

Put Into Practice: Risk Management Tips for Your Firm

OCTOBER 18, 2017 - ASHEVILLE

OCTOBER 19, 2017 - CLEMMONS

OCTOBER 20, 2017 - GREENSBORO

NOVEMBER 3, 2017 - CONCORD

JANUARY 10, 2018 - GREENVILLE

JANUARY 11, 2018 - NEW BERN

JANUARY 12, 2018 - WRIGHTSVILLE BEACH

FEBRUARY 9, 2018 - CARY (AM & PM SESSIONS)



**LAWYERS
MUTUAL**

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Put Into Practice: Risk Management Tips for Your Firm

AGENDA

■ Registration

■ Mastering Conflicts of Interest Issues

Loyalty, confidentiality, and independent judgment form the basis of every lawyer / client relationship. Join Lawyers Mutual claims attorneys as they address the conflicts of interest traps that often arise in professional malpractice cases, as well as grievance claims.

(1 hour Ethics/Professionalism CLE)

■ Break

■ Technically Speaking: Tips, Apps, Games, and Resources to Create a Fun, Efficient, and Ethical Law Practice

This program will cover tools and resources lawyers need to run their practice in compliance with the NC Rules of Professional Conduct. Core competencies covered: communicating with clients using electronic methods, efficient drafting and proofreading tools, using technology to deliver counseling, document production, depositions, & presentation of evidence, and ways to create a more responsive office through mobile tools and workflows.

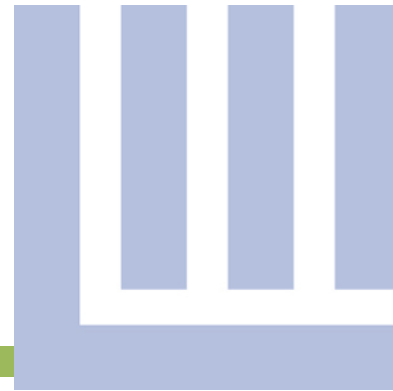
(1 hour Ethics/Professionalism CLE)

■ Break

■ Hindsight is Always 50/50 – It's Never as Clear as You Thought it Was. What Can We Learn from the Fate of Others?

Join us as we look at common mistakes and pitfalls across various practice areas, from the initial phone call to the disengagement letter. Benefit from 40 years of experience and learn how to avoid problems by seeing what others have done wrong in the past. We will discuss do's and don'ts and practical considerations to reduce the risk of errors and claims. We will then look at how you should respond if and when a dispute arises.

(1 hour General CLE)



Mastering Conflicts of Interest Issues



Warren Savage joined Lawyers Mutual as claims counsel in 2005. He focuses on litigation, insurance law, appellate advocacy, criminal matters and professional responsibility in his work with Lawyers Mutual. A former partner with the law firm of Bailey & Dixon, Warren graduated from the University of Virginia and earned a Master of Arts in Teaching at the University of North Carolina at Chapel Hill before graduating magna cum laude from Campbell University School of Law. He spent several years as a high school English teacher and junior varsity basketball coach before entering the legal profession. Warren currently serves as an advisory member of the State Bar Ethics Committee and speaks frequently at CLEs around the state about professional responsibility and malpractice claims avoidance. Email: wsavage@lawyersmutualnc.com

Mark Scruggs joined Lawyers Mutual in March 2001 as claims counsel. Formerly a partner with Spear, Barnes, Baker, Wainio & Scruggs, LLP in Durham, Mark has over 14 years' experience as a trial attorney concentrating in insurance defense litigation. For the last 15 years, Mark has worked with Lawyers Mutual primarily in litigation-related claims and workers compensation and family law matters. He is a 1986 cum laude graduate of Campbell University School of Law. Mark is a past chair of the Law Practice Management section of the North Carolina Bar Association. He has served as an Advisory Member of the State Bar Ethics Committee and is currently serving as an Advisory Member of the Authorized Practice Committee of the North Carolina State Bar. He also serves as c-chair of the North Carolina Bar Association's "Transitioning Lawyers Commission" working to address issues facing aging lawyers. Email: mscruggs@lawyersmutualnc.com

MASTERING CONFLICTS OF INTEREST

Warren Savage
Mark Scruggs
Claims Counsel



CONFLICT OF INTEREST – DIRECT ADVERSITY



- You have represented a developer of a proposed multi-use development for some time. A resident of a adjacent historic, tree lined neighborhood, whom your firm represents in an unrelated matter, wants to hire you to represent him at the zoning hearing to oppose the mixed use development. Can you?

Can you represent the neighbor at the hearing?

ANSWER:



- No, you cannot represent the neighbor at the zoning hearing opposing the development.
- You probably cannot represent the developer at the hearing either.

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THE “HOT POTATO” RULE



- Can you cure the conflict of interest by discharging the developer as a client so that you can represent the neighbor?

4

ANSWER:



- No. The “hot potato rule” in general disallows a law firm from discharging a client for the purpose of eliminating a conflict where it desires to accept the representation of another client.

5

DIRECT ADVERSITY



- You represent the owner of a specialty food store in your town. A newcomer wants to open a similar store just down the road from your client’s store and, of course, this may negatively impact your client’s business. Can you represent the newcomer in opening his competing store?

6

“ECONOMIC ADVERSITY” EXCEPTION



- Yes.
- Simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

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DIRECT ADVERSITY – TRANSACTIONAL MATTERS



- You have been asked to represent the seller of a business in negotiations with a buyer that you represent in a wholly unrelated matter. Can you do so?

8

ANSWER:



- No, not without the informed consent of both parties. Note that direct adversity arises in transactional matters, as well as litigation matters.

9

“MATERIAL LIMITATION” CONFLICT



- You have been asked to represent a seller of commercial real estate, a real estate developer and a commercial lender in the development of a residential development. Can you?

10

ANSWER:



- No. Your representation is likely to be materially limited in your ability to recommend or advocate all possible positions that each client might take because of your duty of loyalty to the other clients.

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CONFLICTS OF INTEREST: TRUST AND ESTATE PLANNING



- You represent the Kennedy family on miscellaneous matters. Joseph Kennedy asks you to prepare a will that disinherits one of his grandchildren, Maria Shriver, whom you are representing in a real estate transaction. Can you prepare the will as requested?

12

ANSWER:



- (Yes. Probably) In a 2004 ethics opinion (ABA LEO 434), the ABA explained that because a will beneficiary normally has only an expectancy in receiving money from the testator, a lawyer representing a potential beneficiary in unrelated matters generally may assist a testator in disinheriting a beneficiary.

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CONFLICTS OF INTEREST: REPRESENTING MULTIPLE PARTIES



- You represent all four occupants of a car involved in a serious two-car crash caused by the negligence of the driver of the other car. The negligent driver has \$100,000 liability insurance, not nearly enough to fully compensate all of your clients for their injuries. There is no other insurance coverage available. Can you represent all four occupants?

14

ANSWER:



- Yes. RPC 251 holds that a lawyer may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, provided each claimant gives informed consent to the representation, and the lawyer does not advocate against the interest of any client in the division of the insurance proceeds.

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CONFLICTS OF INTEREST: ORGANIZATIONS OR OTHER ENTITIES AS CLIENTS



- You represent a large accounting firm in your town on employment matters. You know all of the partners, but deal primarily with one partner. You are told that the wife of one of the partners wants you to represent her in her domestic case against her husband. Can you?

16

ANSWER:



- Yes. As is the case with corporations, the lawyer represents the entity, not its members. The attorney-client relationship does not automatically come into existence between a partnership's lawyer and one or more of its partners.

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CONFLICT OF INTEREST: CURRENT CLIENT – DOING BUSINESS WITH YOUR CLIENT



- You represent the owner of an upscale office building in employment matters. You want to move your slum-like office uptown and are considering leasing space from your client.
- Can you?
- Must your client be separately represented in the lease negotiations?
- Must you make any disclosures to the client or obtain any consents from your client before entering into the leases?

