

“An Ounce of Prevention ...” Continued!

by Janean S. Johnston

Documenting communication with clients and recording your general instructions regarding law office procedures—such as “always fill out a client intake form with new clients”—will be among the most important habits you can develop in your practice. This fifth installment in the Firm Fitness Check-up series emphasizes how careful documentation procedures can serve not only to protect lawyers in the malpractice or disciplinary/ethical context but also to give practitioners peace of mind.

Fee agreements, engagement and nonengagement letters, and closing letters are essential to malpractice prevention and ethics complaint avoidance. Written confirmation also is required when

- A conflict of interest arises.
- A third party might perceive an attorney-client relationship that doesn't exist.
- A client chooses to disregard your advice.

Any situation that potentially could cause problems in your practice should be documented. Establish your guidelines, discuss them at firm meetings, distribute samples and include this information in procedural manuals. Guidelines should be provided on file documentation regarding what should or should not be included in the case files. Phone calls, faxes received and sent, e-mail transmissions, date-stamping of mail received and a log of mail sent—as well as meetings and important events—should all be documented. This information is invaluable when defending against malpractice claims and ethics complaints. When you can't remember what you said to a client—or the reverse—instead of los-

ing sleep, go to your client file and read what you recorded.

OK, now it's time to find out how you are doing with your documentation procedures. Remember, to practice safely, the following questions should be answered “yes.” A “no” answer should prompt you to examine your practices and to refine or change procedures in order to lessen your exposure to malpractice lawsuits or ethics complaints.

Documentation Procedures

- Does the firm always use written engagement/fee agreement letters?
- Do you always send nonengagement letters when you decline representation?
- If representation must be ended due to a conflict or another issue such as nonpayment of the fee, do you send a disengagement letter?
- At the conclusion of a matter, do you send a closing letter?
- Does the firm send copies of all significant documents and correspondence to clients?
- When advising clients and recommending courses of action, do you confirm client decisions and reasons in writing, especially if the client decides not to follow your advice?
- Are all incoming and outgoing phone calls and conversations documented?
- Do you maintain copies of all e-mail communications with clients?
- Are clients given periodic progress reports, and are these reports kept in written form?

- Does your firm have back-up procedures to protect the data on the firm's computers, including all of the pertinent financial data, with tapes, disks, compact discs, flash drives, an online storage vendor and the like?
- Are these backups stored off-site in a secure location?
- Is mail date-stamped when received and a log of outgoing mail maintained?



These questions do not foresee every documentation issue. Hopefully, they will stimulate your thinking and alert you to problems that could jeopardize your firm's health and reputation. Don't forget your obligation to preserve all electronic data that may be relevant in a litigation context. The new rules and amendments regarding this requirement are listed in the Federal Rules of Civil Procedure effective December 1, 2006.

If you have any questions after answering the preceding questions, please contact me at (703) 567-0088. I will be happy to discuss your results and make appropriate suggestions on a confidential basis. Also, remember the Virginia State Bar's Confidential Law Practice Management Review program. There are a limited number of these reviews available during the current year, and I would be happy to send an application to interested firms.

We will continue to review other risk management areas in this ongoing series.