicts, stating that the effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks entailed in the waiver. A general and open-ended consent will not be effective because the client is not likely to be apprised of the risks involved in the waiver. If, however, the client is an experienced user of legal services and is reasonably informed of the risk of a conflict arising, consent by the client to future conflicts is more likely to be effective under circumstances in which the client is represented by independent counsel and the consent is limited to future conflicts unrelated to the subject of the representation.

As a matter of risk management, the most vulnerable part of a waiver of any kind of conflict is the extent to which the client has given informed consent. The question is often, "What disclosures were made to the client before the client waived the conflict?" The more detailed the disclosure and the more specific the actual circumstances surrounding any future conflict, the more likely the waiver will be effective. To the extent possible, the disclosure to the client should include the identity of the actual adverse future client and the actual potential future dispute. Although this may not be necessary under Formal Op. 05-436, more disclosure is still better than less disclosure.

For example, representation of a potential client in a slip-and-fall case could be conditioned on the client's specific agreement to allow future, contemporaneous representation of the adverse party, a bank, on unrelated loan and regulatory matters. Such a specific and limited agreement most likely would be effective. If the potential client refused to make such an agreement, at least counsel could make an informed decision on whether to accept the engagement in the slip-and-fall case.

8. [16.27] Agreement Confirmation

The client should demonstrate his or her acceptance of the terms of the agreement by signing a copy of the agreement. If there are multiple clients or if third parties are guaranteeing payment of the fee, each party who bears any responsibility for payment of the fee should sign the agreement. A letter that confirms an oral agreement may not have the same force as a signed agreement, but it is evidence of an agreement and is better than no writing at all.

Standard engagement agreements should be made available to all lawyers in the firm who bring in new business.

9. [16.28] Retainers and Fee Agreements

In *Dowling v. Chicago Options Associates, Inc.*, 226 Ill.2d 277, 875 N.E.2d 1012, 314 Ill.Dec. 725 (2007), the Illinois Supreme Court for the first time explicitly recognized the existence of advance payment retainers as one of three retainers available to lawyers and their clients in Illinois.

The first kind of retainer is called a "true," "general," or "classic" retainer. It is paid to secure the lawyer's availability during a specified period of time or for a specified matter. This type of retainer is earned when paid and immediately becomes the property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. Accordingly, it must be deposited in the lawyer's general account, not a trust account.

The second type of retainer is a "security retainer," so called because its purpose is to secure payment of fees for future services that the lawyer is expected to perform. It is the payment of a fee that remains the property of the client until the lawyer applies it to charges for services that are actually rendered. A security retainer is typically used for hourly fee agreements, allowing the lawyer to draw on the funds as fees are earned, but it could also be used when a flat fee is paid to a lawyer but is not the lawyer's property until it is earned at the conclusion of the matter. Because it is the client's property until it is earned, a security retainer must be deposited in a trust account and kept separate from the lawyer's own property.

The court recognized a third type of retainer, called the "advance payment retainer," which it described as a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Under this kind of retainer, the fee belongs to the lawyer immediately upon payment and must be deposited into the firm's general account, not a trust account. Lawyers have been charging flat fees in cases and treating the fees as earned upon receipt for years. This is the first time, however, that the Supreme Court has explicitly recognized such a fee.

The court stated that the type of retainer appropriate to a legal matter depends on the circumstances of each case, but the guiding principle should be the protection of the client's interests. The court opined that, in the vast majority of cases, funds paid to retain a lawyer will be considered a security retainer to be placed in a client trust account and drawn on as earned. The court stated that advance payment retainers should be used only sparingly, when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer, such as in *Dowling, supra*, when the client wished to hire counsel to represent him against judgment creditors.

The court suggested that all written retainer agreements should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, the agreement should use that term and state that the funds remain the property of the client until earned and that the funds will be deposited in a client trust account.

The court stated that if an advance payment retainer is used, many stringent requirements must be followed by the attorney. An advance payment retainer must be in writing, must use the term "advance payment retainer" and clearly state that the funds become the property of the lawyer when paid and that they will not be held in a client trust account. It must also advise the client of the option to place his or her money into a security retainer and that the choice of the type of retainer to be used is the client's alone. If the attorney is unwilling to represent the client without receiving an advance payment retainer, the agreement must state that fact and the attorney's reasons for using this form of retainer. In addition, the agreement must set forth the special purpose behind the retainer and explain why an advance payment retainer is advantageous to the client.

The court in *Dowling, supra*, also held that, if the language of a retainer agreement is unclear as to the kind of retainer that is intended, the agreement must be construed as providing for a security retainer because that kind of retainer provides the greatest protection for a client's funds.

Rule 1.15(c) of the Rules of Professional Conduct of 2010 codified much of the *Dowling* decision. RPC 1.15(c) provides:

> **(c) A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term "advance payment retainer" to describe the retainer, and states the following:**
>
> **(1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;**
>
> **(2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;**
>
> **(3) the manner in which the retainer will be applied for services rendered and expenses incurred;**
>
> **(4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;**
>
> **(5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.**

B. [16.29] Rejecting Potential Clients and Nonengagement Letters

As noted in §16.4 above, lawyers owe a duty of confidentiality to persons with whom they consulted as prospective clients under RPC 1.18. In addition, lawyers should avoid giving any kind of legal advice to persons rejected as clients, even advice as to any statute of limitations deadline or whether the case has merits.

When a lawyer declines to take a potential client, written nonengagement letters are critical. Without them, a lawyer remains exposed to allegations of negligence even when, from the lawyer's perspective, there is no client or matter to neglect.

Clients and matters that the lawyer has not accepted can return as disqualification motions, legal malpractice claims, or bar grievances. If a decision is made to turn down a client or matter, documenting every declination in writing can reduce the risk of later claims that the law firm had some continuing involvement. The declination should be communicated in writing by a nonengagement letter.

The nonengagement letter should advise of any rapidly impending time limitations. If the interview was conducted without obtaining confidential information, that should also be confirmed in the letter. This precludes the risk of a claim or disqualification if the firm is later involved with an adverse party or wants to preserve the opportunity to represent another party.

Also, the firm should add to the conflicts database names of prospective clients who had been interviewed or who had provided confidential information.

Standard nonengagement letters should be made available to the lawyers in the firm. See §2.20 of this handbook for a sample form of a nonengagement letter.

IV. [16.30] TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP (INCLUDING DISENGAGEMENT LETTERS)

One of the basic concepts of the practice of law is that the client is entitled to be represented by counsel of his or her choice. It follows that a client may terminate his or her attorney at will, with or without cause. *Herbster v. North American Company for Life & Health Insurance,* 150 Ill.App.3d 21, 501 N.E.2d 343, 103 Ill.Dec. 322 (2d Dist. 1986).

The right to choose counsel is not without limitation, however, particularly in the field of litigation. The client's latitude in selecting, discharging, or substituting counsel is not "so absolute that its exercise may not be denied where it will unduly prejudice the other party or interfere with the administration of justice." *People v. Franklin,* 415 Ill. 514, 114 N.E.2d 661, 663 (1953). Thus, once a trial has commenced, substitution or withdrawal may be denied in the absence of some "valid reason." *See, e.g., Hoffman Electric, Inc. v. Emerson Electric Co.,* 800 F.Supp. 1279 (W.D.Pa. 1992); *In re Marriage of Milovich,* 105 Ill.App.3d 596, 434 N.E.2d 811, 61 Ill.Dec. 456 (1st Dist. 1982).

An attorney's right to withdraw from the attorney-client relationship is somewhat restricted by the Illinois Rules of Professional Conduct. Under RPC 1.16(c), an attorney representing a client before a tribunal must obtain permission from the tribunal to withdraw. Consequently, the rule binds an attorney who files a written appearance on behalf of a client before any court to continue to represent that client in the case until the court, after notice and written motion, grants withdrawal. This is true regardless of whether a final judgment has been entered or the attorney's contract of employment has been carried out. *See, e.g., Broome v. Broome*, 112 N.C.App. 823, 436 S.E.2d 918 (1993).

Strict adherence to withdrawal procedures is mandatory for state court litigation attorneys; however, RPC 1.16(d) provides practical guidelines for malpractice avoidance that should be considered by withdrawing attorneys in non-litigated situations as well. One such universally beneficial procedure is the service of written notice of withdrawal by certified mail or personal service on the client.

Under RPC 1.16(d), a lawyer cannot withdraw until he or she has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client. These steps include giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, complying with applicable rules and laws, and refunding any advance payment of fees or expenses that have not been earned or incurred.

RPC 1.16(b) allows a lawyer to withdraw if the client fails to substantially fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled. Thereafter, the measure of the lawyer's recovery lies in quantum meruit for services actually rendered. In Illinois, a lawyer may also enforce a statutory lien for attorneys' fees under the Attorneys Lien Act, 770 ILCS 5/0.01, *et seq.* See 770 ILCS 5/1. However, the attorney withdrawing for nonpayment of fees must still adhere carefully to RPC 1.16(d), which prohibits withdrawal until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the nonpaying clients.

Although the withdrawing attorney may claim a common law "retaining lien" on the client's papers, any right to withhold documents legally necessary to the completion of the client's representation is subject to the lawyer's obligations under RPC 1.15 (safeguarding property) and RPC 1.16(d) to avoid foreseeable prejudice and to return the papers and property to which the client is entitled. There may be situations in which assertion of a lien would be ethically justified, such as when the client is financially able but deliberately refuses to pay a fee that was clearly agreed on and is due. See, *e.g.,* ABA Standing Comm. on Ethics & Prof'l Liability, Informal Op. 86-1520.

In terms of malpractice avoidance, a lawyer's final report or "disengagement" letter to the client — advising of the completed objective and the resultant termination of the relationship — is prudent practice. Such a letter not only serves to document the discharge of the lawyer's duty in the event of a dispute but also should signal to the client, in concrete terms, that the attorney-client relationship has ended. The disengagement letter should confirm the reason that the relationship has ended, identify any fees and expenses that are outstanding, and inform the client as to the disposition of any property or papers belonging to the client. Such a letter undoubtedly will be important evidence in a malpractice case and may prevent the initiation of suit.

A disengagement letter may be more important in a transactional setting than in a litigated case because of the difficulty in determining when the representation has ended. For example, when a lawyer has been retained each year for a number of years to review leases, is the representation ongoing, or does it terminate each year after the leases have been reviewed? When the legal representation does not have an easily recognizable end, it is important for a lawyer to notify the client when the lawyer considers the representation to be concluded. See §§2.21 and 2.22 of this handbook for sample disengagement letters.

The firm should adopt a procedure for seeking client feedback on the quality of its work product and client service.

V. [16.31] REFERRALS

Lawyers have been sued for negligent referral of matters to colleagues or for failing to document the extent, if any, of their continuing involvement in a matter. Consequently, referrals should be made with caution.

If a lawyer does refer a client to another law firm and the referring attorney is not seeking payment of a referral fee, the referring lawyer or law firm should send a written disclaimer to the client stating that the firm does not make any representations regarding the qualifications of the firm to which the matter has been referred, does not guarantee its provision of legal services, and is not responsible for the rendering of any legal services. It may be best to provide the client with a list of a number of other law firms so that the client decides which law firm to retain.

It is different if the referring attorney or law firm is seeking the payment of a referral fee. As noted in §16.12 above, RPC 1.5(e) allows the payment of referral fees as long as the lawyer discloses the following information to the client in a writing signed by the client:

a. the fact that the referring lawyer has received or will receive economic benefit from the referral;

b. the extent and basis of this economic benefit; and

c. the fact that the referring lawyer agrees to assume the same legal responsibility for the performance of the services as would a partner of the receiving lawyer.

