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## **Law Firm Hygiene: Small Steps Can Pay Big Dividends**

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Earlier in my career when I worked as an in-house ethics counsel at a large firm, one of my managing partners described the routine tasks of risk management as “law firm hygiene.” By that colorful phrase, he meant systematically following simple steps to avoid expensive civil claims and bar grievances. My old managing partner didn’t cite statistics to prove his point, but reports from both the American Bar Association and the Washington State Bar Association bear him out. In this column, we’ll first survey the statistics for context. Next, we’ll turn to simple steps lawyers and their firms can take in three areas to avoid becoming a “statistic”: conflict management; calendaring; and client communication.

### ***The Statistics***

Every few years, the ABA publishes a “profile” of legal malpractice claims in cooperation with several large national malpractice insurance carriers. The ABA Profile contains a wealth of data, including claims by type of error alleged. The ABA began publishing its Profile series in 1985 so a relatively good historical comparison is now available. In the latest Profile reflecting data from 2012 through 2015, alleged administrative errors such as “procrastination” and “failure to calendar properly” made up 23 percent of all claims nationally. Asserted “client relations” errors such as “failure to inform client” and “failure to follow client

instruction” comprised another 13 percent. The “administrative errors” and “client relations” categories have remained stubbornly persistent since the Profile was first published.

Similarly revealing data is available from the WSBA on regulatory grievances. Each year the WSBA publishes a detailed report from the Office of Disciplinary Counsel that includes a statistical breakout of the kinds of conduct that led to regulatory discipline. The newly released report for 2016 reflects that 8.8 percent of cases in which discipline was imposed involved violations of the “communication” rule (RPC 1.4) and 7.6 percent involved violations of the “diligence” rule (RPC 1.3). These statistics are by no means unique to Washington. For 2015 in Oregon, for example, the comparable numbers are 34 percent for “inadequate client communication” and 32 percent for “neglect of legal matter.” Reviewing the statistics from past reports reinforces that, like their malpractice counterparts, the numbers in these mundane but essential areas of practice have also remained stubbornly persistent over time.

***Small Steps***

Although there are potentially many steps that lawyers can take to reduce these common risks, conflict management, calendaring and systematic communication are three of the most effective.

***Conflict Management.*** In *Jones v. Rabanco, Ltd.*, 2006 WL 2237708 (W.D. Wash. Aug. 3, 2006) (unpublished), a law firm was disqualified in large part because the firm had jumped into the case without first running a conflict check that would have revealed that the firm was suing a client. In issuing its disqualification order, the Court included a pithy observation: “The Court notes that appearing in court and giving notice of representation before a conflicts check has been run is not advisable on any level.” (2006 WL 2237708 at \*1 n.1.) Similarly, in *Atlantic Specialty Insurance Company v. Premera Blue Cross*, \_\_\_ F. Supp.2d \_\_\_, 2016 WL 1615430 (W.D. Wash. 2016), another law firm was disqualified in part because it apparently had not included a corporate parent of a client in its conflict system that would have revealed a conflict when taking on a new matter for another client adverse to the corporate family involved. In this instance, the Court observed: “Similarly troubling to the Court was the fact that

... [the law firm] ... could not advise the Court as to whether ... [the corporate parent] ... was identified as a firm client in ... [the law firm's] ... conflicts check system." (2016 WL 1615430 at \*13.)

In both examples, the firms had sophisticated computer-based conflict checking systems. But, as the judges noted, the conflict checking systems either weren't used or weren't used completely. *Jones* and *Atlantic* underscore that it is absolutely critical for all firm lawyers (and staff) to both use conflict checking systems and to input sufficient data into those systems to yield meaningful results that the firm can evaluate before taking on a matter. Moreover, although *Jones* and *Atlantic* involved large firms, conflict failures are not the sole province of big firms with diverse clienteles. A small firm lawyer who takes on the modification of a support decree without first checking to see whether the lawyer's partner had earlier represented the other spouse in the underlying divorce will face the same consequences as the large firms in *Jones* and *Atlantic*.

**Calendaring.** Lawyers constantly face deadlines of one sort or another. Some are self-imposed but others are imposed on us by, for example, agency or court rules. Some deadlines can be extended through a cooperative opposing counsel or a routinely granted motion. Others, such as statutes of limitation, can be harshly unforgiving. Failure to meet statutory or rule-based deadlines can

lead to both malpractice claims and bar grievances. *Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985), for example, involved a malpractice claim for failure to timely perfect an appeal. *In re Lopez*, 153 Wn.2d 570, 106 P.3d 221 (2005), in turn, involved regulatory discipline for failing to file an appellate court brief on time.

Put broadly, “calendaring” comes in two principal flavors.

The first is the ordinary but critical risk management protocol of docketing key dates on an internal “reminder” system. They need to be calculated and entered into an internal system with care. Particular systems vary with the size of the firm involved and the sophistication of the practice area. Importantly, however, simply entering the data into an internal system is not the end. To be truly effective, the system used must be actively monitored—preferably by more than one person—so that the “reminders” will actually be heeded in time to be meaningful.

The second is more subtle but addresses an equally nagging issue: procrastination. Comment 3 to RPC 1.3 on diligence puts it this way: “Perhaps no professional shortcoming is more widely resented than procrastination.” The sources are many and varied. In some instances, lawyers have simply taken on too much work to give individual files the attention they deserve. In others, the

client who sounded great during an initial conference turned out to be so “difficult” that the lawyer simply ignores the matter concerned. Whatever the reason, firms need to use systems to ensure that work is done in a timely manner. Although particular systems will again vary by firm size and practice sophistication, these are more often human rather than electronic—such as a practice group leader in a larger firm or peers in smaller firms. The solutions are also more often human rather than electronic—with some variant of “do you need help with that?” often opening a welcome door.

**Communication.** With communication, the shortcoming that most often leads to problems is not the content but speed and frequency. A wonderfully written ten-page letter that arrives—in the client’s view—three months too late will do little to salve the all-to-human feeling of being ignored. Lawyers also need to acknowledge that in an age of “instant communication” client expectations of responsiveness have changed accordingly. Communication failures can lead to both civil claims and regulatory discipline. *Shoemake v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010), for example, involved a legal malpractice claim centered on a lawyer’s failure to convey a settlement offer. *In re Longacre*, 155 Wn.2d 723, 122 P.3d 710 (2005), in turn, involved regulatory discipline imposed for, in relevant part, failing to inform a client about plea offers.

Neither the standard of care nor the “communication rule” (RPC 1.4) necessarily require that every client question be answered instantaneously. But, if it will take some time to get back to the client (because, for example, you are heading off to court or it will require some research), a quick reply back to the client acknowledging their email and giving a realistic timeline for a substantive response will often head off problems.

### ***Summing Up***

The civil claim and regulatory discipline statistics are both discouraging and encouraging. They are discouraging in that practice management failures continue to make up a substantial portion of claims and grievances. At the same time, they are encouraging because firms that take very simple steps toward “law firm hygiene” can reap big dividends in the form of reduced risk.

## ABOUT THE AUTHOR

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