MALPRACTICE PREVENTION FOR BOUTIQUE LAW FIRMS:
The Top Ten Risk Management Tips To Protect Clients And Reduce The Risk Of Malpractice Claims

WEBINAR
November 16, 2011
1:00 P.M. – 2:30 P.M.

AGENDA

Presenters: Michael T. Mihm
Starrs Mihm LLP (Denver, Colorado)

Ryan M. McCabe
Montgomery Barnett (New Orleans, LA)

Adina Johnson
Wuestling & James, L.C. (St. Louis, MO)

1:00 – 1:05 p.m.

Introductions & Opening Remarks

1:05 – 2:20 p.m.

Risk Management Tip No. 1: Do not accept new clients outside your area of expertise.
- ABA Model Rules of Professional Conduct, Rule 1.1 Competence

Risk Management Tip No. 2: Communicate, communicate, communicate!
- ABA Model Rules of Professional Conduct, Rule 1.4. Communication

Risk Management Tip No. 3: Analyze and calendar statutes of limitation and other important deadlines.
- ABA Model Rules of Professional Conduct, Rule 1.3. Diligence

Risk Management Tip No. 4: Treat clients with respect
- Primerus Pillars of Integrity, Civility, and Excellent Work Product.

Risk Management Tip No.5: Insist on written fee agreements, even with long-time clients.
- No lawyer has *ever* regretted having a written fee agreement.

Risk Management Tip No. 6: Maintain boundaries with clients.
- ABA Model Rules of Professional Conduct 1.8
- *People v. Good*, 893 P.2d 101, 103-105 (Colo. 1995)

Risk Management Tip No. 7: Have a rigorous system for checking for conflicts of interest and be sensitive to possible conflicts of interest.

- You must – absolutely must – have systems in place to check for possible conflicts of interest.

Risk Management Tip No. 8: Keep up with changes in technology.

- You cannot – cannot – competently practice law without being minimally familiar with current information technology.
- Primerus Pillars of Excellent Client Service and Continuing Education.

Risk Management Tip No. 9: Never "borrow" from your client's trust account.

- If you take a client's money, you will almost always eventually be caught, and even if you get away with it and replace the money, you will regret that act every day for the rest of your career.

Risk Management Tip No. 10: Take care of your physical and mental health, and your need for work/life balance.

- More than half (and maybe closer to three-quarters) of lawyer discipline cases have as their genesis a lawyer with personal problems, such as marital, financial, health, depression, alcohol or drug abuse, or mental health problems.

2:20 – 2:30 p.m.

Q & A Discussions & Closing Remarks

- You do not have any control over whether someone complains or files a lawsuit. What you do have control over is your systems, how you conduct yourself day-to-day, and how you treat other people.

Primerus

Built on Integrity. Driven by Innovation.

Member Biography

Michael T. Mihm, Esq.

Starrs Mihm LLP
707 Seventeenth Street, Suite 2600
Denver, Colorado 80202

(303) 592-5900 phone
(303) 592-5910 fax

michael.mihm@starrslaw.com
www.starrslaw.com

Practice Areas

- Legal Malpractice Litigation
- Business Tort and Fraud Litigation
- Personal Injury and Wrongful Death Litigation
- Medical Negligence Litigation

Admitted to Practice

- State Bar of California, 1983
- State Bar of Colorado, 1985
- U.S. District Court for the Central District of California, 1983
- U.S. District Court for the District of Colorado, 1985
- U.S. Court of Appeals, Ninth Circuit, 1983
- U.S. Court of Appeals, Tenth Circuit, 1985
- U.S. District Court for the Northern District of California, 1986
- U.S. Court of Appeals, Eleventh Circuit, 2003
- U.S. District Court for the Southern District of California, 2006

Education

- Walla Walla College, College Place, Washington, B.A., Cum Laude, 1980
- University of Southern California Law School, Los Angeles, California, J.D., 1983 Notes and Articles Editor, USC Major Tax Planning Journal (1981-1983) Notes and Articles Editor, USC Computer Law Journal (1981-1982)

Member

- Colorado Trial Lawyers Association - Member, Board of Directors, 2008-2010 term; Member, Executive Committee, 2009-2010; Chair, Commercial Litigation Committee, 2009-2010
- CLE in Colorado, Inc. - Board of Directors, 2008-present
- American Bar Association - Litigation Section, Business Torts Litigation Committee (Website Editor, 2005 – 2007; Co-Chair, Programs Subcommittee, 2009-2010), Corporate Counsel Committee, Professional Liability Litigation Committee, Intellectual Property Section
- American Association for Justice - Business Torts Litigation Committee, Professional Liability Litigation Committee
- California Bar Association - Litigation Section
- Colorado Bar Association - Lawyers' Professional Liability Committee (Chair, 1997-1999)
- Denver Bar Association
- Faculty of Federal Advocates
- Los Angeles County Bar Association
- International Society of Primerus Law Firms (Primerus)

