

ETHICS RX FOR YOUR PRACTICE

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In recent years, more and more malpractice cases have had their genesis in ethics issues. The Rules of Professional Conduct have long held that an ethics violation does not create a malpractice cause of action. Rule 1-100(A). But recent case law makes it clear that courts will consider violations of the Rules of Professional Conduct in evaluating malpractice claims. See *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41.

In light of this, and because of our profession's increasing awareness of the need to protect our clients' interests, many law firms — from the very largest to sole practitioners sharing office suites — have started developing ethical guidelines and procedures for their practices.

Increasingly, law firms have called on outside expert "ethics doctors" to conduct "physicals," with the focus on preventive care. By reviewing a law firm's operations from top to bottom, recommendations can be made for installing and creating guidelines, procedures, form documents, billing systems and other fail-safe devices designed to prevent ethical lapses and, thus, possible malpractice exposure.

An ethics prescription checklist

The following checklist is a modification of materials we use to conduct ethics "physicals." It is neither exhaustive nor all-inclusive, nor will all the items be applicable to your particular firm.

But this overview will touch on many of the important issues a law firm should consider in developing ethics guidelines. For simplicity, we divide the checklist into three general areas: client representation issues, business and financial matters and law firm procedures.

Client representation issues

□ **Intake procedures** are important first steps in client representation. Law firms should carefully monitor the ever-increasing role of paralegals, ensuring that only attorneys are practicing law. In some small offices, secretaries and even receptionists come dangerously close to practicing law by screening prospective clients before they even get to the attorney. Once the attorney enters the picture, it is vitally important that the scope of representation be defined at the earliest possible time.

□ **Conflicts checks** are vital for any size firm, from sole practitioners to multi-office megafirms. While conflicts check mechanisms may differ depending on firm size, the essentials are the same. In this modern era, a computerized database is almost required. A mere roster of client names can no longer be considered adequate. We have developed databases which contain a dozen or more categories, from clients and opposing lawyers, to expert witnesses and beyond. It is much smarter to dis-close prior interaction with any "player" in a new case. In most instances, a client's waiver is easily obtained. Finally, personal review by attorneys remains necessary, no matter how thorough the law firm's database.

□ **Mergers and lateral hires** should cause any size firm to pay particular attention to conflicts of interest issues. Any merger must be carefully screened for the creation of new potential conflicts. Any lateral hire, while seemingly limited to one lawyer, should similarly be screened, including a review of all clients of

the new lawyer's former firm. Since screen walls (sometimes called ethical walls) are given very limited application by California courts, conflicts checks in these situations become particularly significant.

□ **Forms** should be developed for numerous client representation issues; fee agreements; conflicts waivers; non-engagement letters; billing forms; conflicts check procedures; motions to withdraw and declarations in support, etc. These forms often must be tailored to the representation on a case-by-case basis. For example, the rule governing conflicts, Rule 3-310, has been changed twice in the last five years and is unusually complex. If client conflict waivers are desired, particular care must be taken to be certain the waivers will be effective. More and more, firms are calling on outside experts to assist in the drafting of these forms.

□ **Client communication** is a vitally important component of ethical practice; the failure to communicate is cited by most malpractice providers as the single most important cause of client dissatisfaction. Communication should occur about all "significant developments" in the case. Rule 3-500; Business & Professions Code §6068(m). It is particularly important for good client relations that lawyers communicate in plain English, so clients can readily understand.

□ **Withdrawal** from representation may only be accomplished when the lawyer avoids all foreseeable prejudice to the rights of the client.

Certain situations require withdrawal, while others, such as failure to pay fees, are "permissive," and generally require court approval. See Rule 3-700. This rule can make withdrawal in the modern legal arena a dicey task. Again, law firms are increasingly calling on the services of ethics experts to assist in necessary withdrawal motions.

□ **Shared suite situations** create special problems. Lawyers who share suites with others have numerous issues to contend with, including confidentiality problems of a shared receptionist and reception area, common phone lines, file integrity, and the appearance of a relationship among lawyers in the suite.

Developing a series of written policies on these matters can serve to protect both the clients of these lawyers and the lawyers themselves.

Business and financial matters

□ **Client trustee accounts** must, of course, be monitored and audited in strict compliance with the rules. The State Bar has recently promulgated a series of standards specifying how lawyers should deal with their trustee accounts.

A LAW FIRM WHICH ESTABLISHES ETHICS GUIDELINES AND PROCEDURES CAN AVOID MALPRACTICE

□ **Any advertising or soliciting** conducted by the firm, no matter how pristine its presentation, should be regarded by the firm as creating a series of client expectations about the claims made in the solicitation. No firm should engage in any presentation which it is not prepared to back up completely. Damages in numerous malpractice claims have been greatly exacerbated by claims of attorney "puffing" in solicitations.

□ **Making a presentation for new business** should be done with care to ensure that the law firm is being candid about, for example, who is going to be responsible for working the case and the experience they and the firm have in such matters.