In terms of loss prevention, the forwarding lawyer is the partner of the receiving lawyer for malpractice liability. Thus, forwarding to a competent lawyer is absolutely critical.

The firm should have a policy or procedure that specifies the manner in which appropriate referrals are to be made and documented.

VI. CONFLICTS OF INTEREST

A. [16.32] Conflict Screening

An important part of a firm's risk management program is the system for identifying and dealing with conflicts of interest. The purpose of a conflicts check is to learn, in advance, of any present and past representations that would either conflict with a proposed representation or make a proposed representation unattractive to the firm for business reasons.

Conflict avoidance is important because of the potential that conflicts of interest, in addition to their negative impact on profitability, may result in professional discipline, liability litigation, and embarrassment for the firm. It is far easier to deal with a possible conflict of interest before the firm commits itself, its resources, and its reputation to an engagement it should never have undertaken in the first place.

The conflicts most likely to lead to litigation with clients, loss of business, or even professional discipline include those

1. that involve conflicting obligations to multiple clients in the same matter;

2. in which the new client is adverse to a current client in the same matter;

3. in which the new client is adverse to another current client in a separate matter;

4. in which a lawyer's responsibilities to another client, a third person, or himself or herself may materially limit the lawyer's representation of the client;

5. in which the new client is adverse to a former client in the same or a substantially related matter;

6. in which the attorney has confidential information from a former prospective client;

7. that involve personal, financial, or business relationships of an individual member or employee of the firm with the client or the transaction; or

8. in which the results sought or economic interests represented are potentially adverse to the results sought or economic interests desired in another matter by another client.

These kinds of conflicts are addressed in ABA Model Rules of Professional Conduct 1.7(a) – 1.7(b) and 1.9. Most states have adopted substantially similar rules.

RPC 1.18 recognizes that conflicts can arise between a current client and a rejected prospective client. RPC 1.18(c) provides:

> **(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that**

could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

See §6.3 above for the complete text of RPC 1.18.

Within the context of these prohibitions, most difficulties with clients seem to arise out of one of the following situations:

1. when one client has a claim against another client;

2. when there is a significant disparity in the relative merits of the clients' cases;

3. when the clients have different goals, ideas, or attitudes toward the legal matter at hand; or

4. when the clients are competing for limited funds.

In each of these situations, it would be easy for one client to perceive that the lawyer favored the other client at his or her expense. Thus, a complaint, claim, or bar grievance is more likely to occur when one or more of these factors are present.

Conflicts of interest are best dealt with at the outset of the engagement, rather than at some later point during the engagement. If an actual or potential conflict can be identified and dealt with at the beginning by obtaining the client's informed consent to the representation notwithstanding the conflict or by declining to accept the engagement, the client is less likely to feel betrayed by the lawyer and less likely to make a claim.

B. [16.33] Hiring from Other Law Firms

RPC 1.10 allows a firm to represent clients in matters adverse to former clients of a new lawyer to the firm or this lawyer's former firm under certain conditions:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and with former judges, arbitrators, mediators or other third-party neutrals is governed by Rule 1.12.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

For representation to be prohibited, the legal matter must be the same or substantially related to a matter in which the lawyer or his or her firm represented a client, and the lawyer must have acquired confidential information material to this matter. Thus, the lawyer and his or her new firm may represent clients adverse to the clients of the lawyer's former firm if the legal matters are not the same or substantially related to the new matter, or if the lawyer, while at the former firm, had not acquired confidential information material to the matter. Even if the lawyer had received confidential information, Illinois also allows the lawyer to avoid disqualification by being "screened" from any participation in the matter.

Screening is a procedure that prevents the flow of confidential information from the insulated lawyer to other members of the law firm. Under RPC 1.10(e) and 1.0(k), screening involves "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." RPC 1.0(k). These procedures might include the following:

1. isolating the lawyer from confidential information concerning the matter;

2. isolating the lawyer from all contact with the client or any agent, officer, or employee of the client and any witness for or against the client;

3. precluding the lawyer from discussing the matter with other lawyers in the firm; and

4. taking affirmative steps to accomplish the above actions.

In this age of computers, effective screening should also include limiting the moving lawyer's access to computer records related to the screened matter.

Although the use of screening may rebut the presumption that confidences had been shared, one court criticized the lack of specifics offered by the firm regarding its screening system. In *Van Jackson v. Check 'N Go of Illinois, Inc.*, 114 F.Supp.2d 731, 733 (N.D.Ill. 2000), the court disqualified the firm, stating that in "such a small firm, it is questionable whether a screen can ever work."

If screening is implemented, it must be timely. Screening procedures that are implemented after the lawyer has been at the firm are usually considered ineffective because the firm already will have been infected by imputation with the confidences of the adverse party. For example, a firm's attempt to screen a newly hired lawyer was found ineffective when implemented more than a month after the firm knew of the problem even though the main lawyers involved in the case had informally agreed not to discuss the case with each other from the beginning. *SK Handtool Corp. v. Dresser Industries, Inc.*, 246 Ill.App.3d 979, 619 N.E.2d 1282, 189 Ill.Dec. 233 (1st Dist. 1993).

If screening is not an option or if it has not been implemented promptly, disqualification may be avoided by obtaining the waiver of the client of the former firm. A waiver may be obtained, however, only if the lawyer reasonably believes the representation will not adversely affect the relationship with the client of the new firm and each client consents after full disclosure of the material facts and implications of the waiver. In addition, if the client of the former firm does not object to the representation in a timely manner, he or she may be deemed to have waived the conflict, and the new firm may not be disqualified.

Section 16.84 below contains a sample protocol for screening new lawyers and employees.

C. [16.34] Conflict Management

To identify and deal with conflicts of interest effectively, the policies and procedures outlined in §§16.35 – 16.38 below are recommended.

1. [16.35] General Policy

As conflicts of interest pose serious threats to the firm, the firm should have a written policy that no client or matter will be accepted or handled by the firm or its attorneys without a thorough check for conflicts of interest. The procedure for checking for conflicts should include a consideration of the following kinds of conflicts:

a. current client adverse representation;

b. former client adverse representation;

c. multiple client representation in the same matter;

d. business transactions with or investments in clients;

e. personal interests conflicting with those of clients;

f. business conflicts with existing clients; and

g. positional conflicts.

The firm should designate a partner or committee to deal with issues involving conflicts of interest and to oversee the administration of the policies and procedures regarding conflicts. If it is an individual partner, the firm should also designate a backup to handle conflict issues when the partner primarily responsible is not available.

The firm's conflict policy should provide that no client or matter that presents an actual or potential conflict of interest will be accepted or handled by the firm or its attorneys without the prior approval of a partner or committee designated by the firm for this purpose.

All attorneys should be required to report conflicts of interest immediately to the designated conflict partner or committee.

If an attorney personally has an actual or potential conflict of interest with a firm client on whose behalf the attorney is asked to work or if the attorney has any question as to whether he or she can give a client his or her undivided loyalty, the attorney should be required to make any such problem affecting any particular client known to the designated conflict partner or committee.

2. [16.36] Check Client Database

The firm should maintain a computer database of all former and current clients. When a prospective client or case is being considered, the name of the new client, the adverse party, and other related parties should be run through the client database.

3. [16.37] Circulate New Client/New Case Memo

In addition to running a computer check, information about potential new clients and matters should be communicated periodically throughout the firm to help identify additional potential conflicts. It is typically done by means of a daily or weekly prospective new client memo that is circulated among the firm's attorneys. The information in the memo should include the following:

a. the client's name;

b. the client's parent (or higher) entities;

c. the client's subsidiary entities;

d. associated or affiliated entities;

e. the names of all officers and directors of the client;

f. the names of all officers and directors of parent, subsidiary, or related entities;

g. the names of all providers of information;

h. the adverse party;

i. the adverse party's parent, subsidiary, or related companies;

j. adverse counsel; and

k. the nature of the prospective representation.

This information should be reviewed by all firm attorneys to determine whether there are any conflicts that are not apparent by merely looking at the parties involved. For example, attorneys should try to identify any potential "issues" conflicts between the prospective client and an existing client.

4. [16.38] Conflicts Arising During the Engagement

Sometimes, during an engagement, new parties are joined to litigation or become involved in a transaction. A firm's conflict procedures should include updating conflict data and performing conflict checks when new parties become involved in the matter or when the identity of a party has changed (such as with a merger or acquisition of a corporation).

In cases in which circumstances cause additional adversaries to come to an attorney's attention after representation has started, the attorney should be required to submit an amended new client memo identifying these additional adversaries. This will ensure that the additional adversaries do not involve the firm in a conflict of interest and ensure that the additional names are added to the conflict database.

VII. [16.39] CONFIDENTIALITY

RPC 1.6(a) prohibits lawyers from revealing "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c)." (Under the former Rules of Professional Conduct, lawyers were prohibited from revealing "confidences and secrets" of a client. The new rule protects all information related to the representation, which is a broader body of information than "confidences and secrets.")

As noted in §6.3 above, RPC 1.18(b) imposes a duty on lawyers who consult with prospective clients and decline to represent them. This rule provides:

> **Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.** *Id.*

Unlike the evidentiary attorney-client privilege, the rule of confidentiality applies not only during judicial proceedings, but also at all times and to a client's secrets as well as confidences. *Profit Management Development, Inc. v. Jacobson, Brandvik & Anderson, Ltd.*, 309 Ill.App.3d 289, 721 N.E.2d 826, 242 Ill.Dec. 547 (2d Dist. 1999). It is the client who determines what information is confidential or secret. *King v. King*, 52 Ill.App.3d 749, 367 N.E.2d 1358, 10 Ill.Dec. 592 (4th Dist. 1977).

A. [16.40] Authorized Disclosures

RPC 1.6(b) permits lawyers to reveal information relating to the representation of a client to the extent the lawyer reasonably believes it is necessary to achieve certain goals, such as

> **(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);**
>
> **(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;**
>
> **(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;**
>
> **(4) to secure legal advice about the lawyer's compliance with these Rules;**
>
> **(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or**
>
> **(6) to comply with other law or a court order.**

RPC 1.6(c) requires a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."

It has long been the law in Illinois that a lawyer may disclose client confidences when necessary for the lawyer to protect and preserve his or her rights in matters involving his or her client, such as actions for attorneys' fees and the construction of provisions of the attorney-client contract. *Sokol v. Mortimer*, 81 Ill.App.2d 55, 225 N.E.2d 496 (1st Dist. 1967). The Illinois Supreme Court has held that when a client sues his or her former lawyer for malpractice, the client places the lawyer's advice at issue and has waived the attorney-client privilege with respect to communications between the client and his or her former attorney. *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240, 243, 244 Ill.Dec. 941 (2000).

While the privilege may be waived as between the attorney and client in litigation between them arising out of the representation, it is not waived as to third parties, such as the client's adversary in the underlying litigation, even as to matters that are raised in both the malpractice suit and the underlying suit. It is the revelation of confidential communications, not the institution of suit, that determines whether a party waives the privilege. *Industrial Clearinghouse, Inc. v. Browning Manufacturing Division of Emerson Electric Co.*, 953 F.2d 1004 (5th Cir. 1992).

There are limits on what a lawyer is allowed to reveal in an effort to defend himself or herself or his or her firm. A lawyer may not damage his or her client unnecessarily. Any disclosure by the lawyer should be as protective of the client's interest as possible. *Judwin Properties, Inc. v. Griggs & Harrison, P.C.*, 981 S.W.2d 868 (Tex.App. 1998). While a lawyer may use client communications to obtain payment of his or her fees, the lawyer may not use other confidential communications to deny the client a discharge of the fees in bankruptcy. *Dubrow v. Rindlisbacher (In re Rindlisbacher)*, 225 B.R. 180 (B.A.P. 9th Cir. 1998).