Biography

- Founding Partner, Starrs Mihm LLP

Primerus

Michael Mihm has 26 years of trial experience involving a wide variety professional liability claims and business disputes. He represents businesses and individuals – mostly plaintiffs -- in legal malpractice, business fraud, breach of fiduciary duty, and corporate "squeeze out" and "freeze out" and other corporate litigation. He also handles catastrophic personal injury and wrongful death cases. In 2006, Mr. Mihm was named as a "Colorado Super Lawyer®" for business litigation in the inaugural edition of Colorado Super Lawyers®, and he has been named as a Colorado Super Lawyer® in every year since.

Mr. Mihm is one of Colorado's most experienced legal malpractice trial lawyers, and he has been selected by his peers for inclusion in The Best Lawyers in America® in the field of legal malpractice. While he now mostly represents businesses and individuals in claims against their former lawyers, Mr. Mihm once defended many of Colorado's most prominent lawyers and law firms. He has tried numerous legal malpractice cases on behalf of both plaintiffs and the defendant lawyers. He is the Managing Editor of Lawyers' Professional Liability in Colorado, Second Edition (CLE of Colorado, Inc., 2005, Michael T. Mihm ed.), a two-volume, 42-chapter book on the law of lawyer's professional liability and professional ethics. Mr. Mihm and his associate lawyers also contributed eight chapters to the book, and he continues to edit the annual updates to the book. Mr. Mihm also authored more than half of the chapters in the first edition of the book, first published in 1999.

In August 2010, the members of the Colorado Trial Lawyers Association (CTLA) elected Mr. Mihm as Treasurer of the CTLA. He previously served CTLA as a member of the Executive Committee and the Board of Directors. He is an active member of the Business Torts Litigation Committee of the American Bar Association's Section of Litigation. He is a past chair of the Colorado Bar Association's Lawyers Professional Liability Committee. He is a frequent speaker at continuing legal education seminars on topics ranging from trial advocacy skills to professional liability issues.

Lectures and Seminars

- Michael Mihm, Moderator and Program Co-Chair, "Beating Goliath: How CTLA's David's Took on One of the World's Largest Corporations and Won," Colorado Trial Lawyers Association Annual Convention, Vail, Colorado (August 2010)
- Moderator and Program Planner, "Hardball Tactics and Stupid Lawyer Tricks: Maintaining Civility in Litigation," ABA Section of Litigation and ABA Center for Continuing Education (telephone and webcast seminar) (February 2010). Click here to purchase a recording of this seminar from the American Bar Association.
- Speaker, "Conflicts of Interest" and "Top 10 Ways to Get Sued or Grieved in Small Law Offices," Utah State Bar Fall Forum, Salt Lake City, Utah (November 2008)
- Speaker, "Common Law and Statutory Legal Malpractice Claims," 2007 Preventing Legal Malpractice Seminars, Colorado Bar Association, January 2007, Denver, Colorado.
- Program Chair, 2006 Preventing Legal Malpractice Seminars, Colorado Bar Association, January - February 2006, Denver and Colorado Springs, Colorado.
- Speaker, "Finding Insurance for Your Professional Negligence Claim," in Finding Insurance for Your Personal Injury Claim seminar, Colorado Trial Lawyers Association, Denver, Colorado (April 2005).
- Speaker, "Electronic Discovery" and "Practice Management Software" in Overcoming Your Fears: Using Technology in Litigation seminar, National Business Institute, Inc., Denver, Colorado (March 2005).
- Speaker and Program Moderator, Advanced Trial Advocacy seminar, with Ewing, M., National Business Institute, Inc., Denver, Colorado (July 2004).
- Speaker and Program Moderator, "Damages in Colorado Civil Trial Practice," with Brown, D., National Business Institute, Inc., Denver, Colorado (March 2003)
- Speaker and Program Moderator, "Damages in Colorado Civil Trial Practice," with Brown, D., National Business Institute, Inc., Lakewood, Colorado (January 2002).

Primerus

Built on Integrity. Driven by Innovation.

Member Biography

Mary Adina Johnson, Esq.

