



BEST PRACTICES FOR SOLOS AND SMALL
FIRMS IN THE CURRENT ECONOMY

Committee on Small Law Firms

MAY 2011

NEW YORK CITY BAR ASSOCIATION
42 WEST 44TH STREET, NEW YORK, NY 10036

Best Practices for Solos and Small Firms in the Current Economy

*a Report of the Small Law Firm Committee
of the New York City Bar*

Report Subcommittee:

- Olivera Medenica, *Chair*
- Gracie Ming Zhao, *Secretary*
- Alla Roytberg
- Robin Kravitz
- Anthony Verna
- William Funk

The Subcommittee would like to thank all of the members of the Small Law Firm Committee, and in particular the following committee members for their contributions: Doron Zanani, Damien Bosco, Mira Weiss, Ariel Berschadsky and Martin Klein.

Table of Contents:

Introduction	3
General Best Practices for Every New Client/Matter	5
Section 1 – The Attorney-Client Relationship: Retainer Agreements and Beyond	6
Section 2 – Conflicts of Interest	12
Section 3 – Billing Practices: “Unbundled Services” or Fragmented Legal Services	19
Section 4 – Exit Strategies & Law Firm Partnership Agreements	26
Section 5 – Technology and the Solo Practice	39
Section 6 – Professional Liability Insurance	46

Best Practices for Solos and Small Firms in the Current Economy

*a Report of the Small Law Firm Committee
of the New York City Bar*

Introduction:

As the economic landscape has changed within the past few years, so has the landscape of solos and small firms. The economy has caused large firms to downsize and to place a limit on new hires.¹ As new law school graduates are entering the workforce, they are facing significant obstacles to finding a position at a firm.² This has caused a considerable increase in the number of attorneys, new and experienced alike, to start their own law firm.³

With this increase in new solos and small firms, there is a commensurate need to educate new solos and partners on the basic essentials of running a law firm as a business. Included in this report is an overview of some of the necessities of running a firm. This report is meant as a starting point, and should not be relied upon as a sole source of information regarding the topics included herein.

The statistics included in this report are based on a survey (“Survey”) circulated to members of the City Bar and attendees at a variety of events, such as CLEs, small law firm luncheons and lectures, and through an online distribution list. We obtained over 300 responses to the survey questions. These answers assisted us in narrowing the scope of discussion to the topics included in this report. There are six sections to the report: the attorney client relationship and retainer agreements; conflicts of interest; billing practices (unbundled services); exit strategies and law firm partnership agreements; technology and social media; and professional liability insurance. We focused on those sections because it appeared to us that survey results indicated a general weakness in these practice management areas, perhaps due to misinformation, inexperience or oversight.

In addition to these, we added a general ‘best practices’ section that every attorney should bear in mind when taking on a new matter. As we were finalizing our report, we realized that several ‘best practices’ suggestions throughout the report should not be limited to the subject matter of that particular section. Rather, these suggestions are applicable in a broader context of general law practice management. Whenever we felt a particular best practice should be highlighted in such fashion, we included it in this introductory ‘best practices’ section.

¹ DAN SLATER, *At Law Firms, Reconsidering the Model for Associates’ Pay*, New York Times, April 1, 2010, Page SPG10.

² DAVID SEGAL, *Is Law School a Losing Game?* New York Times, January 16, 2011, Sunday Business, Page 1.

³ According to Alla Roytberg, Director of the Small Law Firm Center at the New York City Bar: “During the last 2 years, I am seeing that more and more lawyers are starting their firms, not due to their entrepreneurial spirit, but rather out of necessity.” Email interview, March 2, 2011.

The Committee especially wishes to thank the contributions provided by the following individuals in putting this report together: Alla Roytberg, Robin Kravitz, Gracie Ming Zhao, William Funk, Anthony Verna, Doron Zanani, Damien Bosco, Mira Weiss, Ariel Berschadsky and Martin Klein.

Olivera Medenica, Chair
Small Law Firm Committee

GENERAL BEST PRACTICES FOR EVERY NEW CLIENT/MATTER

In taking on a new client, or matter, an attorney should be mindful of the following issues:

- A. The matter should be the area of practice in which you already have experience. Clearly understanding the full scope of a legal matter is critical in deciding on whether you can adequately offer representation. If it is a matter that you do not have experience in, consider retaining co-counsel who does, or be prepared to spend time familiarizing yourself with that area of the law at no cost to the client.
- B. Document everything in writing. Make sure that your retainer addresses in detail the scope of your representation and the fee structure. Review the retainer in detail with the client and, if needed, have a plain-language memo that would summarize the terms and is also signed by the client. Make sure to provide the client with copies of these documents.
- C. Carefully evaluate potential conflicts of interests. Advise the client that if, as the case progresses, a previously unknown conflict of interest emerges, you will have to discontinue representation.
- D. Document everything you do on the case. This is important not only for preparing your invoices to the client, but also in the event there is a fee dispute or malpractice claim.
- E. If the scope of representation and/or fee structure changes, make sure to sign a written document which reflects that.
- F. Make sure to preserve client confidentiality in all communications. Do not meet with your client in public spaces to discuss the client's legal matters. All such communications must be behind closed doors and completely private. If there are witnesses to a public conversation, the substance of the conversation is vulnerable to a waiver of attorney-client privilege.

SECTION 1 – THE ATTORNEY-CLIENT RELATIONSHIP: RETAINER AGREEMENTS AND BEYOND

“The greatest trust between man and man is the trust of giving counsel. For in other confidences men commit the parts of life; their lands, their goods, their children, their credit, some particular affair; but to such as they make their counsellors, they commit the whole: by how much the more they are obliged to all faith and integrity.”

Francis Bacon. (1561–1626). *Essays, Civil and Moral*.
The Harvard Classics. 1909–14.

Introduction

A well drafted retainer agreement is probably the most important element of a healthy attorney-client relationship. From the client’s perspective, memorializing the terms of the relationship in a written agreement protects the client from attorney overreaching in billing and the resolution of disputes. From the attorney’s perspective, the reasons for having an engagement letter or retainer agreement⁴ can be more complex. For one thing, a retainer agreement is an effective client screening tool, particularly in tough economic times. A prospective client with a sense of imposing urgency may lose steam when faced with the prospect of writing a retainer check. Perhaps most importantly, however, a retainer agreement serves as an invaluable tool in protecting the attorney against client grievances, setting reasonable client expectations and generally helping to ensure the collection of outstanding fees.

An often neglected companion to the retainer agreement is the disengagement letter. These letters are used when the attorney needs to communicate to an existing or prospective client that the relationship has been terminated. Although most commonly resorted to when the client fails to pay its bills, it can find application in a variety of contexts. For example, a letter of disengagement might be necessary where a prospective client has consulted with the attorney on a pending litigation, but has subsequently dropped from the radar. A letter can warn the client of upcoming deadlines and at the same time permits the attorney to close the file if there is no response. Similarly, a disengagement, or closing, letter when the job has been done finishes the relationship and officially closes the file.

Survey Results

The Survey included questions on a variety of issues from the use of retainers and disengagement letters, reliance on evergreen funds, and the use of flat fee and contingency arrangements. About 74% of takers indicated that they “always” use retainers in matters for more than \$3,000, while about 5% indicated that they “never” do, with the remaining answers ranging from “often” to “sometimes.” As for letters of non-retainment, roughly 45% of survey takers indicated that they “never” use such letters

⁴ The terms “engagement letter” or agreement and “retainer agreement” are generally used interchangeably.

after consulting with a client but never retained, with 34% indicating they “sometimes” do. About 42% similarly indicated that they “never” use such letters after completing representation of a client, and 31% indicating they “sometimes” do. Contrastingly, about 49% of survey takers indicated that they “always” use letters of disengagement if the attorney-client relationship is suddenly terminated by either the attorney or the client.

On the subject of evergreen funds⁵, about 40% indicated they “sometimes” use such funds, and 37% indicated they “never” do. For fee arrangements, about 62% indicated they “sometimes” offer flat fee services to their clients. Interestingly, the vast majority of responses indicated that survey takers have not changed their billing practices as a result of the current economy.

Legal and Ethical Considerations:

In New York State, a written letter of engagement is required if a legal fee is expected to exceed \$3,000. On December 20, 2001, the Appellate Division promulgated part 1215 of title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York (22 NYCRR part 1215). This rule became effective March 4, 2002 and applies to cases where the fee is “expected” to be \$3,000 or more (22 NYCRR 1215.2 [a]). The rule generally mandates that attorneys must provide clients with letters of engagement prior to representation. This letter must include an explanation of the legal services provided, the fees to be charged for such representation, expense and billing practices, and that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator (22 NYCRR 1215.1 [b] [1], [2]). Attorneys may, however, instead of providing a letter of engagement, obtain a fully executed written retainer agreement from clients “within a reasonable time after commencing the representation” as long as it contains an explanation of the scope and fees to be charged (22 NYCRR 1215.1 [c]).

The rule does not provide a penalty if an attorney breaches its provision. For many years, trial courts interpreted the intent of the rule very differently in the event of breach. Some courts permitted a *quantum meruit* recovery of attorney fees, others permitted the attorney to keep fees already received but prohibited additional fees not yet paid, and some prohibited all legal fees under all circumstances.⁶ In 2007, the Appellate Division, Second Department, issued the first definitive appellate decision on the issue, holding that an attorney who fails to obtain a written retainer agreement or letter of engagement with a nonmatrimonial⁷ client in violation of Rule 1215.1 may recover the reasonable value of services rendered on a *quantum meruit* basis. *Seth Rubenstein, P.C. v. Ganea*, 41 A.D.3d 54 (2d Dept. 2007). However, the Court underscored that attorneys “have every incentive to comply with 22 NYCRR 1215.1, as compliance establishes in documentary form the fee arrangements to which clients become bound, and which can

⁵ Evergreen funds are requests by an attorney that the client replenish their retainer in advance once nearing depletion.

⁶ See generally *Mallin v. Nash Metal*, 18 Misc. 3d 890, 849 N.Y.S.2d 752 (2008).

⁷ For matrimonial matters, please refer to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR). Retainers in matrimonial matters have more stringent requirements.

be enforced through 22 NYCRR part 137 arbitration or through court proceedings.” 41 A.D.3d at 64. Whether as a letter of engagement or retainer agreement, an attorney is therefore best served by having some form of written record of the nature of the relationship between the attorney and the client.

In addition to Rule 1215.1, Rule 1.5(c) of the Rules of Professional Conduct requires that counsel in contingent fee matters provide the client with a writing stating the method by which the fee is to be determined, expenses that are to be deducted and whether they will be deducted before or after the fee is calculated. In addition, Rule 1.5 (d)(5) provides that written retainer agreements are required for domestic relations matters.

The existence of a letter of engagement or a retainer agreement, however, is not determinative of whether an attorney-client relationship was established in the first place.⁸ New York case law provides that the existence of an attorney-client relationship is a matter of contract law. In *Medical Diagnostic Planning, PLLC v. Carecore National LLC*, 542 F. Supp. 2d 296, the court listed six factors for determining the existence of an attorney-client relationship: (1) whether a fee arrangement was entered into or a fee was paid; (2) whether a written retainer agreement or contract exists; (3) whether there was an informal relationship whereby the attorney performed services gratuitously; (4) whether the attorney actually represented the client in one aspect of the matter; (5) whether the attorney excluded the individual from some aspect of the litigation to protect the client; and (6) whether the client had a reasonable belief the attorney was representing him or her.

