



# THE LEGAL MALPRACTICE SELF-AUDIT

from TEXAS LAWYERS' INSURANCE EXCHANGE

# THE LEGAL MALPRACTICE SELF AUDIT

## A SELF AUDIT FOR YOUR FIRM

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# Introduction

## THE LEGAL MALPRACTICE SELF AUDIT

### A SELF AUDIT FOR YOUR FIRM

by Jett Hanna

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This questionnaire and explanatory text are designed to assist an attorney or a law firm in avoiding legal malpractice claims. The questionnaire and explanatory text are not a reflection of the standard of care that an attorney or firm must follow in order to practice in a non-negligent manner. In some cases the suggestions in this document help attorneys and firms avoid nuisance claims which may cost time and money. The questionnaire and text are not comprehensive, and following the suggestions of this document is no guarantee that a malpractice claim will not be made.

Several works are recommended for a deeper exploration of the issues raised by this work. A Practical Guide to Achieving Excellence in the Practice of Law (ALI-ABA 1992) is an excellent expanded audit-type format reference work with extremely thorough citation to original source material. A Practical Guide also focuses on skills that should be mastered to perform quality legal services. Mallen & Smith, Legal Malpractice (3d. Ed. West 1990 & Supp.) is an excellent hornbook on legal malpractice with many examples of forms that can be utilized to prevent malpractice claims. Here in Texas, the Legal Form Manual for Real Estate Transactions (State Bar of Texas 1993) contains a significant ethics section with many useful forms that both meet ethical requirements and help avoid claims. Herring, Legal Malpractice in Texas (1992), offers many practical suggestions for avoiding malpractice liability, particularly in light of specific Texas law.

This questionnaire can be used in several ways. Law firm managers may use the questionnaire to evaluate firm systems. Individual attorneys, both experienced and new, may use the questionnaire to check the manner in which they are practicing law. Lay staff may also benefit and provide firm management with valuable insight if allowed to work through the form. If you are a TLIE insured and desire to receive an evaluation of your firm's risk areas based on the form, please call Jett Hanna at 1-800-252-9032. We welcome comments from anyone concerning the questions or text.

The author would like to acknowledge the special assistance of Nancy Byerly Jones, Vice-President of Risk Management and Loss Prevention Counsel for Lawyers' Mutual Liability Insurance Company of North Carolina. Her questionnaire, entitled "Loss Prevention Self Audit," served as a model for the questions used here. A number of the questions were borrowed verbatim, and we appreciate her permission to use those questions.

# Self Audit

## THE LEGAL MALPRACTICE SELF AUDIT

### A SELF AUDIT FOR YOUR FIRM

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*Preferred answers are in boldface type. Think about each question carefully, and write down any ideas that come to mind for improving your situation even if you check the preferred answer. For example, you may be doing something which lets you choose the preferred answer, but you may have a system which forces you to do it every time, or you may think of other people in the office who do not do what is suggested.*

#### I. TRAINING AND MONITORING FIRM PERSONNEL

##### A. ALL PERSONNEL

1. Does your firm have a written policy manual which every member and employee is required to read and sign? **Yes**  No
2. Does your firm have a drug, alcohol, and mental health policy designed to encourage impaired employees and their co-workers to deal with such problems, without undue fear of punitive action? **Yes**  No
3. Are attorneys and staff with a history of drug, alcohol, or mental health problems monitored by at least one member of the firm in a non-threatening manner to assure they are following an appropriate rehabilitation program? **Yes**  No
4. Are you and members of your firm sensitive to the following signs of possible impairment of yourself or a co-worker:
  - a) Drug abuse **Yes**  No
  - b) Excessive alcohol consumption **Yes**  No
  - c) Suicidal thoughts or threats **Yes**  No
  - e) Family, marriage or relationship problems **Yes**  No
  - f) Deterioration of physical appearance or health **Yes**  No
5. Does your firm require all personnel to have a yearly physical? **Yes**  No

# COMMENTS

6. Does your firm require personnel to schedule vacations when a certain amount of vacation time has been built up? Yes  No
7. Do you have a firm policy against sexual conduct toward clients? Yes  No
8. Does your firm encourage stress management and a healthy balance between work and private life for all attorneys and staff? Yes  No

## **B. ALL ATTORNEYS**

1. Does your firm confirm the status of each attorney's membership in the state bar once a year? Yes  No
2. Does your firm have a system for confirming that all attorneys joining the firm are licensed? Yes  No
3. Does your firm have a system to confirm that every attorney has paid required bar dues? Yes  No
4. Does your firm have procedures to confirm that when an attorney leaves the firm, retires, or dies, it is clear which remaining attorney is responsible for clients handled by the departing attorney and that any substitution of counsel or similar notice in change of counsel necessary has been completed? Yes  No
5. Does your firm have a system for assuring each attorney's compliance with mandatory continuing legal education requirements? Yes  No
6. Do you or your firm have a system for keeping up to date with:
- a) Changes in substantive law in areas in which you practice; Yes  No
  - b) Developments in legal ethics and bar discipline; Yes  No
  - c) Developments in the law of disqualification; Yes  No
  - d) Developments in the law of legal malpractice? Yes  No
7. Does every attorney in the firm know who can advise them on ethics questions on short notice? Yes  No

## **C. ASSOCIATES**

1. Do you have a thorough plan for the initial and ongoing training of your associates? Yes  No
2. Do your associates feel free to ask for your guidance, opinions, and critiques of their work? Yes  No
3. Do you teach your associates about the necessity for and value of integrating good risk management systems in their practices? Yes  No
4. Do you follow up with your associates to ensure that they have read the policy manual and have received answers to any questions they may have? Yes  No
5. Besides the required CLE courses taken outside of the firm, do you offer your associates in-house programs conducted by partners in the firm or others regarding such topics as legal writing, effective negotiation skills, how to prepare and file a pleading, etc.? Yes  No
6. Do you give your associates time to do pro bono work and to participate in community and bar activities? Yes  No

# COMMENTS

7. Do you give your associates fair and adequate time to complete projects for you? Yes  No
8. Do you let your associates accompany you to court, depositions, real estate closings, and the like so they can learn from observing you or other attorneys in the firm? Yes  No
9. Is your billable hour requirement for associates a fair one to them and to your clients? Yes  No
10. Do you teach your associates, by word and example, how to work respectfully and cooperatively with staff members? Yes  No
11. Does your firm have procedures which train and allow associates to discuss the following problems in confidence:
- a) Improper billing by partners, shareholders, or associates; Yes  No
  - b) Deadlines or appointments missed by partners, shareholders or associates; Yes  No
  - c) Other problems which can alert firm management to ongoing problems which could lead to malpractice claims or ethical violations? Yes  No

#### **D. LAY STAFF**

1. Have you or your firm made reasonable efforts to ensure that nonlawyer assistants' conduct is compatible with your professional obligations, as required under Disciplinary Rule 5.03, by:
- a) Requiring them to read the Texas Disciplinary Rules and discussing the Rules with them; Yes  No
  - b) Informing them of the importance of confidentiality and requiring them to sign a confidentiality pledge; Yes  No
  - c) Educating them how to avoid unauthorized practice of law? Yes  No
2. Do you take time as necessary to train your staff thoroughly at the beginning of their employment and offer them continuing education? Yes  No
3. Do you utilize quality control systems for checking the quality and timeliness of your assistants' work (e.g., reviewing files at random to see if proper checklists are used and files are maintained in an organized manner)? Yes  No
4. Have you taught your assistants the essentials of professional and courteous telephone manners and procedures? Yes  No
5. Do you introduce your clients to your staff and explain their important roles as members of the client's legal team? Yes  No
6. Would you like to work for yourself? Yes  No
7. Do you have regular staff meetings? Yes  No
8. Do you encourage staff to suggest ways to improve office procedures? Yes  No
9. Do you give your staff regular reviews? Yes  No
10. Do you personally check both the substance and form of all documents completed by staff, even mundane details such as case numbers? Yes  No