In *In re Horne*, No. M.R. 12936, 1997 Ill.Atty.Reg.Disc. LEXIS 231 (S.Ct. May 30, 1997), *approving* No. 93 CH 568, 1996 Ill.Atty.Reg.Disc. LEXIS 47 (Review Bd. Aug. 9, 1996), a disciplinary case with the Attorney Registration and Disciplinary Commission (ARDC), an attorney had filed a parentage complaint against his former client, with whom he also had a personal relationship. The attorney had disclosed the client's history of problems and a previous instance of giving up a child for adoption. The attorney maintained that he was permitted to disclose the information to defend against an accusation of wrongful conduct. He claimed that prior to his filing of the parentage complaint, he was warned that his former client would be filing an action against him. According to the attorney, he was merely raising a defense in anticipation of formal accusations by his former client. The Supreme Court adopted the ARDC Review Board's finding that the information was not used to defend the attorney from any charge of wrongful conduct that could be asserted against him. Because it was used instead to denounce his former client's suitability for parenting, the attorney's disclosure of this information violated RPC 1.6.

In those instances in which an attorney is permitted to disclose confidential information, the attorney should be careful not to reveal more confidential information than is necessary. Going beyond this limit may result in a charge of professional misconduct.

B. [16.41] Electronic Communications

The world is moving more and more toward electronic communications. No doubt, rules of ethics and civil liability will evolve to accommodate these changes. In fact, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued an opinion that a lawyer does not violate a client's right of confidentiality by transmitting information via unencrypted e-mail. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (Mar. 10, 1993). But, opinions such as this cannot be interpreted as broad clearance to favor speed and convenience over ordinary notions of confidentiality.

RPC 1.6 is as clear as it is mandatory: A lawyer shall not reveal a confidence or secret of a client unless the client consents after disclosure. Nowhere in the rules will one find any bonus

points for extra-fast communication. Likewise, the common law uniformly recognizes the unauthorized disclosure of client confidences and secrets as a breach of fiduciary duty. The fact that the disclosure occurs at nearly the speed of light is no defense to a breach of confidentiality.

To avoid the civil liability and professional responsibility problems inherent in the use of facsimile machines, cell phones, and e-mail, the attorney should ask himself or herself first if the communication by that mode serves any genuine need or client desire that could not be accomplished by regular mail, express mail, or messenger. If the answer is no, then the attorney should not communicate by fax, cell phone, or e-mail. If the answer is yes, the attorney should take reasonable precautions to maintain the confidentiality of the information.

When faxing a communication, the attorney should use a cover sheet identifying the material beneath it as confidential. The cover sheet, of course, should not contain confidential information. The attorney should mark every page confidential. If relying on others to process faxes, the attorney should explain the importance of maintaining client confidences and direct all people who handle faxes not to read faxed materials or to leave them unattended in open areas. The attorney also should make sure to verify that the fax number is correct.

The attorney also should understand the risk of inadvertent disclosure on the recipient's end. The greater the risk, the more precaution is required. For example, if there is a significant risk of inadvertent disclosure, the attorney should explain the risk to the client, including the risk that attorney-client privilege may be lost. It is often appropriate to call the client immediately before sending a fax so that the client can be present on the receiving end when it arrives or otherwise ensure it will not fall into the wrong hands. The attorney should probably ask the client to verify receipt. If the attorney is to be on the receiving end of a fax, he or she should advise the client of appropriate precautions, such as the use of a cover sheet identifying the contents as confidential and calling the attorney immediately before transmission.

If the attorney or the client wants to communicate by e-mail, the attorney should inform the client of the risk that the communication may be misdirected or intercepted by a hacker. Again, the attorney should be extra careful that the address to which he or she intends to send the e-mail is correct.

None of these precautions is particularly difficult or time-consuming. Nevertheless, they are the type of measures that will accomplish two things: (1) they reduce the risk of inadvertent disclosure; and (2) in the event of inadvertent disclosure, they are the type of measures required to contest a waiver of the attorney-client or work-product privileges.

Education and direction within the firm should concern preservation of client confidences, which can greatly reduce the likelihood of ethical violations and potential claims. The firm should have a policy for all lawyers and support staff explaining the confidentiality of client matters. The firm's confidentiality policy should be part of the firm's employee manual and specifically brought to the attention of all new employees.

VIII. [16.42] CLIENT COMMUNICATIONS

Many malpractice claims are the direct result of a lawyer's failure to communicate regularly, to provide communication on material events, and to document these communications, resulting in the client's perceptions that the matter is being neglected or that the lawyer does not care. Good communication with the client is essential to a healthy, successful attorney-client relationship. If counsel is looking for an especially effective and efficient way to reduce civil malpractice exposure, counsel should turn his or her sights toward one of its most frequent causes — poor communication with the client.

For lawyers, communicating with clients is not optional, it is mandatory. RPC 1.4 requires the following:

> **(a) A lawyer shall:**
>
> **(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;**
>
> **(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;**
>
> **(3) keep the client reasonably informed about the status of the matter;**
>
> **(4) promptly comply with reasonable requests for information; and**
>
> **(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.**
>
> **(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**

In *In re Smith,* 168 Ill.2d 269, 659 N.E.2d 896, 213 Ill.Dec. 550 (1995), the Supreme Court of Illinois held that RPC 1.4(a) imposes a two-part duty to communicate with clients. First, lawyers have an affirmative duty to take the necessary steps to keep clients informed about their cases so that clients can make intelligent choices. In addition, lawyers must respond to client questions and demands for information. The court stated that compliance with this rule is "particularly important for those clients who may be unfamiliar with the workings of our legal system." 659 N.E.2d at 902.

The most common ways in which attorneys violate RPC 1.4(a) are by failing to inform clients of the status of their cases and by neglecting to return their telephone calls. The records of the Attorney Registration and Disciplinary Commission contain hundreds of examples of lawyers who have been disciplined for failing to affirmatively provide information to clients or for failing to respond to requests for information.

RPC 1.4(b) contains a third requirement that a lawyer explain matters to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. A lawyer violates this rule by failing to inform the client of the significance of a proposed course of action. One example of this from a disciplinary case is a lawyer who failed to explain to his clients that the voluntary dismissal of the clients' bankruptcy petition would expose them to legal action by creditors or that the client would be barred from filing another bankruptcy petition for six months.

Another rule mandating communication with clients is RPC 1.2(a), which requires that a lawyer consult with the client as to the means by which the objectives of the representation are to be pursued. Lawyers have been disciplined under this rule for accepting the defense of a case from the client's insurer while failing to consult with the client about the case, and for asserting a position on behalf of a client without discussing it with the client.

RPC 1.2(a) also requires that a lawyer abide by the client's decision as to whether to accept or reject an offer of settlement. Although not stated, the rule implies that the lawyer has informed the client of all settlement offers so that the client could make the decision to accept or reject the offer. Lawyers are disciplined most often under this rule for settling claims without first obtaining the consent of the client, rather than for rejecting settlement offers without the client's consent, although both violate the rule.

RPC 1.5, which regulates attorneys' fees, also contains communication requirements. It describes four specific kinds of information that must be disclosed to clients. RPC 1.5(b) states that a lawyer must communicate the fee that he or she will charge either before or within a reasonable time after commencing the representation unless the lawyer has regularly represented this client. RPC 1.5(c) requires that a lawyer communicate in writing the terms of a contingent fee, including the percentage that will accrue to the lawyer, the circumstance under which it will accrue, and whether expenses will be deducted before or after the contingent fee is calculated. Third, when a contingent fee matter is concluded, RPC 1.5(c) also provides that the lawyer must communicate to the client in writing the outcome of the matter including any remittance to the client and its determination. Fourth, RPC 1.5(e) requires that any agreement to share a legal fee with an attorney outside the lawyer's firm, including an agreement for a referral fee, must be communicated to the client and the client's agreement must be confirmed in writing.

Some rules impose duties to communicate under very specific circumstances. For example, a lawyer must promptly notify his or her client of receipt of client funds. RPC 1.15(d). When a lawyer withdraws, he or she must give due notice to the client. RPC 1.16(d). If a lawyer wants a client to give "informed consent" to a conflict of interest under RPC 1.7(b) and 1.0(e), the lawyer must communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." RPC 1.0(e).

Written communication to the client on all essential aspects of legal representation should be routinely provided. Not only do these writings help alleviate any existing problem, but they also form the foundation of the lawyer's defense in the event that suit is threatened or filed. It is no coincidence that in virtually every legal malpractice action, the one written document from an attorney to a client that would conclude the case in the lawyer's favor does not exist.

All settlement proposals, monetary demands, and material developments should be communicated to the client in writing. Matters for client decision should be identified and evaluated for the client in writing with a recommendation made. Client decisions should be confirmed in writing or otherwise documented. Periodic status reports to the client should be required, even if there has been no significant activity to report. Lawyers should promptly return client telephone calls, preferably within 24 hours.

The bottom line is that a lawyer cannot go wrong by communicating with a client. Clients rarely, if ever, complain that their lawyers talk to them too much.

IX. [16.43] DOCKET AND CALENDAR

The administrative practice management area linked most closely to malpractice claims is the calendar system. Technology is available and law firm procedures can be implemented that will greatly reduce the risk of these claims. Despite the best automated system, human intervention is necessary for input and follow-up.

Unfortunately, most firms' systems are incomplete. There is a risk that even a duplicate diary system will fail. To limit the possibility of malpractice claims, there should be one person to ensure that essential deadlines are met. To guard against problems in the certainty that the designated person sometimes will not be present, the firm should assign a backup to ensure compliance with critical time limitations.

The firm should maintain a centralized, firm-wide docket and calendar system. The system should be computerized. The system's backup data should be stored offsite. An individual should be assigned the responsibility for the input of dates and deadlines in the system. All plaintiff matters should be reviewed at the intake stage for any applicable statutes of limitation. Statutes of limitation and other deadline dates should be recorded conspicuously in the file.

A redundant system should be maintained under which the office's central calendar is backed up by the attorneys' individually maintained calendars. Lawyers' individual calendars should be maintained in duplicate (*i.e.*, by the lawyer and by his or her secretary or a legal assistant).

Incoming mail, faxes, and overnight or hand deliveries should be centrally scrutinized for dates and deadlines by an assigned calendar person.

Written calendar reminders for individual lawyers should be generated at least weekly. One person at the firm should be responsible for ensuring compliance with critical time limitations. A backup person also should be designated.

Additionally, docket and calendar procedures should be in writing.

X. [16.44] WORK CONTROL AND SUPERVISION

One of the principal benefits of lawyers working together in firms is the ability to provide each other with support and backup. Yet, many lawyers operate essentially on their own even within the law firm, creating a substantial malpractice risk. This risk, however, can be reduced by instituting procedures to enhance oversight and accountability, even in small firms.

To ensure that matters are handled with requisite competence, the firm should assign a partner to every matter handled by the firm for supervision or consultation. Every associate (or other non-partner) should be formally assigned to a partner for supervision.

Law firm policies and procedures should be in writing in an employee manual or handbook or in some other accessible place.

The firm should conduct, outside the compensation setting, regular, comprehensive performance reviews of associates. A topic that often intimidates and that is sometimes perceived to interfere with firm culture is partner peer review. Often, peer review occurs in the process of setting compensation. It may be more effective if the process is separated from the issue of compensation. Separating these issues could be beneficial because partners can then also benefit from constructive criticism. The forum and manner in which peer review is conducted is critical.