These factors illustrate the basic principles of contract law that there must be a “meeting of the minds” when establishing a relationship between the parties.⁹ This

⁸ A unilateral belief does not confer upon a person the status of client. *Pellegrino v. Oppenheimer & Co., Inc.*, 49 A.D.3d 94 (1st Dep’t 2008); *Volpe v. Canfield*, 237 A.D.2d 282 (2d Dep’t 1997); *Jane Street Company v. Rosenberg & Estis, P.C.*, 192 A.D.2d 451 (1st Dep’t 1993).

To determine whether an attorney-client relationship exists, a court must consider the parties’ actions. *Pellegrino v. Oppenheimer & Co., Inc.*, 49 A.D.3d 94 (1st Dep’t 2008); *Carlos v. Lovett & Gould*, 29 A.D.3d 847 (2d Dep’t 2006) (where the client did not sign a retainer agreement until after the statute of limitations expired, no attorney-client relationship); *Tropp v. Lumer*, 23 A.D.3d 550 (2d Dep’t 2005) (where the plaintiff presented evidence that the lawyer told her that he would “keep an eye on [another attorney] and follow the case.” and that she and her husband discussed the status of the case with him on a regular basis and that the lawyer prepared her as a witness at a hearing, there are issues of fact as to whether an attorney-client relationship was created).

An attorney-client relationship is created where there is an explicit undertaking to perform a specific task. *Pellegrino v. Oppenheimer & Co., Inc.*, 49 A.D.3d 94 (1st Dep’t 2008); *C.K. Industries Corporation v C.M. Industries Corporation*, 213 A.D.2d 846 (3rd Dep’t 1995); *Platt v. Portnoy*, 220 A.D.2d 652 (2d Dep’t 1995) (a request to file a counterclaim which the lawyer did not agree to do does not create an attorney-client relationship). See also the definition of attorney-client relationship provided in Section 14 of the Restatement of the Law Governing Lawyers.

⁹ As aptly stated by the Appellate Division, Second Department in *Rubinstein.*: “Attorneys who fail to heed rule 1215.1 place themselves at a marked disadvantage, as the recovery of fees becomes dependent upon

requirement was painfully illustrated in *Mallin v. Nash Metal*, 18 Misc. 3D 890, 849 N.Y.S.2d 752. In *Mallin*, the attorney had been consulted by a client regarding a pending matter. During the initial meeting, the attorney met with a prospective client and discussed many aspects of the case, including the requirements of filing a lawsuit, the merits of the case and the applicable statute of limitations. There was limited discussion of the compensation except that the attorney initially agreed to a fixed legal fee of \$60,000 for the prospective legal representation. The attorney later allegedly mailed the prospective client a draft “Attorney Engagement Agreement” where the law firm agreed to fix the legal fee at \$100,000, which also included fees for an associate and fees for experts and disbursements. The attorney sought \$50,000 upon signing the agreement, \$25,000 upon filing of the proceeding, and the remaining \$25,000 within 30 days thereafter. The prospective client never signed the agreement, nor did the client ever retain the attorney to represent them during this initial meeting as they were in the process of interviewing other prospective counsel. The prospective client ultimately retained the services of another attorney.

Despite the fact that the letter of engagement was never signed and no payment tendered, the attorney began working on the matter. The attorney apparently expended about 77 hours of work, but only billed for 34 hours. When the attorney was notified that the group had selected another attorney, he estimated he had performed 34 hours of legal work at \$300 per hour for a total of \$10,200. Nine months later, the attorney sent an invoice to the prospective client for the same. The client refused to pay and the attorney filed suit.

Based upon testimony of both parties, the court ultimately ruled in favor of the defendant. The court found that the defendant had convincingly challenged both the retention of the plaintiff and any liability for legal services rendered, and that plaintiff had failed to prove that defendant fully understood the fee arrangement. On the issue of *quantum meruit* recovery, the court found that had the attorney alleged a *quantum meruit* claim (which he didn’t), the attorney would also not be able to recover because “plaintiff’s billing entries are too imprecise to deduce the reasonable amount of attorney’s fees.” *Id.* at 896. According to the court, “[i]t is plaintiff’s ‘burden and responsibility to clearly, and in detail, present the hourly rate for legal services performed by various counsel, the specific services rendered, and the time spent in performing these services, to avoid the court having to speculate or surmise this information.’” *Id.* at 896 (quoting *Employers Ins. Co. of Wausau v. Team, Inc.*, 12 Misc. 3d 1192 (2006)).

The *Mallin* and *Rubenstein* cases clearly illustrate the benefit of memorializing the terms of the relationship between the attorney and the client in order to avoid a battle of conflicting testimonies in court.

factors that attorneys do not necessarily control, such as meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, an agreed upon. There is never any guarantee that an arbitrator or court will find this burden met or that the fact-finder will determine the reasonable value of services under quantum meruit to be equal to the compensation that would have been earned under a clearly written retainer agreement or letter of engagement.” *Rubenstein*, 41 A.D.3d at 64.

Beyond the statutory requirements and contract basics, it is important to remember that every billing arrangement between attorney-client must be reasonable in nature. Rule 1.5 of the New York Rules of Professional Conduct,¹⁰ governs legal fees and the permissible divisions of fees. Rule 1.5(a) provides in relevant part:

A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive.

The Rule further goes on to list a number of factors that must be examined to determine the reasonableness of the fee. A fee that is therefore unreasonable will be set aside by the court, and an attorney may be able to merely recover in *quantum meruit*, as determined by the court. See *Rubenstein v. Ganea*, 41 A.D.3d 54 (2d Dept. 2007).

Best Practices

In view of the current statutory and ethical requirements, an attorney should be mindful of the following issues:

1. The retainer letter should make clear the scope of the representation, including what will be part of the representation and what will fall outside of the representation.
2. The retainer letter should make clear what the fee structure is, including whether the arrangement is a general retainer, based on an hourly rate or involves a contingency fee. To the extent that retainers are to be refreshed, this must be made clear.
3. The retainer letter should make clear what obligations the client has to provide cooperation and should set forth conditions under which the attorney may terminate the representation.
4. The attorney should take protective measures to avoid ambiguity about those persons with whom the attorney does not have a retainer agreement.
5. Where an attorney must “fire” the client, the attorney should communicate the reasons for the termination, send a final statement to the client and advise of the existence of deadlines or statutes of limitations where applicable.

In view of the above considerations, we recommend the following:

¹⁰ The New York Rules of Professional Conduct have been adopted by the Appellate Division of the new York State Supreme Court and are published as Part 1200 of the Joint Rules of the Appellate Division (22 NYCRR Part 1200).

- A. For matters before a tribunal or regulatory agency, the retainer letter should make clear that only specified phases or practice areas are covered. For transactional matters, the retainer letter should state the transactions covered and those practice areas to which the representation is limited.
- B. With respect to fees, the retainer letter should be clear as to what costs are being charged to the client.
- C. For clients who do not sign a retainer letter, it is recommended that a non-retainment letter be sent, tailored to the specific circumstances of the client. If you believe the client needs a reminder, the letter may state that the representation has not started and advise of any applicable deadlines that have been discussed. If you don't believe the client will follow through, or you would prefer the client not follow through, the letter should emphasize that the client should obtain counsel in the matter discussed, as well as mention that deadlines or statutes of limitations may apply.
- D. Attorneys who have effectively started representing a client by reviewing documents, taking actions on the client's behalf or accepting payments should memorialize any discussions about the nature of the contractual relationship.
- E. In disengagement situations, the attorney should address the return of any files and discuss applicable deadlines or statutes of limitations.

SECTION 2 – CONFLICTS OF INTEREST

“Loyalty and independent judgment are essential aspects of a lawyer’s relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties.”

N.Y. Rules of Professional Conduct, Rule 1.7, Comment 1.

Introduction

Conflict of interests rules are perhaps the most commonly cited rules in malpractice actions. Every attorney must ensure that the attorney-client relationship is free from competing interests that could ultimately result in some harm to the client. Although conceptually simple, the rules can result in tricky situations. Conflicts can arise at the beginning, during and subsequent to the attorney’s representation of a client. It is therefore incumbent on the law firm to ensure that proper conflict checks are implemented throughout the duration of the attorney-client relationship, and beyond.

Survey Results

The responses to the Survey indicate that the vast majority of survey takers, about 76%, have an established, reliable conflict-checking system in their firm. More disturbingly, however, about 25% have indicated that they do not have such a system in place. When prompted to describe the type of conflict check that they use, about 17% use a form-based conflict system, 5% use specialized software, 24% use simple software, and 58% use some other form of conflict check system. It therefore appears that the vast majority of survey takers rely on their memory or review of their contacts database to determine whether a conflict exists.

Ethical and Legal Considerations

Although conflict of interest rules appear to be drafted by litigators, they apply with equal force in both the litigation and transactional context. The following is a brief summary of the conflicts provisions of the New York Rules of Professional Conduct. This section should not be relied upon for ethical guidance. Lawyers must review the Rules themselves and consult relevant court decisions and bar association ethics opinions. Generally speaking, there are four basic principles to keep in mind:

1. An attorney’s interests cannot be adverse to a current client;
2. An attorney’s interests cannot be adverse to a former client if the new matter is the same or substantially related to the former client’s matter;
3. An attorney’s conflict is imputed to other lawyers within the firm; and

4. A client can waive a conflict after adequate disclosure and consent, but only if the attorney reasonably believes that he will be able to provide competent and diligent representation.¹¹

Rule 1.7 (a) provides in relevant part that “a lawyer shall not represent a client if a reasonable lawyer would conclude that either . . . (1) the representation will involve the lawyer in representing differing interests; or (2) . . . the lawyer’s professional judgment . . . will be adversely affected by the lawyer’s own financial, business, property or other personal interests.” Subsection (b) of the same rule provides an exception 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, confirmed in writing.

Comment 2 to Rule 1.7 provides further guidance:

Resolution of a conflict of interest problem under this rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, i.e., whether the lawyer’s judgment may be impaired or the lawyer’s loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph 9a) include all of the clients who may have differing interests under paragraph (a)(1) and any clients whose representation might be adversely affected paragraph (a)(2).

When dealing with the interests of a former client, an attorney cannot represent a new client in the same or a substantially related matter where the new client’s interests are materially adverse to the former client’s interests unless the client gives written, informed consent.¹² This absolute bar can be avoided where the former client gives informed consent, confirmed in writing. Under no circumstances, however, can an attorney reveal the confidential information of a former client unless specifically

¹¹ Each one of these principles is subject to various exceptions as provided in the Rules. Notably, some conflicts are not waivable even with client consent.

¹² See generally Rule 1.9.

permitted by Rule 1.6 (Confidentiality of Information) or the information has become generally known.

If an attorney is found to have represented two clients with conflicting interests, the sanction imposed will most likely include a forfeiture of all fees claimed or received for services rendered.¹³

Rule 1.10(e) requires a law firm or solo practitioner to establish a conflicts-checking system.

Best Practices

In view of the current statutory and ethical requirements, an attorney should be mindful of the following issues:

1. A law firm or solo practitioner should always keep records of current and prior engagements, which are made at or near the time of such engagements, and should have an implementing system in place to effectively check the proposed engagements against current and prior engagements, so as to render effective assistance to lawyer(s) within the firm in complying with the current statutory and ethical requirements of conflict checking.
2. A law firm or solo practitioner should be mindful of the formation of an attorney-client relationship and be cautious of *de facto* or accidental clients, especially when dealing with corporate, trade association, or other institutional clients.
3. A law firm or solo practitioner should be cautious of joint representations where one lawyer or one firm represents multiple clients in the same matter.
4. Although conflicts may be waived, a law firm or solo practitioner should be mindful that mere reliance on client's waivers or consents is not a valid defense according to the courts. Further, an attorney should be mindful that certain conflicts – e.g., litigation conflicts where one lawyer seeks to represent two adverse parties in the same proceeding – can never be waived.