# COMMENTS

11. Do you praise staff members for a job well done? Yes  No
12. Is the criticism you give staff constructive, i.e., delivered in a manner calculated to help them improve rather than to punish them? Yes  No
13. Does your staff know how to contact you at all times? Yes  No
14. Is your staff comfortable asking you questions? Yes  No
15. Do you help your staff handle difficult clients? Yes  No
16. Are you a good role model for staff when it comes to complying with firm policies and procedures? Yes  No
17. Does your firm have procedures which train and allow lay staff to discuss the following problems in confidence:
- a) Improper billing by partners, shareholders, or associates; Yes  No
- b) Deadlines or appointments missed by partners, shareholders or associates; Yes  No
- c) Other problems which can alert firm management to ongoing problems which could lead to malpractice claims or ethical violations? Yes  No

## II. DOCUMENTATION

1. Do you always use engagement letters or employment agreements, signed by clients, which state the financial terms of your employment, the scope of the work to be performed, and disclose any potential conflict of interest? Yes  No
2. Do you send non-engagement letters or otherwise confirm in writing that you are not the attorney for any person with whom you have met or consulted, but who you believe is not your client, including the following:
- a) persons whom you decline to accept as clients; Yes  No
- b) partners or shareholders who are unrepresented when you represent a partner, shareholder, or an entity; Yes  No
- c) unrepresented parties to a real estate closing; Yes  No
- d) relatives of clients with whom you discuss matters relating to the representation; Yes  No
- e) employees of an entity when you represent the entity; Yes  No
- f) any person who is unrepresented who could conceivably believe you are representing them. Yes  No
3. Do you use non-engagement letters that:
- a) clearly state that you have not and will not act as attorney for the person? Yes  No
- b) warn the person in a general way that any delay could prejudice their rights in the matter, without making a specific conclusion as to when the statute of limitations may run? Yes  No
- c) advise the person to seek other counsel? Yes  No
- d) give no other legal advice to the person? Yes  No

# COMMENTS

4. Do you send disengagement letters to clients from whose cases you are withdrawing? Yes  No
5. Do you send termination letters to all clients when you have completed your services stating:
- a) no further services will be provided unless new arrangements are made (if the person is someone you would want as a client in the future); Yes  No
- b) any additional action which the client must carry out on their own, if applicable; Yes  No
- c) the firm may destroy the file in the future, and that if the client wants copies of file materials they should request them as soon as possible? Yes  No
6. Do you take notes of and/or confirm by letter all discussions with clients or anyone else you talk to about a matter? Yes  No
7. Do you confirm by letter or other writing the following critical matters:
- a) numerical figures such as loan balances; Yes  No
- b) agreements with opposing or third party counsel; Yes  No
- c) a client's decision to act contrary to your recommendations; Yes  No
- d) risks that the client faces and has accepted in connection with going forward with a course of action? Yes  No
8. Do you instruct your staff how to document their conversations with clients and others? Yes  No

### III. CLIENT RELATIONS

1. Have you or your firm given the notice of the grievance process to clients as required by Section 81.079 of the Texas Government Code in any of the following ways:
- a) Making complaint brochures prepared by the State Bar available; Yes  No
- b) Posting a sign prominently displayed describing the process; Yes  No
- c) Including the information on a written contract for services with the client; Yes  No
- d) Providing the information in a bill for services to the client? Yes  No
2. Have you and your firm informed your clients of the contents of the Texas Lawyer's Creed as required by Article II, Section 1 of the Creed, and can you prove that you have if necessary? Yes  No
3. Do you and your firm have policies and procedures which lead you to decline to represent the following types of clients:
- a) Clients with matters outside your area of expertise; Yes  No
- b) Clients with a history of changing attorneys; Yes  No
- c) Clients who have procrastinated in seeking legal advice; Yes  No
- d) Providing the information in a bill for services to the client? Yes  No

# COMMENTS

- e) Clients with poor credit histories, if fees are to be paid hourly and billed periodically; Yes  No
- f) Clients with problems that cannot really be solved by a remedy available under the law? Yes  No
4. Do you regularly remind your staff of the importance of good client relations? Yes  No
5. Do you present clients with alternatives and allow them to choose appropriate courses of action where possible? Yes  No
6. Do you copy clients with your work product and correspondence? Yes  No
7. Do you allow the client an opportunity, where appropriate to assist in complying with discovery requests and in investigation of the case? Yes  No
8. Do you or a trained member of your staff return your clients' phone calls within twenty-four hours, at the very least to see if the nature of the call is time sensitive? Yes  No
9. Do clients receive your undivided attention during conferences? Yes  No
10. Do your clients routinely have to wait for more than five minutes to meet with you when they have an appointment with you? Yes  No
11. Do you routinely ask clients if there is anything you can do to improve your services for them? Yes  No
12. Do you thank your clients for giving you the opportunity to serve them and for any referrals they may have sent your way? Yes  No
13. Do you call or write to your clients at least every three months, particularly when their cases are on hold for some reason? Yes  No
14. Do you explain to clients, when applicable, that they will be billed for telephone conferences with you? Yes  No
15. When you play "telephone tag" with a client or other person, do you document in the file the dates and times that you have attempted to return the call? Yes  No

#### **IV. CONFLICTS OF INTEREST**

1. Do you have a comprehensive conflict of interest system for discovering potential conflicts? Yes  No
2. Do you and your firm have procedures to prevent opening a file without obtaining basic conflict information? Yes  No
3. Do you check for any potential conflicts prior to receiving confidential disclosures from new clients? Yes  No
4. Do you share new and potential client information with all attorneys and staff on at least a weekly basis through new matter memoranda? Yes  No
5. Does your firm have a centralized index, accessible to all attorneys and staff, of the following parties? NOTE: The list below represents an ideal database for analyzing conflicts. You may meet the needs suggested by the list through the use of the new matter memoranda suggested in question 4.
- a) attorneys and staff of the firm; Yes  No

# COMMENTS

- |   |                              |                             |
|---|------------------------------|-----------------------------|
| b) business interests of attorneys and staff;   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| c) clients;   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| d) persons declined as clients;   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| e) adverse parties;   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| f) co-plaintiffs or co-defendants;  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| g) known allies of either clients or adverse parties;   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| h) subject matter of representation;  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| i) known relatives of anyone listed in the index;   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| j) corporate parents or subsidiaries of entities in the index;  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| k) trade names of entities in the index;  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| l) directors and officers of entities in the index;   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| m) partners or known shareholders of entities in the index;   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| n) known employees of entities in the index;  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| o) attorneys for any party in the index?  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| 6. If you detect a conflict of interest, do you always either (a) decline to take the case, or (b) notify the client of the potential conflict and explain the risks and benefits of waiver of the conflict in writing? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| 7. Does your firm have form letters for conflict disclosures and waivers that seem to occur on a frequent basis?  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| 8. Does your firm have a mandatory review procedure for all cases proposed for acceptance in which a potential conflict of interest is detected?  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| 9. Do you or any one in your firm engage in any of the following practices:   |                              |                             |
| a) act as both an attorney and an officer or director for the same corporation?   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| b) have a financial interest in a client matter?  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| c) participate in a business transaction along with a client?   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| d) accept stock in lieu of fees?  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| e) represent adverse parties in "friendly" suits or any other kinds of suits?   | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| f) represent multiple parties attempting to recover funds from a fixed recovery pool such as a single bankrupt, an insurance company in receivership, or a single insurance policy?                                     | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| 10. Do you always confirm who you represent in writing, and inform non-clients who might believe they are your client that you do not represent them in writing?  | Yes <input type="checkbox"/> | No <input type="checkbox"/> |