Further, there should be procedures for handling attorney departures from the firm.

XI. [16.45] INFORMATION MANAGEMENT

The volume of paper with which lawyers have traditionally had to deal, combined with increasing reliance on technology, requires that firms address information management systematically and effectively.

A firm should have written procedures for records management available to staff and attorneys, including procedures for handling faxes, overnight mail, and hand deliveries.

When legal representation of the client is concluded, the lawyer can retain file documents, discard them, or give them to the client. The best course of conduct depends on the particular circumstances at hand. Certain circumstances, however, allow no room for discretion. For example, RPC 1.15(a) requires a lawyer to retain complete records of all funds and other property held for clients or third persons for seven years after termination of the representation.

Other rules, such as RPC 1.5(c) and 1.8(g), expressly condition certain activity on the existence of written documentation. These rules do not specify any document retention period; however, they are obviously important to the Attorney Registration and Disciplinary Commission. Any attorney who values his or her license should be prepared to demonstrate compliance. Common sense dictates that the seven-year period of RPC 1.15(a) for the retention of records is an appropriate and safe guide.

In the ordinary case, the lawyer should follow one simple rule: Retain any document for future reference that was important to the lawyer to have in writing in the first instance. These are the documents that will evidence compliance with the standard of care or resolve future questions concerning the representation. These documents include retainer agreements, correspondence concerning important events, copies of materials documenting the conclusion of the legal matter, and billing materials.

Property of the client, such as original business records, personal diaries, and tax returns, should be returned to the client. Likewise, original contracts, releases, and other written instruments representing the culmination of legal representation should be tendered to the client. Otherwise, the lawyer assumes an ongoing duty to safeguard these documents.

As for remaining file matters, the lawyer may simply ask the client what, if anything, he or she wants to retain for his or her personal reasons. Usually, the answer is nothing. But, if the client wants deposition transcripts, documents subpoenaed from third parties, pleadings, or other miscellaneous materials, he or she is entitled to them.

The attorney should keep any personal notes or internal memoranda that constitute work product. Documents such as these are all too easily misunderstood or misinterpreted by the client. The attorney may want to consider keeping these documents, without turning copies over to the client.

The file is the attorney's first line of defense to a malpractice claim or an ARDC investigation. If the attorney cannot retain the file, he or she should at least make a copy of its contents. There is no other way to ensure that critical evidence will be preserved.

A list of considerations for a records retention policy is provided in §16.85 below.

XII. [16.46] TRUST ACCOUNTS

If handling client or third-party funds, the attorney should maintain an escrow or trust account and also maintain accurate accounts of these funds.

Ethical rules governing trust accounts are detailed and require no improper intent to constitute a violation. Systematic oversight of trust accounts, therefore, is critical to reduce the risk of ethical violations. A lawyer should be sure that he or she is familiar with the trust account regulations contained in the Illinois Rules of Professional Conduct. See RPC 1.15.

The Attorney Registration and Disciplinary Commission publishes a CLIENT TRUST ACCOUNT HANDBOOK that it distributes at no cost. The handbook is also available on the ARDC's website at www.iardc.org/pubs.html. This handbook contains a detailed discussion of the manner in which client funds must be handled and in which trust accounts must be maintained.

The firm's accountants should periodically review and approve the controls on all firm bank accounts, including client trust accounts.

Supreme Court Rule 756(d) requires that, as part of the annual registration process, each lawyer must identify any and all trust accounts maintained by the lawyer during the preceding 12 months to hold property of clients or third persons in the lawyer's possession in connection with a representation. For each account, the lawyer must report the account name, account number, financial institution, and whether the account is an account under the Interest on Lawyer Trust Accounts program. If the lawyer does not maintain a trust account, the lawyer is required to state why no such account is required.

This reporting requirement is mandatory. S.Ct. Rule 756(g) provides that if a lawyer fails to provide the trust account information required by S.Ct. Rule 756(d), the lawyer will be deemed not registered for that year and will be removed from the master roll of attorneys authorized to practice law in Illinois. Any person who is not on the master roll and who practices law or holds himself or herself out as authorized to practice law is engaging in the unauthorized practice of law and may be held in contempt of the Supreme Court.

XIII. [16.47] BILLING AND COLLECTIONS

Often, malpractice claims are in direct response to lawyers' efforts to collect unpaid bills. Many claims are indirect reactions to legal fee issues. Effective billing and collections procedures not only reduce the risk of these claims, but also help to avoid disputes with clients that can sour valuable relationships.

A prolific source of claims is fee disputes. Some estimates are that legal fee issues account for as much as 40 percent of all legal malpractice claims. Although this risk cannot be eliminated, it can be reduced.

Law firms should adopt written policies on billing, the collection of accounts receivable, and suing for fees. The responsibility for collections should be clearly assigned as to both lawyers and staff. Training should be provided on prudent collection techniques. The firm should provide standardized collection letters for use by its lawyers.

Authorization to sue for fees should require review and decision by the firm's management or at least by another lawyer who did not work on the matter to determine the likelihood of a responsive claim for legal malpractice. Collection attempts and filing suit against a client should require the prior approval of another partner.

A screening checklist should be used to assess whether collection litigation will be pursued. A sample form of a fee collection checklist is provided in §16.86 below.

XIV. [16.48] OUTSIDE ACTIVITIES AND INVESTMENTS WITH CLIENTS

When lawyers serve as directors, officers, trustees, or executors for, or invest in, clients, the risk of claims increases significantly based on the dual relationship.

A. [16.49] Investing in Clients

Investments with or in clients implicate fiduciary obligations and are fraught with professional responsibility issues. Procedures should be implemented either to prohibit these activities or to control the manner in which they are carried out and documented.

The decision of whether to take a financial interest in a client should involve a thoughtful risk-benefit analysis. The benefits are clear enough. For the client, these arrangements reduce cash requirements and arguably result in a more interested, committed, and loyal legal counsel. And as for the lawyer, there is the potential for an enormous gain on what may amount to only a minimal investment of time or money.

The primary concern is one of conflict of interest. RPC 1.7(a) provides, in pertinent part:

> **[**A**] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**
>
> *** * ***
>
> **(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**

Whenever a lawyer has a financial interest in the subject matter of the transaction, a question necessarily arises as to whether that interest might materially affect legal representation of the client. If it does, the lawyer has a conflict of interest. If this conflict causes damage to the client and was not knowingly waived, the lawyer is vulnerable to an action for breach of fiduciary duty, among others.

Generally speaking, the severity of the risk depends on three variables:

1. What are the merits of the venture? The more likely a venture is to fail, the more likely it is that a dissatisfied client will file a civil action or a complaint with the Attorney Registration and Disciplinary Commission. Simply put, losers can be bitter and will look for ways to recoup their losses. A lawyer with a conflict of interest presents an obvious target.

2. How large is the lawyer's interest? The larger the interest, the more likely it presents a material limitation on the representation. A one-percent interest in a large, publicly held corporation is a different animal than one percent of a closely held corporation because of the degree of control of this interest. Consider, for example, the lawyer who helps two friends form a small, closely held corporation and takes one percent of the stock as a fee. The remaining 99 percent is divided evenly between the two friends. When the corporation is formed, the majority shareholders, being friends, are in basic harmony. But, when a disagreement arises between them, the lawyer's mere one-percent holding becomes the controlling interest. When a vote is taken on some matter of importance, the losing shareholder may claim, for example, that the lawyer never adequately explained the significance of the one-percent stock fee or, worse yet, intentionally

concealed its significance to favor the other majority shareholder. Similar problems arise if and when the lawyer tries to sell the one-percent interest. A sale to either of the majority shareholders is tantamount to handing over control of the corporation, and a sale to some outsider may be even more objectionable. These are significant concerns.

3. To what extent does the arrangement between the lawyer and the client constitute or involve more than a simple matter of compensation for services rendered? This issue often gives rise to the thorniest problems. Once an arrangement strays beyond the singular issue of compensation (*i.e.*, it involves more than a question of the size of the fee), the lawyer may be transacting business with the client, and that is a particularly serious matter. In fact, there is a very significant possibility that the arrangement constitutes a prohibited transaction within the meaning of RPC 1.8(a). For example, it is one thing to take a one-percent stock holding in a client; but it is quite another to negotiate voting rights, buy-out provisions, a seat on the board, or other such matters having implications far beyond remuneration for services. These are matters on which the client ought to have independent legal representation.

Consider also that investing in a client or client transaction may have adverse professional malpractice insurance implications. Malpractice policies typically exclude coverage for legal representation in connection with an entity that is operated, managed, or controlled by the lawyer or in which the lawyer has an ownership interest. In other words, what may be a risky investment for the lawyer to begin with may become even riskier because the investment itself may take the future representation out of the terms of the coverage.

There are insider trading considerations. The Securities and Exchange Commission has asserted that law firms have an affirmative duty to safeguard material, nonpublic information. SEC Release No. 34-13437, 11 SEC Docket 2231 (Apr. 8, 1977). An investment by an insider or indirectly to a relative or friend can have severe consequences. The liability exposure dramatically increases if a lawyer, an employee, or an "of counsel" lawyer is a director and officer.

The simplest and safest approach is for the law firm to prohibit trading of securities by all lawyers and nonlawyers except through investment vehicles such as mutual funds and discretionary blind trusts. This is obviously a significant restriction on the scope of investment decisions by individual lawyers and nonlawyers.

Many law firms will favor a policy that will prevent insider trading abuses while enabling a reasonable individual flexibility and freedom for investment decisions. Such a policy involves several considerations:

1. There is a need to educate all lawyers and nonlawyers regarding the law governing insider trading. This includes explaining key terms such as "material," "nonpublic," and "reckless." Education should include annual updates for all lawyers and nonlawyers currently with the firm, as well as for those who subsequently join the firm.

2. The policy should expressly state that the firm prohibits, as does the law, the trading of securities based on material, nonpublic information. Equally important, these prohibitions must apply to providing this material, nonpublic information to other persons, which is referred to as "tipping."

3. The policy should apply to the securities being issued by clients as well as non-clients, although there is certainly a higher chance of detection, prosecution, and sanctions when insider trading occurs concerning clients. Some procedures may be applied only to clients' securities.

If an attorney has an opportunity to take stock in lieu of fees, the attorney can minimize the ethical and civil liability risks by referring to the items in the investments in clients checklist in §16.87 below.

B. [16.50] Acting as Officer or Director

A law firm should adopt a written policy regarding its lawyers serving as directors or officers of client organizations, investing in or with clients, and serving as trustees or executors for clients. This is an important area for control because the consequences can be serious liability exposures and thus shift the burden of proof.

Serving as an officer or director for a client corporation can result in the loss of insurance coverage. Almost every professional liability policy for lawyers excludes conduct outside the practice of law. Moreover, carriers have shown no reluctance to decline coverage when the lawyer's conduct does not constitute the practice of law. Accordingly, any time a lawyer assumes some role other than as lawyer, such as acting as an officer or director, insurance coverage is an issue.

By acting as an officer or director, a lawyer may lose the protection against punitive damages that exists when lawyers are sued as lawyers. The Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, prohibits punitive damages from being awarded against lawyers, but only to lawyers acting as lawyers. 735 ILCS 5/2-1115. Therefore, it is of dubious value to the lawyer who is sued in his or her capacity as a corporate officer, broker, or other individual not engaged in the practice of law.