□ **Billing practices** are being far more carefully scrutinized by clients than 10 years ago. American Lawyer editor Steven Brill recently wrote that "there should be no aspect of a bill that, if more fully known by the client, would surprise the client . . ." That's not a bad watchword to live by. Among the issues lawyers should consider are: notice to client of precise billing practices, including the acceptability of "value billing"; how costs, including both case-specific and general overhead expenses, are charged; double billing time during travel periods (the subject of a recent ABA ethics opinion); and the particular problems of contingency fees.

□ **Outside business interests** of the firm's lawyers should be carefully monitored, and specific law firm policies should be developed to determine what kinds of outside interests are permitted, and under what circumstances, and whether business dealings with clients (governed by their own special rule, Rule 3-300) should ever be permitted. Such business interests also require that

the issue of conflicts of interest be revisited. In the last three years, whether lawyers and law firms should be permitted to engage in "ancillary" businesses has been one of the hottest topics at almost every ABA convention.

Law firm procedures

□ **A network of committees** can be developed by even moderate-sized law firms if some careful planning is put into it. Many mid-sized and larger firms have at least a new business or conflicts committee and a partnership or compensation committee. Other committees of particular value are a personnel committee, a risk management committee and an ethics committee, devoted specifically to the evaluation of ethical issues. Law firm policy should include an "open door policy" so that anyone seeking the help of the ethics committee is protected by strict confidentiality within the firm.

□ **Procedural manuals** should accompany the formation of these committees. For example, some firms have included an ethics statement or "mission" in written form which memorializes the "open door" policy. Other facets of law firm practice that can be covered by such manuals include general law firm procedures, billing practices and calendaring systems. In developing these manuals and a roster of committees, many firms use experts in law office management and legal ethics to assist in and facilitate these changes.

See ETHICS on Page 13



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SELF-ASSESSMENT TEST

READ THIS ARTICLE AND TAKE THE ACCOMPANYING
TEST TO EARN ONE HOUR OF MINIMUM CONTINUING
LEGAL EDUCATION CREDIT IN ETHICS.

FOLLOW INSTRUCTIONS ON TEST FORM

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CONTINUED FROM PAGE 11

□ **Calendaring systems** which work are a clear priority for any law firm, large or small. Firms of any significant size should not only develop an office administrator who is in charge of calendaring, but should have a senior attorney also responsible. Double and triple calendaring systems are imperative to provide a fail-safe device against any possible error.

□ **File integrity**, along with calendaring, is perhaps the most important procedural technique which a law firm must develop. Electronic communications have greatly enhanced our abilities to gain and control information, but they have also increased dramatically the danger of losing the integrity of the files of our clients. Systems should be created to ensure file confidentiality, computerized segregation of data, the storing and protection of physical evidence and its electronic indexing.

□ **Continuing education and training**, now required of all California lawyers, is often conducted by law firms, either in-house or, in order to avoid insularity, with outside assistance, particularly in specialty CLE areas such as ethics, law office management and elimination of bias. Whether a firm does its own CLE or utilizes the services of outside instructors, the development of a CLE manual, along with a CLE committee or at least an attorney CLE overseer, is an important component of the modern law firm.

CERTIFICATION

■ THIS ACTIVITY HAS BEEN APPROVED FOR MINIMUM CONTINUING LEGAL EDUCATION CREDIT BY THE STATE BAR OF CALIFORNIA IN THE AMOUNT OF 1 HOUR, OF WHICH 1 HOUR WILL APPLY TO LEGAL ETHICS.

■ THE STATE BAR OF CALIFORNIA CERTIFIES THAT THIS ACTIVITY CONFORMS TO THE STANDARDS FOR APPROVED EDUCATION ACTIVITIES PRESCRIBED BY THE RULES AND REGULATIONS OF THE STATE BAR OF CALIFORNIA GOVERNING MINIMUM CONTINUING LEGAL EDUCATION.

Conclusion

The practice of law has changed enormously in the past 20 years, and so have the things consumers have come to expect from the modern law firm. This checklist provides a start by which a law firm can begin to consider preventive measures to protect its clients and thereby itself.

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MAY '94

SELF-ASSESSMENT TEST

■ Answer the following questions after reading the article on establishing ethics guidelines and procedures for a law firm. Use the answer form provided to send the test to the State Bar.

1. Under the Rules of Professional Conduct, an ethics violation does not create a malpractice cause of action, but courts will consider violations of the rules in evaluating malpractice claims.

- A) True
B) False

■ **HYPOTHETICAL 1**
(Applicable to questions 2-3)

Attorney A has a busy personal injury practice. A potential new client called and was transferred to A's experienced paralegal for screening. The paralegal set up an appointment with the attorney and requested that the client send in documentation of her injuries. The paralegal also advised the client to see an orthopedist and gave a preliminary "ballpark evaluation" of the claim at \$100,000.