18

ANSWER:



- Yes, No and Yes.
- You can rent space from your client, and your client does not have to be separately represented. You must, however, obtain informed consent by the client in writing as to the essential terms of the transaction and the lawyer's role in it, and whether the lawyer is representing the client in the transaction.

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CLIENTS' GIFTS TO LAWYERS



- You represent a wealthy client who is also a personal friend and who gives regularly and generously to worthy causes. May you solicit a substantial gift from your client to fund a scholarship in your father's name, a renowned physician, at his alma mater's medical school?

20

ANSWER:



- No. Because of the fiduciary relationship, such gifts would be presumed fraudulent. Therefore, most states impose limitations on such arrangements.

21

GIFTS TO LAWYERS: PREPARATION OF INSTRUMENTS



- Your wealthy client asks you to prepare a will for him, naming your son, whom your client has known and loved since your son was a baby, as a beneficiary under the will. May you prepare the will as instructed by your client?

22

ANSWER:



- No. A lawyer may not prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.

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GIFTS TO LAWYERS: EXCEPTION



- You are preparing a will for a client. May you suggest to your client that she should name you or a member of your firm as executor of his estate?

24

ANSWER:



- Yes. Rule 1.8 does not prohibit this, as long as the lawyer obtains the informed consent of the client and advises the client of the nature and extent of the lawyer's financial interest in the arrangement as well as the client's option of appointing someone else.

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LAWYER PROVIDING FINANCIAL ASSISTANCE TO CLIENT



- You represent a client in a personal injury claim. You expect a substantial settlement within the month, and the client comes to you with a plea for a short-term loan to prevent foreclosure of the loan on his home.
- Can you loan him the amount of the mortgage payment for one month to tide him over until the settlement funds arrive?

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ANSWER:



- No. A lawyer may not make a loan to a client for living expenses in effect subsidizing the litigation. A lawyer may, however, advance litigation expenses, such as the cost of a necessary medical examination or the cost of bus fare to the doctor's office.

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SETTLING A MALPRACTICE CLAIM WITH THE CLIENT



- You represent a client in a personal injury claim and you allow the statute of limitations to expire on the claim without filing suit. May you offer to settle your client's potential claim against you for an agreed upon amount?

28

ANSWER:



- Yes, but only after advising the client, in writing, of the desirability of seeking independent counsel concerning the settlement and providing the client a reasonable opportunity to do so.

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DUTIES TO FORMER CLIENTS



- You represented Jim 15 years ago in his domestic case and obtained information about Jim's assets in the course of that representation. You now represent an investor who contends that a investment group in which Jim is a partner has defrauded him. The investor is seeking punitive damages. In representing your investor client, you must take Jim's deposition. Can you?

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ANSWER:



- No.
- 2003 FEO 14 (Opinion rules that if a current representation requires cross-examination of a former client using confidential information gained in the prior representation, then the lawyer has a disqualifying conflict of interest.)

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CONTACT INFORMATION



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Lawyers Mutual Liability Insurance Company Of North Carolina

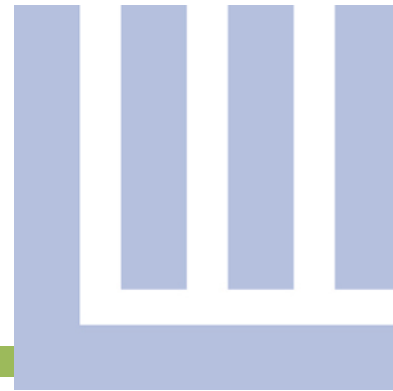
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- Like Us on Facebook
- Connect with us on LinkedIn

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Technically Speaking: Tips, Apps, Games, and Resources to Create a Fun, Efficient, and Ethical Law Practice



Joyce Brafford is with the CLE Department at the NC Bar Association. Prior to her work in CLE, she was a practice management advisor and legal tech consultant. Joyce is passionate about getting the right technology in front of lawyers so that they are prepared for the future of the legal profession. She is an attorney, and an alumna of Campbell Law. jbafford@ncbar.org



Pegeen Turner has been working with law firms for more than 20 years. First, as an IT person for large and small law firms, and now as a legal technology consultant with Legal Cloud Technology. Her firm works with small and medium-sized firms as they start-up as well as firms that need help updating and integrating legal technology into their firm's.

In addition, she helps firms understand the risks of the cloud and how to incorporate cloud technology into their practices. pturner@legalcloudtechnology.com



Damon Duncan opened the Greensboro office of Duncan Law LLP, practicing in the areas of bankruptcy and workers compensation. Damon is a member of the Elon University School of Law's Alumni Council, the Secretary of the Greensboro Bar Association, Secretary of the North Carolina Bar Association's Bankruptcy Section and Chair of the Law Practice Management and Technology section. Damon also regularly speaks across the state of North Carolina on law practice management issues attorneys face and is an adjunct professor at the Elon University School of Law teaching the law firm management class. damonduncan@duncanlawonline.com

JOHN E. FITZGERALD

CRIMINAL, DWI & TRAFFIC TICKET DEFENSE ATTORNEYS

John E. Fitzgerald began practicing law on March 1, 1993, as an associate for well-known Winston-Salem attorney Larry L. Eubanks. Mr. Fitzgerald quickly excelled at representing Mr. Eubanks' large number of criminal, traffic, and driver's license clients. Mr. Fitzgerald took over the busy law practice on January 1, 2000, when Mr. Eubanks retired. He is a member of the North Carolina State Bar, the North Carolina Bar Association, the North Carolina Advocates for Justice, and the Forsyth County Criminal Defense Trial Lawyer's Association. Mr. Fitzgerald is also a member of the Westwood Swim & Tennis Club. He is an avid tennis player and fan. jfitznc@triad.rr.com



Angela McIlveen is a partner at the McIlveen Family Law Firm. She handles cases in family law including child custody and support, divorce, alimony, adoption, separation, domestic violence, and equitable distribution. Angela also supervises cases that are handled by our Associate Attorneys. Angela is a frequent speaker and writer on family law matters. When not full speed ahead in the courtroom and running a growing law practice, she loves spending time with my family. angela@mcilveenfamilylaw.com



Brandon Huffman (@brandonjhuffman) is an attorney and founder of Odin Law and Media in Raleigh, North Carolina. His practice focuses on counseling clients in the video game, digital media, entertainment and creative industries on issues related to cyberspace law, intellectual property and corporate growth. He also assists attorneys and others with media relations and crisis communications. In his practice, he tries to ensure that he is at least a fraction as innovative as his clients. Brandon serves as the general counsel to the International Game Developers' Association, engagement editor of Business Law Today and Membership Director of the ABA Business Law Section Cyberspace Committee. He is on the Sports and Entertainment and the Law Practice Management and Technology Section Councils of the North Carolina Bar Association, the Board of Triangle ArtWorks and the Vocational Rehabilitation Small Business Advisory Committee of the North Carolina Department of Health and Human Services. brandon@odinlaw.com

60 Tips in 60 Minutes

This program will cover 60 tools, websites, and tips that the uses and encourages lawyers in North Carolina to use to better serve clients. The following slides will cover everything from practice management software, to accounting tools, to client communication programs.