Lawyers possess a privilege to advise. Therefore, a lawyer, unlike other individuals, can advise or encourage a client to breach a contract without exposure to tort or liability for interference with a contract or interference with prospective advantage. This may not be the case if the lawyer is acting as an officer or director. In addition, communications with a corporate client are privileged when a lawyer is giving advice as a lawyer, but probably not when acting as an officer or director.

A lawyer who acts as both lawyer and officer or director for his or her corporate client may also have limited ability to participate in certain decisions, such as any involving the lawyer's own fees or participation in a legal issue. Thus, the client will be deprived of the counsel of one of its officers or directors in making important decisions.

Lawyers also have a relatively short statute of limitations, as well as their own statute of repose. One can easily visualize a situation in which an action is time-barred or reposed if the defendant is acting in his or her capacity as a lawyer, but is not if the defendant can be characterized as something else.

Acting as an officer or director may also limit a firm's ability to represent the client in certain legal matters, such as when the lawyer may be called on to be a witness as a result of his or her actions as officer or director. The firm also may be precluded from representing the client in other matters, such as the client's bankruptcy.

Obviously, there may be very good reasons for a lawyer to take on some role other than that of a lawyer, but the decision to do so should be an intelligent, calculated act rather than a mindless excursion into other professional worlds.

C. [16.51] Outside Practice of Law

A law firm should adopt a written policy regarding the practice of law by its lawyers outside the authority of the firm. No such activities should be allowed unless approved by the management of the firm.

The most obvious professional responsibility issue is the identification and avoidance of conflicts of interest. If the lawyer has outside clients unknown to the firm, these secret clients may be adverse to existing firm clients, and future clients may be accepted who are adverse to the secret clients.

As for civil liability, associates are likely to have apparent authority from their employer to accept legal representation of the client. Consequently, the employer is likely to be held liable for any malpractice committed by the associate even though the employer had no knowledge of the legal representation and received no benefit from it. Moreover, the employer's professional liability insurance carrier is much more apt to have policy defenses to coverage, such as late notice of the claim.

In *Florida Bar v. Cox*, 655 So.2d 1122 (Fla. 1995), the Florida Supreme Court ordered a 30-day suspension from the practice of law of an associate who, contrary to firm policy, did a little moonlighting. In particular, the associate accepted unauthorized cases, corresponded with clients on these matters, and billed clients on firm stationery. He collected and kept some of the fees derived from the unauthorized cases. Moreover, he denied having done so until confronted with the written evidence. Significantly, the court acknowledged that the lawyer's conduct may not have caused harm to the clients or to the firm where he was employed, but it was unimpressed with this no harm, no foul defense. The associate's conduct involved dishonesty and misrepresentation toward his employer and his clients, and that was sufficient to warrant a 30-day suspension.

In *Kramer v. Nowak*, 908 F.Supp. 1281 (E.D.Pa. 1995), the plaintiff claimed that a legal malpractice judgment against him was caused by the negligence of the defendant, another lawyer whom he employed to assist him in the underlying matter. The plaintiff sued for contribution,

negligence, and breach of contract. As to the contribution claim, the court held that the defendant was entitled to summary judgment unless the plaintiff could prove that they operated as separate economic entities with respect to the underlying legal matter. The typical associate-employer relationship has no such characteristic, and thus, *Kramer* stands for the proposition that an employer ordinarily may not seek contribution from an associate whose negligence results in a legal malpractice judgment against the employer.

With respect to the tort and contract claims, however, the court in *Kramer* recognized a legal right of recovery in favor of the employer and against the subordinate attorney. The court based its decision on the general rule of agency that "[u]*nless he has been authorized to act in the manner in which he acts,* the agent who subjects the principal to liability because of a negligent or other wrongful act is subject to liability to the principal for the loss which results therefrom." [Emphasis added by court.] 908 F.Supp. at 1293 – 1294, quoting RESTATEMENT (SECOND) OF AGENCY §401, cmt. d (1958). The court held that the plaintiff had a cause of action to recover the amount of the legal malpractice judgment against him if the defendant's conduct was not authorized, if the plaintiff did not ratify the defendant's conduct, and if the conduct could not have been discovered through reasonable inquiry.

XV. [16.52] PROFESSIONAL DEVELOPMENT

A law firm should have a program or policy for the professional development of its lawyers. Continuing education of all individuals in the firm, on both substantive law relevant to their practice and on the firm's internal policies and procedures, is a key component of any successful loss prevention program.

XVI. [16.53] MALPRACTICE INSURANCE/CLAIMS MANAGEMENT

Getting, and keeping, the right insurance coverage in place for a firm is critical, as is the proper management of client disputes and formal claims. Assigning oversight of these specific functions to a responsible individual in the firm, therefore, should be a component of a firm's loss prevention program.

The firm should designate an individual to be responsible for obtaining and maintaining the firm's malpractice insurance. This individual should be responsible for notifying the firm's errors and omissions insurer of actual or potential malpractice claims and then monitoring these claims.

There should be written procedures regarding the handling of client complaints.

The firm should become aware of complaint-handling resources and loss prevention assistance available from the firm's malpractice insurer and elsewhere and make this information available.

The firm should have a policy that requires lawyers subject to judicially imposed sanctions or disciplinary investigation or any scrutiny by the state bar to notify the firm.

XVII. [16.54] DISASTER PLANNING

No matter where a firm is located, disaster can strike without notice and threaten the firm's ability to keep the doors open and continue to serve its clients — whether it is earthquakes in California, hurricanes in the Southeast, tornadoes in the Midwest, or power failures, fire, or flood anywhere. There is also the concern of a terrorist attack. Having a disaster plan in place, therefore, is extremely important contingency planning.

No one expects a disaster, but it can occur. Having a disaster response and recovery plan, however, will help prevent or limit many of the potential losses. Sections 16.55 – 16.62 below discuss some of the necessary components of a disaster response and recovery plan.

A. [16.55] Identifying Potential Causes of a Disaster

The first step in developing a disaster response and recovery plan is to identify the kinds of disasters that could possibly occur. Geographic location may determine some of the risks involved (*e.g.*, the firm may be in an area that is susceptible to floods, hurricanes, tornadoes, or blizzards). The kind of building in which the office is located will also determine how to formulate the details of the plan. Because of the threat of a terrorist strike, the firm might include the bombing of the office building or closure of the building because of exposure to anthrax on the list of potential disasters. The key is to anticipate what might happen and establish a procedure to follow when something does occur. For each type of emergency, the plan should describe the steps to be taken to minimize the adverse consequences and to make the firm operational as soon as possible.

B. [16.56] Obtaining Adequate Insurance Coverage

Adequate insurance coverage is an important part of a disaster recovery plan. The firm should consult with insurance professionals to ensure that critical coverage is in place, including coverage for business interruption, extra expense, valuable papers, and computer hardware and software.

C. [16.57] Designating and Training an Emergency Response Person or Team

Any disaster preparation and recovery plan should include the designation of a specific person or team (depending on the size of the firm) responsible for having a plan in place, implementing the plan, and making decisions and providing leadership during an emergency. The persons responsible for various duties should be clearly designated, as should backup persons for those individuals. One or more persons should be responsible for regularly updating the plan to address potential emergencies that previously were not likely to occur but now appear to be possibilities.

One or more persons should keep the written emergency plan at his or her home in case the office copy is destroyed or becomes inaccessible. This person should also have available offsite employee addresses and contact numbers and contact numbers for building management and security, vendors, court personnel, and clients. He or she should also have copies of insurance policies and information regarding coverage, the office lease, and any other important documents.

D. [16.58] Establishing a System of Communications

As noted in §16.57 above, the emergency response person or team should keep copies of all employee contact numbers including home and cell phone numbers and e-mail addresses. Street addresses should also be on the list in case there is no way to communicate electronically. The plan should include a telephone tree, designating which employees are to call or be called and by whom. One or more persons with cell phones should be designated as persons to contact when regular phone service is unavailable.

One or more persons should be designated to contact key management and security personnel of the building to facilitate learning about the accessibility of the building and additional safety precautions that may have been implemented. These persons can then disseminate this information to the office staff as needed.

Clients will naturally want information about the functioning of the firm after a disaster. The plan should include ways to communicate with clients. Communications to clients should provide information and instill confidence. A spokesperson should be designated to ensure that the same message is being conveyed to everyone at the same time.

E. [16.59] Ensuring the Personal Safety of Staff and Visitors to the Office

An emergency response plan should include procedures for evacuation. The entire staff should be informed of these procedures. One or more persons should be responsible for devising the evacuation plan and for educating the staff. Evacuation routes and other safety notices should be posted. Periodic fire drills should be held, and the staff should know where fire alarms and fire extinguishers are located, how to use them, and when it is appropriate to use them. The planners should assign persons to help those that need assistance. The planners also should use the educational and inspection services of the local fire and police departments. A meeting place outside the office should be designated in the event of an evacuation.

Security measures can be taken to help prevent emergencies from happening. Areas that are not open to the public, usually any place other than the reception area, should be clearly marked or closed. Visitors should be escorted in any nonpublic areas. A staff member should always be present in the reception area. All outside access windows and doors should be secure. All control and alarm systems should be maintained regularly. Because terminated employees are a security risk, all identification and keys should be collected before an employee leaves for the last time. Bomb threat guidelines, including the importance of not touching any suspicious package, should be stressed to employees. Employees should be instructed to stay away from letters and envelopes containing unidentified powder and to stay away from any person who has come in contact with these substances, even though their inclination will be to come to his or her assistance.

F. [16.60] Preserving Files and Records

A disaster response plan should designate a person or team to maintain an inventory of all important documents and records. These include the firm's client list, master docket and central calendar, bank and financial institution account numbers, insurance policies and contacts,

employee records, vendor lists, and copies of office contracts. Computerized records should be backed up, including the data on each individual's computer. Data should be stored offsite so that records and documents can be restored. There should be some kind of redundant system in place that can take over when the primary system fails.

Physical files risk destruction when exposed to fire, smoke, or water. When paper documents become wet, they decay from mold or fungal growth. If documents become wet, they may be saved by freezing them until professionals are able to begin the restoration process. Some damage may be prevented by storing files and records in places that are not susceptible to flooding.

G. [16.61] Providing Space and Facilities

When office space and facilities are damaged, destroyed, or unreachable, the emergency response plan should include possible arrangements that can be made to share space, occupy alternative sites, or work from home.

H. [16.62] Ensuring Post-Disaster Well-Being of Staff

A disaster recovery plan should address the material needs of employees to continue receiving wages or salaries and for information about available insurance benefits.

After a major catastrophe, staff and employees may experience posttraumatic stress syndrome, making them unable to function in the workplace. The plan should include the provision of resources to employees to assist them in dealing with any post-disaster emotional reaction. Anticipating some inability to function on the part of some employees, the plan should include ways in which the firm will continue to function when some of its employees cannot work.

There are many resources available to assist a firm in developing a disaster response and recovery plan. Whether a firm consults a professional or does it itself, it is important to formulate and implement a plan so that, if disaster strikes, the resulting damage can be minimized and recovery can proceed as soon and as quickly as possible.

XVIII. [16.63] ALCOHOL, DRUG, AND STRESS-RELATED PROBLEMS

Another frequent underlying cause of malpractice claims and ethical violations is a lawyer becoming impaired by alcohol, drug, or stress-related problems. Resources, however, have become more widely available to provide assistance in this difficult area.

The firm should ascertain whether its medical plan provides for employee assistance on these issues. If so, the firm should formulate a written policy that publicizes this information and expresses the firm's requirements that impairment issues be reported. A disabled or impaired lawyer or employee is not consistent with the requirement of competent representation.