¹³ LaRusso v Katz, 30 AD3d 240 (1st Dept 2006); Pessoni v Rabkin, 220 AD2d 732 (2d Dept 1995); Alcantara v Mendez, 303 AD2d 337 (2d Dept 2003); Sidor v Zuhoski, 261 AD2d 529 (2d Dept 1999); Quinn v Walsh, 18 AD3d 638 (2d Dept 2005); Shaikh v Waiters, 185 Misc 2d 52 (Sup Ct, Nassau County 2000); Dorsainvil v Parker, 14 Misc 3d 397 (Sup Ct, Kings County 2006); Ferrara v Jordache Enters. Inc., 12 Misc 3d 769 (Sup Ct, Kings County 2006); Wolfram, Modern Legal Ethics § 7.3.3, at 353 (West 1986).) For discussion of dual representation in other contexts, see Greene v Greene (47 NY2d 447 (1979)) and Mullery v Ro-Mill Constr. Corp. (76 AD2d 802 (1st Dept 1980)). See also Kimm v. Chang, 38 A.D.3d 481 (1st Dep't, 2007)(holding that a conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a cause of action for malpractice); Swift v. Ki Young Choe, 242 A.D.2d 188 (1st Dep't 1998)(holding that attorney malpractice claim not necessarily foreclosed where two clients with potentially competing interests agree to have the same attorney represent them, and ratify this dual representation by a written acknowledgment and release).

In view of the above we recommend the following practices:

1. What “records” should a law firm or solo practitioner keep in place in order to satisfy an effective conflict checking mechanism –
 - A. The “records” should be written or electronic records.
 - B. The records of prior engagements should be made at or near the time of such engagements.
 - C. The records should be independently maintained and be separated from retainer agreements or engagement letters in clients’ individual files so as to allow them to be quickly and accurately checked for possible conflicts. The mere fact that a law firm or solo practitioner has information about clients and engagements written down in the individual files pertaining to each matter does not satisfy the “records” requirement, because it is simply not realistic to think that a law firm can search through every paper file and folder to look for conflicts each time the firm considers a proposed new engagement.
 - D. The records should at minimum consist of 3 elements:
 - a. The full and precise names of a client;
 - b. The full and precise names of an adverse party;
 - c. A brief description of current engagement or prospective engagement;

In case that a client or adverse party is a corporation or entity, the best practice is to record such corporation/entity’s subsidiaries or affiliated entities at the time of record-making as well. The reason of doing so is explained below in “When representing corporations”.
 - E. An effective conflict checking mechanism should be form-based or software-based.
 - a. A form-based conflict checking tool should list client names and adverse party names in separate lists. When performing a conflict check before a new engagement, a small firm or solo practitioner should first check on the current and prior client names, then check on the adverse party names to make sure there is no potential conflict of interest issue.

- b. Alternatively, a software-based conflict checking tool is available through many “case management” software products available in the market. They allow a small firm or solo practitioner to conduct conflict checking by inputting a prospective client’s name and simply clicking on a search button. A thorough search will be conducted throughout the whole database of the firm’s records of current and prior client names, other parties, etc.
- 2. How to avoid *de facto* or accidental clients, when representing entities such as corporations, trade associations, institutions that are part of syndicates or that are affiliated to other entities, or closed corporations where one individual controls the entity and directs the representation –
 - A. A law firm or solo practitioner should identify those individuals or entities that are clients of the lawyer and simultaneously identify those individuals or entities that are not clients.¹⁴ This requires that a lawyer distinguish between the business entity that requires legal representation, for example, and the individuals who run it. In the event of a conflict, an officer or board member will need separate counsel. Properly categorizing such individuals and entities will assist the attorney in adequately pursuing and protecting the interests of her clients.
 - B. The best practice to ensure that there is no misunderstanding about the identity of the client is to specify in the engagement letter who the client is and to identify any related individuals or entities that the lawyer is not representing.¹⁵
 - a. Avoid corporate family conflicts – When a prospective engagement is to oppose an entity that belongs to the corporate family of a current corporate client, a conflict of interest may exist. The best practice is to have some system in place to alert the law firm or solo practitioner of potential conflicts with the members of the corporate client’s family.
 - b. Avoid corporate constituents conflicts – When an entity is the client, a law firm or solo practitioner is the attorney to the entity not to any of its constituents.
 - c. Avoid trade association members conflicts - Similarly, a law firm or solo practitioner that represents a trade association

¹⁴ Thomas Mason, “Ethics: Conflicts of Interests for Transactional Attorneys”.

¹⁵ Id.

ordinarily represents only the trade association and not the members of the trade association.

C. A law firm or solo practitioner should avoid potential conflicts with clients of laterals. If a law firm hires lawyers laterally from other law firms, the hiring firm should include in its conflict-checking system a means for determining which clients the lateral lawyer personally represented while at his or her former firm in order to avoid potential conflict of interests issue. See Rule 1.10.

3. How to avoid conflict of interests in joint representations –

A. The clients should always be fully informed of the potential perils of joint representations. An informed consent from clients to such joint representations is required before the engagement.

B. Even if the lawyer receives client consent at the outset of the joint representations, a law firm or solo practitioner should always periodically re-evaluate the joint representations to ensure that the jointly` represented clients are sufficiently of like interests or like mind.

4. What constitutes a valid waiver –

A. It is an invalid defense to rely on client waiver or consent alone.

B. A 2-prong test must be satisfied: “A lawyer may represent multiple clients (1) if any disinterested lawyer would believe that the lawyer can competently represent the interest of each; and (2) after full disclosure of the implications of the simultaneous representation and the advantages and risks involved, each consents to the joint representation”.¹⁶

In light of the above statutory and ethical considerations, we urge small law firms and solo practitioners not only to keep written or electronic records of their current and prior clients and engagements but also to implement a conflict check before a new engagement. The comprehensiveness of such system may depend on the practice areas of a law firm or practitioner.

But the rule of thumb is to always keep in mind an attorney should not accept a proffered employment if his or her exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the

¹⁶ Tavaréz v. Hill, 23 Misc.3d 377, 381-82 (2009).

proffered employment, or if it would be likely to result in the attorney representing differing interests, even if consent from the client is obtained.

SECTION 3 – BILLING PRACTICES: “UNBUNDLED SERVICES” OR FRAGMENTED LEGAL SERVICES.

INTRODUCTION

“The creation of barriers to the procurement of legal services by those in need and who are unable to pay in the name of legal ethics ill serves the profession.” New York State Bar Ass'n Op. 613 (1990).

In 1990 The New York State Bar Association conducted a study of poor households which revealed that on a yearly basis there were 2.5 million legal problems for which no lawyer was available. These problems were critical as they affected people's families, marriages, homes and jobs. New York State Bar Association, The New York Legal Needs Study 1990 (revised 1993)(“Legal Needs Study”). The middle class is in a similar predicament. A 2010 study by the Task Force to Expand Access to Civil Legal Services in New York reported that over 2 million people each year navigate the State's civil justice without representation. The unmet legal needs of our poor and middle class are a nationwide problem with estimates that fewer than three in ten of the legal problems of low-income households are brought to the justice system and only four in ten for moderate income households. *See* Roy W. Reese & Carolyn A. Eldred, American Bar Ass'n, Legal Needs Among Low-Income and Moderate-Income Households: Summary of Findings from the Comprehensive Legal Needs Study 22 (1994).

The tough economic climate of the last two years clearly demonstrates an inverse relationship between the increase in clients' need for legal services and the decrease in their ability to pay legal fees. Many middle class consumers whose income is above the range to qualify for free legal service are in a predicament of having to completely drain their limited financial resources if they are to hire an attorney to represent them in a traditional litigation model, where a large advance retainer is often required. Yet, most of these consumers do not feel confident to represent themselves without at least some assistance of a legal professional. Over the years, various “paralegal” agencies have emerged, which aid clients in preparing uncontested divorce forms, bankruptcy filings, corporate documents or immigration petitions. In some cases, paperwork is prepared incorrectly by those who are unqualified to provide proper legal advice. There is a clear need for competent legal advice at a reasonable cost.

On the other side of the spectrum stand dozens of solo and small firm practitioners who are willing to offer concrete consultation services and document preparation services to clients at reasonable rates. These services, often called “unbundled legal services” or “limited scope legal assistance” can consist of discrete tasks that a lawyer is engaged to perform by his/her client. A lawyer may provide advice and information during consultations, coach the client on how to negotiate with the other side or to behave in court, draft pleadings, discovery documents and/or motions and

sometimes even appear in court. In other words, rather than being retained to handle the entire “bundle” of a particular case, the attorney “unbundles” this service and only performs a certain portion, while the client does a lot of his/her own work to save money on the cost of a full fledged representation.

In the transactional legal world such unbundling has been fairly common. A client can seek an attorney’s advice to negotiate a contract, to file incorporation documents or to review an office lease. However, in litigation, the practice of “ghost writing” has been extremely controversial. “Ghost writing” refers to a practice of a lawyer actually writing pleadings, motions and court documents for a client, which the client then submits as if he/she has produced them himself. The court and the opposing counsel believe that the party is unrepresented. In reality, the client is assisted by a “phantom” counsel. Proponents of “unbundled services” in a litigation context applaud it as providing qualified and cost-effective service to clients. Its opponents denounce the practice as unethical.

Especially in this economic climate many solo and small firm practitioners would undoubtedly encounter a client who requests unbundled services. Limited scope representation offers increased flexibility, self-determination and empowerment to clients who seek practical cost-effective legal advice from experienced professionals. Offering such services is especially attractive for solo and small firm practitioners, many of whom address legal needs of middle class consumers. The Small Law Firms Committee of the New York City Bar believes that attorneys who provide limited scope representation ethically and competently, fulfill a critical legal need of New Yorkers in the current economy.

While providing “unbundled” legal assistance is worthwhile, practitioners should be mindful of the issues it raises. Does the client seek background counsel because he or she is unable to afford full representation? Or is this done to gain a tactical advantage? If an attorney decides to provide this type of a service, what should the retainer agreement state in order to effectively limit the scope of representation, avoid potential conflicts, outline the nature and limit of the attorney-client relationship, provide necessary disclosure to the client and safeguard against attorney’s inadvertent violation of ethical rules?

SURVEY RESPONSES

The Survey has yielded interesting responses in this area. Although most small firm practitioners who responded have had long legal careers (20 years or more), and 71% offer limited representation in a transactional setting, 74% have responded that they do not offer “unbundled services” for litigation. 83.5% of small firm practitioners say that in their own practice they have not seen any increase in limited representation as a result of the current economy and 51.6% do not know whether there has been an increase in the use of unbundled services as a result of the current economy. Oddly, 86.9% of the small law firm practitioners did not increase their offers to cap their fees and 78.9% did not

offer more flat fee services as a result of the current economy. It seems that for better or for worse the billing structure of small firm practitioners surveyed has roughly remained the same despite the economic slump of recent years.