1. Electronic Signatures – Allows attorneys and clients to sign document electronically. Prices vary. Not all HIPAA compliant.
 - a. DocuSign – www.docusign.com
 - b. Echosign – www.echosign.com
 - c. Hellosign – www.hellosign.com
 - d. RightSignature – www.rightsignature.com
2. MS Quickparts- Save time and prevent errors with Quickparts. Capture commonly typed words, phrases, and paragraphs - Video - <https://www.youtube.com/watch?v=bpd1bCT32Vs>
3. Adobe – www.adobe.com Adobe Reader, Standard, Pro, Creative Cloud. Use Adobe Creative Cloud to capture comments, add text, and review documents both in the office and on the go.
4. Office 365- Office 365 for Business – www.office.com Getting rid of your on-premise email server in favor of a cloud based solution from Office 365 for Business can save your firm time and money. Starting at \$5/month for a single mailbox.
5. Templates- Create MS Word and Adobe templates in just once, and don't spend money on doc automation tools, Save several hours each month, and reduce typos. Use styles in MS Word to easily and quickly create consistency within documents and create Tables of Contents and Tables of Authority with ease.
6. Grammarly- www.grammarly.com Use Grammarly (free) with Google Chrome to catch typos and grammar mistakes that your usual web browser will miss. video - <https://www.youtube.com/watch?v=fVbE2CSXCj0>
7. Practice Management Software- calendaring, document management, client management and so much more you need to manage your practice
 - a. Clio – www.clio.com
 - b. RocketMatter – www.rocketmatter.com
 - c. PracticePanther – www.practicepanther.com
 - d. ActionStep – www.actionstep.com
 - e. Matter 365- www.microsoft.com/en-us/legal/productivity/mattercenter.aspx Matter Center for MS 365. Did you know that MS 365 can have practice management function built right in? Matter Center adds the functionality of a standalone practice management software inside your MS Office. Starting at \$12.50/month for the Small Business Premium plan.

8. Citrix Sharefile- www.sharefile.com ShareFile is a cloud-based service for sharing, storing and syncing your data, much like Dropbox or Box. The difference with ShareFile is its best-in-class security. Their prices are commensurate with the uptick in security, unfortunately. Starting at \$29.95/month.
9. UberConference. www.uberconference.com Free conference calling for small users. Relatively inexpensive (\$10/month) to remove branding. Features: screen sharing, see who is on the call.
10. Text Expander- TextExpander (Mac)/Active Words (PC) – www.textexpander.com A typing shortcut utility that allows attorneys to efficiently and quickly produce text that is used over and over. Using a full-blown document assembly to quickly create form documents can make a big difference in a lawyer's efficiency. However, those document assembly programs tend to be expensive and difficult to master. Take a first step by using TextExpander for Mac, \$34.95 or ActiveWords Plus for PC, \$49.95 This is as fully featured as a product like HotDocs, but you'll master it in minutes and it can save lots of time in your day. - Video - <https://www.youtube.com/watch?v=8IJb0wr64FE>
11. Phone Soap- www.PhoneSoap.com . It's a dirty world out there and few objects in a lawyers life gets handled and transported to more environments than the phone. PhoneSoap cleans your phone using UV light. \$59.95.
12. Office for iPad. www.office.com The ubiquitous iPad took a great leap forward when Microsoft made (nearly) fully featured versions of MS Word, Excel, Powerpoint and Outlook for the iPad. These mobile versions of Office are very good and do away with the need to cobble together a string of third party apps for lawyers to handle their most basic office functions on a tablet. Starting at \$5/month.
13. Henry Desk Vacuum- www.amazon.com - Battery powered mini desk vacuum for all those little messes we make at our desk.
14. Encrypt emails - www.Virtu.com Gmail and Office 365 email encryption. Email encryption through Office 365–additional \$2/mailbox/month.
15. "Unsend" mail with Gmail's delayed delivery- Use Gmail's Unsend option to stop an email from reaching it's recipient.
 - a. In Outlook, recall an email within your organization- This works only if you have an Exchange account. Simply access the "Action" menu on the sent email, and select "recall this message." If it hasn't been opened, your email will be removed from the recipient's inbox.
16. Backup Your Computer in Three Ways.
 - a. CrashPlan – www.crashplan.com
 - b. BackBlaze – www.backblaze.com
 - c. Carbonite – www.carbonite.com
 - d. Solo Low-rent option: External hard drive like Western Digital 1TB drive or backup to cloud-based system.

17. Business Cards & Receipts

- a. Evernote – www.evernote.com Sometimes you collect business cards that you want to keep, but don't necessarily want to keep them in your Outlook contacts. Evernote now has a new feature that allows you to capture business cards from your phone's mobile app and have them stored alongside the searchable text from the card. There is no better way to have a modern Rolodex. Free with Evernote.
- b. Google Drive: Upload → Scan
- c. Adobe Scan app
- d. Scanner Pro app

18. Simply File – www.techhit.com/simplyfile File messages in Outlook with a single click. Organize both received messages, and messages you are sending. Keep track of your digital client communication, and save time.

Video -

<https://www.youtube.com/watch?v=saw3v3DNmS8&list=PLEB43E3EE474C18C9>

- 19. Google Now/Siri./Alexa Typing on small phone keyboards is a pain. The future of controlling our increasingly powerful smartphones is to use their built in "digital assistant" – Siri for iOS and Google Now for Android. Much more than just simple dictation, these digital assistants allow us to make our phones do complicated tasks without ever touching a key. Free with mobile operating system.
- 20. NomadKey. www.amazon.com Simply put, it is a charging cable for your mobile device that is shaped like a key and hangs on your keychain. As long as you have your keys, you'll always have a way to charge your phone, too. Starting at \$19.95.
- 21. Google Cloud Print- Google Cloud Print is a new technology that connects your printers to the web. Using Google Cloud Print, you can make your home and work printers available to you and anyone you choose, from the applications you use every day. Google Cloud Print works on your phone, tablet, Chromebook, PC, and any other web-connected device you want to print from.
- 22. Encrypt Files- www.BoxCryptor.com - Boxcryptor is an easy-to-use encryption software optimized for the cloud. It allows the secure use of cloud storage services without sacrificing comfort. Boxcryptor supports all major cloud storage providers (such as Dropbox, Google Drive, Microsoft OneDrive, or SugarSync) With Boxcryptor your files are protected from the moment you send them to your cloud provider. You can enjoy peace of mind knowing that your information cannot fall into the wrong hands.
- 23. Client Portals- It doesn't matter which you choose- Clio, Firm Manager, Practice Master, MyCase, or any other system, so long as there are adequate security measures. Client portals create safer communication channels, and direct access to client files.

24. Chrometa - www.chrometa.com Captures your time for you as you work on your PC, Mac, iPhone, and Android. No need to start or stop timers. That's all done for you. It's like having your very own personal timekeeper. Every email you write, every minute you work gets recorded and "automatically" put on your timesheet.
25. Social Media - FaceBook, Twitter, LinkedIn, Snapchat, Instagram, WhatsApp
26. Hoot Suite/Buffer – www.hootsuite.com, www.buffer.com Share and schedule posts from your Twitter, Facebook, Instagram, and LinkedIn accounts all from one app
27. What'sApp- WhatsApp Messenger is a cross-platform mobile messaging app which allows you to exchange messages without having to pay for SMS. WhatsApp Messenger is available for iPhone, BlackBerry, Android, Windows Phone and Nokia and yes, those phones can all message each other! Because WhatsApp Messenger uses the same internet data plan that you use for email and web browsing, there is no cost to message and stay in touch with your friends.
28. Smartwatch - Check your calls and your texts without getting out your phone. Samsung, Apple, Nokia
29. Evernote- www.evernote.com WRITE short lists to lengthy research, no matter what form your writing takes, Evernote keeps you focused on moving those ideas from inspiration to completion. COLLECT Easily gather everything that matters. Clip web articles, capture handwritten notes, and snap photos to keep the physical and digital details of your projects with you at all times. FIND Your words, images, and documents are always close at hand. Evernote's powerful search and discovery features make everything you've collected easy to find.
 - a. OneNote –Part of the MS Office suite, use OneNote as your trial notebook. Keep track of research, deposition prep, documents to review, and anything else you may need to keep for your law office.
30. Expensify- www.expensify.com - Hassle-free expense reporting built for employees and loved by admins. \$5- Quick and simple for startups, non-profits, churches, and student groups. Online Sync with QuickBooks and Xero - Video - https://www.youtube.com/watch?v=UOl_Wq9LuVU
31. Find My Phone/Find My Mac- Don't panic. If one of your Apple devices goes missing, iCloud can help you figure out where it is. Just sign in at iCloud.com or use the Find My iPhone app to see your missing iPhone, iPad, iPod touch, or Mac on a map. And with the Lost Mode feature you don't just see where your device is, you can track where it's been. That way you can decide on your best course of action. You can immediately lock your device and send it a message with a contact number. Then whoever finds it can call you from the Lock screen without accessing the rest of the information on your device. Older macs, the Find My Mac app is not enabled by default. Go back and turn it on to take advantage of this feature.