The firm should have a written policy addressing alcohol, drug, and stress-related problems of attorneys and staff and provide information on resources available to assist personnel with these problems. The firm should provide an employee assistance plan as a benefit for both attorneys and staff.

XIX. [16.64] WHEN A LAWYER NEEDS A LAWYER

One of the most important tools in any risk management program is the advice of other objective, knowledgeable lawyers.

Lawyers have legal problems, too. The practice of law is governed by its own set of procedural and substantive rules. These rules are far from settled. Given the time demands of an active practice, one cannot expect to be thoroughly versed in the law of lawyers any more than a personal injury practitioner stays up to speed on antitrust principles.

This is not to say that lawyers should not strive to be familiar with the law that governs them. It is the duty of every lawyer to do so, but general familiarity often is not enough. Besides the issue of unknown intricacies, there is the matter of objectivity. Even when one knows the law, applying it accurately to oneself is more difficult than most imagine.

The circumstances under which lawyers need independent, objective advice from other lawyers are common and expansive. For example, take the ordinary petition for fees under Fed.R.Civ.P. 11 or S.Ct. Rule 137. A petition for fees raises many issues. Does one's professional liability policy provide indemnity or at least a defense? Should notice be given to the carrier? What should the client be told? Does the client require separate counsel and, if so, at whose expense? Does the lawyer's defense require disclosure of privileged or confidential information? If so, under what circumstances and to what extent can this information be disclosed? Are the circumstances such that the lawyer must withdraw as counsel? Is the client responsible for the lawyer's cost of defending himself or herself?

There is also the question of how to defend the petition. Should an expert be retained on the issue of liability or damages or both and at whose expense? Is discovery available and necessary? What legal defenses exist? What type of witness will the attorney or his or her client make? May the lawyer cross-examine his or her own client to advance his or her own defense?

Each of these questions presents a legal problem for the lawyer himself or herself. Nonlawyers seek the advice and counsel of lawyers with respect to their own legal issues. Lawyers should do the same.

Larger firms often have internal professional responsibility committees to whom firm lawyers can turn for legal advice. Solo practitioners or small firms can arrange to provide each other with legal assistance. Responsibility for keeping current on different types of problems can be divided among the lawyers.

A lawyer can also retain experienced outside counsel. What is most important is that the arrangement provide readily accessible, objective, and knowledgeable legal advice.

What matters should be presented to legal counsel? These questions typically include conflicts of interest and compliance with other Rules of Professional Conduct. Other matters include

a. any communication to or from the Attorney Registration and Disciplinary Commission;

b. any claim or threat of a claim by any person against the firm;

c. any petition for fees under Fed.R.Civ.P. 11 or a similar statute; and

d. any subpoena on the firm for documents or testimony.

Whether a lawyer can obtain sophisticated legal advice within his or her firm or must seek it elsewhere, the cost is substantial. Avoiding this expense, however, is likely to be a false savings. Lawyers are operating in a world of increasing adversity among themselves, their clients, their adversaries, and even the court. Through proactive legal advice, many costly mistakes and problems can be avoided, and those that cannot be avoided at least should not be aggravated through continued erroneous action.

XX. [16.65] LAW FIRM NAMES AND SHARING OFFICE SPACE

For many lawyers, it makes economic sense to reduce the cost of overhead by sharing office space, office machines, and support staff with one or more other lawyers — other lawyers who are not their partners. While most lawyers realize that they are vicariously liable for the acts of their partners, they might be surprised to learn that they may also be held liable for the acts of lawyers who are not their partners.

When the office-sharing arrangements of lawyers create confusion in the minds of their clients (or others) as to whether the lawyers are associated as partners or otherwise, the lawyers involved are exposed to risks of many kinds, including the risk of being liable for the malpractice of the lawyer sharing the office. This liability is based on the legal theory of partnership by estoppel or apparent partnership.

A. [16.66] Partnership by Estoppel

The theory of partnership by estoppel is contained in §308(a) of the Uniform Partnership Act (1997), 805 ILCS 206/100, *et seq.*, which provides that if a person, by words or conduct, purports to be a partner or consents to being represented by another as a partner of one or more persons who are not partners, the purported partner is liable to a person who, relying on the representation, enters into a transaction with the purported partnership. 805 ILCS 206/308(a). If the representation is made in a public manner, the purported partner is liable to a person who relies on the purported partnership, even if the purported partner is not aware of being held out as a partner. *Id.* Evidence of holding out may consist of words spoken or written or of conduct.

To prevail under a theory of partnership by estoppel, a plaintiff is required to prove four elements:

1. that the would-be partner has held himself or herself out as a partner;

2. that the holding out was done by the lawyer directly or with his or her consent;

3. that the plaintiff had knowledge of the holding out; and

4. that the plaintiff relied on the ostensible partnership to his or her prejudice. *Gosselin v. Webb*, 242 F.3d 412 (1st Cir. 2001); *Brown v. Gerstein*, 17 Mass.App.Ct. 558, 460 N.E.2d 1043, *review denied*, 391 Mass. 1105 (1984).

B. Office Sharing

1. [16.67] Indicia of Partnership

Claims of partnership by estoppel commonly arise out of office-sharing arrangements in which the separate identities of the individual lawyers are not apparent to the public. In *Atlas Tack Corp. v. DiMasi*, 37 Mass.App.Ct. 66, 637 N.E.2d 230 (1994), the plaintiff sued for malpractice three lawyers who shared office space. Two of the lawyers moved for summary judgment based on their contention that they were not partners of the lawyer who had handled the plaintiff's matter. They argued that because they did not hold themselves out as partners of the other lawyer to the plaintiff or anyone else, kept separate files, had their own staffs, had their own stationery, and paid their own expenses, they should not be held vicariously liable for the malpractice of the other lawyer. The trial court granted summary judgment in favor of the two attorneys, but the appeals court reversed. The court found that the three lawyers shared office space, jointly paid for a receptionist, and knowingly allowed the printing and use of office stationery entitled "Law Offices of DiMasi, Donabed & Karll, A Professional Association." 637 N.E.2d at 232. All correspondence and invoices for fees received by the plaintiff bore that letterhead, and the plaintiff paid the invoices by checks payable to DiMasi, Donabed & Karll, A Professional Association. The court held that these facts were sufficient to defeat a motion for summary judgment in favor of the lawyers.

In *Gosselin v. Webb*, 242 F.3d 412, 413 (1st Cir. 2001), a lawyer who was licensed in the District of Columbia and Massachusetts had an arrangement by which he used the Lowell, Massachusetts office of an association of lawyers who called themselves "Field, Hurley, Webb, Sullivan Attorneys at Law." When contacted by a prospective client located in Massachusetts, the lawyer stated that he was "with" the Field, Hurley firm. *Id.* Upon inquiry, the prospective client was informed that the Field, Hurley firm was well-respected and agreed to meet the lawyer at the Field, Hurley office. In the foyer of the office building, the lawyer's name was listed on the directory under the Field, Hurley name and the names of the other lawyers who participated in that association. Later, the lawyer instructed the client to sign papers at the Field, Hurley office at times when the lawyer would not be there. The client called or went to the Field, Hurley office and spoke with one of the lawyers or secretaries to obtain information about his case. The court of

appeals found that the lawyer's words and the directory listing implied a partner-like arrangement. In reversing summary judgment, the court held that the above facts could result in a finder of fact determining that Field, Hurley held the lawyer out as a partner.

Merely being listed on the letterhead of a firm, however, does not, by itself, necessarily give rise to liability under partnership by estoppel. The presence of a name on a law firm's letterhead simply indicates that the firm is practicing law in a combination of some type, but not necessarily a partnership. *Janjigian v. Ferraro & Walsh*, 1 Mass.L.Rptr. 86 (1993). It is one factor, however, in determining whether a lawyer is being held out as a partner of other lawyers. In addition, the Rules of Professional Conduct in many jurisdictions, including Illinois, make it an ethical violation for a lawyer to state or imply that he or she practices in a partnership or other organization when that is not the case. See RPC 7.5(d).

2. [16.68] Of Counsel

Identifying oneself as "of counsel" may also provide a basis for liability for another lawyer's malpractice. In *Staron v. Weinstein*, 305 N.J.Super. 236, 701 A.2d 1325 (1997), two lawyers, Weinstein and Thelander, were sued for malpractice in allowing a statute of limitations to expire. The first page of the written retainer agreement referred only to Weinstein, the lawyer handling the case, but the second page above that lawyer's signature identified the name of the firm as Robert C. Thelander, Esq. Weinstein also wrote to the adverse party's insurer on stationery bearing Thelander's firm name and indicating that Weinstein was of counsel to Thelander's firm. The letter used the plural term "we," as representatives of the plaintiff. 701 A.2d at 1326. Weinstein sent a second letter to the insurer on identical stationery and sent a copy to his client. The appellate court held that the retainer agreement and the fact that the defendant had at least apparent authority to enter into these agreements on behalf of the firm was sufficient to withstand a motion for summary judgment.

3. [16.69] Liability for Intentional Torts

Liability under the theory of apparent partnership may encompass intentional, as well as negligent, acts of another. For example, in *Myers v. Aragona*, 21 Md.App. 45, 318 A.2d 263 (1974), the court imposed vicarious liability on one attorney for the theft of $310,000 by another, holding that the two had a partnership by estoppel. The first lawyer, Gordon, was retained to handle certain real estate matters, including the receipt of funds that were to be used to pay off construction loans. The funds were deposited into the "Gordon and Myers" escrow account. 318 A.2d at 265. Gordon used a settlement statement for the transactions that bore the legend "Gordon & Myers, Attorneys at Law." *Id.* Both lawyers used "Law Offices Gordon & Myers" letterhead. *Id.* When Gordon and the money disappeared, the plaintiffs sued Myers under the theories of vicarious liability and negligence in his supervision of the escrow account. Myers denied that he and Gordon were partners. The court, however, held: "Even if no actual partnership existed between Gordon and Myers, Myers is nonetheless, by virtue of his using or allowing the use of the name 'Gordon & Myers, Attorneys at Law' on the 'Settlement Statement(s)' and 'Law Offices Gordon & Myers' on the letterheads estopped from denying the existence of the partnership." 318 A.2d at 268. The court held that, in the eyes of the law, the two

lawyers' relationship was "as much a partnership, insofar as third parties are concerned, as if there had been formal Articles of Partnership subscribed to by both Myers and Gordon." 318 A.2d at 268 – 269.

4. [16.70] Reliance on the "Holding Out"

In *Atlas Tack Corp. v. DiMasi*, 37 Mass.App.Ct. 66, 637 N.E.2d 230 (1994), the court briefly discussed the element of reliance on the ostensible partnership. The plaintiff in *Atlas Tack* claimed that the corporation only used firms with multiple personnel and financial resources and that, when he spoke to the lawyer regarding his case, he assumed that he was hiring the law firm of "DiMasi, Donabed & Karll, A Professional Association." 637 N.E.2d at 232. This fact was sufficient to defeat summary judgment in favor of the defendants on this issue.

5. [16.71] Basis for Assertion of Long-Arm Jurisdiction

Partnership by estoppel may also provide a basis for the assertion of personal jurisdiction over a lawyer by a federal court in another state. In *Johnson v. Shaines & McEachern, PA*, 835 F.Supp. 685 (D.N.H. 1993), the plaintiff sued the New Hampshire firm that had represented him in litigation over a landfill lease and also the Massachusetts firm that it claimed was in partnership with the New Hampshire firm under the name G & M Law Group. The Massachusetts firm moved for dismissal for lack of personal jurisdiction. The court found that there was sufficient evidence of a partnership, either in fact or by estoppel, to defeat the motion to dismiss. The court noted that the plaintiff was aware that both firms were referred to as G & M Law Group, that the plaintiff claimed he was told that the legal resources of the Massachusetts firm were available for the landfill case, that Martindale-Hubbell indicated that the Massachusetts firm was affiliated with the New Hampshire firm, and that the New Hampshire firm's letterhead contained the imprint: "The G & M Law Group with affiliated offices in Boston, MA." 835 F.Supp. at 690. The court found that the question of whether there was an actual partnership, partnership by estoppel, or no partnership was a question for the jury but if the jury found that there was a partnership in fact or by estoppel, the Massachusetts firm would be liable for any negligence by the New Hampshire firm.