THE STATE OF LAW/ETHICS ON UNBUNDLED SERVICES NATIONWIDE

The past several decades witnessed many ethics opinions in different states that disagreed on the issue of whether a background attorney in litigation had a duty to disclose the existence of his/her representation to the other side or to a tribunal. While in earlier years most opinions demonstrated a reluctance to condone the practice of “ghostwriting”, opinions issued in recent years, perhaps in response to the economic realities of consumers of legal services, seem to be more flexible in allowing “unbundled legal services” representation.¹⁷

¹⁷ For example, while in 1978 ABA Informal Op. 1414 stated that “the extent of assistance by counsel is an important issue and **if the assistance goes to a certain extent without counsel disclosing his or her assistance, it may amount to misrepresentation**, in 2007 ABA Formal Opinion 07-446 (2007) already allows a lawyer to “provide legal assistance to litigants appearing before tribunals “pro se” and help them prepare written submissions **without disclosing or ensuring the disclosure of the nature or extent of such assistance.**” (Emphasis added.) In 1988 the Virginia State Bar provided a fairly detailed opinion, which permitted legal support to a pro-se litigant: “It is ethically permissible for a lawyer to advise and assist a pro se litigant and provide: general legal advice, recommendations for a course of action to follow discovery, legal research, and redrafting of documents prepared by the pro se litigant. A lawyer may prepare discovery requests, pleadings or briefs for signature by the pro se litigant.” However, the opinion warned that “failure to disclose that the attorney provided active or substantial assistance may constitute a misrepresentation to the court.” Standing Comm. On Legal Ethics, Virginia State Bar Ass’n Legal Ethics Op. 1127 (1988). In 1991 the Kentucky Bar Association said that “a lawyer may limit his or her undertaking and provide assistance in preparation of initial pleadings. However, the lawyer should not aid a litigant in the deception that the litigant is not represented when, in fact, the litigant is represented behind the scenes.” Kentucky Bar Ass’n Op. E-343 (1991). In 1995 the Iowa State Bar warned that “ghostwriting that represents pleadings to be ‘pro se’ is a deception on the court when it is in fact a product of the lawyer who is counseling the party and not accepting the inherent lawyer responsibilities to the court and to the law.” Iowa State Bar Ass’n Op. 94-35 (1995). In 1998 the Massachusetts Bar Association said that “an attorney may provide limited background advice and counseling to pro se litigants. However, providing more extensive services, such as drafting pleadings, i.e., ghostwriting, would usually be misleading to the court and other parties and therefore would be prohibited.” Massachusetts Bar Ass’n Committee on Professional Ethics, Op. 98-1 (1998). In 2000 Florida State Bar Ass’n Op. 79-7 (Reconsideration 2000) was very firm that “any pleadings or other papers prepared by an attorney and filed with the court on behalf of a pro se litigant must clearly indicate that the litigant was aided by an attorney. Specifically, such filings should state, “Prepared with Assistance of Counsel.” Florida State Bar Ass’n Op. 79-7 (Reconsideration 2000). Similarly, in 2001 Kansas Ethics Opinion No. 09-01 required any lawyer who prepares a pleading for an otherwise pro se litigant to disclose such assistance, including the phrase “Prepared with Assistance of Counsel” on the pleading. It continued, however that the identity of a particular lawyer did not need to be disclosed.”

In 2005 Arizona State Bar Association stated that an attorney “providing limited scope representation is not required to disclose to the court or other tribunal that the attorney is providing assistance to a client proceeding in propria persona.” Arizona State Bar Ass’n Op 05-06 (2005). In 2006 Arizona State Bar proceeded to specifically address coaching or ghost writing of papers, stating that the attorney who engages in such a practice “must direct the client to be truthful and candid in the client’s activities.” It goes on to state that “while an attorney is not required to disclose to opposing counsel that the attorney is providing limited-scope representation, the attorney must maintain client confidentiality if doing so. Arizona State Bar Ass’n Op. 06-03 (2006). In 2005 D.C. Bar has sanctioned the use of “unbundled legal services”

It appears that most of the shift towards a more flexible standard occurred as a result of the adoption of Model Rules of Professional Conduct as amended by ABA House of Delegates through February 2007. Specifically, Rule 1.2 of the Model Rules governs the “Scope of Representation and Allocation of Authority between Client and Lawyer”. Its subparagraph “C” provides that “a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.” In the pre-2002 version of the Model rules subparagraph “C” stated that “A lawyer may limit the objectives of the representation if the client consents after consultation.” and nothing is mentioned about giving notice to a tribunal or an adversary.

provided that the client is fully informed of the limits on the scope of the representation and that competent service is still being provided. The D.C. Bar did not require a lawyer to disclose his/her existence to opposing counsel or to a tribunal. D.C. Bar Op. 330 (2005). The above demonstrates a shift from a lawyer’s duty to disclose the existence of representation to the other side or a judge to a consumer-focused duty to fully inform the client of the consequences of the lawyer’s rendering only limited assistance to that client. In 2006 the State Bar of Nevada said that “a lawyer who provides substantial assistance to a self-represented litigant must disclose such assistance to the court.” Nevada Bar went even further to require the lawyer to disclose his or her identity “by signing all papers filed with the court for which the lawyer gave substantial assistance to the pro se litigant, by drafting or otherwise.” Even “in non-litigation settings, any attorney that provides substantial assistance to a pro se litigant must disclose such assistance, in writing, to the opposing party. State Bar of Nevada Formal Ethics Opinion No. 34 (2006, Revised 2009).

In 2008 the New Jersey Supreme Court Advisory Committee on Professional Ethics made a distinction between situations in which a client cannot afford to otherwise hire an attorney and a client who chooses to use a “background” lawyer as a tactic to gain a legal advantage. “Disclosure of limited assistance is not required if part of a non-profit program designed to provide legal assistance to people of limited means, **or if it represents an effort by a lawyer to aid someone who is otherwise unable to afford an attorney.** Disclosure of limited assistance **is required** in other situations such as when **used as a tactic to gain advantage in litigation** or when a lawyer effectively controls the final form and wording of pleadings and the conduct of litigation. New Jersey Supreme Court Advisory Committee on Professional Ethics Op. 713 (2008)(emphasis added). Similarly, in 2007 Tennessee said that an attorney may prepare pleadings for a pro se litigant without providing disclosure to the other side if the purpose of representation is to help the litigant protect his or her claim. However, this cannot be done without disclosure where “doing so creates the false impression that the litigant is without substantial legal assistance.” Bd. of Prof. Resp. of the Sup. Ct. of Tenn. Op. 2007-F-153.

In 2008, however, Utah State Bar shifted the emphasis from disclosure to the other side to meeting obligations to the client. “A lawyer may provide legal assistance to litigants appearing before tribunals pro se and help them prepare written submissions **without disclosing or ensuring the disclosure to others of the nature or extent of such assistance.** Undertaking to provide limited legal help does not generally alter any other aspect of the attorney’s professional responsibilities to the client.” Utah State Bar Ethics Advisory Op. Comm. Op. 08-01 (2008)(emphasis added). In 2010 Alabama State Bar Association allowed “a lawyer to limit the scope of the representation” and stated that “ordinarily, a lawyer is not required to disclose drafting assistance to the court.” Alabama State Bar Ass’n Ethics Op. 2010-01. In 2010 Michigan State Bar said that “An attorney may assist a pro se litigant by giving advice or preparing documents as long as the attorney complies with the Michigan Rules of Professional Conduct. An attorney who assists a pro se litigant is not required to appear in any proceeding and is not required to disclose the assistance to the court or opposing counsel.” State Bar of Michigan Op. RI-347 (2010).

Rather the comments seem to point to telephone consultations and concrete and simple legal matters.

THE STATE OF ETHICS ON UNBUNDLED SERVICES IN NEW YORK

A similar shift in emphasis can be seen in the State of New York. In 1987 the New York City Bar's Committee on Professional and Judicial Ethics warned that "nondisclosure by a pro se litigant that he or she is, in fact, receiving legal assistance, may, in certain circumstances, be a misrepresentation to the court and to adverse counsel where the assistance is active and substantial or includes the drafting of pleadings. A lawyer's involvement or assistance in such misrepresentation would violate DR 1-102(A)(4). **The inquirer cannot draft pleadings and render other services of the magnitude requested unless the client commits himself or herself beforehand to disclose such assistance to both adverse counsel and the court.** Less substantial services, but not including the drafting of pleadings, would not require disclosure." Ass'n of the Bar of the City of New York Formal Op. 1987-2 (1987)(emphasis added). The Opinion suggested that to avoid impropriety the ghostwritten pleadings should bear the words "Prepared by Counsel", without the need to specifically identify a particular attorney. In 1990 The New York State Bar Association's Committee on Professional Ethics agreed in an opinion specifically addressed towards ghostwriting, which held that even a simple pleading for a pro se litigant had to disclose the lawyer's participation. The New York State Bar went even further to require the name of the attorney to be identified. New York State Bar Ass'n Op. 613 (1990).

However, in 2009, New York adopted a version of the Model Rules of Professional Conduct, including Rule 1.2(c) relating to unbundling of legal services. . In 2010, New York County Lawyers' Association opined that, in light of the adoption of Rule 1.2(c), "[I]t is ethically permissible for an attorney to prepare pleadings and other submissions for pro se litigants. Lawyers are not required to disclose such assistance, except in certain, limited situations." New York County Lawyers' Association Committee on Professional Ethics Op. 742 (2010). The opinion cautioned that as Rule 1.2(c) had not yet been interpreted by New York courts, best practice dictates that "when the attorney's participation has been substantial and the circumstances so warrant, practitioners should give notice to the tribunal or opposing counsel." Therefore, the opinion recommended that the phrase "Prepared with the assistance of counsel admitted in New York" should appear on all court documents prepared for a pro se party by counsel.

BEST PRACTICES:

In addition to the Best Practices attorneys should undertake for all matters (see page 5), an attorney who decides to undertake limited scope representation on behalf of a client should be mindful of the following issues:

1. The scope of representation and its limits, and any changes to this scope as the case progresses, should be clearly stated in writing to the client.

2. The limitation on scope must be reasonable enough to ensure that the attorney is able to provide competent legal advice on that particular matter or issue;
3. An attorney must be mindful of potential conflicts of interest resulting from the attorney's lack of information on the "entire" case;
4. An attorney is still bound by confidentiality, attorney client privilege and all other ethical obligations inherent in an attorney-client relationship.

In view of the above we recommend the following practices:

1. What to be mindful of in deciding whether or not to take an "unbundled" matter:
 - A. The matter should be the area of practice in which you already have experience. Clearly understanding the full scope of a legal matter is critical in deciding how and whether you can offer limited representation.
 - B. Don't agree to "cut corners" to comprehensive representation. Make sure you have the latitude to complete the task the client gives you. If you undertake to represent a client you remain ethically responsible to fully advise that client. For example, be wary if the client insists on an hour limit to be placed on the work, because if you cannot adequately do the work in an hour and provide incomplete work as a result, you could be violating your ethical obligations regarding the client and risk a malpractice action. If you still decide to take on such a representation, at the very least make sure that your retainer agreement clearly provides that your ability to provide comprehensive advice is severely limited by the scope of representation.
 - C. Carefully assess a client's ability to perform his/her own work in the case. If a client has a significant language barrier that client may be unable to adequately represent himself pro se in a litigation. If a client is very emotional or comes from a background of domestic violence she may be unable to adequately assess her own ability to proceed on her own and may require comprehensive legal assistance. If a client is involved in a sophisticated transaction that client may overestimate his/her ability to do his/her own work.
 - D. Evaluate the potential client's intent in seeking limited scope

_____ Is the client seeking “unbundled services” to save money or to gain an unfair advantage or to deceive the other side? You want to make sure that you will not be assisting a client in perpetrating a fraud or a misrepresentation.

- E. Document everything in writing. Make sure that your retainer addresses in detail the limitations in the scope of representation and the fee structure. Review the retainer in detail with the client and, if needed, have a plain-language memo that would summarize the terms and is also signed by the client. Make sure to provide the client with copies of these documents.
- F. Adequately communicate the risks of limited scope representation to a potential client.