Wuestling & James, L.C.
The Laclede Gas Building
720 Olive St., Ste. 2020
St. Louis, MO United States 63101

Tel: (314) 421-6500
Fax: (314) 421-5556

johnson@wuestlingandjames.com

Practice Areas

- Commercial Litigation
- Insurance Coverage and Extra Contractual Liability
- Legal Malpractice Defense

Admitted to Practice

- Admitted to the state and federal courts of both Missouri and Illinois, and is a member of the Missouri and Illinois state bar associations

Education

- St. Louis University School of Law

  Honors: *Magna Cum Laude;* admitted to the Order of the Woolsack (top 10% of graduating class)

Member

- Missouri State Bar Association
- The Bar Association of Metropolitan St. Louis
- Women Lawyers Association
- Illinois State Bar Association

Biography

Adina Johnson heads up the firm's motion and appellate practice in both Missouri and Illinois state and federal court. She also is a member of the firm's legal malpractice defense, insurance coverage, and extra-contractual liability teams.

Adina spent ten years teaching junior high and high school students before attending St. Louis University School of Law where she graduated *magna cum laude* and was admitted to the Order of the Woolsack (top 10% of her graduating class). Thereafter, Adina served a clerkship with the staff attorneys' office for the Circuit Court of the City of St. Louis, Missouri for two years. In her position with the Circuit Court, Adina reviewed and analyzed motions before the court that involved a wide variety of issues including venue, jurisdiction, forum non conveniens, and summary judgment. In drafting orders for the court, Adina had the unique opportunity to view the arguments from the other side of the bench.

At Wuestling & James, Adina has authored many successful motions for summary judgment and winning appellate briefs. In the case of Swope v. National American Insurance Company, U.S. District Court of Missouri, Eastern District, Adina drafted a successful summary judgment motion that analyzed choice of law and coverage issues, including the pollution exclusion of a general liability policy.

Adina is admitted to the state and federal courts of both Missouri and Illinois. She is also a member of the Missouri and Illinois state bar associations, the Bar Association of Metropolitan St. Louis, and the Women Lawyer's Association. When not drafting motions, Adina serves on the Board of Trustees for the Village of MacKenzie to which she was elected two years ago. She is a volunteer attorney with Legal Advocates for Abused Women, and served as a volunteer attorney monitoring polling sites during the 2004 national election. She previously volunteered with the St. Louis City Mentoring Project. Along with other members of Wuestling & James, she enjoys participating in community activities such as Read Across America and Special Olympics.

Primerus

Built on Integrity. Driven by Innovation.

Member Biography

Ryan M. McCabe, Esq.

Montgomery Barnett
3300 Energy Centre
1100 Poydras St., Suite 3300
New Orleans, LA 70163

(Tel: (504) 585-3200
Fax: (504) 585-7688

rmccabe@monbar.com

Practice Areas

- Commercial Litigation
- Legal Malpractice Defense
- Business/Corporate
- Admiralty

Admitted to Practice

- Louisiana State Bar, 2007
- U.S. District Court Eastern District of Louisiana, 2007
- U.S. District Court Middle District of Louisiana, 2007
- U.S. District Court, Western District of Louisiana, 2007
- U.S. District Court, Southern District of Louisiana, 2007
- U.S. Court of Appeals, Fifth Circuit, 2008

Member

- Louisiana State Bar Association, 2011-Present Member, House of Delegates, Orleans Parish
- Louisiana State Bar Association, 2010-Present,, Ethics Advisory Opinion Committee
- New Orleans Bar Association
- Federal Bar Association, National Committee on Attorney Ethics and Professionalism
- Louisiana State Bar Association, 2009-Present, Rules of Professional Conduct Committee

Education

- Tulane Law School, New Orleans, Louisiana, J.D., 2007

  Honors: Certificate in Maritime Law; Recipient, 2007 Tulane Admiralty Law Institute Aware of Excellence, Winner, Tulane Maritime Journal 2005 Annual Writing Competition; 2006 John R. Brown Admiralty Moot Court Competition

  Law Journal: Tulane Maritime Law Journal, Editor in Chief, 2006-2007

  Law Journal: Tulane Maritime Law Journal, Junior Editor, 2005-2006

- University at Albany, State University of New York, B.S., B.A. 2004

  Honors: Suma Cum Laude; Recipient, University at Albany Presidential Scholarship; School of Business Honors Program; Presidential Honor Society, National Society for Collegiate Scholars, Dean's List (All Eight Semesters)

  Major: Business Administration (Finance Concentration)

  Major: Urban Studies and Planning (Urban Ecomics Concentration)