C. Partnership Dissolution

1. [16.72] Notice to Clients

The theory of partnership by estoppel can be used against lawyers who dissolve their partnership but fail to remove the indicia of partnership from letterhead, signs, and advertising. In *Staron v. Weinstein*, 305 N.J.Super. 236, 701 A.2d 1325 (1997), one attorney, Thelander, not only argued that he was not a partner of another attorney, Weinstein, but also that he had terminated his of counsel relationship with Weinstein prior to the alleged malpractice. Thelander had written to all of the clients about whom he had knowledge informing them that he and Weinstein were no longer associated. Unfortunately, the plaintiffs were not among those notified. Even though it was undisputed that Thelander had no knowledge of the plaintiffs' case and the alleged malpractice did not occur until nearly a year after Thelander terminated his relationship with Weinstein, because Thelander's name was on the retainer agreement and he did not inform the plaintiffs of the termination of his of counsel relationship with Weinstein, summary judgment was reversed.

2. [16.73] Continued Indicia of Partnership

The principle of partnership by estoppel was applied to two former partners in *Royal Bank & Trust Co. v. Weintraub, Gold & Alper,* 68 N.Y.2d 124, 497 N.E.2d 289, 506 N.Y.S.2d 151 (1986). In *Royal Bank & Trust*, an attorney, Weintraub, agreed to hold in the firm's client trust account $60,000 and pay it to Royal Bank eight days later. The funds were not paid, so the bank sued the borrower, the law firm, and the three named partners. The two other attorneys, Gold and Alper, contended that the firm was dissolved by oral agreement of the partners 20 months before the $60,000 loan was made and that Weintraub had no authority to bind the partnership at that time. The court disagreed, holding that Gold and Alper were estopped from denying liability to a party that relied on the public indicia of partnership for a tort committed by a partner acting with apparent authority. In so holding, the court noted that Weintraub had written a letter to the bank on the law firm's stationery acknowledging that the check would be received by the firm as escrow agent and placed in the firm's trust account. Prior to making the loan, the bank learned that the firm was listed in the current telephone directory at the address and number corresponding to the letterhead and that the receptionist who answered the telephone at that number identified the firm as "Weintraub, Gold and Alper." 497 N.E.2d at 291. The court stated that, notwithstanding the partners' private agreement to dissolve the partnership, the public indicia of the partnership remained undisturbed even two years later, making the partnership liable to any party reasonably relying on the impression of an ongoing entity.

3. [16.74] Withdraw or Substitute Counsel in Pending Cases

Not only should former partners remove all public indicia of partnership, but they should be sure to file substitutions of attorney in all pending cases in which the former firm had filed its appearance. Failure to do so could result in liability for any malpractice that occurs after the dissolution of the partnership. For example, in *Redman v. Walters*, 88 Cal.App.3d 448, 152 Cal.Rptr. 42 (1979), one of the partners in the firm of MacDonald, Brunsell & Walters accepted the plaintiff's case on behalf of the firm. The plaintiff had no dealings with Walters and had never met him. After Walters had left the partnership, about a year after the firm had been retained by the plaintiff, the firm stopped using Walters' name in firm stationery and on pleadings and other court documents. The successor firm, however, never filed substitutions as attorneys for the plaintiff and never formally advised the plaintiff that the partnership had changed. In the ensuing legal malpractice case against the firm, the court held that existence of the partnership continues until the winding up of its affairs is completed and that, among the partnership affairs that were to be wound up, was the plaintiff's case. Because the plaintiff had not consented to nonrepresentation by Walters, the firm of MacDonald, Brunsell & Walters continued as a partnership, and Walters as a partner for purposes of representing the plaintiff.

4. [16.75] Reliance

In *Brubaker v. Shafran, Zapka & Leuchtag,* No. 77949, 2000 WL 1867251 (Dec. 14, 2000), two lawyers formed a partnership solely to work on delivered ex ship (DES) cases together, although each maintained a separate office and separately represented other clients in other kinds of matters. When one of the lawyers contacted the plaintiff offering to represent the plaintiff in a personal injury claim, the lawyer referred to a partner but did not identify the other lawyer by

name. The partnership had dissolved prior to the dismissal of the plaintiff's case, but the plaintiff claimed he was not notified of the dissolution. The plaintiff sued both lawyers and the partnership for malpractice. The court dismissed the case as to the other lawyer and the partnership because the plaintiff did not rely on the fact of the partnership or the identity of the other partner when he retained the firm. The court pointed out that although the partnership name was listed in the telephone directory, the plaintiff did not consult the directory, so he had no knowledge of it. The plaintiff testified that he did not learn of the other lawyer's name until two years after he had retained the firm.

5. [16.76] Firm Dissolution Checklist

Upon leaving a firm or dissolving a partnership, the firm or lawyer should take the following steps, when appropriate, to ensure that a client is not confused about who is representing the client:

a. send a letter informing the client of the dissolution of the partnership;

b. use stationery bearing the new firm name;

c. file a substitution of counsel using the new firm name; and

d. enter into a new retainer agreement.

6. [16.77] Misleading Firm Name

Continuing to use the name of a dissolved partnership may violate ethics rules. RPC 7.5(d) provides that lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

The New Jersey Rules of Professional Conduct go even further. Its version of Rule 7.5(d) provides that lawyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services. In *Falzarano v. Leo,* 269 N.J.Super. 315, 635 A.2d 547 (1993), a lawyer attempted to avoid vicarious liability for the alleged malpractice of another by claiming that he was not a partner in the law firm, but only an employee. The court stated that, although he may not have actually been a partner in the firm, because he held himself out to the public as a partner by allowing his name to appear in the firm name, he could be liable as an apparent partner, the same as liability under partnership by estoppel. The court noted that under the New Jersey Rules of Professional Conduct, by appearing as a named partner in the firm name, he shared in the responsibility and liability of the firm's performance of legal services.

In a California disciplinary case, it was held that the continued use of the firm name of Miller & Miller after one of the two partners had resigned from the practice of law was misleading. *In re Miller,* 2 Cal. State Bar Ct.Rptr. 423 (Review Dept. 1993).

In Arizona State Bar Ethics Opinion 90-01 (Feb. 16, 1990) (available at www.myazbar.org/ethics/pdf/90-01.pdf), the Committee on Rules of Professional Conduct of the State Bar of Arizona held that a sole practitioner could not use in his firm name the words "and Associates" because it would convey the misleading impression that there were other lawyers associated with the firm.

Maryland State Bar Association Ethics Opinion 96-49 held that a group of independent lawyers who on occasion worked together on a case could not use the phrase "Affiliated with the Smith Law Group" on their letterhead because the phrase implied that they practiced in a partnership when they did not.

Pennsylvania Bar Association Ethics Opinion 90-171 provides that a professional corporation may not include in its firm name the name of an associate employee who is not a shareholder in the corporation because such a designation would imply that the associate has an ownership interest in the corporation and would therefore be misleading.

7. [16.78] Confidentiality and Conflicts of Interest

Sharing office space, machines, and staff also creates other potential ethics problems. Client confidences may be at risk of disclosure if client files are kept or stored in a common area or if a fax machine or computer software is shared with persons outside a lawyer's firm.

Covering for other lawyers in the office by appearing at court on behalf of their clients without obtaining the client's consent or checking for conflicts of interest could also raise ethical issues. If a lawyer appears in court on behalf of a client of another lawyer (*e.g.,* to argue a motion), the lawyer is representing this client. If the client is adverse to any of the lawyer's clients in an unrelated matter, the lawyer has violated RPC 1.7(a), which prohibits a lawyer from representing one client (*i.e.,* the client of the other lawyer in the suite of offices) in a matter directly adverse to another client (*i.e.,* the lawyer's own client).

In addition, some states, such as Illinois, have ethics rules that prohibit a lawyer from delegating to another lawyer not in the lawyer's firm the responsibility for performing or completing tasks involved in the representation of the client without the client's consent. RPC 1.2(e).

8. [16.79] Liability Insurance

Another issue that a lawyer who shares office space or who dissolves his or her partnership should address is whether he or she is covered by his or her professional liability policy for the errors or omissions of apparent partners or former partners who continue to hold themselves out as current partners. If these errors and omissions are not covered, the lawyer should take all necessary precautions to avoid giving the appearance of a partnership when none exists.

9. [16.80] Indicia of Partnership Checklist

Whether a lawyer is sharing office space or dissolving a partnership, it is wise to pay attention to how the lawyer and his or her firm represent themselves and are represented by others. Among the items that reflect how affiliations with others are perceived are the following:

a. the greeting used by the office receptionist;

b. the greeting on the telephone answering machine;

c. the firm letterhead;

d. pleadings, motions, and notices;

e. business cards;

f. signs;

g. building directories;

h. checks;

i. invoices;

j. advertisements;

k. yellow pages listings;

l. other lawyer listings, such as Martindale-Hubbell;

m. insurance policies; and

n. tax returns.

XXI. [16.81] WHEN MISTAKES HAPPEN

Everyone makes mistakes, and lawyers are no exception. When lawyers make mistakes in the course of representing a client, however, they face potential civil liability, sanctions, or disciplinary proceedings. Some mistakes have very serious consequences, such as the case being dismissed, a default judgment being entered, and causes of action, parties, or affirmative defenses being stricken. Lesser sanctions, such as monetary awards to opposing parties or opposing counsel, are costly and embarrassing.

Many mistakes are correctable and, if addressed properly, will result in nothing more than some inconvenience. If handled improperly, even an easily corrected mistake can become a

nightmare. A good example of a small mistake becoming a large one is *In re Kantor,* 241 A.D.2d 103, 670 N.Y.S.2d 448 (1998), in which a lawyer, Kantor, was retained to file suit to recover funds. He initiated litigation and obtained an order requiring the defendant to file a judicial accounting. When the defendant failed to file the accounting, the clerk of the court advised Kantor to seek an order holding the defendant in contempt. Instead, Kantor filed an order to show cause, which the clerk rejected.

Rather than filing the correct petition, Kantor engaged in a scheme of deception to convince his client that the case was proceeding, when it was at a standstill. He fabricated documents including signed court orders. Eventually, the client realized that he had been deceived and complained to the disciplinary committee. Disciplinary proceedings were initiated, and Kantor was suspended for five years. What happened? Kantor testified at his disciplinary hearing that paralyzing shame at having his order to show cause rejected compelled him to deceive his client.

Kantor's situation is not unique. Lawyers who try to cover up their mistakes or lie about them rather than deal with them tend to get into serious trouble. In one disciplinary case, the Illinois Supreme Court said that the lawyer's mistake in failing to comply with a six-month notice requirement in a personal injury case was not professional misconduct, but his scheme to conceal his error from his client was. *In re Mason,* 122 Ill.2d 163, 522 N.E.2d 1233, 119 Ill.Dec. 374 (1988).