2. Best Practices during Limited Scope Representation:

- A. Document everything you do on the case. Also document the portions of the case which are being handled by the client.
- B. Make sure to instruct a client who is a pro se litigant to disclose that any documents submitted in a litigation bear the phrase “Prepared with Assistance of Counsel”. It is a good idea to specify this in your retainer with the client. This will protect you in a situation where a client finalizes a court document and submits it without the needed disclosure.

3. Best Practices at the end of Limited Scope Representation:

- A. Determine the extent to which a client may be prejudiced if you withdraw from representation.
- B. Send a disengagement letter that notifies the client of the end of your representation. Make sure to add language that if the client disagrees about the end of your involvement in the case, he/she should contact you immediately.

SECTION 4 – EXIT STRATEGIES & LAW FIRM PARTNERSHIP AGREEMENTS

“Lawyers die as all humans do. But when a lawyer dies without plans in place for the continuance, transfer or closure of his or her practice . . . chaos frequently results with serious harm coming to clients and family left bereft and law practices left unattended.” Recommendation 111 of the Senior Lawyers Division to the ABA House of Delegates, approved at the 1997 ABA Annual Meeting.

Introduction

Although exit strategies and partnership agreements may at first glance appear incongruous subject matters, they are both critical components of a law firm’s internal management.¹⁸ Perhaps most importantly, they are of utmost importance in the protection of law firm clients’ interests. There is no doubt that the purpose of exit strategies is to protect clients’ interests; less obvious is the role that partnership agreements can play in protecting those same interests. They are, however, roadmaps to ensuring the continuity, security, and predictability of relationships between attorneys, staff, clients, assets, and outside parties. Nothing impacts a law practice as intimately as these documents. Yet, time and again, they are overlooked due to an already over-burned schedule and the exigencies of a small law firm practice.

Attorneys at small law firms often play multiple roles: counselor, paralegal, rainmaker, IT consultant, receptionist and bookkeeper. Given the overlap of administrative tasks and professional skills, it is not surprising that documents setting forth a roadmap for the worst case scenario get pushed to the side since they do not address immediate needs such as cash flow and client concerns. Ignoring them, however, can have disastrous consequences.

In the event of an attorney’s involuntary absence, client trust accounts can become indefinitely frozen pending the attorney’s return. If the attorney is deceased, such clients will have to wait until probate proceedings deal with the issue, which may be a year or more subsequent to the attorney’s passing. Similarly, an attorney’s absence can mean court dates and important deadlines will be missed, thereby potentially severely prejudicing the absent attorney’s client interests.¹⁹

¹⁸ According to a 1995 American Bar Foundation Statistical Report, around 30,000 attorneys have been admitted each year since 1977 (The report is issued every 5 years and is available here: <http://www.americanbarfoundation.org/publications/lawyerstatisticalreport.html>.) Those attorneys who were in their 40s in the mid-nineties will be approaching retirement between 2010 and 2015. Furthermore, it is estimated that within the next 20 years, more than 90 million people in the United States and Canada will be reaching retirement age. This represents not only a tremendous transfer of wealth and skill for future generations, but also a collective responsibility to ensure that client interests are adequately protected.

¹⁹ CPLR §321 governs what happens when there is a death, removal or disability of an attorney during a proceeding. Specifically, CPLR §321(c) states that [i]f “an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no

As for partnership agreements, it is a well known fact that court dockets are replete with cases dealing with feuding business owners. Having no partnership agreement, or a badly drafted partnership agreement, can result in costly, lengthy and taxing disputes that could have been avoided with a well drafted document. These disputes can also disrupt, or injure, client interests that are invariably caught in the cross-fire of a law partnership court proceeding.

It is important to note that an exit strategy is a prerequisite to obtaining professional liability insurance. Every insurance application requires that the applicant certify that she has an exit strategy in place in the event of death, disability or unavailability. Most applicants simply check off these questions in the affirmative without further thought as to its implications. If an event that should have been envisaged by an exit plan occurs, and the attorney does not have such an exit plan

further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such a manner as the court directs.” See *Carder v. Ramos*, 163 A.D.2d 732, 558 N.Y.S.2d 322 (3rd Dep’t 1990). Further, the client may request additional relief after the 30 days upon the discretion of the court. See also Rule 1.15 which provides in relevant part:

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm. Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

implemented, query whether insurance will cover a potential malpractice claim against the attorney's law firm or estate.

Survey Results

Several of the questions in the Survey were specifically geared towards the subject matters of exit strategies and partnership agreement. About 83% of survey takers indicated that they have no exit strategy implemented for their retirement; this is all the more surprising given the fact that 67% of survey takers are solo practitioners. These percentages change somewhat significantly where a substitute is needed: about 52% of survey takers indicated that they have a strategy implemented in the event they are unavailable to their clients voluntarily or involuntarily. As for partnership agreements, over 80% of responders in multi-person firms have partnership agreements. Nevertheless, when comparing the number of survey takers indicating that they are a multiple partner firm to the responses indicating the presence of a partnership agreement, there appears to be a significant percentage of attorneys who are in a multiple attorney firm without a partnership agreement.

Ethical and Malpractice Considerations

In 1992, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion addressing the disposition of deceased sole practitioners' client files and property. Formal Opinion 92-369 highlighted the need for a lawyer to have a plan in place that would provide for the protection of a client's interests in the event of a lawyer's death, and provided guidance to lawyers assuming responsibility for the deceased lawyer's files.²⁰ The ABA Opinion states:

The death of a sole practitioner could have serious effects on the sole practitioner's clients. . . Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the clients discover that their lawyer has died. As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death.

Although the ABA Opinion is based on the ABA Model Rules²¹, it does raise some important ethical and legal considerations applicable to New York practitioners. For example, Rule 1.1 of New York Rules of Professional Conduct provides that:

²⁰ See also New York State Bar Association, Committee on Professional Ethics, Opinion 623 (1991)(Procedures for disposing of closed files).

²¹ Although NY has not adopted the ABA Model Rules in full, the NY Rules have adopted the Model Rules numbering scheme and there are a number of similar sections in both sets of rules. The NY Rules should, however, be researched separately from the ABA Model Rules.

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

Rule 1.3 further provides that a “lawyer shall act with reasonable diligence and promptness in representing a client.” Comment 5²² to Rule 1.3 states:

To avoid possible prejudice to client interests, a sole practitioner is well advised to prepare a plan that designates another competent lawyer to review files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action.

Although Rule 1.16 provides that a lawyer should withdraw from representation if physically or mentally unable to represent a client, Rules 1.1 and 1.3 indicate that an attorney should be thoroughly prepared for a client’s representation by considering all possible contingencies. This preparation should entail an exit plan should the attorney be temporarily or permanently unable to represent the client. In addition, a lawyer’s fiduciary obligations towards a client survive disability, death and the dissolution of a law firm.²³

A solo practitioner would, therefore, appear to have a duty to ensure that client matters are properly taken care of even subsequent to disability, death or law firm dissolution. Since this duty cannot be addressed subsequent to a passing or disability, a solo practitioner needs to implement an exit plan, or at the very least designate an attorney who will take care of pending matters should the worst occur.

If a solo practitioner does designate an attorney to take care of client matters, such attorney can be compensated for those services and can be entrusted with the sale of the deceased or disabled lawyer’s practice. Rule 1.17 provides in relevant part that the “personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice.”²⁴ With regards to such designated attorney’s compensation, Rule 5.4 provides in relevant part that:

A lawyer or law firm shall not share legal fees with a nonlawyer, except that . . . a lawyer who undertakes to complete unfinished legal business of a deceased lawyer

²² The Appellate Division has not enacted the Preamble, Scope and Comments, but they may provide guidance for attorneys in complying with the Rules. Where a conflict exists between a Rule and the Preamble, scope or a Comment, the Rule controls.

²³ See *Vollgraff v. Block*, 458 N.Y.S.2d 437 (Sup.Ct. 1982) (breach of fiduciary duty if partnership’s clients are not advised of dissolution of partnership).

²⁴ Rule 1.17 also provides further guidance on how such personal representative of the deceased lawyer may handle the disposition of such files while preserving the confidential nature of the attorney-client relationship.

may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer.

In light of the foregoing, included below are some thoughts and guidelines as how to best approach exit strategies and partnership agreements.

BEST PRACTICES

In view of the current requirements stated in Rules 1.1, 1.3, 1.16, 1.17 and 5.4 of the New York Rules of Professional Conduct an attorney should be mindful of the following issues when contemplating whether to implement an exit strategy:

1. The absence of an exit strategy, particularly for solo practitioners, could be deemed a failure to provide competent representation to a client and therefore a violation of the relevant ethical provisions;
2. It is permissible to appoint an attorney unrelated to the law firm to handle the matters of a deceased, disabled or missing lawyer, and such attorney can undertake to complete unfinished legal business, pay to the estate of the deceased lawyer monies collected from such matters, or sell the law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice.
3. It is incumbent upon lawyers joining a firm as partners that internal disputes are properly addressed with sound partnership agreements.

Exit Strategies

This section addresses how a lawyer should plan for the involvement of a substitute attorney in the event of an attorney's illness, disability, accident, planned or unplanned retirement, or untimely death.²⁵

Exit strategies are created through an Exit Strategy Plan ("Plan").²⁶ A Plan should address the following issues: (1) designation of attorney to implement the Plan; (2) written instructions to outside parties; (3) written agreements between the exiting attorney, the designated attorney, and outside parties.

²⁵ The discussion in this section addresses exit strategies for solo practitioners. For a discussion of exit strategies in the context of a multiowner firm, please refer to the partnership agreement discussion.

²⁶ This section was based upon the guiding principles included in the NYSBA's Planning Ahead guide prepared by the NYSBA's Committee on Law Practice Continuity (http://www.nysba.org/Content/NavigationMenu/Publications/ForSolosPlanningAheadGuide/PlanningAheadGuide_FINAL_PRINTED_VERSION_OCT_2005.pdf). This section is merely an overview and should not be considered a thorough discussion of all the issues that can arise when considering exit strategies and partnership agreements.

In view of the foregoing, we recommend the following Best Practices:

1. Some things to consider when establishing an Exit Strategy Plan:
 - A. Designate an attorney to implement your Plan.
 - (a) The first step in setting up an exit strategy is to identify an attorney who is willing and able to implement the exiting attorney's exit strategy. This individual should have the requisite skill to understand the exiting attorney's client matters, and a thorough understanding of how the law firm is structured. Anyone can be a designated attorney; it could be an executor, a family member who is a lawyer, other attorneys in the firm, or another firm.
 - (b) If your firm focuses on family law matters, for example, an attorney with an intellectual property practice may not have the requisite skills to handle or assign pending matrimonial or custody matters to outside counsel.
 - B. Prepare written instructions for your designated attorney, staff and family members.
 - (a) Although a formal plan is necessary, the exiting attorney should prepare written instructions for the benefit of the designated attorney, law office staff, family members, or executor, as appropriate. This can avoid substantial delay and confusion as to how the Plan should be implemented. For example, these instructions should address how client files should be transferred, how clients should be notified, which agencies and courts need to be notified, which attorneys should receive clients files dependent upon their expertise, essential contacts such as malpractice carriers, which receivables need to be collected, what liabilities need to be paid and other similar matters.
 - (b) These instructions should include essential information such as passwords to computer, bank account information for the firm, and location of storage facilities. They should also be periodically reviewed for accuracy; what may be accurate now may no longer be so five years from now.
 - (c) Examples of such instructions/practices include:
 - (1) General information about pending matters.
This information can be regularly updated

- (2) Detailed information regarding password protected files and programs. All of your usernames and passwords should be kept in a secure location, but should be accessible to the designated attorney should the unexpected occur.
- (3) Billing on pending matters and collection on accounts receivables. Time and expenses spent on a particular client should be diligently kept in the same location and invoices that have been outstanding for over a month should be flagged on a regular basis.
- (4) Directions on how to dispose of closed files, as well as office furnishings and equipment.
- (5) Detailed information on the payment of current liabilities of the office. The law firm may have a commercial lease, equipment leases or other liabilities that need to be taken care of.
- (6) Itemized list of law firm bank accounts and insurance information. Your bank account and insurance information should be kept in a designated location in your office and computer and should be kept up to date.