# COMMENTS

## V. DOCKET/WORK CONTROL

1. Do you feel that your present docket/work control system is reliable and efficient? Yes  No
2. Is the plan for your docket/work control system in writing? Yes  No
3. Has your firm appointed an employee to oversee, supervise and ensure the use of your docket/work control system? Yes  No
4. Do you have a centralized docket/work control system that is used by the entire firm? Yes  No
5. Is there a system in place for screening incoming mail for new deadlines by someone in addition to the responsible attorney? Yes  No
6. Does your docket/work control system assign a review date to every open file in the office, even if the matter is temporarily dormant? Yes  No
7. Do you and your assistants keep personal calendars in addition to the centralized calendar? Yes  No
8. Are deadlines distributed on a routine (daily or weekly) basis? Yes  No
9. Do you factor in the leadtimes necessary for completion of tasks? Yes  No
10. Do you automatically set multiple reminder dates prior to the final date that items become due? Yes  No
11. Are all attorneys and staff trained and refreshed about the docket control system on a regular basis? Yes  No
12. Do you have a reliable follow up system in place to confirm the actual completion of docketed deadlines? Yes  No
13. Does your docket/work control system include?
- a) statute of limitations? Yes  No
  - b) all court appearances? Yes  No
  - c) client and other appointments? Yes  No
  - d) all administrative systems and deadlines? Yes  No
  - e) real estate closing deadlines? Yes  No
  - f) all litigation deadlines? Yes  No
  - g) all self-imposed, discretionary deadlines (i.e., promises made to others, promises made to you and work deadlines you have set for yourself? Yes  No
  - h) at least one docket date for every open file within your firm so that temporarily inactive files will be reviewed at least every 3 months? Yes  No

## VI. FILE MANAGEMENT

1. Are your files organized in a logical manner that someone else in the office understands? Yes  No

# COMMENTS

2. Have you designated one staff member to supervise a centralized filing system? Yes  No
3. Do you have a file-opening procedure that includes the following elements:
- a) controls to prevent billing or work until the procedure is followed; Yes  No
  - b) a file-opening memorandum which contains all information necessary to set up the file and to follow all procedures; Yes  No
  - c) analysis of potential conflicts of interest; Yes  No
  - d) credit checks of clients; Yes  No
  - e) verification that fee agreements or employment letters have been executed by the client; Yes  No
  - f) assignment of the file to an attorney? Yes  No
4. Does your firm have a file check out procedure so that the location of the file is known at all times? Yes  No
5. Do you review every open file and contact the client at least every three months? Yes  No
6. Do you use a form to indicate when documents are removed from a file and who took them? Yes  No
7. Do you have a file closing form that indicates which attorney reviewed the file prior to closing, what file contents were returned to the client, that a termination letter was set to the client, and a safe date for destruction of the file? Yes  No
8. Do you have a system in place for reviewing applicable closed files when new law could affect a closed matter, particularly if the client is someone you represent on a continuing basis? Yes  No
9. Do you have a firm policy regarding regular destruction of files which balances the economics of file storage with the need to preserve evidence in the event of a claim or client need? Yes  No
10. Have you written and implemented adequate fire prevention and disaster policies for your firm? Yes  No
11. Do you return all original, valuable or unique documents and items to clients as soon as possible? Yes  No
12. Do you keep all original, valuable or unique documents and items in fireproof cabinets or a safe? Yes  No
13. Are back ups of all docket/work control deadlines and all computer generated work stored in a fireproof safe or at a firm approved, off-site location? Yes  No
14. Are negatives and original photographs stored in separate locations? Yes  No

## **VII. BILLING AND COLLECTION**

1. At the beginning of representation, do you explain your fee and billing procedures to clients verbally and in writing? Yes  No
2. Do you explain to your clients, verbally and in writing, the differences between your professional fees and out of pocket expenditures? Yes  No

# COMMENTS

3. Are daily entries made by staff members into your centralized time records? Yes  No
4. Do you send your clients monthly bills? Yes  No
5. Do your bills outline the details of the work performed for the client? Yes  No
6. If fee or expense variations from your employment agreement are necessary, do you promptly notify your clients and request their authorization regarding those changes? Yes  No
7. If clients do not pay their bills due on time, do you have a reasonable in-house collections procedure to follow (e.g., call the client, send a second notice, etc.?) Yes  No
8. Do you explain to all clients that you would appreciate their promptly informing you of any concerns or complaints they may have regarding your fee, billing procedures or related issues? Yes  No
9. Do you and your firm have a policy against suing clients for unpaid fees? Yes  No
10. If you or your firm does sue for fees, do you:
- a) Sue only if there was a written fee agreement; Yes  No
  - b) Sue only after reviewing the economy of pursuing the fees in light of lost billable time and expenses necessary to pursue the case; Yes  No
  - c) Sue only if a favorable result was obtained by the client; Yes  No
  - d) Have a disinterested attorney outside your firm review the fee case; Yes  No
  - e) Have a firm policy against asserting attorney's liens; Yes  No
  - f) Consider any other factors which may form the basis of a counterclaim by the client? Yes  No
11. Do your fees fairly embody the value of legal services received by your clients? Yes  No

## VIII. TRUST ACCOUNTS

1. Do you retain records of trust accounts for at least 5 years after final disposition of the underlying matter, as required by Disciplinary Rule 1.14(a) and Article 11, Section 38 of the State Bar Rules? Yes  No
2. Do you retain funds paid jointly to the attorney and the client and which are in dispute in a trust account, as required by Disciplinary Rule 1.14, even if you think the client is wrong about the manner in which they want the funds disbursed? Yes  No
3. Do you obtain client consent to disbursements to you or your firm from the trust account? Yes  No
4. Do you at all times maintain fiduciary funds separate from firm monies? Yes  No
5. Do you reconcile your trust account at least monthly? Yes  No
6. Do you provide clients with written accountings when disbursing their funds or, if no disbursements, at least annually? Yes  No
7. Have you properly and thoroughly trained your staff regarding the handling, recordkeeping and accounting of trust funds? Yes  No

# COMMENTS

8. Do your records always indicate what funds are being disbursed, when and from which client? Yes  No
9. Do you closely supervise any assistants who work with trust monies? Yes  No
10. Do you maintain an IOLTA trust account in accordance with the State Bar Rules for client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time? Yes  No
11. Does your firm have a system for confirming compliance of every attorney in the firm with annual reporting requirements of IOLTA status? Yes  No