  Minor: Economics

Published Works

- *The Third Circuit Declines to Extend Maritime Liens to Replacement Vessels in PNC Bank Delaware v. F/V Miss Laura*, 23 TUL. MAR. L.J. 427, 2006
- *A Statutory Frolic of Its Own? A Divided Fourth Circuit Calms the Seas of the Suits in Admiralty Act Discretionary Function Exception Circuit Split*, 30 TUL. MAR. L.J. 457, 2006
- *Quantum Survey by Ryan M. McCabe and Arjya B. Majumdar*, 31 TUL. MAR. L.J. 697, 2007
- *Collision Survey by Ryan M. McCabe and Arjya B. Majumdar*, 31 TUL. MAR. L.J. 727, 2007
- *Forum Selection Clause Survey by Ryan M. McCabe and Arjya B. Majumdar*, 31 TUL. MAR. L.J. 745, 2007

Classes and Seminars

- Co-Panelist with Louisiana Insurance Commissioner Jim Donelson, "Wind versus flood and other Trivial and Mundane Matters", Louisiana State Bar Association, June 20, 2008
- 2008 Maritime Law Update (With Elizabeth Ryan and Clay Cosse), New Orleans Bar Association, December 16, 2008
- Panelist on Ethics and Professionalism at Tulane University Law School's 2009 Incoming Student Orientation

MALPRACTICE PREVENTION FOR BOUTIQUE LAW FIRMS

Michael T. Mihm
STARRS MIHM LLP
707 Seventeenth Street, Suite 2600
Denver, Colorado 80202
303.592.5900
michael.mihm@starrslaw.com
Primerus Consumer Law Institute

As Primerus members, we hold ourselves out as "The Finest Lawyers Anywhere in the World." We have an obligation to live up to that plaudit and the Primerus Six Pillars in all aspects of our professional lives.

The purpose of this article is to discuss risk management and malpractice prevention in the context of Primerus and the Six Pillars. None of this material is new. You've heard or read much of what follows before. However, from time to time it is helpful to remind ourselves of the basics of malpractice prevention and its corollary, client protection. Just as airline pilots review pre-flight checklists before every flight, even though they have gone through the routine hundreds of times, it is helpful for experienced, successful lawyers to review risk management checklists to remind us to do those things that we need to do to protect our firms and our reputations and, most importantly, protect our clients.

Most lawyers sued for malpractice have practiced law for more than 10 years. While there are a number of reasons that more experienced lawyers are sued, some of the common reasons are that we let our guard down, we think we know everything, and we don't have the self-discipline to conduct ourselves the way we know we should conduct ourselves. In short, we become lazy and complacent.

The wonderful thing about malpractice prevention is that we can implement most basic risk management techniques by doing what we should be doing anyway: by placing our clients' interests ahead of our own. Not coincidently, by placing our clients' interests first and doing those common-sense things we know we should do, we also adhere to the Six Pillars, particularly the Pillars of Integrity and Excellent Work Product.

What follows is our unscientific list of our top ten Risk Management Tips that a boutique law firm can implement to protect clients and reduce the risk of malpractice claims. Conversely, the breach of these risk management principals roughly coincides with our observations of the top ten reasons that lawyers find themselves on the wrong side of a malpractice lawsuit.

We developed this list from our experience as plaintiffs' lawyers who regularly bring professional negligence claims against lawyers from around the country.

However, in a past professional life we were also professional liability defense counsel and represented many dozens of lawyers in malpractice cases. The mistakes that we saw as defendants' counsel were not significantly different from the mistakes we now see as plaintiffs' counsel. The technology may have changed, and the "hot" practice areas where claims arise may be somewhat different, but humans being human, the mistakes tend to be the same.

Risk Management Tip No. 1: Do not accept new clients outside your area of expertise.

Each of our law firms went through a rigorous vetting process before we joined Primerus. Our firms wouldn't be members of Primerus if our firms were not already top-flight and if we didn't agree with the Six Pillars. As a group, then, we start with high expectations of ourselves, our firms and our other member firms. However, by definition, if we're members of Primerus, we are members of a smaller law firm and we can't reasonably expect to be all things to all clients. Moreover, even the best lawyers can find themselves in professional quicksand if they stray outside their area of expertise or accept new clients that, in their guts, they know they should not accept.

Each of us has had the experience of taking on (or being tempted to take on) that new client whose legal problem is outside our areas of expertise. Because we are motivated and successful lawyers, most of us find ourselves drawn to novel and interesting areas of practice and we embrace new challenges.