C. Draft and implement the necessary agreements between the exiting attorney, designated attorney and outside parties. There are numerous documents and correspondences that need to be drafted in order to implement a proper exit strategy. Included below is a non-exhaustive list of such documents:

- (a) An agreement between the exiting attorney and the attorney designated to assist in the event of disability, incapacity, retirement or death. This may be accomplished through a limited power of attorney, or a more detailed agreement in either short or long form.

- (b) In the event the law firm is a professional corporation, resolutions authorizing the sole shareholder to appoint a designated attorney to close down the firm.
 - (c) Authorizations authorizing the designated attorney to contact existing clients of the closure, to transfer files as appropriate, and to obtain extensions of time in any pending proceedings.
 - (d) Sample letters that the designated attorney can use in implementing the Plan (e.g. notification to clients, requests to transfer files, acknowledgement of receipt of file).
 - (e) A power of attorney from the exiting attorney to the designating attorney allowing the latter to withdraw funds from a trust account containing client funds.
 - (f) Authorization to release medical information that may be needed to determine the exiting attorney's incapacity.
- D. Discuss your plan with your designated attorney, staff, executor and family members. Discussing your plan in advance with key individuals can help save time and avoid confusion in the event of death or disability.
- E. Provide for compensation of your designated attorney. Your agreement with the designated attorney should spell out how he or she should be compensated for handling the managing or sale of your practice. Compensation may be in the form of a flat or hourly fee, and should cover all expenses. Funding of this fee may be allocated from law firm receipts, your estate or by purchasing some of form of insurance. You should discuss this liability with your executor as well as your insurance broker.
- F. Make sure that your trust accounts do not remain indefinitely frozen. Unless you permit another attorney to access your trust accounts, they will remain frozen until a court authorizes access. This may cause substantial harm to clients that have permitted you to place their money in your trust account. Make sure that your designated attorney has a power of attorney to access such accounts in the event of your death or disability. Alternatively, you could provide for the same in an exit strategy agreement or consent and authorization form. Check with your bank to make sure that these agreements are acceptable to it and to make sure that no other form is necessary.

Partnership Agreements²⁷

Every multiowner law firm should have a written agreement setting out policies for addressing major practice issues.²⁸ Even in the most deceptively simple partnership there are always issues that need to be addressed. For example, a 50/50 partnership, where partners share equally in profits and expenses, can result in a voting deadlock if the partnership agreement leaves out a mechanism for resolution. Similarly, partnership agreements should address when partners can add another partner, and under what circumstances they can leave.

It is important to note that each partnership agreement is different, as every partnership consists of unique attorneys, circumstances, and interests. There is no one size-fits-all agreement; therefore, drafting a partnership agreement requires time, discussion and effort on all parties to settle on the appropriate language for the circumstances. Included below are some clauses as a suggested starting point.

In view of the foregoing, we recommend the following Best Practices:

1. In approaching partnership agreements, consider the following clauses:
 - A. Clearly set out the duties of the partners. Each partnership agreement needs to set out the duties of the partners. This clause is quite broad and can include anything that might be deemed necessary by the law firm owners. Such clauses often include language stating that the law firm partners will devote their full-time efforts to the firm, and also discuss items such as vacation and sick days, and reduction of earnings for excess days taken off. In addition, this clause might address the maximum expense allowance permitted for reasonable and customary expenses incurred in furtherance of the business and affairs of the partnership (e.g. marketing and networking expenses). There may also be limits on outside interests that involve using the firm name, so as to avoid having the firm entangled in businesses or activities deemed inappropriate by the remaining partners. Finally, there may be a clause discussing leaves of absences, whether it is for non-income producing purposes, or income producing purposes, and an allocation of such funds to either the absent partner or the firm.

²⁷ The use of the term “Partnership Agreement” in this context includes any kind of agreement between law firm owners, whether an operating agreement, shareholder agreement or partnership agreement.

²⁸ This is not to say that a solo practitioner should not have an operating agreement, bylaws or other foundational documents, as appropriate. This section is merely focusing on issues that need to be addressed in multiowner firms.

- B. Define who manages the partnership. In small firms, such as two or three partner firms, management usually vests in all of the owners rather than a select group of people. But even if that is the case, the partnership agreement should spell out who those people are and what are their roles. This is the section that should discuss when unanimous, super-majority, or a majority vote is required. For example, a voting clause might itemize decisions that require unanimous votes such as the admission of additional partners, a change in the name of the partnership, expenses in excess of certain amounts, or a readjustment of partners' levels of compensation.
- C. Avoid stalemates by including deadlock provisions. The deadlock provision is essential for law firms where there can be an equal percentage of votes either for or against a particular decision (e.g. the 50/50 law firm). It can be a subsection of the management provision or a stand alone provision, There are a number of mechanisms that be used to address such deadlocks, each with their own advantages and disadvantages.
- (a) The most costly mechanism is to require arbitration or mediation in the event of a deadlock dispute. This solution may work quite well where partners want a neutral, amicable, solution to their dispute, and welcome the assistance of an independent facilitator. Language must be included addressing who will pay for the cost of such arbitration or mediation.
 - (b) Other possibilities include appointing a third party to cast a vote to break the tie, forcing the dissolution of the partnership, or buying a partner out through a buy-sell agreement. Appointing a third party, however, might unnecessarily leave a third party with too much power over law firm decisions. Similarly forcing a buyout might be result in abuse where the trigger point for the buyout is caused by a problem much greater than the voting deadlock (i.e., one partner's desire to expel the other).
 - (c) Although none of these solutions are ideal, each presenting its own set of advantages and disadvantages, the fact that some form of deadlock-breaking device is included in the partnership agreement generally forces parties to reconsider their differences. A dispute that would otherwise escalate, might in the end diffuse if the

- D. Describe how bank accounts should be handled. The partnership agreement also needs to discuss how bank accounts will be managed, whether each partner will be a signatory on such accounts, and whether a partner can open the other partner's mail. In addition, a clause should be included defining what constitutes partnership income. Some partnership agreements specifically spell out that income includes not only legal services, but also income received as a holder of political or public office, as a teacher, author, arbitrator, lecturer, broker, title closer and other similar positions. Furthermore, it might be wise to include language discussing investment opportunities made available to a partner as a result of client relations. The law firm in such event may wish to have a say in whether such opportunities should rather be offered to the firm, or define the parameters of such relationship.
- E. Clearly set out the distributions/profits clause. The distribution clause is often one of the most contentious clauses in a partnership agreement. There is no uniform methodology for determining distributions, and law firms can use from a simple 50/50 split to complex calculations taking into account who brought the client and spent time working on the matter.
- (a) These clauses should invariably define what constitutes distributable income. In other words, gross receipts less an itemized list of expenditures. These expenditures can include overhead costs, funds expended to reduce partnership debt, charitable contributions, cost of insurance, salaries, fees paid to associates and other professionals, and other amounts set aside as reserves for unforeseen contingencies.
 - (b) The division of profits section should discuss what amount of such distributable income can be distributed to the individual partners. In such instances, some firms may divide it according to a set percentage. Other firms, particularly where a new partner comes on board, may decide to phase in the incoming partner by giving her a reduced percentage for a set period of time. There are numerous permutations of this clause and it serves multiowner firms well to spend the time determining what might be considered fair and equitable towards all parties.

- F. Make sure to address changes as to partners. The changes as to partners clause addresses how partners can enter and exit the firm. This clause can sometimes be a stand alone buy-sell agreement, or a section of the law firm partnership agreement. In either instance, this language serves the same purpose.
- (a) An essential component of this clause is language listing events that trigger the termination date of a partner. These should be itemized and generally include death, mental or physical disability, retirement, voluntary withdrawal and involuntary removal. It is important to distinguish between voluntary and involuntary withdrawal and specifically spell out the mechanism triggered by such events. Death or disability are insurable events which can trigger a payout by the insurance company to the disabled partner or the representatives or beneficiaries of the deceased partner.
 - (b) Involuntary withdrawals, such as retirement, exiting the firm for personal reasons, or an expulsion, each require a different treatment of the exiting partner. For example, in the event of voluntary withdrawal, a partnership payment may be such partner's percentage ownership in the firm multiplied by the partnership's net assets. Of course, in such instance, the partnership's net assets need to be carefully defined, as does the partner's percentage interest. It is also important to note that language discussing the expulsion of a partner needs to be carefully defined and it is preferable for such expulsion to be based on outside events such as multiple ethical complaints or a felony conviction.
- G. Address what happens in the event of dissolution. This section should discuss how the winding down and dissolution of the firm should occur. There should be guidelines as to how dissolution is decided by law firm vote, and who is responsible for handling the liquidation of the firm. Most importantly, this clause needs to outline the distribution of proceeds of the firm in an itemized list of priority. For example, there should be language stating that creditors need to be paid first, an amount set aside for any contingent liabilities, payments to former partners, to partners for their contributed capital, an amount for each partner's tax liability, and then a distribution in accordance with each partner's percentage ownership.

2. Discuss key provisions such as management, payment, dissolution and the admission of a new partner. Drafting an agreement is useless if the parties do not see eye to eye on key provisions. The only way to determine whether partners are on the same page regarding the management of the firm is to discuss frankly how key issues should be addressed in the partnership agreement prior to preparing a first draft.
3. Seek out the advice of an attorney. If partnership agreements are foreign to your practice, or if you are unable to have an objective perspective, it may be beneficial to retain counsel to review the agreement. You and your partners should not share an attorney, each of you should have your own.
4. Seek out the advice of an accountant. The partnership agreement should include information on how law firm profits will be distributed to you. Make sure to check with an accountant to ensure that you don't have a negative tax treatment as a result of such provisions.

SECTION 5 – TECHNOLOGY AND THE SOLO PRACTICE

“The first rule of any technology used in a business is that automation applied to an efficient operation will magnify the efficiency. The second is that automation applied to an inefficient operation will magnify the inefficiency.”

Bill Gates

Introduction

Solos and small firms can stay competitive with larger firms by developing tech-related skills to either get new clients or better service existing ones. With less overhead, smaller firms can invest in the appropriate technology and provide services that would not otherwise be possible fifty years ago. Taking advantage of these opportunities, however, requires a restructuring of the traditional law firm setting. Every new technology requires an investment of time, money and a good dose of caution to ensure that client confidences are properly maintained. This means that lawyers in small firms must either learn to be technologically savvy or outsource the maintenance of their technological infrastructure to an outside party.

Despite the significant competitive edge that technology can play in smaller firms, attorneys are often unprepared to tackle the financial, ethical and logistical issues that come up when implementing new technology in an existing law firm. Data from a 2006 ABA Annual Technology Survey indicate that most practices of 9 attorneys or fewer do not have technical support staff.²⁹ Furthermore, not only are smaller firms apparently much less likely to have access to technology training,³⁰ but they are also much less likely to have backoffice software³¹ (i.e. billing and accounting) in comparison with larger firms.