32. Fastcase – www.fastcase.com or through the www.ncbar.org website. Fastcase's libraries include primary law from all 50 states, as well as deep federal coverage going back to 1 U.S. 1, 1 F.2d 1, 1 F.Supp. 1, and 1 B.R. 1. The Fastcase collection includes cases, statutes, regulations, court rules, and constitutions. Fastcase also provides access to a newspaper archive, legal forms, and a one-stop PACER search of federal filings through our content partners.
33. Ravel Law – www.ravellaw.com Use Ravel Law to research your judge- Get insight into how a judge will rule, and the reasoning and case law they've relied on in the past. <https://www.ravellaw.com/judges>
34. Logickull- www.logickull.com An online e-discovery platform. Data is uploaded securely and documents are automatically processed. Documents are culled, searched and reviewed for relevance and confidentiality. Download-Identified documents are assembled, downloaded and shared with another party. Video - <https://www.youtube.com/watch?v=eT0bukpaaTk>
35. PageVault- www.pagevault.com A better way to collect and print content from the internet. Great for websites, social media, webpages and online videos.
36. Calend.ly – www.calendly.com Scheduling made simple. You give the link, your contact picks what works for them. Your calendar is already in the app. Video - <https://www.youtube.com/watch?v=ukDt2lGfwG4>
37. Virtual Court Reporting- Use services like NextGen for virtual court reporters. Have parties stipulate to the presence of the virtual reporter, and save time and expenses on travel and accommodation.
38. Password Keepers
 - a. Last Pass- Just remember your master password and LastPass remembers the rest.
39. Rapid Recharge in Airplane Mode- One popular phone charging tip circulating the internet is that putting your mobile phone on airplane mode will decrease the time it takes to charge its battery. Because airplane mode turns off all radio frequencies on your device, the battery should charge faster in this disengaged state.
40. Cyber Liability Insurance - Media Perils
 - a. cyber and privacy policies cover a business' liability for a data breach in which the firm's customers' personal information, such as Social Security or credit card numbers, is exposed or stolen by a hacker or other criminal who has gained access to the firm's electronic network. Policies cover liability arising from website media content, as well as property exposures from: (a) business interruption, (b) data loss/destruction, (c) computer fraud, (d) funds transfer loss, and (e) cyber extortion.
 - b. Media Perils - infringement, libel

41. Presentation VR- www.PresentationSimulator.com (PSim) is a virtual reality (VR) presentation software application designed to practice public speaking before a virtual audience. This allows the user to improve their presenting skills with the ultimate goal of overcoming speech anxiety - and to become a confident public speaker.
42. ScreenFlow - www.screenflow.com - Video editing and screen recording software that can be used for internal training.
43. YouTube - www.youtube.com Videos on literally everything imaginable. From deposition tactics to learning how to use the rest of these tips.
44. Roomba - www.irobot.com Robotic vacuum cleaner. Seriously though, \$300 could save you hundreds on office cleaning. Video - Moment of zen - <https://www.youtube.com/watch?v=A0Z79ycisDU>
45. IFTTT/Zapier/Flow - www.ifttt.com, www.zapier.com If This, Then That. Routine processes between apps can be automated. Got a new client in the practice management software? Announce it to the firm! Past due bill? Send an automatic reminder. Leaving your house? Set your phone to silent.
46. RSS feeds. Why visit 30 sites for information? Get them all aggregated in one place.
47. UpWork/Fiverr/Elance/99Designs - www.upwork.com; www.fiverr.com, www.elance.com, www.99designs.com Finding freelancers, cheap, has never been easier. Each of these has their purposes. Imagine, someone to troubleshoot a tricky website problem from across the globe at a fraction of the cost.
48. HARO - www.Helpareporter.com - Daily emails with queries from reporters looking for sources. Want to be known as an authority? You need press. This gets you press. PRO TIP: use filters in Outlook or Gmail to only get relevant inquiries and cut down on emails.
49. Streak - www.streak.com - Basic CRM for tracking process with contacts. Track emails. snooze emails until later.
50. Slack - www.slack.com - Instant messaging for business. Other options include Yammer, Skype and Google Hangouts - The chat room, evolved for business and productivity.
51. Tali - www.telltali.com - Alexa-based time tracking that integrates with Clio.
52. USB Batteries - Never have an uncharged device again.
53. MileIQ app - \$5.99/month - Mileage tracking app that build your mileage report for you.
54. Recap - free.law/recap - Free Pacer - A Chrome or Firefox plugin that automatically archives any PACER document you view to the cloud. It also allows you to view any document anyone else has viewed from the RECAP cloud instead of paying for the PACER access.
55. Quickbooks Online - quickbooks.intuit.com - Online accounting system. Has improved tremendously over the past few years. Includes syncing with online banks, bank grade encryption and automatic backups.

56. LawPay – www.lawpay.com Allow firms to easily accept credit cards, but make allowances for deposits into trust and operating accounts.
57. Two Factor Authentication - Two factor authentication will require you to use your phone to confirm any new log in whether or not you are the one attempting to log in. Use it wherever it is offered including in Office 365, online document storage, like Dropbox and cloud-based document and practice management systems.
58. AI – Artificial Intelligence – Check out the future of law artificial intelligence programs that are being used in law firms today. www.RossIntelligence.com, www.jEugene.com and chatbots that are answering basic legal questions.
59. Phantom Key Stroker - www.amazon.com Brilliant way to mess with your coworkers. Random CAPS lock. Stray characters. Phantom typing. Madness!
60. Samsung Gear 360 – www.samsung.com 360 degree video at an affordable price.



Hindsight is Always 50/50 – It's Never as
Clear as You Thought it Was. What Can
We Learn from the Fate of Others?



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Colleen L. Byers began practicing law in 2008 with Bell, Davis & Pitt shortly after moving to Winston-Salem. She concentrates her practice in the areas of business litigation, professional malpractice defense, guardianship, and employment law. Colleen regularly represents financial institutions, corporations, limited liability companies and individuals in contract, employment, corporate, shareholder, Uniform Commercial Code, and fiduciary disputes. She has served on the advisory board of the Chamber of Commerce's Winston < 40 and has served as chair of the Young Lawyers Division of the North Carolina Association of Defense Attorneys. Colleen has previously served as president of the board of directors of the Forsyth County Humane Society and president of the Forsyth County Women Attorneys Association. cbyers@belldavispitt.com

Joshua B. Durham has practiced law in Charlotte for more than 15 years. He was a partner at Poyner Spruill LLP before joining Bell, Davis & Pitt in 2016. Josh represents individuals and corporations in a wide number of disputes, focusing primarily on business litigation cases, intellectual property disputes, and government investigations. He regularly advises clients on the benefits of early case evaluations and mediations to resolve disputes quickly. Knowing that litigation can still be inevitable, however, Josh is a passionate and experienced advocate and has handled more than twenty jury trials. Josh is an active volunteer at Trinity Presbyterian Church and regularly participates in a number of important areas in the life of the church, from teaching Sunday School and serving on the church's governing board, to organizing neighborhood Food Truck rallies and running the church's website. Follow Josh on Twitter at @joshdurhamlaw. jdurham@belldavispitt.com