There is nothing wrong with a lawyer wanting to broaden and deepen his or her legal knowledge and experience. We should all strive to fully develop our professional interests, but we should never do so at the expense of our clients. We each need to know our limitations.

Almost every area of legal practice has its nuances and traps for the unwary, regardless of whether the practice area is simple and mundane or very technical and glamorous. It is incumbent upon us to exercise a little humility; we must recognize that we may not know what we don't know – and that's when we are particularly dangerous to ourselves and to our clients.

My partners and I repeatedly see lawyers fall into trouble where the lawyers take on a representation that is beyond their experience and expertise, and when they fail to obtain competent assistance. Sometimes the lawyers accept the representation out of a genuine desire to help the client. Sometimes the lawyers accept the representation out of a desire to expand his or her practice area and a genuine interest in the subject matter. Both are honorable reasons.

Too often, however, we find that defendant lawyers have stepped into the quicksand of incompetence for less honorable reasons, such as the following:

- **Greed.** The lawyers desire to keep the client's business and fees to themselves;

- **Fear.** The lawyers fear that if they refer the matter to another firm, the client will like the other firm better and the referring firm will lose the client;

- **Arrogance.** The lawyers are dismissive of the unfamiliar practice area, believing that they are as capable of handling the matter as any competitor, and without acknowledging that other lawyers may know more than they about the legal matter;

- **Ignorance.** Most areas of law practice – even those areas that on the surface appear simple or straightforward – have nuances and hidden traps for the unwary.

Sometimes the defendant lawyer's reasons are a confused mixture of honorable and dishonorable reasons. All of us are vulnerable to these human failings. We can guard against our tendencies by recognizing our own limitations and by observing the Pillars of Integrity and Excellent Work Product. If we listen to that small voice that in each of us that tells us when we are about to do something foolish, we will take steps to protect the client. We will swallow our pride and admit that we are not going to be good at everything.

What can you do if you want to take a case in an unfamiliar area of law?

First, don't dabble – dabbling generally leads to disaster. When you dabble, you don't know what you don't know, and you are at extreme risk for making a case-critical mistake. Moreover, you will almost certainly run afoul of Rule 1.1 of the ABA Model Rules of Professional Conduct, which states:

> **RULE 1.1 COMPETENCE**
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

If you are not willing to take the time to develop your competence, don't accept the representation.

Second, if you've decided to take the matter, learn all that you can learn about the new area of the law. Read the available treatises; use the treatises to find, read and thoroughly digest the leading cases in the area of law. Determine what statutes apply, and thoroughly analyze the statutes and the cases interpreting the statutes. Research whether any important cases have been reversed or overruled, and determine whether the pertinent statutes have been amended. Look for the articles

on the topic in the state and local bar association journals, or the journals of national organizations to which you may belong. Join the bar association committees that focus on the area of law. Look at the committees' web sites for relevant articles. In short, learn from those who have gone before you. It is often helpful to obtain back issues of the leading journals in the practice area. Read the pertinent articles and maintain a "rip & read" file for the new practice area.

Third, take advantage of the tremendous resources within the Primerus family and associate with a lawyer experienced in the new area of law from whom you can learn and who can keep you out of trouble. There will likely be traps in the practice area about which you will be unaware regardless of how carefully you study the cases, statutes or treatises. Associating with an experienced lawyer can help you avoid those traps.

Fourth, remember that your family and friends *will* sue you if a case goes badly, so don't agree to do a favor for someone and then ignore the case or fail to treat the matter as you would for a paying client.

The beauty of Primerus is that there is probably a law firm within Primerus that has the expertise to handle the matter. By associating with another lawyer or law firm that has the required expertise, we not only protect the client, but we also protect ourselves and strengthen the Primerus referral network.

Risk Management Tip No. 2: Communicate, communicate, communicate!

You may think that being a good technical lawyer and knowing the law is the most important part of fostering good client relations. You may think that being professional and ethical is the most important part of fostering good client relations. You may think that upholding justice and The American Way is the most important part of fostering good client relations. If this is what you think, you are wrong!

The *most* important thing you can do as a lawyer to foster good client relations is to communicate with your clients. Good communication skills will not only make the client *feel* well represented, good communication skills will also reduce the risk of claims against your firm, reduce the risk that you are named in a legal malpractice suit, and reduce the risk that you'll have to defend a complaint with the your state's attorney regulation counsel. Moreover, the ABA Model Rules of Professional Conduct *require* you to adequately communicate with the client. Model Rule 1.4 sets out the minimum communication required of a lawyer:

RULE 1.4. COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

When you think about it, Rule 1.4 merely requires a lawyer to do what should be common sense for lawyers to do. Yet, failing to communicate with the client is one of the most common failings of lawyers that result in malpractice claims or grievances.