## **IX. OFFICE SHARING**

1. Is there anything about your office sharing relationship with other attorneys that could reasonably lead a client to believe that a partnership exists? Yes  No
2. Do you explain to each client that you are not a partner with the attorneys with whom you are sharing space? Yes  No
3. Do you have a written agreement regarding the terms of your office sharing relationship with the attorneys involved? Yes  No
4. Does your office sharing agreement specifically prohibit any of the parties from representing that there is a partnership? Yes  No
5. Do you ever share fees or work on a case with another attorney sharing space with you without documenting how the fees are to be split and without specifying that this situation is an exception to the normal terms of your office sharing agreement? Yes  No
6. Does each attorney have his or her separate letterhead? Yes  No
7. Do all signs clearly indicate that the attorneys sharing space are separate firms? Yes  No
8. If one receptionist takes calls for all the attorneys who are office sharing, has he or she been properly trained in how to answer the telephone without inferring a partnership and how to answer clients' questions regarding who employs him or her? Yes  No
9. Have precautions been taken to guard client confidentialities from other attorneys who are not your partners and their staff? Yes  No
10. Do your office sharing mates carry the same amount of professional liability insurance you do? Yes  No

## **X. TIME MANAGEMENT**

1. Do you make a to-do list of all pending projects? Yes  No
2. Do you update and prioritize your to-do lists at the end of each day for the day ahead? Yes  No
3. Do you set aside specific blocks of time to meet with clients, return phone calls, conduct research and work uninterrupted? Yes  No
4. Do you delegate work whenever possible? Yes  No
5. Do you use simple and easy to understand forms that are indexed for ease in locating when needed? Yes  No

# COMMENTS

6. Have you chosen equipment for your practice that, excluding the initial training time, handles your case load in the most efficient manner? **Yes**  **No**
7. Do you use checklists, both standardized and customized, in all areas of law in which you practice? **Yes**  **No**
8. Do you prioritize the work assigned to assistants making it clear what deadlines are pertinent to each task? **Yes**  **No**
9. Do your assistants know where to leave urgent materials within your office for your review? **Yes**  **No**
10. Are you realistic when setting deadlines in terms of how much time to allow for the completion of specific projects? **Yes**  **No**
11. Do you use checklists for all areas of the law within which you practice? **Yes**  **No**
12. Do you require your staff members to utilize checklists in their procedural and administrative tasks? **Yes**  **No**
13. Are your checklists customized, if and as needed, for individual cases? **Yes**  **No**
14. By quickly reviewing the checklists, can you get an accurate update regarding the current status of the case? **Yes**  **No**
15. Do you review and revise all checklists at least twice each year? **Yes**  **No**

# COMMENTS

# Contents

## THE LEGAL MALPRACTICE SELF AUDIT

### I. TRAINING AND MONITORING FIRM PERSONNEL

Comment 1 to Rule 5.03 of the Texas Disciplinary Rules states that attorneys should be responsible for the work of lay staff. This rule is supported by the imposition of common law liability on attorneys for the acts, errors and omissions of their staff. Firms and shareholder or partner attorneys have been held responsible for the acts of partners, other shareholders, and associates as well. It is thus critical to have a thorough system for training and monitoring the work of all personnel in a firm.

#### A. ALL PERSONNEL

A written policy manual is recommended for two reasons. First, it makes attorneys think through the structure of their practice so they can identify what needs improvement. The second reason is to let everyone in the organization know what is expected of them, so anticipated problems can be averted.

Impaired attorneys and staff contribute to a disproportionate share of claims, in the opinion of this author. It is important to encourage personnel to seek help rather than to hide problems. While a "fire any alcoholic or drug abuser" policy seems to protect the firm from the acts of an impaired individual, the message sent to firm personnel is that impairment should be hidden, not faced. Also, there is often a significant investment in an impaired person-training, knowledge, contacts, etc.-which the firm could salvage with a treatment oriented policy. A structured policy which gives impaired individuals incentives to deal with their problems can save money in the long run. It should be stressed, however, that merely sending an impaired person for counseling or treatment may not be enough to assure that the firm is protected from future remissions. Monitoring of the impaired person's continuation of treatment and counseling might be necessary to protect the firm in some cases. Some of the questions in this section point to factors which can encourage a work atmosphere which makes the development of impairment problems less likely, and, not coincidentally, can make a law firm a more pleasant place to work.

#### B. ALL ATTORNEYS

Some of the questions here are designed to make sure that all attorneys are in good standing. If a firm lets an unlicensed associate or partner practice law, the firm and its members could face liability for the acts of the unlicensed person.

When a firm member dies, it is important to reassign his or her tasks or make sure that someone else takes over their work. State Bar regulations make partners responsible for making sure this occurs. When an attorney leaves the firm, it is important that both the attorney leaving and the firm understand whether the firm will continue to provide service to that client on outstanding matters. Whatever the understanding between the firm, and the attorney, it should be confirmed with the client in writing. If the matter involves pending litigation, any substitutions or withdrawals of counsel should be confirmed as required by rules of court.

This part of the question also lets attorneys understand whether the attorneys in the firm have the resources to stay on top of ethics developments. The State Bar has a toll free line for attorneys to get advice on ethics matters, 1-800-532-3947. TLIE insureds can call 1-800252-9332 to get our two cents worth on any ethical or malpractice related problem. Neither service provides legal advice-attorneys should still conduct their own research and evaluation of any problem.

## **C. ASSOCIATES**

This section of the audit addresses some of the problem areas that can arise in making sure your associates are receiving appropriate training, on both a formal and informal basis. Associates learn as much or more from the example of senior attorneys as they do from organized, structured training. This author would suggest that associates also answer this questionnaire section-the answers might be enlightening.

## **D. STAFF**

Lay staff are a very critical component of the legal service team, and cannot be ignored in a review of your firm's potential weaknesses. Staff can be both a source of great frustration and life saving, often on the same day. The questions presented here are intended to emphasize that attorneys can utilize staff in a way that enhances the law practice. Staff is often the main point of contact between your firm and clients, so they have to have some training in people skills. Staff is also often in a position to notice problems in your firm systems that attorneys might not catch. It is important for staff to communicate with attorneys, both for using the knowledge they have and the filling in the gaps in their knowledge and experience.

## **II. DOCUMENTATION**

The types of documentation suggested by the questions are needed, if for no other reason, to serve as evidence in the event of a claim. Without documentation, the case may come down to the attorney's word against the client's word, and a jury is not likely to have any attorneys on it. The Disciplinary Rules favor written fee arrangements, and require them when the attorney is to receive a contingent fee.

Many suits arise because people whom the attorney does not believe to be clients claim to be clients. Non-engagement letters help prevent these situations. Non-engagement letters should not usually state a specific date upon which limitations will run, particularly since the attorney may not have fully investigated all aspects of the case. A sample non-engagement letter is found in Appendix A. In some circumstances, it may be appropriate to get the "non-client" to sign a statement. A sample non-representation form is found in Appendix B, for situations where an attorney represents a lender in a real estate transaction where neither the buyer or seller is represented. Similar forms may be necessary whenever unrepresented parties are involved in a matter.

Termination letters can avoid claims that the attorney did not finish the work. Telling the client at time of closing that the file may be destroyed can avoid your having to track down the client years later in the event that the firm decides to destroy the file. A sample termination letter is in Appendix C.

Written confirmation of advice given to a client is especially important, since your memory and the client's memory may not be the same if a claim arises. Major strategy decisions and decisions to take actions with some risks to the client deserve extra attention. At times, any course of action for the client may have risks, and the attorney may need to document the alternatives laid out for the client. If a client refuses advice, written confirmation of the attorney's advice and the client's choice is critical.