Bradley Friesen moved to Winston-Salem and joined Bell, Davis & Pitt in 2002. His practice consists of trial and appellate litigation of complex business, commercial and banking disputes, environmental claims, and a broad spectrum of real estate issues. Brad is a member of the technology committee of the North Carolina Bar Association and the North Carolina Association of Defense Attorneys. He previously served as a board member and treasurer of the Forsyth County Young Lawyers Association. Brad also serves on the board of the Winston-Salem Symphony and volunteers time at his children's school. He loves all sorts of outdoor activities, including running, gardening and backyard astronomy. bfriesen@belldavispitt.com

Ward Davis joined Bell, Davis & Pitt in 2003 to help the firm open its Charlotte office. He began his career in South Carolina before moving to Charlotte in 2000. Ward focuses his practice primarily on various types of business and construction litigation. He practices in the state and federal courts of North Carolina and South Carolina, including the North Carolina Business Court, and is also a certified mediator in North Carolina. He also regularly defends fellow members of the bar against legal malpractice claims. Ward is Past Chair of the Charlotte Housing Authority Scholarship Fund Advisory Board and Past President of the Bobbitt Inn of Court, and also serves on the board of directors of Community Link and the Charlotte Community Board for Lawyers Mutual Liability Insurance Co., and is an active elder at First Presbyterian Church in Charlotte. Ward is also an avid runner, and (very) amateur cook and golfer. ward.davis@belldavispitt.com



Will Graebe joined Lawyers Mutual in 1998 as claims counsel before being promoted to Vice President of Claims in 2009. He focuses his efforts at Lawyers Mutual on transactional matters and real estate. Prior to joining Lawyers Mutual, he worked at the law firm of Pinna, Johnston & Burwell. Will graduated from Stetson University and Wake Forest University School of Law. He is an avid swimmer, kayaker, fisherman and yogi. Email: willg@lawyersmutualnc.com



“Hindsight is always 50/50.”

Cam Newton, 10/12/14

Colleen L. Byers
Ward B. Davis
Joshua B. Durham
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We Learn from the Fate of
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Pre-Engagement



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Pre-Engagement – Start with a **Conflict Check**

Avoid a grievance or potential disqualification from representing your current client or the client you want. Don't accept material information about the case before determining whether there is a conflict.



Chemcraft Holdings Corp. v. Shayban

- “The Court grants Defendant’s motion to disqualify counsel on the grounds that ... [Plaintiff’s Attorney]’s actions, while unintentional and inadvertent, give the appearance of impropriety”
- Defendant was referred to Plaintiff’s Attorney by another lawyer, who sent an email, telling him to expect a call from Defendant. **The unsolicited email attached three documents about case strategy prepared by Defendant.** Attorney did not notice the attachments at the time, which remained on his computer for months.



Chemcraft Holdings Corp. v. Shayban

- Disqualification is based “on the reasonableness of a client’s perception that confidences it once shared with its lawyer are potentially available to its adversary.”
- Rule 1.18(b): “Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation.”
- Rule 1.18(c): A lawyer “... shall not represent a client in the same or a substantially related matter **if the lawyer received information from the prospective client that could be significantly harmful** to that person in the matter.”



Tips for Avoiding Disqualification

- “Before you tell me about the case, I need to find out who is involved so that I can do a conflict check.”
- Website disclaimer:
Attorney Advertising: This website is designed for general information only. Information presented on this website should not be construed as formal legal advice or the formation of an attorney-client relationship. Additionally, any email sent to [the Firm] or any of its lawyers at the email addresses set forth in this website will not create an attorney-client relationship.



Tips for Avoiding Disqualification

- Example for declining unsolicited email:

Dear [Potential Client]:

Thank you for contacting me about your matter. I am sorry to have to tell you that my firm cannot accept this representation because we have a conflict. I read enough of your email to see who the parties are. I did not read the attachment. I have permanently deleted the email and the attachment to prevent obtaining any information about this.



Pre-Engagement – Set Realistic Expectations



- Don't overstate your experience or skills.
 - Rule 7.4: You cannot hold yourself out as a specialist, unless you are a certified specialist. It is OK to say that you practice in a particular field.
 - Don't dabble! Decline matters that you are not competent to handle. (Rule 1.1: Competence)
- Don't overpromise on results.
- Don't understate the potential cost.
- Don't understate the timeframe.



Pre-Engagement – Mind the Red Flags

- Decline bad clients.
 - Can't afford your fee.
 - Unrealistic expectations.
 - Fired by other attorneys.
 - Overly "Needy" – frequent calls, everything is a crisis.
 - Seeks moral victory/vindication. Fighting on principle.
 - "Jailhouse lawyer" – wants to rely on what "friends" or "other lawyers" tell them; not receptive to your advice.



Pre-Engagement – Mind the Red Flags

- Reluctant to tell the truth.
- Seeks a lawyer to get a screwed-up case out of the ditch.
- Statute of limitations about to run.
- Personality conflict from the outset.
- BOTTOM LINE –
Trust Your Instincts! If something doesn't seem right,
decline the representation.



Pre-Engagement – Confirm Non-engagements

- “An attorney-client relationship is formed ‘when a client communicates with an attorney in confidence seeking legal advice regarding a specific claim and with an intent to form an attorney-client relationship.’ Such a relationship may be implied by the parties’ conduct ...

Harris v. Ballantine 235 N.C. App. 655, 764 S.E.2d 698 (2014)

‘... and is not dependent on the payment of a fee, nor upon the execution of a formal contract.... The dispositive question ... is whether the attorney’s conduct was such that an attorney-client relationship could reasonably be inferred.’”

- “He said, she said” about whether an attorney-client relationship was formed will create a question of fact for the jury in a malpractice case.
- *See also Jenkins v. Batts*, __ N.C. App. __, 788 S.E.2d 628 (2016).

When a former or current client calls to
“pick your brain” about a new matter

“It was great to catch up with you by phone today. I’m sorry to hear about your new problem. When we spoke you mentioned that you would continue to work on this issue without retaining me. I just wanted to make sure that we have the same understanding. I always appreciate hearing from you, but I haven’t undertaken to represent you on this particular matter. I hate to be so formal about it, but I would also hate for there to be a misunderstanding.”



Engagement



Rule 1.5

Fees, generally

- When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
- Be clear on who you represent, individual(s) or corporation, especially in a multi-party case.
- Identify the lawyer(s) and other professionals who will be working on the client's matter.

Rule 1.5(c)

Contingency Fees

- Contingent fee agreements must be in writing.
- Signed by the client.
- Shall state the method by which the fee is to be determined.
- The litigation and other expenses to be deducted from recovery and whether they are deducted before or after the fee is calculated.

Rule 1.5(c) Contingency Fees

- Must clearly notify the client of any expenses for which the client will be liable whether or not they prevail.
- Upon conclusion of the matter, must provide client with a written statement stating the outcome and, if there is a recovery, showing the remittance to the client and the method of its determination.



Battles v. Bywater, LLC 2014 NCBC 52

- Bywater, LLC brought suit against a fifty-percent owner for mismanagement and other improper acts.
- Bywater executed a written fee agreement, signed by the other fifty-percent owner.
- The defendant objected, claiming the other fifty-percent owner had no right to hire outside counsel or to file suit.
- Court agreed, and Bywater's counsel had to withdraw.
- \$85,000 in fees were left outstanding.



Ratonel v. Roetzel & Andress, LPA
67 N.E.3d 775 (Ohio 2016)

- Plaintiffs engaged Keating, Muething & Klekamp PLL (“KMK”) to help with the purchase of an apartment building.
- Apartment building had defects, and Plaintiffs hired Defendant to pursue malpractice claims against KMK.
- Plaintiffs also wanted Defendant to sue KMK arising out of another project, known as French Village.



Ratonel v. Roetzel & Andress, LPA
67 N.E.3d 775 (Ohio 2016)

- Only one paragraph in Defendant’s original complaint against KMK mentioned French Village.
- Amended Complaint did not mention it at all.
- At trial, KMK moved for directed verdict as to any claim that it committed malpractice on French Village.
- Court entered directed verdict entered at trial in favor of KMK on French Village.
- Plaintiffs sued Defendant for legal malpractice.