Good communication skills include at least the following:

- Answer your client phone calls and emails within 24 hours (2 hours is better). If you can't respond to the client, make certain that there is a system in place to have a staff person respond to the client. This can be as simple as having a secretary or receptionist call the client, inform the client that you are unavailable, and schedule a time for you to return the call. Alternatively, this can mean having a junior lawyer or partner make the call for you. The important principal is – respond! Don't ignore the client until you find it convenient to get back to him or her.

- Make certain that you do something on each client's case once a month, even if nothing significant is happening in the matter. Put a "no charge" on the client's bill for your time doing this. This will serve the double purpose of letting the client know you are involved in his or her case plus building some goodwill by showing that you are paying attention to the client's matter even though you are not charging for that attention.

- Bill monthly and make your bills detailed so the client knows what you are doing to advance the legal matter and bring it to resolution.

- Blind copy your client on every substantive piece of correspondence or court filing which leaves your office (we're not talking about transmittal letters and routine certificates of service). Have the *client* tell *you* that you are communicating too often – not the other way around. When a client does complain about being provided with too much information, take the opportunity to discuss with the client about precisely what materials the client wishes to see and what materials the client does not want to see. However, the firm's default position should be that the client receives a copy of whatever leaves the office.

- Put your significant advice to the client in writing. If there is a matter of significance to the representation, put it in writing – even if you discussed the matter with the client on the telephone or in person. Clients, being human, will sometimes hear one thing when you meant another or, more problematically, hear what they want to hear. Moreover, human memory is notoriously fallible, and with time's passage can twist events or communications beyond recognition. Thus, memorialize the significant discussions or advice in a letter or memorandum or, even, an email. This will not only protect your firm if the representation doesn't go as planned, but is more likely to flush out any misunderstandings and allow the client to re-contact you for clarification.

- When advancing litigation costs, send a monthly invoice of costs to the client (with a cover letter stating that payment isn't expected at that time), so that the client is kept aware of how much money you are expending on his or her behalf, and so the client can't claim surprise at the total amount of costs when it comes time to settle the case.

- Manage the client's expectations. Don't permit a client's expectations to become unrealistic or out of control. This means you need to realistically evaluate the client's matter for its strengths and weaknesses and likely outcome *and* communicate your evaluation to the client both personally and in writing.

Risk Management Tip No. 3: Analyze and calendar statutes of limitation and other important deadlines.

You must have a method that you track the deadlines in every single matter and a system whereby you routinely check the deadlines. Not only is meeting deadlines a way to help you avoid malpractice claims, it is required by the ABA Model Rules of Professional Conduct:

> **RULE 1.3. DILIGENCE**
>
> A lawyer shall act with reasonable diligence and promptness in representing a client.

If you only have one other employee, have the other employee calculate the dates. Then, verify that employee's work. Don't just calendar statutes of limitation and statutes of repose (even though this is very important). When a motion or brief is filed, you must calculate and document when the response is due, factor in any different response time allotted for mailing or email, and allow yourself or your staff sufficient time to prepare a proper response or reply.

If you are a transactional lawyer, calendar any important deadlines. If there is a deadline that you expect the client to follow through on, for example, a deadline to make an election on an estate and gift tax return, make certain that you not only tell

the client in person or on the telephone of when the client must make the election, but tell the client in writing. Then, diary the due date and, at a reasonable time before the due date, remind the client again in writing. Otherwise, if the client misses the deadline, and there is nothing in the file or billing records to show that you advised the client, as a practical matter, you didn't advise the client and you may be liable for whatever losses that follow.

There are a number of software applications to assist you to track deadlines. You likely can develop an adequate method of tracking deadlines using Microsoft Outlook. You can also buy jurisdiction-specific products to automatically calculate deadlines.

If you don't have some system in place, and you miss a deadline, and you don't have or did not use some kind of easily available method of calculating the dates, the consequences to you and your soon-to-be former client can be significant. Moreover, you will have few defenses to liability if you are sued for malpractice.

Risk Management Tip No. 4: Treat clients with respect

One of the best way to improve your chances of being a defendant in a disciplinary proceeding or legal malpractice case is by treating a client with disrespect. Even if the client doesn't deserve your respect, show the client respect for you own protection if not for the client's benefit. Treating a client with respect includes, at a minimum, the following:

- Don't take phone calls or allow other interruptions while you're meeting with a client. Stay off your iPhone, iPad, Droid, Blackberry or other electronic device when you are meeting with the client.