2. The paralegal was practicing law when she set up the appointment and gave detailed instructions for requested documentation of the injuries.

- A) True
B) False

3. The paralegal was practicing law when she suggested seeing an orthopedist and gave an estimate of case value.

- A) True
B) False

4. Law Firm ABC, a professional corporation with five lawyer shareholders, employs 25 additional lawyers. The office manager, not a member of the bar, is executive vice president of the law firm. Law firms should encourage non-lawyers to participate in their partnerships and corporations.

- A) True
B) False

5. Attorney does not have a form fee agreement, so he simply obtains one from the State Bar and fills in the blanks. He argues that "if it's a State Bar form, it must be right." Attorney can be assured that if it is a State Bar form, he won't have a problem in a fee dispute with a client.

- A) True
B) False

6. Law firm mergers raise particular conflict-of-interest issues that should be reviewed by either an in-house or outside ethics

expert, but individual lateral hirings of attorneys are not subject to the same conflicts problems.

- A) True
B) False

7. The failure to communicate with a client is cited by most malpractice coverage providers as the single most important cause of client dissatisfaction.

- A) True
B) False

8. Attorney has not been paid for several months by his client, so he brings a motion to withdraw. In his declaration, he characterizes his client as "difficult" and "someone who does not pay his bills." Has the lawyer violated the Rules of Professional Conduct?

- A) Yes
B) No

9. Two attorneys from Law Firm A participate in a "beauty contest" to get a client. They talk for hours about their expertise in bankruptcy, although only 20 percent of their business is in that area. They talk about how they "handled" a patent matter, although they were really only local counsel. They then proceed to discuss staffing of the case, but fail to tell their potential clients that many of the attorneys who will be doing the bulk of the work are contract attorneys. The lawyers figure that this "puffing" is part of any sales presentation. Are they right?

- A) Yes
B) No

10. A lawyer flies two hours to Portland for a major client. While on the plane, the lawyer puts in an hour of work for another client. The total billable time is three hours.

- A) Yes
B) No

11. All law firms must develop a firm policy and procedures manual to ensure compliance with ethics policies.

- A) True
B) False

12. A law firm's conflicts check discloses the title of each representation, the names of cases and a roster of all parties. Is this a sufficient conflicts system?

- A) Yes
B) No

13. The ethics of a law firm's associates are based on the culture and environment of the firm.

- A) True
B) False

14. Attorney is a majority shareholder of a collection agency. If the collection agency cannot collect, attorney has authorized the agency's manager, who is not a member of the bar, to write letters to the debtor on the attorney's letterhead and sign the attorney's name. The attorney is not assisting in the unauthorized practice of law.

- A) True
B) False

■ **HYPOTHETICAL 2**
(Applicable to questions 15-16)

Law firm represents both the framing subcontractor and the concrete foundation subcontractor in a suit wherein a homeowner is suing for construction defects. The case involves 12 different subcontractors.

15. It is not possible to represent these two defendants, since they have differing interests in the lawsuit.

- A) True
B) False

16. Law firm can draft a simple one- or two-sentence letter saying "there is a potential conflict."

- A) True
B) False

17. May an attorney act as a witness in favor of a client?

- A) Yes
B) No

18. Plaintiff's attorney asks probing questions about defendant's immigration status at a deposition, and then later threatens to inform the INS that defendant is out of status in order to force a settlement. Is this proper?

- A) Yes
B) No

19. Law firm becomes aware that one of its senior associates may have a drinking problem. Since the associate is one of the most senior associates in the firm, it does not intercede in any way. They believe that a firm is not a "morals police," and thus should not become involved in the associate's problem. Is this the correct approach?

- A) Yes
B) No

20. Lawyer X specializes in land use. She has a commercial real estate business in addition to her law practice. X often gives home buyer presentations to groups of potential clients in which she explains the services of her legal business. Is this appropriate?

- A) Yes
B) No

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NAME _____
LAW FIRM / ORGANIZATION _____
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ANSWER FORM

May 1994

1.	<input type="checkbox"/> True	<input type="checkbox"/> False
2.	<input type="checkbox"/> True	<input type="checkbox"/> False
3.	<input type="checkbox"/> True	<input type="checkbox"/> False
4.	<input type="checkbox"/> True	<input type="checkbox"/> False
5.	<input type="checkbox"/> True	<input type="checkbox"/> False
6.	<input type="checkbox"/> True	<input type="checkbox"/> False
7.	<input type="checkbox"/> True	<input type="checkbox"/> False
8.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
9.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
10.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
11.	<input type="checkbox"/> True	<input type="checkbox"/> False
12.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
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15.	<input type="checkbox"/> True	<input type="checkbox"/> False
16.	<input type="checkbox"/> True	<input type="checkbox"/> False
17.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
18.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
19.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
20.	<input type="checkbox"/> Yes	<input type="checkbox"/> No

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