Ratonel v. Roetzel & Andress, LPA
67 N.E.3d 775 (Ohio 2016)

- Defendant's engagement letter only mentioned the other project; it did not mention French Village.
- "Should you decide to retain our firm for additional services not specified in this letter, we will be pleased to provide such services under such terms and you and we may agree upon."
- Though the record showed that Plaintiffs and Defendant discussed French Village frequently, there was nothing to indicate Defendant had agreed to pursue that claim.



Ratonel v. Roetzel & Andress, LPA
67 N.E.3d 775 (Ohio 2016)

- Settlement demands to KMK did not make demand for French Village.
- In fact, Defendant had even sent Plaintiffs an email stating "there is no viable claim against KMK on FV."
- Plaintiffs' representative even admitted she was told "several times" that there was no claim regarding French Village and even that Defendant had "refused to" file such a claim.



Litigation Hold See Appendix p. 1

- Must give thought to the contents; cannot just send out a form.
- Consider issues in the case, subject matter, potential custodians.
- Not just for emails. Can include text messages, voicemails, social media, thumb drives, etc.
- Cannot send and forget it. Must follow up.

8 NORTHERN DISTRICT OF CALIFORNIA
9 SAN JOSE DIVISION
10 APPLE INC.,) Case No.: C 11-1846 LHK (PSG)
11 Plaintiff,)
12 v.) **ORDER GRANTING-IN-PART**
13 SAMSUNG ELECTRONICS CO., LTD, a) **APPLE'S MOTION FOR AN**
14 Korean corporation; SAMSUNG) **ADVERSE INFERENCE JURY**
15 ELECTRONICS AMERICA, INC., a New York) **INSTRUCTION**
16 corporation; and SAMSUNG) **(Re: Docket No. 895)**
TELECOMMUNICATIONS AMERICA, LLC,)
a Delaware limited liability company,)
Defendants.)

On this record, the court concludes that Samsung's preservation efforts failed because: (1) Samsung did not to suspend mySingle's automatic biweekly destruction policy; (2) Samsung failed to issue sufficiently distributed litigation hold notices after Samsung itself admitted that litigation was "reasonably foreseeable," and to follow up with the affected employees for seven months as it later showed it knew how to do; and (3) at all times Samsung failed to monitor its employees' preservation efforts to ensure its employees were at all compliant. In effect, Samsung kept the shredder on long after it should have known about this litigation, and simply trusted its custodial employees to save relevant evidence from it. The stark difference in production from mySingle and Microsoft Outlook custodians makes clear that this plan fell woefully short of the mark.

1 of 1 DOCUMENT

Daynight, LLC, Plaintiff and Appellant, v. Mobilight, Inc., Defendant and Appellee,
v. KK Machinery Pty. Ltd.; Paul LaMarr; and Cory Rowe, Third-party Defendants
and Appellants.

Case No. 20091088-CA

COURT OF APPEALS OF UTAH

2011 UT App 28; 248 P.3d 1010; 674 Utah Adv. Rep. 26; 2011 Utah App. LEXIS 31

already filed a complaint for trespass against Mobilight five days before the laptop was destroyed. Additionally, actions and words attributable to KK Machinery after it filed suit, including throwing the laptop off a building; running over the laptop with a vehicle; and stating, "[If] this gets us into trouble, I hope we're prison buddies," unquestionably demonstrate bad faith and a general disregard for the judicial process.



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Communication with Clients



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Communication with Clients

- “... [M]ost disciplinary complaints stem from simple communication failures with clients”

“Ten Pitfalls That Trip Up Otherwise Ethical Attorneys,” *US Law Week*, Feb. 1, 2016

- Attorneys who communicate well with clients are less likely to be sued for malpractice when something goes wrong.



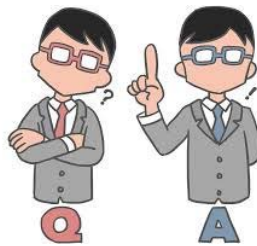
Rule 1.4 Communication

(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(f), 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.

Rule 1.4 Communication (cont)

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



Roadblocks to Client Communication

- Too busy
- Bad news
- Afraid of client because client is unhappy
- Client is not paying the bill
- Embarrassed because it has taken a long time to return client's call

Tips to Ease Client Communication

(in addition to promptly returning calls and emails)

- Send regular bills.
- Create processes for automatic communication (e.g., send copies of pleadings, discovery requests, correspondence, due dates and deadlines).
- Send client a copy of everything (most everything).
- Email is great for documentation, but sometimes clients need to hear your voice or see your face.
- Explain your lack of communication (out-of-office email, phone call from assistant to explain that you are in court, etc.).



Tips to Ease Client Communication

(in addition to promptly returning calls and emails)

- Sometimes, start with an apology (no need to give an excuse): "I apologize that I am just now getting back to you about this. Here is what we can do going forward."
- Don't sit on the bad news; it will only become more difficult to communicate.
- If you are available to pick up the call, pick it up. It will be easier than returning a voicemail at the end of the day.



Common Mistakes

Common Mistakes Involving ...

- Wiring Funds and Wiring Instructions
- The Latest Scam—Fake Trust Account Audit
- Client's Social Media
- Form Transactional Documents
- Procrastination and Missed Deadlines
- Inadequate Documentation
- Suing a Client
- Conflicts of Interest
- Dabbling

Wire Instructions

- The news is replete with well-intentioned firms being duped.
- Cutting checks before retainer check sufficiently clears.
- Wiring instructions sent via email being intercepted, so that later changes to instructions are not coming from the original parties.
- See sample control form. Appendix p. 4.

Wire Instructions

- Ensure email transmissions with instructions are SECURE.
- Confirm instructions via a telephone call and keep a record of the number and person called.
- Follow up with a confirming email both to a known contact at the client and the person with whom you spoke (if different from your known contact).
- Ask for confirming response in writing.



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September 2017

New Scam Attempts Access to Lawyers' Trust Accounts via Unauthorized Auditing Service

The North Carolina State Bar has learned that a caller representing an entity named "Small Business Growth Alliance" is calling lawyers and telling them that their IOLTA accounts are due for audit. The caller falsely claims that Small Business Growth Alliance is authorized by the State Bar to perform random audits and tries to schedule the audits.

Neither Small Business Growth Alliance nor any entity other than the State Bar is authorized to perform a State Bar random trust account audit. Auditors who are employees of the State Bar perform all random trust account audits. If you are selected for a random State Bar audit, you will be contacted by a State Bar official and will receive a written subpoena signed by State Bar officials.



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Risk Management Safeguards

- Never give out sensitive information over the phone or via email.
- Hover over any link in an email to verify that it leads to webpage shown in the text and that it is the destination you wish to visit. For the safest practice, type the website into your browser instead of clicking the link. If in doubt that the website listed is correct, use search to find the page you want to visit.
- Do not open attachments that come from unknown senders or that come unexpectedly.
- Always verify suspicious requests using previously known contact information, or found through independent research, and not contact information provided in the request.



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Social Media

2014 FEO 5

- If the client's postings could be relevant and material to the client's legal matter, competent representation includes advising the client of the legal ramifications of existing postings, future postings, and third party comments.
- If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media.
- See Appendix p. 5.



The Case of Virginia Attorney Matthew Murray

- Client's wife was killed when a cement truck crossed the center line and tipped over onto her car.
- Murray represented her husband in a suit against the concrete company.
- Concrete company's lawyers requested certain information about client's Facebook account.
- Murray advised his paralegal to tell the client to clean up the account. Client removed sixteen photos, including one in which he held a beer can and wore a t-shirt that said "I [heart] hot moms."