Mason was accused of neglecting a client's personal injury claim against the Chicago Transit Authority (CTA). He had begun working on the case immediately but learned too late of a statutory requirement that notice to the CTA of a claim must be made within six months of the injury. Rather than admit that he failed to comply with the notice requirement, Mason "concocted a somewhat extensive scheme to conceal the error from his client" that included a fictitious settlement of $700. 522 N.E.2d at 1235. The Illinois Supreme Court dismissed the charge of neglect, stating that Mason's failure to strictly comply with the statutory notice provision, by itself, "simply cannot be deemed neglect or incompetence." 522 N.E.2d at 1236. Mason was never in danger of being disciplined for his error. It is also unlikely that he would have been found guilty of malpractice. When he created the fictitious settlement, the case was pending and might have settled. The CTA had not filed a motion to dismiss, and the CTA had written to Mason saying that its file was incomplete as to medical release forms, medical reports, and bills.

Even if the case had been dismissed for failure to comply with the notice requirement, Mason's client may not have been able to prove damages caused by the failure to give notice because, as the court stated, his claim was "dubious." 522 N.E.2d at 1237. The emergency room records were inconsistent with the client's story, the police report was based solely on the client's report four days after the alleged accident, and the client's medical records were not related to a bus accident but showed treatment for acute alcoholism.

Mason's real mistake was trying to cover up an error that may not have resulted in any adverse consequences. He paid the client out of his own pocket for a dubious claim, he incurred legal fees in defending the disciplinary proceeding, he was assessed all of the costs incurred by the Attorney Registration and Disciplinary Commission in prosecuting his case, and he was

publicly censured by the Illinois Supreme Court. If he had sought the advice of competent, experienced counsel before embarking on his scheme to conceal the error from his client, he might not have panicked and run blindly into disaster.

Lying to one's client to cover up a mistake is one way of getting into trouble. Lying to the disciplinary authorities is another. In *In re Mendelson*, No. 95 CH 339, 1996 Ill.Atty.Reg.Disc. LEXIS 45 (Review Bd. Aug. 2, 1996), a lawyer was suspended for six months for doing just that. The lawyer, Mendelson, accepted a personal injury case referred by another lawyer. He relied on the referring lawyer to communicate with the client and had little or no contact with the client himself. After filing suit, the case was dismissed for want of prosecution. Mendelson refiled the case in 1994. Shortly thereafter, the client discovered that Mendelson was acting as her attorney. She fired Mendelson and complained to the ARDC. Upon receipt of the ARDC's letter of inquiry, Mendelson withdrew from the pending personal injury case.

Although Mendelson should have communicated with his client and should have obtained her written consent to represent her, it is unlikely that he would have been prosecuted for this conduct alone. Mendelson guaranteed himself a disciplinary prosecution, however, by his attempt to cover up his conduct. In his response to the ARDC's inquiry, Mendelson enclosed a copy of a letter dated June 22, 1992, purporting to notify the client of his involvement in the case. The ARDC noticed that the letter contained a reference to the court docket number of the refiled case, 94 L 3910. During his sworn statement at the ARDC, Mendelson stated that he actually sent the letter in June 1992 and denied having fabricated it even after the 1994 docket number was pointed out to him.

Mendelson testified at the hearing that he believed he had sent his client a letter like the one he fabricated, but when he was unable to find such a letter in his file, he panicked. He testified that his conduct caused him to become an insomniac, seek treatment from a psychiatrist, and suffer stress-induced esophageal spasms. He was so ashamed at losing the respect of his peers that he contemplated withdrawing from the practice of law. He was suspended from the practice of law for six months.

What should a lawyer do to avoid turning a mistake into the end of his or her professional life? First, get a disinterested opinion from another lawyer. Having made a mistake means that the lawyer has a legal problem. A lawyer with experience in representing other lawyers brings objectivity, knowledge, and experience to a problem that may be lacking in the lawyer who made the mistake. Another lawyer may point out ways in which the case that was thought to be lost could be saved or in which any damage resulting from the mistake may be mitigated.

At the same time, once the lawyer recognizes that he or she made a mistake, the lawyer should notify his or her professional liability carrier immediately. The importance of this cannot be understated. Failure to give timely notice of a claim may result in the loss of coverage. Also, the lawyer should not make admissions or settle the client's claim without first notifying the carrier and obtaining its permission.

If it is possible to save a case by taking some action, the lawyer should not become paralyzed with shame. The lawyer should take whatever steps are necessary to correct or mitigate the matter and do so promptly. If the lawyer cannot bring himself or herself to correct the error, he or she

should find a lawyer who will. But, the lawyer should keep in mind that, in most states, a lawyer may not delegate or refer a client's matter to a lawyer outside the firm without the client's prior consent.

The lawyer may also have to inform the client of the error. Lawyers have a duty to keep their clients reasonably informed about the status of their matters, to promptly comply with reasonable requests for information, and to explain matters to clients to the extent necessary to permit them to make informed decisions regarding their representation. This does not mean that all mistakes must be reported to the client, particularly if the client is not harmed and the case has not been prejudiced or unduly delayed. If a client inquires into the status of a case before the lawyer is able to remedy an error, however, the lawyer should not conceal it. And, if the mistake is one that must be disclosed, it is best to make the disclosure by a personal telephone call or a meeting.

If the lawyer has partners, the lawyer should notify them so that the firm can take appropriate action to correct or mitigate the error. If the lawyer is an associate, he or she should notify the managing partner or the partner designated to be notified of possible claims.

There are several things a lawyer should never do when discussing a mistake with a client:

a. The lawyer should not lie, misrepresent facts, or conceal information. This, by itself, is misconduct and could guarantee a disciplinary proceeding or a civil claim that might otherwise have been avoided.

b. The lawyer should not become defensive and blame the client for the mistake or say things that would antagonize or incite the client.

c. The lawyer should not try to settle the claim directly with the client unless the lawyer first advises the client in writing to seek independent legal advice. Transactions with clients are presumptively fraudulent. Also, settling with a client without the permission of the lawyer's professional liability carrier may result in the loss of coverage.

d. The lawyer should not attempt to condition any settlement of the client's civil claim on the client's agreement not to complain to the disciplinary authority of the lawyer's jurisdiction or on the client's agreement not to cooperate in any disciplinary investigation or proceeding.

e. The lawyer should not make any unnecessary or inappropriate admissions (*e.g.*, that the lawyer has committed malpractice, has caused the client's loss, or owes the client a certain amount as the result of the error). These admissions can be used against the lawyer in later proceedings as party admissions, and they may not be true. In legal malpractice cases, there are many defenses that may be asserted to defeat a finding of liability. The claim may be of dubious merit, or the lawyer's error may not be the proximate cause of any damage to the client. In addition, these admissions may constitute a failure to cooperate with the lawyer's carrier in its defense of the case and may result in loss of coverage.

When confronted with a mistake, the lawyer should not panic. The lawyer should be sure he or she knows what happened and should report the matter to his or her insurer. The lawyer also

should consult another lawyer for an objective opinion about what can and should be done about it and should correct the error or mitigate its consequences, if possible. The lawyer should protect his or her interests by not making damaging admissions and should always keep in mind the lawyer's duties to his or her client, partners, and professional liability carrier.

XXII. APPENDIX OF CHECKLISTS

A. [16.82] New Client Screening Checklist

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO SMARTBOOKS® OR SMARTBOOKSPLUS.

B. [16.83] New Client File-Opening Checklist

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO SMARTBOOKS® OR SMARTBOOKSPLUS.

C. [16.84] Screening New Lawyers or Employees

When a lawyer leaves one firm to join another firm, and the new firm represents a client that is adverse to a client of his or her former firm, the lawyer may be disqualified from representing the client of the new firm. Under certain circumstances, the new firm may be required to withdraw from its representation of the client under the theory of vicarious disqualification. The same result may occur when a nonlawyer employee switches from one firm to another that represents a party adverse to a client of the previous firm.

In some jurisdictions, but not all, lawyers and nonlawyer employees may be "screened" from the case involving the adverse parties so that the firm need not be disqualified from continuing to represent its client. Counsel should check the disciplinary rules and common law in his or her jurisdiction to determine whether screening is allowed and, if so, under what circumstances.

The following is a screening policy that was found to have been effective by the Supreme Court of Tennessee in *Clinard v. Blackwood,* 46 S.W.3d 177, 185 (Tenn. 2001):

(a) the Managing Partner will compile a list of all matters where a potential conflict exists because of previous employment;

(b) all attorneys, summer associates, paralegals, and legal secretaries will be instructed in writing not to discuss the specified matter or matters with, or in the presence of, the newly hired individual or to permit such individual to have access to any files pertaining to such matters;

(c) all attorneys, summer associates, paralegals, and legal secretaries will be instructed in writing to place brightly colored labels on all files pertaining to the specific client or matter, which will state the following: "The person listed below is not allowed to access this file and no discussions should be had with or around

this person regarding this case. This is in accordance with Ethics Opinion 89-F-118 of the Tennessee Board of Professional Responsibility. (Individual's name)";

(d) all attorneys in the Firm will be advised that no reference shall be made to the case or matters in the Firm's daily newsletter;

(e) the newly hired attorney . . . shall, if possible, be located on a different floor or on a different part of the floor, than the attorneys, paralegals and secretaries involved in the case(s) under question; and

(f) the Managing Partner will fully inform any affected client of the conflict in writing before the new employee reports to work.

The screening policy must be implemented before the hiring of the attorney or other employee of the firm representing the adverse party. The newly hired attorney or other employee must be notified that he or she is forbidden from engaging in any work, having any discussions, gathering any information, and being involved in any way with the case under question.

D. [16.85] Records Retention Considerations

Once a case has been closed, the lawyer should store the file so that it is available for use if a claim is made about the handling of the case. As a general rule, files should be maintained at least for the period of limitations applicable to legal malpractice actions and other claims. The period of time that a law firm may be vulnerable to a claim may be lengthened by the discovery rule, continuous representation by the attorney, liability to non-clients, and the period during which legal services may affect the client or his or her intended beneficiary's duties and rights.

The lawyer should retain any document that was important to him or her to have in writing in the first instance, such as retainer agreements, correspondence regarding important events, copies of materials documenting the conclusion of the legal matter, and billing materials. These documents will evidence the lawyer's compliance with the standard of care concerning the representation.

Property of the client, such as original business records, personal diaries, original contracts, releases, other written instruments representing the culmination of the legal representation, and tax returns, should be returned to the client. If not delivered to the client, records containing information that the client may need and would not be able to obtain elsewhere should be kept by the lawyer.

RPC 1.15(a) requires that complete records of client trust account funds and other property shall be kept and preserved by the lawyer for seven years after the termination of the representation.

S.Ct. Rule 769 requires that lawyers maintain (for an unspecified period of time) records identifying the name and last known address of each of the attorney's clients and an indication as to whether the representation is ongoing or concluded and that lawyers maintain for at least seven years all financial records related to the attorney's practice, including bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, and tax reports.

If any portions of the file are destroyed or discarded, care should be taken to preserve the confidentiality of the information contained in the documents.

The lawyer should maintain an index of the file records that have been delivered to the client or destroyed.

E. [16.86] Fee Collection Checklist

Before suing a client for legal fees, a law firm should always conduct a review of the client matter and the client's attitude and history. Many insurers and lawyers who frequently litigate legal malpractice claims believe that fee disputes underlie as many as 40 percent of the claims and no less than 25 percent of the claims. This means that suing a client has at least a one-in-four chance of drawing a legal malpractice claim in response.

The following analysis checklist provides a minimal review before suing for fees:

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F. [16.87] Investments in Client Checklist

If a lawyer has an opportunity to take stock in lieu of fees, the lawyer can minimize the ethical and civil liability risks by considering the following:

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