## **III. CLIENT RELATIONS**

A successful law practice depends on good client relations. If clients aren't satisfied, they won't recommend new clients, won't use the firm again, and are more likely to make a malpractice claim. If there is a malpractice claim, the entire attorney-client relationship will be reviewed, and not just the "mistake." In many cases, juries have been willing to assess punitive damages for gross negligence-a finding of conscious indifference or that "that the (attorney) knew about the peril, but his acts or omissions demonstrated that he just didn't care."

Compliance with all of the ethics rules is a first step in assuring that a fact finder will look favorably on the attorney. Attorneys are required to give every client notice of the grievance process by Section 81.079 of the Texas Government Code, and to make them aware of the provisions of the Texas Lawyer's Creed as required by Article II.1 of the Creed.

Some clients are going to be problems no matter how well they are treated. This section of the questions suggests some of the warning signs that may appear at the beginning of the representation.

Many commentators suggest that involving clients with the "legal service team" as much as possible makes it less likely that they will feel like they have not received good representation. Allowing clients to choose alternatives when there are risks to proceeding in any manner is one way to involve the client. Another is to copy clients with as much of your work product as possible. In some cases, clients will appreciate the chance to assist in investigation of the case or in sorting through materials to assist in preparation of discovery responses.

Many techniques for creating good client relations are no more than the Golden Rule: Do unto others as you would have them do unto you. Most of the remaining questions in this section focus on that aspect of client relations.

## V. CONFLICTS OF INTEREST

A thorough conflict of interest system is necessary. It is not sufficient to rely on memory, even if the attorney is a solo practitioner. It is also important that the conflict system is used every time a potential client consults you. In some cases, mere receipt of confidential information can create a duty not to reveal the information. This is true even if the attorney does not accept the person as a client.

In a firm larger than a solo practice, it is recommended that the firm have new matter memos to let everyone in the office know who is a new client or prospective client. Simply having an index is not enough: there are all kinds of reasons why a conflict could not be detected by an index, but would be detected by having every attorney in the firm review who is becoming a client and for what purposes. The most common example of this is subject matter conflicts. If an attorney is representing one client in an appellate matter on a point of law, and a new client comes in who would need to make the opposite argument, the firm might choose to decline the case. Note that sharing info about new clients also permits monitoring whether any of partners are taking on otherwise questionable cases (credit risks, non-meritorious cases, etc.).

Question 5 suggests the "ideal" entries in a conflict of interest index or database. One of the keys to avoiding conflicts of interest is knowledge of facts, and knowing who your firm represents and who they are in opposition to is critical. Some of the ideal entries might alternatively be taken into account on the new matter memo suggested by question 4. It is critical that the index be centralized and accessible, so that it will be used.

In soliciting comments regarding this audit form, a number of people suggested that perhaps too many factors were included. The information suggested can help avoid conflicts, and a few examples from the more obscure listings will be noted. Family members is a good example. If an attorney has taken on a divorce client, no one else in the firm should represent the other spouse in a business deal. Sometimes the conflicts are more subtle. If an attorney represents one client on an estate plan, knowledge of the plan could be useful to other family members even though the client wants to keep the plans confidential. In many cases, it is important to fully evaluate the possibility of conflicts with family members of persons who appear to have similar interests, such as family members with different injuries in the same car accident. Finally, it is just embarrassing to explain to a business client that the firm would not have taken a case against the client's parents if the firm had only known...

Consider the following situation regarding employees of clients. An attorney represents X company on a variety of corporate matters. A partner receives a call from Smith, an employee of X, who has a great new idea he wants to patent. Smith doesn't tell the partner he developed the idea while he worked with X, and the partner assists Smith on the patent application. X contacts the first attorney to challenge the patent, but she has to tell X that a partner is the one who assisted Smith. When dealing with officers and directors, it is similarly critical to keep in mind that representing them on their dealings with the corporation could be a conflict if the firm represents the corporation on other matters.

Attorneys for parties in the index was criticized by some reviewers. If an adverse attorney joins the firm, the potential scope of disqualification will be more clear. A lateral transfer may not be able to get information from his or her prior firm that will let the firm evaluate the situation properly.

Written conflict disclosures and waivers are necessary if an attorney does not decline cases in which there is a potential conflict of interest. While the rules may not require that these disclosures and consents be in writing, there won't be any evidence but the attorney's word if the client says no disclosure or consent occurred.

All situations in which a potential conflict is detected should be reviewed by other members of the firm. Larger firms may want to have a conflicts or ethics committee review the situation; smaller firms might just discuss the situation at a partners meeting or designate one attorney as the conflicts specialist.

Acting as attorney and officer or director for a client has been a key factor in many of the claims made by the government in connection with the savings and loans problems. It can be dangerous to have a common financial interest with the client. Many attorneys have been sued even when all they did was point out an opportunity to a client that the attorney also invested in. Clients are not adverse to claiming later that they were led to believe the attorney checked on the situation. Representation of adverse parties is prohibited by the Disciplinary Rules in all situations.

Confirming who the attorney represents and doesn't represent in writing is a key to avoiding conflicts problems. If someone can create a fact question as to whether they were the client, a letter which tells the person the attorney does not represent them could save a lot of headaches. These types of conflict allegations are the most frustrating-attorneys do not even perform a conflicts check for someone whom they do not think is a client. If an attorney talks with individuals who are not the client about a situation, such as partners when the firm is representing a partnership or family members when representing one person, the attorneys should send a letter confirming the attorney is not representing them. In commercial transactions, the attorney should get unrepresented parties to acknowledge in writing that the attorney does not represent them.

## **V. DOCKET/WORK CONTROL**

A work control system is vital for every firm. This system is often called docket control, but should not be limited to use in litigation practices. All practices have work with deadlines-if there is no other deadline, there is the date on which the client will be so fed up with inaction that they pick up the file and go elsewhere. A centralized system is necessary in order to allow other firm members to know of deadlines if an attorney is absent, ill, or otherwise unable to carry out assigned work. Centralized work control can also assist in determining work loads for other reasons, such as efficiency of personnel or assigning new matters.

The centralized system is not enough. Attorneys and their assistants should keep personal calendars, too. This can avoid simple mistakes, such as miss-entering deadlines or one person forgetting to enter a deadline. If sufficient leadtime is not allow to complete work entered on the calendar, the system won't be of much help. Some matters with long lead times will require entry of multiple deadlines, so that progress toward completion can be evaluated. It is a good idea to verify that hard deadlines have actually been met, rather than just assuming that a reminder is enough.

The questions suggest a few of the matters that should go into the docket/work control system. One type of deadline that should not be overlooked is an arbitrary periodic review deadline. Some files may have to sit for months; it is a good idea to review such files on a regular basis and to remind the client why the file is temporarily inactive.

## **VI. FILE MANAGEMENT**

It is critical that the firm keeps files in a way that allows tracking of files and documents taken from the files. Many of the questions in this section address the basics of taking care of files. File opening can be a good place to make sure firm policies are complied with, such as types of clients and cases. At some point, the firm may have to consider destruction of files. Appendix D suggests some considerations in file destruction.

The firm should also consider means of protection for files from physical damage, and plan for worst case disasters. For some documents, the firm may need a safe or safety deposit box. Only keep valuable and original documents as long as required. Return such items to clients as soon as possible.