The Case of Virginia Attorney Matthew Murray

- Discovery responses said client “did not have a Facebook page on the date this is signed”
- Unfamiliar with anything about privacy settings, Murray claimed that defense counsel must have gotten a photograph by hacking the client’s account.
- Murray said he did not intend to accuse defense counsel of committing a crime.
- Murray was ordered to provide a privilege log regarding communications with his client about the subject.
- Murray intentionally deleted one email from the log.



The Case of Virginia Attorney Matthew Murray

- Murray was ordered to pay \$594,000 to the lawyers for the concrete company.
- Client was ordered to pay \$180,000.
- Murray also agreed to a five-year suspension.
- Fear not, the jury did award client \$8.5 million.
- Murray paid the sanction.
- Once the suspension was announced, he was unavailable for comment, as he was volunteering on the Appalachian Trail.



Be Careful With Form Transactional Documents

- Avoid using form documents, if possible.
- If necessary, use blanks as opposed to fictitious names or names of other clients.
- Know precisely who your client is, especially a corporate client with affiliates and/or divisions.

Procrastination and Missed Deadlines

- Maintain a good calendaring and docketing system.
- Don't wait until the last minute to file complaint.
 - Service and summons issues.
 - Wrong defendant named, and no time to correct.
- Approach every case without assuming that it is going to settle.

Inadequate Documentation

- Claims occur each year where the lawyer and the client have different recollections about the content of a conversation.
 - Classic he said vs. she said, which is an issue of fact.
- Keep copious notes.
- Be sure the client stays informed.
- Don't settle a case without specific authority.
- Document the authority from the client.

Suing a Client

- ***Never*** a good idea.
- Expect counterclaim and an ethics complaint.
- However, if contemplating suing:
 - Fee should be substantial and the result for the client was undoubtedly positive.
 - Fee should be collectible.
 - If decide to pursue, comply with Rule 1.5 regarding State Bar's program on fee dispute resolution.
- Ways to avoid fee issues:
 - Bill early and often.
 - Use engagement and disengagement letters.

Spot the Conflict

- You cannot serve two masters.
- Become intimately familiar with Rules 1.7, 1.8, 1.9 and 1.10 of the Rules of Professional Conduct.
- If unsure about a conflict, contact the State Bar.
- Maintain a good conflicts system to identify potential conflicts.

Spot the Conflict

- Conflicts most likely to result in a malpractice claim when the attorney:
 - Represents multiple clients on same matter.
 - Has a personal interest in the matter.
 - Represents one client against another current or former client.
- Obtain written waiver, when a waiver is possible.

Don't Dabble

- Practicing in other jurisdictions.
 - Be sure you know SOL in other jurisdiction.
- Unauthorized Practice of Law Issues.
 - Rule 5.5 of the Rules of Professional Conduct
 - “A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.”
 - If your conduct violates the applicable unauthorized practice statute in another jurisdiction, your conduct runs afoul of Rule 5.5.

Practicing Outside of Your Expertise

- Say no, even to family and friends.
 - Rule 1.1 of the Rules of Professional Conduct provides that “[a] lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter.”
 - No exception for friends and family.

Communication with Opposing Counsel

Communication with Opposing Counsel



- Rule 4.1: In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.
- *See also* Rule 3.4: Fairness to Opposing Party and Counsel.

Tips for Communication with Opposing Counsel

- Assume that what you write may be seen by the judge.
- Be careful about “Reply to All” if the opposing party has been copied.

There are scenarios where the necessary consent may be implied by the totality of the facts and circumstances. However, the fact that a lawyer copies his own client on an electronic communication does not, in and of itself, constitute implied consent to a “reply to all” responsive electronic communication.

2012 FEO 7



Example of Extremely Bad Communication

Attorney Douglas J. Crawford appeared with his client for a videotaped deposition on April 21, 2014. “Immediately after [the client] was sworn, Crawford pointed a can of pepper spray at counsel’s face from a distance of approximately three feet. Crawford said,

Mr. Traver [Chase’s counsel], if things get out of hand, I brought what is legally [sic] pepper spray, and I will pepper spray you if you get out of hand.



Example of Extremely Bad Communication

“Crawford then produced a stun gun, pointed it at Traver’s head, and said,

If that doesn’t quell you, this is a flashlight that turns into a stun gun.

Crawford discharged the stun gun close to Traver’s face. Traver terminated the deposition.”

Crawford v. JPMorgan Chase Bank, 195 Cal. Rptr. 3d 868 (2015).

Crawford has since been disbarred.

Disengagement

Aqua-Trol Corp. v.
Wilentz, Goldman & Spitzer, P.A.,
144 A.D.3d 956 (N.Y. Supr. Ct., Nov. 23, 2016)

- Plaintiff engaged Defendant to help it recover funds loaned to a developer and to foreclose on a deed of trust securing the loan.
- Another creditor foreclosed, wiping out Plaintiff's deed of trust.
- Defendant argued statute of limitations barred Plaintiff's claims.
- At issue was the time that Defendant ceased providing services to Plaintiff.



Aqua-Trol Corp. v.
Wilentz, Goldman & Spitzer, P.A.,
144 A.D.3d 956 (N.Y. Supr. Ct., Nov. 23, 2016)

- Defendant argued it had withdrawn from the case, as it sent a letter to another attorney turning over the file and asking new attorney to execute substitution of counsel.
- Plaintiff disputed that it ever received a copy of the letter to the new attorney.
- Plaintiff also showed that nearly seven months later, the Defendant wrote it asking it to consent to a substitution of counsel.



Aqua-Trol Corp. v.
Wilentz, Goldman & Spitzer, P.A.,
144 A.D.3d 956 (N.Y. Supr. Ct., Nov. 23, 2016)

- Unfortunately for Defendant, Plaintiff had filed suit within three years of the second letter.
- Plaintiff's suit allowed to proceed.

Rule 1.16, cmt 10
Declining or Terminating Representation

- May not retain papers to secure a fee.
- Anything in the file that would be helpful to successor counsel should be turned over.
- Personal notes and incomplete work product need not be released.

Practice Pointers

- Be clear that engagement is at an end.
- Be specific as to the matters affected.
- Inform “client” there may be deadlines in the case and that they should consult counsel about those.
- Be sure to “close” matter in systems.

2013 FEO 15 Return of Electronic Records

- If an electronic record relative to a client’s matter would be helpful to successor counsel, the electronic record is a part of the client’s file. Unfortunately for Defendant, Plaintiff had filed suit within three years of the second letter.
- If the lawyer determines that an electronic record is a part of a client’s file, then the lawyer has a duty to provide a copy of the record to the client upon the termination of the representation.

Responding to a Malpractice Claim

Dealing with a Potential Malpractice Claim

- Give prompt notice of the claim.
 - Don't jeopardize coverage by thinking the problem is going away.
 - Opportunity for claims repair.
- Lawyers Mutual – “Professional liability claims – made and reported policy”
- Report potential claims on renewal application.
- Experienced counsel ready to assist.
 - Cooperate fully.
 - Open and honest.
 - Provide your knowledge of facts, law and your former client.
- The standard of care for professional competence is not perfection or brilliance.

“Hindsight is always 50/50.”
It’s Never as Clear as You Thought it Was.
What Can We Learn from the Fate of Others?

Appendix



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SAMPLE LITIGATION HOLD LETTER

Client Name
Address

Re:

Dear [Client]:

We are pleased to represent you with regard to the above-referenced matter. Though it may be unnecessary, I write to make sure that you are aware of your obligation to take reasonable steps to preserve all data in your possession, custody or control that is in any way relevant or related to _____.

A. Preservation Obligations Generally.

Preservation in this sense means taking reasonable steps to:

1. Ensure that potentially relevant documents (including electronically stored information, or “ESI”) are not destroyed, lost or relinquished to others, either intentionally or inadvertently through the implementation of an ordinary course document retention or destruction policy, including auto deletion processes;
2. Ensure that potentially relevant documents are not altered or modified (an issue that arises particularly in the case of ESI, which may be modified by the simple act of accessing the information); and
3. Ensure that potentially relevant information remain accessible so that it can be collected and produced if necessary.