- Be prompt – don't keep the client waiting. If you're late, clients will conclude that you're disorganized and disrespectful.

- Do what you say that you are going to do. If you make a commitment to your client, follow through or call the client and explain why if it appears that you will not able to meet the commitment.

- Confirm advice in writing – this protects you and the client and will immediately flush out any misunderstandings. See Risk Management Tip No. 2, above.

- Evaluate and communicate risks to clients in person, followed by a writing. At a minimum, that habit of routinely communicating risks in writing forces you to think through those risks and clearly articulate them to the client. See Risk Management Tip No. 2, above.

These principles may seem obvious and common sense, but it is stunning how many lawyers violate the basics of simple courtesy. Your client is paying you; he or she deserves your full attention. Moreover, these principles are consistent with the Primerus Pillars of Integrity, Civility and Excellent Work Product.

Risk Management No. 5: Insist on written fee agreements, even with long-time clients.

No lawyer has *ever* regretted having a written fee agreement. True, it is a nuisance at the time the client hires you. The ABA Model Rules of Professional Conduct require fee agreements in most cases. Lawyers without written fee agreements almost always lose legal battles over the scope of the engagement, the terms upon which the client was to pay, and the method of how a settlement was to be distributed. Entering into a written fee agreement, and talking frankly to the client in person about every part of the agreement, not only helps establish the parameters of the client-lawyer relationship, but also makes the client realize that he or she is entering into an important business contract as well as a professional relationship.

Take prompt action when an account is in arrears. You should only have to do this once. Barring extraordinary circumstances, if the client won't pay on time or honor the contract, the client likely doesn't respect you or your skills, so you probably should withdraw from that relationship.

Finally, the closer your relationship with the client, the more important it is that you have a written fee agreement. It is tempting, when representing a friend, relative, or a friend of a friend, to not have a written fee agreement because everyone is a friend or a family member and you have an understanding with people that you know or trust. On the contrary, we believe that it is *more important* to have a well-written fee agreement when there is less than an arm's length relationship with the client.

The closer you are to the client, the more opportunity there is for the relationship to be clouded with unspoken assumptions and the personal baggage that comes with long-term friendships and relationships. Thus, there are *more* opportunities for things to go wrong, not fewer, when the client is close to you.

Risk Management Tip No. 6: Maintain boundaries with clients.

This problem can appear in a variety of ways.

Sex. A lawyer should never have a sexual relationship with a client, unless the lawyer is in a romantic relationship with the client that predates the representation. See comment 18 to ABA Model Rule 1.8. (However, there are other very good reasons why a lawyer should not represent a loved one.) The Colorado Supreme Court explained the dangers of a sexual relationship between a lawyer and a client:

> [A] sexual relationship between lawyer and client during the course of the professional relationship presents significant dangers, including, at the least, the potential that the client will be injured by the lawyer's conduct. A sexual relationship between lawyer and client may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair the lawyer's ability to represent the client competently.
>
> Because the lawyer stands in a fiduciary relationship with the client, an unsolicited sexual advance by the lawyer debases the essence of the lawyer-client relationship. Often the lawyer-client relationship is characterized by the dependence of the client on the lawyer's professional judgment, and a sexual relationship may well result from the lawyer's exploitation of the lawyer's dominant position.
>
> The inherently unequal attorney-client relationship allows the unethical lawyer just as easily to exploit a client sexually as financially. The trust and confidence reposed in a lawyer can provide an opportunity for the lawyer to manipulate a client emotionally for the lawyer's sexual benefit. Moreover, the client may not feel free to rebuff unwanted sexual advances because of fear that such rejection will either reduce the lawyer's ardor for the client's cause or, worse yet, require finding a new lawyer, causing the client to lose the time and money that has already been invested in the present representation and possibly damaging the client's legal position. A sexual relationship also presents the strong possibility of a conflict between the lawyer's personal interests and the best interests of the client.

People v. Good, 893 P.2d 101, 103-105 (Colo. 1995) (internal citations and quotation marks omitted.)

Other boundary issues. Far more common is the situation where the lawyer gradually becomes less and less formal with a client.

Don't blur the lines between lawyer and client. Always remember who is who. As a general rule, you should not become such good friends with the client that it will then make it difficult for you to give tough advice. You are not doing the client any favor and you are potentially hurting yourself. The odds increase that your client will wind up being a plaintiff in a legal malpractice suit against you if your friendship with the client clouds your judgment and affects your advice to the client.