Although the lack of a sophisticated technological infrastructure does not necessarily mean that a small firm cannot function, it does demonstrate that smaller firms may not have found a way to reap the benefits of the latest technological developments. Whether this results from lack of training, financial restraints or resistance to innovation may vary from firm to firm, and probably generation to generation.

There are, however, basic technological and ethical considerations that every small firm attorney must keep in mind. Solo and small firm practitioners may be more likely to work remotely, from either a home office or a local coffee shop. They may also be more likely to experiment with social media platforms such as Twitter, Facebook and

²⁹ According to the ABA survey, 57% of firms sized 1-9 and 78% of solo practitioners do not have technical support staff. American Bar Association Legal Technology Resource Center Survey Report 2006, Volume I.

³⁰ For example, only 18% of solo attorneys surveyed by the ABA have at least minimal access to video training resources, as opposed to 73% of their peers in larger 100+ attorney firms.

³¹ According to the ABA survey, about 26% of solos lack some form of accounting software, and 56% lack billing software.

LinkedIn to get the word out about their practice. Although these scenarios are not inherently problematic, they do raise unique considerations that should not be ignored.

Survey Results

The Survey questions raised a number of significant issues that are of particular relevance in the small law firm context. Overall, survey takers exhibited a disturbing lack of knowledge as to the vulnerability of their technological everyday uses.

About 83% of survey takers indicated that they work remotely from their office.³² It appears that when working remotely, the vast majority of survey takers do not work in public spaces as about 60% indicated that they “almost never” do. Despite the high number of survey takers working remotely, a substantial 24% indicated that they do not use a secure Wi-Fi when working wirelessly, and 16% indicated that they simply lack knowledge as to whether they do or do not.

When asked whether they rely on encryption methods, about 50% indicated that they “almost never” do, with the remaining 50% almost evenly split between “very often,” “often,” and “sometimes.” On the issue of metadata, about 70% of survey takers indicated that they almost never rely on software programs to scrub metadata before transmitting documents.

The majority of survey takers also indicated that they do not rely on a remotely located computer owned and operated by a third party to enable their computing tasks, and do not store their data on remote servers. Interestingly, about 10% of survey takers in both instances indicated that they lacked sufficient knowledge to answer both questions.

Finally, an alarming 23% do not make use of external storage for emergency backup, and 55% do not have a disaster recovery plan in case of emergency.

Legal and Ethical Background

The prevalence of technology and social media use in today’s law practice raises considerable ethical and malpractice concerns. The expansion of technology leads to a commensurate increase in privacy concerns and the potential for loss of privileged client information or attorney work product.

Rule 1.6 of the New York Rules of Professional Conduct provides that a “lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person unless . . . the client gives informed consent.” Comment 3 goes on to clarify that the “confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source.” Comment 17 further provides that:

³² 3.5% said they “always” do; 31.8% said they “often” do; and 47.5% said they sometimes do.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

A lawyer's ethical duty to keep matters confidential therefore extends well beyond the attorney-client privilege to include any kind of information regarding the client obtained during the course of the representation. Every care must be taken that electronic communications do not unwittingly lead to the disclosure of client confidence.

So for example, it would be inappropriate for a lawyer to write in a tweet "Just talked to my client who totally lied to me about all the facts." Although the identity of the client may not be disclosed, the tweet itself will include a date and time stamp, which has the potential of revealing information to someone who might know that the client was meeting with her lawyer that day. Similarly, the loss of a USB thumb drive containing client files can result in disastrous consequences, particularly if the information contained on the thumb drive is not encrypted.

The Rule 7.1, addressing lawyer advertising, applies to any "computer-accessed communications"³³ including internet websites, blogs, chat rooms, banner advertisements, electronic mail and instant messaging. If the online material falls under Rule 7.1's ambit, it must contain a conspicuous "ATTORNEY ADVERTISING" disclaimer, and if a statement relates to the lawyer's skills, should also include the disclaimer of "Prior results do not guarantee a similar outcome."

Rule 7.1 provides in relevant part that a "lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that . . . contains statements or claims that are false, deceptive or misleading." An advertisement may not include:

- Endorsements or testimonials regarding a pending matter;
- Any paid endorsements or testimonials, unless such compensation is disclosed;

³³

Rule 1.0 definition.

- The use of actors, fictionalized events or scenes, without the disclosure of such fictionalization;
- Materials or information with a clear and intentional lack of relevance to the selection of counsel.

These rules can generate potential pitfalls in the social media context. Special care must be taken when accepting testimonials or recommendations on LinkedIn, for example, and lawyers would be well-advised to avoid making reciprocal recommendations where one is contingent upon the other. Similarly, LinkedIn permits a member to list in its profile that it is a “specialist” in a certain field, which may run afoul of the ethical proscription against holding yourself out as a “specialist”. The same issue arises when LinkedIn designates a member as an “expert” in a particular category if it has been voted as the “best answer” in a particular bulletin board discussion.

As a general rule, New York attorneys must retain a copy of their internet website for at least one year. Furthermore, a copy of the contents of the site must be preserved upon the initial publication, as well as any major website redesign, or extensive content change, but in no event less frequently than once every 90 days. In other words, it is incumbent upon the attorney to use certain computer programs or the website’s content management systems to automatically preserve a copy of the content for certain time periods or even each time a change is made.

Best Practices

In view of the current statutory and ethical requirements, an attorney should be mindful of the following issues:

1. Client files and communications must be kept confidential. It is incumbent upon an attorney relying on various technological tools to ensure that such confidentiality is adequately preserved.
2. Consider converting documents to .pdf form before emailing or otherwise conveying them electronically, to limit tampering.
3. Client matters should not, as a general rule, be discussed via social media even if the identity of the client is not revealed to the user.
4. It is permissible for an attorney to use social media, websites, electronic communications and other means to provide information, news, and events relating to the firm; however, such communications will most likely constitute attorney advertising and should include the appropriate disclaimers.
5. Every care must be taken not to be labeled an “expert” or “specialist” unless appropriate under the circumstances.

In view of the above we recommend the following practices:

A. **Viruses, Worms and Malware**

- (a) Understand what are computer viruses and worms. One of the biggest threats to computers is the different kinds of computer viruses, worms and other malware. A computer virus is a computer program that can copy itself and infect a computer.³⁴ A worm can exploit security vulnerabilities to spread itself automatically to other computers through networks.³⁵
- (b) Use anti-virus software. All computers that lawyers and law firms use should have anti-virus software and an active subscription to update with the anti-virus software company. Every computer should be scanned for viruses weekly at a minimum and every anti-virus program should be updated monthly at a minimum. Every anti-virus program should also scan for malware.
- (c) Be careful about which sites you visit. Computers with malware tend to download the malware from visiting websites with malware. Lawyers should refrain from visiting websites that are not trusted on computers on which client information is stored.
- (d) Don't open suspicious emails. Worms tend to come in e-mails. If an e-mail looks suspicious, deleting that e-mail may be the safest choice. Do not open e-mails that look suspicious and do not click on links that appear to be suspicious. Lawyers should use their best judgment regarding e-mails that are suspicious and not just click on any link in an e-mail.

B. **Wi-Fi**

- (a) Be careful when using public wireless networks. Wireless networks can be open for all to use. This comes with its own set of drawbacks, the main one being that it is possible for anyone with particular devices or software to see which computers are accessing which websites. This is a problem as most cafes with wireless networks – popular, modern destinations to work outside of the office – are open for all to use.
- (b) Use a secure wireless network. Wireless networks can also be secured by a password. There are various ways to encrypt the signal from the computer to the wireless network router. Generally, the computer will ask the user to type in the password

³⁴ http://en.wikipedia.org/wiki/Computer_virus (Retrieved October 3, 2010)

³⁵ Ibid.

when the user connects his computer to the wireless network. This is the preferred type of network at home or on the road. At home, lawyers should make sure their computers are either plugged in with an Ethernet connection or secured with a password on the wireless network.

C, Off-site Storage and Disaster Recovery Plan

- (a) Regularly store your data. You can find a range of off-site services – from continual off-site computing (so all the business' activity is off-site) to storage of data. All data are secured on server farms behind many passwords for the user and support staff.
- (b) Create a disaster recovery plan. This can be a simple, hand-written plan that lists one employee calling another to a complex plan (as many different software packages exist to help develop business disaster recovery plans).
- (c) Use both (store data, and disaster recovery plan). Lawyers should have a disaster recovery plan combined with off-site storage so that their practice can continue after disaster strikes.

D. Social Media

(a) LinkedIn

- (i) On LinkedIn, users can make recommendations on the profiles of other users. Lawyers should only accept recommendations from other users who can accurately state why they are recommending the lawyer.
- (ii) Lawyers should avoid being labeled a “specialist” under LinkedIn categorization rules. While lawyers will participate in the questions feature in LinkedIn because it is very helpful to be social and to share expertise in an area, there may not be a solution to avoiding being labelled an “expert” in this situation if a lawyer gives the best answer to a question by using LinkedIn's questions feature.

(b) Facebook

- (i) On Facebook, there are two kinds of webpages that a user can view: a profile and a page. A profile is

the page for every user. It is the highest level of interaction on Facebook. Every user can be friends with another user. A page is a webpage that represents a business. Users with profiles can “like” a business' page. Lawyers can have business pages and any user can “like” that page.

- (ii) Lawyers should use the business page feature to separate the professional from the personal. Lawyers can then post thoughts on the areas of law the lawyer or law firm focuses on.
- (iii) Lawyers should also include “ATTORNEY ADVERTISING” somewhere on the business page that the lawyer or law firm creates in Facebook.
- (iv) Lawyers should avoid being friends on Facebook with other Facebook users who are clients, again to separate the professional from the personal.

SECTION 6 – PROFESSIONAL LIABILITY INSURANCE

“Prudence is the virtue by which we discern what is proper to do under various circumstances in time and place.”

John Milton

Introduction

Ideally, lawyers should be covered by professional liability insurance. Yet there is no requirement that lawyers obtain such insurance and there are understandable reasons why lawyers do not obtain coverage. In addition, there are different points of view about what should be disclosed about coverage to some or all clients, and whether coverage should be disclosed in the state attorney registration.

Arguments in favor of coverage and disclosure include:

- Obtaining professional liability coverage protects the public.
- Insurance can insulate a lawyer from substantial loss of assets in the face of large malpractice awards.
- Private practice of law is comparable to other industries such as manufacturing, health care, etc., and liability coverage is a normal cost of doing business.
- The reputation of the profession is tarnished if clients harmed by an attorney's errors or omissions are uncompensated.
- Some clients want the state bar to be able to confirm coverage because the clients may be uncomfortable asking counsel about such matters.
- The lack of coverage by a potential defendant attorney may make it harder for a plaintiff to find representation to pursue a claim.
- Having malpractice coverage may be a material fact to some prospective clients, and, therefore, disclosure of coverage status is a fiduciary duty.

Arguments against coverage and disclosure mandates include:

- There is a lack of evidence that disclosure/non-disclosure is a problem.
- Required coverage and/or disclosure would encourage frivolous suits.
- Other professionals are not required to make such disclosures.
- Coverage requirements would add yet another layer of unnecessary bureaucratic regulation.
- Required disclosure is potentially misleading because, for example, having information about coverage at any given time doesn't guarantee coverage or coverage levels at a later time, or that any policy will adequately compensate for damages.
- Coverage of some practice areas may be unavailable (or effectively so due to pricing).
- Coverage requirements result in increased attorney fees.