## **VII. BILLING AND COLLECTION**

Fees are a frequent source of friction between attorneys and clients. Clients of attorneys working on contingent fees should understand the difference between attorneys fees and expenses from the start: they will be very dissatisfied with the outcome otherwise. Attorneys working on an hourly basis should send detailed fee bills frequently. When this is done, the client has smaller individual payments and the firm can catch the slow or no payers before too much time and effort has been invested in an unexpected pro bono case.

It is better not to sue clients for fees. Malpractice counterclaims occur frequently in fee suits. Juries are often left wondering if the attorney really cared about the client, or just wants money. The disciplinary rules do require that the fees be fair and reasonable to the client. If a firm is going to sue for fees, Question 10 in this section suggests factors to consider before filing suit.

## **VIII. TRUST ACCOUNTS**

Misuse of trust accounts is a frequent source of disciplinary actions. Certain trust accounts must comply with rules regarding the IOLTA system which generates revenue for indigent legal service. As noted in the questions, Disciplinary Rule 1.14 requires that records of trust accounts be maintained for 5 years after representation ceases. That rule also prescribes a procedure for disbursement in the event that the attorney and the client disagree about the proper accounting of the fund, and many of the questions are geared to making sure that there is no disagreement about disbursement.

Commingling of trust and operating accounts is a serious offense which a well meaning, but poorly trained, staff member could commit. Staff that works with trust accounts must understand that the rent cannot be paid out of the trust account, and that settlement proceeds must first be deposited in the trust account, for example.

## **IX. OFFICE SHARING**

Office sharing relationships provide a number of questions for attorneys. Disciplinary Rule 7.04 (d) requires that attorneys not represent to clients that a relationship with other attorneys exists when no such relationship exists. From a malpractice standpoint, an apparent or de facto partnership between attorneys may be sufficient to subject an attorney who does not work on a case to vicarious liability. Appendix E is an article discussing office sharing in more detail.

## **X. TIME MANAGEMENT**

Many malpractice problems arise when an attorney or his staff gets “snowed under.” The questions in this section suggest a few ideas that may help an attorney “dig out” if he or she feels constantly behind, or avoid getting that feeling.

Making and utilizing checklists on recurring cases or processes can avoid the need to reinvent the wheel every time, and ultimately save time. Checklists also help attorneys and staff improve the quality of work, since the lists provide a check against the firm’s past experience as to what needs to be done in classes of cases and matters.

**APPENDIX A: SAMPLE NON-REPRESENTATION LETTER**

(DATE)

(ADDRESS)

RE: (STATE NATURE OF REPRESENTATION)

Dear (NAME):

I appreciate the opportunity to discuss the possibility of representing you in (STATE NATURE OF REPRESENTATION). After reviewing this matter, I have concluded that we are not the appropriate firm to represent you in this matter. (I am returning the documents you provided to me with this letter.)

In declining to accept this matter, this firm is not expressing an opinion about (the merits of the action or whether you may ultimately prevail if suit is filed.) (your legal remedies in this situation, nor am I suggesting that a solution is or is not available.) The passage of time is always important and could (ultimately bar any claim you may have.) (restrict available alternatives.) I recommend you contact another attorney immediately to assist you with this matter.

In accordance with our standard policy, we are not charging you for any legal fees. We charge evaluation of a matter only when we express an opinion about the matter. (OPTIONAL: If you need legal assistance in the future, we would be happy to discuss the possibility of representing you in other matters.)

Sincerely,

(Attorney)

(Enclosure: LIST DOCUMENTS RETURNED)

***NOTE:** This letter is based on forms 100.11 and 100.12 of the Legal Form Manual for Real Estate Transactions, State Bar of Texas (1992). The author does not advocate making any specific statements about statutes of limitations, unlike the Form Manual. Obtaining a signature from the party declined is acceptable, but unworkable in many cases. If proof of receipt is thought to be necessary, the letter can be sent by certified mail, return receipt requested. As with all of these samples, it may be necessary to modify this form to fit the circumstances.*

**APPENDIX B: SAMPLE NON-REPRESENTATION LETTER  
TO BORROWER WHEN REPRESENTING LENDER**

§ 100.24

ETHICS AND PROFESSIONAL CONDUCT

***NOTE: THE FOLLOWING LETTER IS FURNISHED ONLY AS AN EXAMPLE AND SHOULD NOT BE USED AS A STANDARD FORM.***

[DATE]

[INSIDE ADDRESS]

RE: [DESCRIBE TRANSACTION]

Dear [NAME]:

I have represented [NAME OF LENDER] in the preparation of legal documents for use in closing the transaction described below.

While I have acted solely on behalf of [NAME OF LENDER], [NAME], the buyer, and [NAME], the seller, acknowledge that the legal fees incurred in preparing the legal documents will be paid for by the buyer or the seller even though I have not in any manner undertaken to assist or render legal advice to the buyer or the seller, except in the preparation of the legal documents. The buyer and the seller further acknowledge and understand that they may retain independent legal counsel to represent their individual interests in the referenced transaction.

The buyer and the seller specifically recognize that I do not have the responsibility to provide any truth-in-lending disclosures, any other truth-in-lending documents, or any other documents required by any regulations that apply to this transaction. The lender is responsible for providing those documents, and no charge may be made for providing them.

Please sign below to acknowledge that you have been advised of my representation of the lender and that you understand that I am not your attorney.

Sincerely yours,

[NAME OF ATTORNEY]

## **APPENDIX C: SAMPLE TERMINATION LETTER-NO FEE PROBLEM**

(DATE)

(ADDRESS)

RE: (DESCRIBE MATTER)

Dear (NAME):

I appreciate the opportunity to have represented you in (DESCRIBE MATTER). (It is my understanding that you do not desire any further services from our firm in this matter. If you do believe further services are necessary, please contact me at once.) OR (We cannot represent you further in this matter, and you should secure other representation at once.)

(As I have advised you previously, there are certain matters which you must follow up on in order to secure any rights you may have in this matter.) (LIST SPECIFIC MATTERS THAT MUST BE FOLLOWED UP, i.e. filing of tax forms, execution of documents, etc.) OR (You should consult with other counsel immediately regarding these matters).

During our representation of you, we have created a file with copies of documents relating to your matter. (My records indicate that all original documents have been returned to you or sent to appropriate parties.) OR (All original documents not previously sent to you or given to appropriate parties are included with this letter.) It is our firm policy to destroy files when we no longer need them, but no sooner than 7 years after the end of the representation. If you need any copies of documents from the file we have generated, please contact us as soon as possible.

(OPTIONAL: If you need legal assistance in the future on this case or any other matter, we would be happy to discuss the possibility of representing you.)

Sincerely,

(Attorney)

(Enclosure: LIST DOCUMENTS RETURNED.)

***NOTE:** This letter is to be used when representation has ended and no further services are to be provided. Form 100.25 in the Legal Real Estate Form Manual provides a sample termination letter when the attorney is withdrawing for non-payment of fees. As with all of these samples, you may need to modify this form to fit the circumstances.*

## **APPENDIX D: MALPRACTICE CONSIDERATIONS IN YOUR FIRM'S FILE DESTRUCTION POLICY**

*The Legal Malpractice Advisory, Summer 1991*

### Liability Avoidance

# Malpractice Considerations in Your Firm's File Destruction Policies

One of the most frequent questions asked by TLIE insureds is whether TLIE has any guidelines for how long files should be retained. Answering that question is not as simple as giving a list with a certain number of years for each category of case. Each individual file has its own considerations. It is also often important to take a look at the context in which the question is asked.