Clients want a lawyer who is a little better or smarter than themselves. Give your best to the client, but don't make the client your best friend. You will both be better off.

Risk Management Tip No. 7: Have a rigorous system for checking for conflicts of interest and be sensitive to possible conflicts of interest.

You may have a small, informal law office but you must – absolutely must – have systems in place to check for possible conflicts of interest. Of course, there are the obvious conflicts of interest that most lawyers have sense enough to avoid (but, surprisingly, still ensnare many lawyers): you should *never* represent both the husband and the wife in a divorce, no matter how "amicable." You should *never* represent a buyer and a seller of real property or a business, even though all they (think) they want is a scrivener to draft a contract. There is no such thing as a "mere scrivener."

The smaller things are just as important: don't take a case against your secretary's cousin. Exercise caution when suing former clients. You may be correct legally, but emotionally your former client won't like it. Moreover, some enterprising professional malpractice lawyer will try to find a way to show that you're responsible for the opposing party's bad result. Even if you win the argument, you'll lose by having to defend an unnecessary lawsuit.

Risk Management Tip No. 8: Keep up with changes in technology.

If you're one these people who says: "my yellow pad was always good enough for me," you're rationalizing your laziness. Not only do clients expect you to know how to communicate via email and use the internet, electronic filing is becoming the rule, not the exception. You cannot – cannot – competently practice law without being minimally familiar with current information technology. Being technologically competent implicates the Primerus Pillars of Excellent Client Service and Continuing Education.

We understand that it can be expensive to maintain current technology, and time consuming to learn how to use it. You don't have to have the most cutting-edge technology – and, in fact, unless you are a so-called first adopter with unlimited resources, we recommend that you stick with the tried and true.

However, if you don't keep up with technology, your failure will eventually cost your firm business and reduce your firm's competitiveness. It will also expose your firm to risks for missed deadlines, lost files and other problems inherent in failing to keep up with technology.

Risk Management Tip No. 9: Never "borrow" from your client's trust account.

This problem, fortunately, isn't very common. However, any lawyer who has been practicing more than ten years probably can recall a respected lawyer who was disbarred or indicted for taking a client's money. Most lawyers cannot imagine that they would be tempted to take money from a client but, still, sadly, it happens.

Disciplinary prosecutors across the country will tell you that they see routinely see the following tragic pattern: a lawyer feels pressured to pay the mortgage or to make payroll, the money is "just sitting there," and the lawyer knows that another client is about to pay a large invoice in the next few weeks, but the mortgage payment or payroll is due today. The temptation is too much and the lawyer takes money from a client's trust account – with the intent of paying back the money.

Don't do it! Ever! It's stealing. It's better to lose your home, to lay off employees or to file bankruptcy than lose your law license, your freedom or your reputation. You are a fiduciary. Act like it. If you take a client's money, you will almost always eventually be caught, and even if you get away with it and replace the money, you will regret that act every day for the rest of your career.

Risk Management Tip No. 10: Take care of your physical and mental health, and your need for work/life balance.

More than half (and maybe closer to three-quarters) of lawyer discipline cases have as their genesis a lawyer with personal problems, such as marital, financial, health, depression, alcohol or drug abuse, or mental health problems. When you don't maintain good physical and mental health, your dramatically increase your risk of ignoring boundaries, of taking money from your client, of missing deadlines, of ignoring your clients' cases, of treating your clients with disrespect, of going through a messy divorce (and more). It may seem selfish in the moment, but remind yourself that it is more selfish to disrespect others, to ignore those who entrusted you with your legal problem, to break the law so you won't be around to be the parent or spouse to someone else. You must prioritize personal time and ensure that you don't ignore your health and personal relationships. If you ignore your personal needs, eventually that neglect will catch up with you and not only negatively affect your health, personal relationships and personal finances, but your professional relationships.

Conclusion

These are just some of the steps that you can take to minimize your risk for being sued for malpractice or being the respondent in a lawyer discipline matter. Remember: complaints by unhappy clients are inevitable and you do not have any control over whether someone complains or files a lawsuit.

What you do have control over is your systems, how you conduct yourself day-to-day and how you treat other people. Adopting and adhering to the Primerus Six Pillars is a good baseline to protect your clients and yourself.

If you acknowledge these risks, exercise some common sense and take steps to protect yourself and your client, you'll minimize the risks of a malpractice suit. In addition, if the client sues you, you'll have put yourself in the best possible position to defend that lawsuit.