Different Views Nationwide

Oregon is the only state that requires attorneys to carry a minimum amount of professional liability insurance. California attorneys are required, under most circumstances, to disclose to clients if they do not carry professional liability insurance. States including Alaska, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Pennsylvania and South Dakota require disclosure of coverage directly to clients; other states including Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, Rhode Island, South Dakota, Virginia, Washington and West Virginia, require attorneys to disclose whether they carry professional liability insurance on their annual registration statements.

New York Ethical Approach

The New York Rules of Professional Conduct³⁶ adopted in 2009 do not require attorneys admitted to practice in New York to obtain professional liability insurance or make any disclosure about coverage to either clients or the Office of Court Administration in connection with attorney biennial registration. The superseded Code of Professional Responsibility also did not require such coverage or disclosure.

Survey Results

Several of the questions in the Survey were specifically geared towards the subject matter of insurance and changes in coverage. Among Survey respondents, 55% indicated their firms carried professional liability insurance, 23% indicated they did not, and 22% did not answer the question. In response to a similar question regarding firm health insurance, 48% indicated they carried health insurance, 31% indicated they did not, and 22% did not answer the question. Too many respondents did not answer the Survey questions regarding changes in coverage and reasons for such changes for this information to be indicative of any trend.

Useful Information Solos and Small Practitioners Should Know When Looking for Professional Liability Insurance

In order to make the right decisions about insurance to purchase, attorneys looking into obtaining professional liability coverage should understand the kinds of policies available, what is covered, what is excluded, when coverage starts, when it terminates, and what happens to coverage when the attorney leaves the firm to join another firm, retires from law practice, becomes a judge, becomes disabled or dies.

Attorney professional liability insurance in New York is subject to a subset of regulations under Property and Casualty Insurance. See 11 NYCRR Part 73. Insurance is a regulated industry, and every state has a department involved with insurance governance. The New York Insurance Department regulates the insurance policy and certificate provisions. A policy covering “errors and

³⁶ 22 NYCRR 1200 et seq

omissions liability” and “professional liability” may be provided on a “claims made basis” (see below) in connection with legal services insurance, provided the insurer complies with certain minimum standards.

Working with a broker who has experience with insurers who write professional liability policies is an important first step. Unlike other forms of property and casualty insurance, professional liability coverage is subject to different regulations, and involves fewer insurers and insureds; consequently, fewer brokers will have exhaustive experience. Lawyers’ professional liability policy premiums also differ by practice area. An experienced broker will have a better feel for the nuances that will affect both coverage needs and premiums.

“Claims-made” vs. “occurrence” policies; a reaction to social and economic trends: Prior to 1986 when regulations governing “claims made” policies were adopted in New York³⁷ professional liability insurance policies were based on “occurrence”, meaning that liability for the injury or damage that the insured became legally obligated to pay arose out of events (incidents, acts or omissions) that occurred during the policy period, including events occurring subsequent to the “retroactive date”, if any (see below), *and* where a claim may be made *during or subsequent to the policy period*.³⁸ These policies didn’t impose time limits on reporting claims; once the “occurrence” happened, the insurer remained obligated under the policy.

That indefinite time exposure, coupled with increases in claims (due, in part, to changes in cultural trends), inflation and ensuing actuarial difficulties, affected premium prices. Following public hearings, the New York Insurance Department permitted insurers to write “claims-made” policies, meaning that liability for injury or damage that the insured becomes legally obligated to pay arises out of incidents, acts or omissions, *as long as the claim is first made during the policy period or any extended reporting period*.³⁹ In other words, the claim must be made while coverage is still in place. That condition made exposure of the insurer predictable because there was a time limit.

The New York Insurance Department acknowledged that claims-made coverage tended to provide less protection than occurrence coverage, it was more complicated and confusing, and involved potential exposure gaps. It also concluded that it was inappropriate and unwarranted for all types of liability coverage. On balance, however, and given marketplace developments, the use of claims-made policies elsewhere, and the increased knowledge and sophistication of certain insureds, including large commercial entities and professionals (including medical and legal professionals), the Department approved the claims-made policy insurance form provided it met a number of minimum standards.⁴⁰

³⁷ 11 NYCCR 73.0 Historical Note

³⁸ 11NYCCR 73.1(j)

³⁹ 11 NYCCR 73.1(p)

⁴⁰ 11 NYCCR 73.0 (c),(d)

What is covered: The lawyers' professional liability insurance policy covers claims based on an act or omission in the insured's rendering or failure to render legal services for others. "Legal services" are the services rendered by a licensed attorney in good standing. These can also include services of an arbitrator, mediator, title agent, notary public, administrator, conservator, receiver, executor, guardian, trustee, or other fiduciary where the act or omission that formed the basis of a claim was in rendering of services ordinarily performed by a lawyer. A common exclusion is services rendered as a real estate agent or broker or insurance agent or broker.

Who is covered: The named insured is the firm or, in the event of a solo practitioner, the attorney (or the solo's professional corporation as the case may be). Those covered by the policy written for the firm include any lawyer listed in the application on the inception date of the policy until such time as that person ceases to be a member, employee or of counsel to the firm. Employees include lawyers, of course, but can also include secretaries, paralegals and other legal office staff members in connection with the firm's rendering legal services and within the scope of their employment. In addition to the law firm's working group, coverage can include the estate, heirs, executors, administrators, assigns and legal representatives of the insured in the event of the insured's death, incapacity, insolvency, or bankruptcy, but there will be expected limitations. Former members, partners, shareholders, employees, etc., may also be insured, but only in connection with rendering/failing to render legal services. Contract lawyers pose a different question since they are independent and responsible for their own services. An endorsement (see below) may be obtained from an insurer for an additional premium to include contract attorneys within the policy coverage.

Claims-made policy features: Claims-made policies contain a specific date on which coverage begins, commonly known as the "retroactive date". No coverage exists for claims arising out of occurrences prior to that date. In the case of claims-made policy renewals, the retroactive date is earlier than the inception date of the particular renewal policy. With each succeeding renewal of the policy, coverage expands to include claims that may arise during the prior periods of that policy. In this respect the retroactive date of the policy remains the same, but since more services are covered, the risk of a claim increases, and the exposure of the insurer increases. Therefore, the policy premium increases on a commensurate level for each successive period the policy is renewed. Sticker shock is common if this aspect of claims-made professional liability policies isn't understood and appropriately budgeted.

Moving to a different firm is common among attorneys. The question naturally arises as to which insurer and which policy is going to be responsible for claims where an occurrence takes place under a policy that existed earlier but is reported later on. This resulted in the creation of so-called "tail coverage" also referred to

as “extended reporting period coverage”: coverage for a period of time specified in the policy in which claims first made after termination of the policy are considered made *during* the policy term, triggering the insurer’s obligations. The extended reporting period length is covered by an endorsement. As long as the insured renews a policy this endorsement does not need to be used. However, upon changing firms, retiring, becoming a judge, dying or becoming disabled, tail coverage provided in the endorsement adds years to the reporting time of claims. As can be expected, the longer the extended reporting period, the higher the premium. However, due to factors including limitations on actions and actuarial predictions of the number of years likely to elapse before all potential claims of a given year are reported and settled, tail coverage is deemed to “mature” at a point and the premium for an unlimited extended reporting period can be charged. Unlike renewal policies, however, tail coverage is paid all at once and within a given time of the expiration of the policy term.

Attorneys may also want to switch insurers, but want their claims-made coverage for prior years of work to continue as they continue to practice. This is accommodated by another feature of claims-made policies, “prior acts coverage”, in which the retroactive date is earlier than the inception date of the new policy, and covers claims made during the policy period arising out of events preceding the policy period. Attorneys are granted prior acts coverage in that the premium rate for that prior period is already considered mature.

A differentiating (and potentially beneficial) feature of a claims-made policy versus the occurrence policy is that the limit of liability of the occurrence policy doesn’t change after the policy terminates; if a claim was made two years after the occurrence policy expired, the limitation of liability was the amount applicable to that expired policy. The limits of the claims-made policy, however, are those in effect at the time the claim is made, not the date of the insured’s alleged act or omission. Therefore, an increase or a decrease in the limit of liability for a prior period is possible.

The New York Insurance Department has adopted a substantial set of minimum terms and conditions in connection with claims-made policies. Among them:

- When a claim is deemed first made
- Prohibitions on changing retroactive dates during the term of the relationship or extended reporting period
- Minimum periods of time within which the insurer must advise on automatic extended coverage, and the availability, the premium for and the importance of extended reporting period coverage
- Many extended reporting period options including:
 - The mandatory offer of extended reporting coverage upon policy termination
 - Prohibition on endorsements restricting extended reporting period coverage
 - Automatic extended reporting for 60 days

- The time within which the insured can accept extended reporting period coverage
- The minimum period of extended reporting
- The minimum aggregate liability limit for claims-made relationships of at least three years and less than three years
- The basis upon which the premium charged for extended coverage and prohibitions on charging a different rate under certain conditions
- Commensurate nature of premiums and length of the extended reporting period
- Offering extended reporting periods to former firm employees and affiliates
- Offering extended reporting periods to people who had been covered when a firm has been placed in liquidation, bankruptcy or ceases operation

Endorsement: This is an insurance policy form that either changes or adds to the provisions included in one or more other forms used to construct the policy, such as the declarations page or the coverage form. Insurance policy endorsements may serve any number of functions, including broadening the scope of coverage, limiting or restricting the scope of coverage, clarifying the application of coverage to some unique loss exposure, adding other parties as insureds, or adding locations to the policy. Endorsements often effect these changes by modifying the existing insuring agreement, policy definitions, exclusions, or conditions in the coverage form, or adding additional information, such as insured locations, to the declarations page. Policy endorsements also result from what has been brought to light in policy application answers.

Limit of Liability: Each policy has a cap on the amount of liability of each individual claim as well as the aggregate limit for the combined total of all damages and claim expenses. If the limit of liability of a policy is exhausted prior to settlement or judgment of any pending claim, the insurer's obligations under that contract terminate. The inclusion of more than one insured in any claim or the making of claims by more than one person against the insured doesn't affect the policy's limit of liability.

Claim expenses: These are the fees and costs charged by attorneys retained or approved by the insurer to defend the insured along with the costs of investigation, adjustment, defense and appeal of the claim, including appeal and similar bonds. Generally, claim expenses are part of the claim limit of the policy, meaning the expenses, which are paid first and which are applied to the deductible first, reduce the amount that is available to pay the claimant in a settlement or for a judgment. An important endorsement that may be obtained from an insurer for an additional premium is to exclude expenses from the claim limit and add them as an additional level of coverage.

Best Practices

- A. Read and be familiar with regulations applicable to claims-made policies. See 11 NYCCR Part 73. If you are going to be purchasing professional liability insurance coverage for the first time, this will enable you to ask a broker the questions most relevant to your practice.
- B. When leaving a firm where you were not involved in the selection of a professional liability insurer or the coverage, don't assume that the firm will continue to cover you in the foreseeable future or provide extended reporting/tail coverage. Request a copy of the old firm's professional liability policy as well as a summary of the coverage and endorsements. This will help you when working with your broker and to avoid gaps in coverage. Similarly, if your firm is dissolving and there is no successor and you haven't joined another firm or formed your own, be familiar with the available tail coverage options.
- C. When joining a new firm, determine the scope of the prior acts coverage available to you to make sure that, when taken together with any tail coverage you receive via your prior policy, the new firm's policy affords you the right, continuous protection.
- D. When joining a new firm or obtaining your own coverage, find out if your other activities, e.g., as an officer or director, can be covered by the policy you're considering or an endorsement thereto.
- E. Bear in mind that every piece of information supplied in an insurance application is incorporated by reference into the policy and becomes a material representation. Assiduous attention should be paid to accuracy. Insurers will void a policy *ab initio* in the event of false representation.