Because attorneys are more transient now than in the past, the question of what to do with closed files has become more complicated. The question of how long to retain files might be fairly easy if the widow or widower of a solo practitioner is asking the question, but might be very complicated for a large firm whose composition is likely to change considerably over the years.

This article addresses the question of how and when to destroy files or parts of files in the context of avoiding or defending against malpractice claims. Liability considerations are not the only factors which may affect a file destruction policy. Such practical economic questions as the availability and cost of storage should also affect a file destruction policy for any given attorney or firm.

### **How Files Are Used In Malpractice Claims**

The attorney's file is frequently a key piece of evidence in a malpractice claim. The file could either help or hurt the firm or attorney in the event of a malpractice claim. The file can document that malpractice has occurred. One recent article notes that attorneys sometimes retain file information that can be misinterpreted. Our experience at TLIE has been

advice given to a client, the chances of a legal malpractice claim are drastically reduced.

In countless cases, litigation has boiled down to the client's word against the attorney's word. In those cases where the attorney's version of the story is documented by a letter or notes, TLIE's insureds have often been successful either in arguing a motion for summary judgment or in dissuading claimants from filing suit. When there is no written evidence of what the attorney did, the jury gets to decide who it believes.

While proper file documentation retained by the attorney can be effective in helping to deal with malpractice claims, a poorly kept file may at least help the attorney to recall precisely what happened. In a number of cases, we have had attorneys who have turned over their file to clients without retaining a copy of the file. It is quite difficult to evaluate such cases until the file can be obtained from the client again during discovery. While this author has not dealt directly with a malpractice claim which involved a file which had been completely destroyed, it seems like the difficulties that have resulted from poorly documented files and files that have been turned over to the client would repeat themselves in cases where a file has been destroyed.

### **The Effect of Statutes of Limitations on File Destruction Policy**

The remainder of this article will take as a given that if a claim is made against an attorney, it is better to have a file than not to have one. Just because it would be better to have a file does not mean that the benefit of retaining every file will

remain constant over time. At some point, every claim could be barred by the applicable statute of limitations. With the advent of the discovery rule for limitations in legal malpractice claims, it has become harder to predict when the statute of limitations could run as to any particular file. Nonetheless, in order to make an orderly decision about when to destroy files, each file can be examined to determine approximate dates when statutes of limitations are likely to have run or dates at which the service provided to the client will have been provided so long before that problems are unlikely to arise.

Taking a look at a few categories of legal services will illustrate why each individual file must be examined.

**Wills:** An error in a will may not come to light until the death of the testator. In such a circumstance, retaining the file a certain number of years beyond the death of the testator may be appropriate. On the other hand, once distribution is made of a small estate, it may be possible to close the file within a very few years after finishing the services for the estate.

**Real Estate:** An error in a deed of trust mortgage may not come to light in any particular situation until a foreclosure is contemplated on the deed of trust. Conversely, if an attorney has simply drafted a quit claim deed for an individual without providing any other advice, such a file could arguably be destroyed fairly quickly.

**Litigation:** At TLIE, we have seen at least one case alleging an attorney's failure to advise a client of the necessity of renewing a judgment which the claimant did not bring until over 20 years after the

original judgment was taken. A simple litigation case resolved in favor of the client by settlement, on the other hand, might reasonably be destroyed within a relatively short time after closing of the file.

With these examples in mind, there are some general themes that cut across specialty lines which may be useful in evaluating possible safe times for the destruction of files.

- Events that can trigger clauses in documents. Provisions in wills and mortgages as noted above, set definite times at which the documents become important. Any settlement document, agreement between parties, or other such documents could contain similar provisions that are triggered by specific events. If the time at which those events might occur can be identified, a possible date for file destruction might be determined.
- Continued litigation involving other parties. If other litigation related to litigation which was the subject of the legal services is expected to continue, decisions about when to destroy files probably should be postponed. As long as other litigation continues, interim settlement agreements between only certain parties to the litigation might be called into question. In one case handled at TLIE, the basic allegation of malpractice was that an attorney representing one of several plaintiffs recommended settlement too early. The later-settling plaintiffs received larger settlements than the early settling plaintiff.
- Final deadlines for challenging court decisions. In litigation situations, there are frequently methods for obtaining review of a case long after a judgment becomes final. The possibilities that these avenues may be pursued should be factored into any analysis of appropriate dates for file destruction. In Texas, for example, a final judgment may be challenged by a properly filed bill of review up to four years after the judgment becomes final.
- Income tax statutes of limitations. Almost all legal services carry some type of federal income tax impli-

cations. The possibility, however remote, that the government could challenge the tax consequences for certain activities should be factored into any decision about dates for file destruction.

- Factors that toll statutes of limitations. The most frequent factor that must be considered is tolling provisions based on minority. If legal services have been provided to someone under 18 years of age, special consideration may need to be given to appropriate time for destruction of the file.

### **Evaluating and Destroying Files**

The best time to evaluate when to close any given file is when the firm or attorney proposes to close the file and remove it from the tickle or docket system. Since the file is being removed from the tickle system, the likelihood of additional activity in the case has been judged by the firm to be unlikely. A thorough review of the file at the time of closing can lead to a determination of a proposed destruction date while the details of the case are still fresh in the managing attorney's mind, or before the attorney leaves the firm. Such an evaluation may also identify materials within the file which could be destroyed at time of closing or routed to other systems of document collection within the law firm.

Destroying parts of the file can be dangerous, though if performed carefully, could greatly reduce storage space or the amount of media needed for some sort of permanent retention of the file. One of the most common examples of material which could reasonably be destroyed at the time of closing are pleadings in a litigation case. Copies of the pleadings will be available from the court in which the case was filed in most jurisdictions. So long as that is true, significant space at the law firm storage facility could be saved. In those litigation cases which do turn into claims, there may be significant expense incurred in recopying the pleadings from court files. There is also danger that either the claimant or some member of the public will simply remove documents from the file. This author neither recommends nor discourages the idea of relying on the pleadings available from the court of record at some point in the

history of the file, but simply points to the possibility that public records could suffice as adequate documentation of the file.

Many file materials can be routed either to other firm document files or to the client at the time of closing. Research materials, briefs, forms, or pleadings may be retained so that they can be compared and used in other cases the firm may handle. The file storage system should not be considered a research bank for the firm in the best of all possible worlds. It is far more efficient to maintain separate files for such purposes that are appropriately indexed. All original documents should be given to the client and not retained in any law firm files. If originals are kept by the client, the client may use them as he or she wishes and cannot claim, if a transmittal letter is retained, that the firm lost an original thus causing some harm to the client. Some firms consciously decide to act as a repository of important documents for certain clients. If the firm does undertake to do this, careful attention should be paid to protection of the documents to guard against inadvertent destruction.

Many experts recommend sending a notice letter to clients before destroying files. This is a good practice, especially if the firm has not warned the client in writing during the course of the representation that the file will be destroyed at some point in the future. A good practice is to give the client a warning about future destruction in the final letter to the client closing out the file, while the whereabouts of the client are still known. The author does not mean to imply that failure to warn the client is grounds for liability. Having a written warning should act to dispel any impression the client may have picked up that the firm would safeguard his or her files indefinitely. Such a written warning is especially apropos if an established firm with long time clients is embarking on a file destruction policy for the first time.

### **Conclusion**

This article is meant to simply outline some of the considerations in developing a file destruction policy. The author recommends the articles listed below for

further discussion of economic factors in file destruction policies. With some planning, a file destruction policy can be formulated which balances the need to keep files with the economic realities of storing files for too long a time.

### **Articles on File Retention and Destruction**

Chester, et al., "Banking Your Briefs", *Legal Management* p. 52-58 (March/April 1990).

Dimitriou, "File Retention Schedules", *Law Practice Management* p. 24-27 (January/February 1990).

Krocheski, et al., "Solving the Records Management Crisis", *Texas Lawyer* p. 38 (March 4, 1991).

Smith, "Managing the Loss of Valuable Papers and Records", *Law Practice Management* p. 43-47 (July/August 1990).

**APPENDIX E: HOW TO PROTECT YOURSELF  
IN OFFICE SHARING ARRANGEMENTS**

*The Legal Malpractice Advisory, Issue No. 1, 1992*

# How to Protect Yourself in Office-Sharing Arrangements

Office sharing can create one of the most frustrating forms of liability in your practice. Most attorneys assume, with some justification, that they are only liable for acts which they commit or which are committed by formal partners or associates. While this is generally true, office-sharing arrangements can create situations in which liability is imposed upon an attorney for the acts of another attorney with whom office space is being shared.

This article will explain the basic reasons why office sharing can lead to such liability. A number of strategies will be suggested for avoiding such liability. The article will conclude with a discussion of "of counsel" relationships which can both create and help avoid this type of liability.

## **THE BASIS OF OFFICE-SHARING LIABILITY**

Section 16 of the Texas Uniform Partnership Act (TUPA) provides that a person may be a partner by estoppel "when a person, by words spoken or written or by conduct represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners...." This simple representation is not enough in itself to create the partnership by estoppel. The person seeking to impose such liability must also have relied on the representation. In short, if the facts and circumstances would lead a reasonable client to believe that a partnership did exist and the client relied on that fact in order to engage in business with the attorney, the possibility for a partnership by estoppel exists.

Partnership by estoppel is not the only way in which partnership liability could be visited upon an attorney who is sim-

ply engaging in an office-sharing arrangement with another attorney. Facts may exist which would support a claim that an actual partnership existed between the attorneys concerned. For example, regardless of whether they thought of themselves as partners, attorneys who share office space and proceeds in some regular manner could very well be considered partners under the TUPA. Section 6 of the TUPA defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."

The TUPA is not the only potential source of liability arising from office sharing. In the right situation, an office-sharing attorney may appear to be an employee of the "main" attorney in the office.

## **INSURANCE AND OFFICE-SHARING**

Because of the potential liability inherent in office-sharing situations, many malpractice insurers take steps to identify and minimize that liability. At TLIE, the application requests information on the attorneys with whom an applicant may share offices. A copy of the letterhead is also requested by the application. The TLIE policy forms exclude many types of liability that can arise from office sharing arrangements. Please contact us if you have any questions regarding the status of your coverage for office-sharing related liability.

## **AVOIDING LIABILITY**

Liability arising from office-sharing arrangements depends upon the facts in any particular case. The primary method for avoiding unwanted liability is to create as many facts as possible that would dispel any notion that a client may have that a partnership exists.

The physical arrangement of the offices is the first critical fact which can be created at the outset. Signs used on the office should not create a potential for a client to misunderstand the true relationship among the attorneys in the office. When office-sharing arrangements exist, signs should very clearly delineate whether attorneys within the office belong to partnerships or professional corporations within the office, or whether the attorneys are solo practitioners. For example, if the firm of Smith & Jones shares office space with Jane Johnson, the name of Smith & Jones should appear on the door, with a separate sign for Ms. Johnson. Preferably, Ms. Johnson's sign should indicate that she is a solo practitioner, or, in appropriate cases, of counsel to Smith & Jones. If Ms. Johnson's name does not appear on the door, a reasonable client might infer that Ms. Johnson is an associate of Smith & Jones, whether that is in fact the case or not.

Other physical arrangements in the office need to be considered. The letterhead used by all of the attorneys in the shared offices should be reviewed. Each attorney should use only the appropriate letterhead for their situation, and not use just any letterhead which may be available. The manner in which the receptionist answers the phone is also important. The answer should not indicate that the offices are only the offices of one particular attorney or firm if, in fact, many attorneys use the office. The attorneys in the office should also carefully instruct the receptionist in how to respond to clients' questions such as who employs the receptionist.

Another set of facts which could help avoid office-sharing liability involves formalization of the arrangements among

the attorneys in the office. The terms of the office-sharing should be written in an agreement, which would allow reference to the agreement in the event of a suit by someone claiming that a partnership exists. In addition, if clauses are included in the agreement which prohibit the parties from representing that they are partners when, in fact, they are not, the uninvolved attorney may successfully argue that any representation of partnership was unauthorized. The terms of the partnership agreement should be scrupulously followed, with any exceptions to standard operating procedure being memorialized by a letter or agreement.

For example, if two of the attorneys in an office-sharing arrangement decide to work on a case together, they should agree at the outset on how fees will be shared. This agreement should be written and should make clear that the situation involved is an exception to the usual situation under their existing office-sharing agreement.

In those situations in which an attorney does work with any other attorney in the office, the client should be specifically informed of the nature of the consultation with the other attorney. This advice should be in writing. For example, consider a situation in which Garza and Hinojosa are office-sharing. Garza is contacted by a client and asked to form a corporation. A tax question arises, and Garza consults with Hinojosa on the question. Garza should inform the client, preferably in advance and in writing, that he will consult with Hinojosa on the tax question. The letter Garza writes to the client should also make clear that the fees for the tax question should be paid to Hinojosa. If such a procedure is not followed the client may argue that Garza has accepted responsibility for the tax advice provided by Hinojosa.

When dealing with clients and other attorneys in the office, be certain to keep in mind that the other attorneys in the office are not partners. Attorneys in the office should not just come in through closed doors at will. Even random conversations in the hallway while clients are present require careful thought. If you begin to relate the client's story to the other attorney, the client may very well

get the impression that the other attorney is somehow your associate. You should create systems to avoid any other attorneys accidentally or purposely looking at your clients' files and correspondence. Regardless of whether the client may believe that another attorney in the office is a partner, an attorney in an office-sharing arrangement could bear responsibility if he or she allows confidential information to be passed to attorneys who are not partners or associates.

#### **“OF COUNSEL” RELATIONS**

One device which may assist in formalizing the relationships within a common suite of offices is the “of counsel” relationship. For attorneys who may wish to explore the use of “of counsel” agreements, TLIE recommends “The Of Counsel Agreement, A Guide for Law Firm and Practitioner”, published by the Senior Lawyers Division of the American Bar Association.

The “of counsel” designation has been used in various ways over the years. Use of the “of counsel” designation by itself does not necessarily avoid the liability problems already discussed in other office-sharing arrangements, but can make clear to a client that the attorney's relationship to another attorney or law firm is something other than that of a partner.

A person who is “of counsel” can still conceivably be an employee of the firm or the attorney with which the individual is of counsel. Once again, it is important to formalize the relationships between the person who is “of counsel” and the other attorneys, and to observe proper protocol in dealing with clients.