B. Potentially Relevant Information.

Based upon information currently available, potentially relevant information includes:

- All information (paper documents and ESI) concerning, evidencing or relating to: _____
- All communications (including emails) to or from the following: _____
- All communications (including emails) concerning or relating to: _____
- All data concerning, evidencing or relating to: _____
- All documents concerning any checklists or processes you created for: _____
- All financial records related to: _____

You must act immediately to preserve the above-referenced information. Failing to take reasonable steps to avoid the loss, modification, corruption, or deletion of potentially relevant information may result in serious consequences, including litigation sanctions. Please document all actions that you take, including the dates thereof, to preserve potentially relevant information.

C. Definition of “Document.”

1. Paper/Hard Copy Documents.

The term “document” as used in the applicable Rules of Civil Procedure has a very broad scope. With respect to paper or hard copy documents, it includes virtually any form of recorded communication, including among other things correspondence, internal memoranda, memos to files, diary or calendar entries, handwritten notes, agreements, invoices, printouts of emails, bills, securities, vouchers, accounting

records and other such items. "Document" also includes sound recordings, videotape, film, photographs, charts, graphs, maps, plans, surveys, and data and other information in electronic form that has been printed out, as well as all originals, copies and drafts of the same document.

All potentially relevant hard copy documents must be preserved immediately.

2. Electronically Stored Information.

The obligation to preserve documents also applies to data and information that is stored electronically (ESI). The obligation extends to all ESI on any kind of electronic media, not only emails and word processing documents, but also spread sheets and other accounting data, the contents of databases, text messages, instant messages, electronically stored voicemail records, calendars, archived and deleted files, auto recovery files, web-based files such as internet history logs, temporary internet files, and "cookies" and "metadata."

It is essential to ensure that potentially relevant ESI is preserved intact and unmodified in its original electronic form, until counsel has had an opportunity to assess the relevance of the records and the appropriate means of collection and, if necessary, production of the records to opposing parties.

The largest repository of ESI typically will be a party's servers. However, a party may also have relevant documents/ESI contained on individual desktop computers, laptops, home computers, archives, personal digital assistants, cell phones, Blackberries, Palm Pilots, iPhones or similar multi-function devices, voicemail, digital cameras, other digital storage devices such as floppy disks, CDs, DVDs, zip drives, backup media, external hard drives, and USB ("thumb") drives.

Please ensure that the relevant ESI is preserved on each of the above devices. This includes ensuring that any employees who have relevant ESI are instructed to not delete any potentially relevant electronic records, including emails, and that steps are taken to capture and preserve such records, including their accompanying metadata. Relevant ESI can easily be destroyed or damaged through routine IT maintenance and/or automatic deletion policies and procedures, generally carried out by companies and individuals, or the use of computers or other electronic storage devices in the party's possession. Therefore, it is necessary to take immediate steps to preserve this ESI.

If you have backup media, please note that those are often recycled over a period of time. You must ensure that backup media for the relevant time period are removed from circulation and preserved until it can be determined whether they need to be searched as well.

Please be mindful that there may be others who might have records, documents or information relevant to [REDACTED]. If you know of any individuals who may have relevant records, information or documents, but who did not receive this letter, please provide those names to me so that I can send this notice. If you or an employee having relevant information are (or plan to be) leaving the employ (e.g., retirement, resignation), please contact me to ensure that any relevant information in your possession is preserved prior to departing.

D. Summary.

We regret any inconvenience that these efforts may cause. However, the law requires that once litigation is filed or is reasonably anticipated, all potential parties must maintain and not destroy any potentially relevant documents, including ESI, even if that means retaining documents well beyond minimum periods set out by law or company record-retention policies. These instructions supersede any other record retention policy. The relevant data must be preserved, even if [Client's] record keeping guidelines (formal or informal) otherwise would allow you to delete or otherwise destroy material. Destruction, modification, loss, or significant alteration of evidence can cause a party to lose possible

defenses and/or subject the party to civil and criminal penalties. Accordingly, preservation of potentially relevant documents is a matter of utmost importance.

In sum, please ensure that all necessary steps are taken to preserve all potentially relevant paper documents and ESI, as well as computer hardware, software and other electronic devices that contain potentially relevant electronically stored information. If you have any questions concerning the above, please do not hesitate to contact me.

Optional Language: Please sign and date the acknowledgment below and return a copy of the signed acknowledgment to me by [date].] (Please keep the original copy of this letter for your records.).

Sincerely,

LAW FIRM, PLLC

I, [NAME], hereby acknowledge that: (i) I received this litigation hold letter dated [] on [date]; (ii) I have read and understand the preservation obligations described herein; and (iii) I have taken reasonable steps to preserve all potentially relevant information in my possession, custody, and/or control.

Signature: _____

Date: _____

Sample Firm Wire Instruction Form

Firm C/M No.: _____ Transaction Date: ____/____/____ ☐ INCOMING WIRE ☐ OUTGOING WIRE ☐ OTHER _____

Sender(s): _____ Recipient(s): _____ Matter: _____

Notes: _____

☐ ANY CHANGE TO WIRE INSTRUCTIONS (INCOMING/OUTGOING) ****MUST START A NEW FORM (ATTACHING TO ORIGINAL FORM)**

<p>STEP 1: TRANSACTION TYPE</p> <p><input type="checkbox"/> Domestic <input type="checkbox"/> International</p> <p>Purpose of Wire: <input type="checkbox"/> Seller's Proceeds <input type="checkbox"/> Escrow <input type="checkbox"/> Firm Invoice(s) <input type="checkbox"/> Other: _____</p> <p>INCOMING WIRE - FIRM ACCOUNT: Amount: \$ _____ <input type="checkbox"/> Trust – Real Estate Iolita (Closing Atty/Para) <input type="checkbox"/> Trust - Iolita 2 (Accounting) <input type="checkbox"/> Receipts (Accounting)</p> <p><input type="checkbox"/> Email Accounting to notify of incoming wire (\$ and c/m#): ____/____/____ (Iolita 2 or, Receipts) - or - <input type="checkbox"/> Email to closing atty/para to notify of incoming wire (\$ and c/m#): ____/____/____ (Real Estate Iolita)</p> <p>OUTGOING WIRE: Amount: \$ _____ Bank: _____ Routing No. _____</p> <p>Account Name: _____ Account No. _____ Account Holder's Physical Address on Acct: _____ _____ _____</p> <p>Assistant Initials: _____</p>	<p>STEP 2: DELIVERY METHOD OF INSTRUCTIONS:</p> <p><input type="checkbox"/> RECEIVE - <i>or</i> - <input type="checkbox"/> SEND (if sending, must check 1 box below) <input type="checkbox"/> "SECURE" Email <input type="checkbox"/> Mail/Overnight <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Fax (____) _____ <input type="checkbox"/> Other: _____</p> <p>Note: If emailing wire instructions, use secure email by doing the following: _____.</p> <p>Instructions Sent or Received: ____/____/____</p> <p>CONTACT INFO FOR SENDER/RECIPIENT OF INSTRUCTIONS: Name: _____ Contact Ph: (____) _____ Email: _____ Party to Transaction: <input type="checkbox"/> Buyer <input type="checkbox"/> Seller <input type="checkbox"/> Lender <input type="checkbox"/> Other _____</p> <p>MUST COMPLETE VERBAL VERIFICATION <input type="checkbox"/> Verbal Verification of Instructions: ____/____/____ Note: must use "Contact Ph:" listed above, do <u>not</u> rely on individual that calls you. <input type="checkbox"/> Email to confirm verbal verification: ____/____/____ Note: If Sender/Recipient of instructions is unknown to Firm, must send email to confirm verbal verification</p> <p><input type="checkbox"/> Attach copy of wire instructions <input type="checkbox"/> Attach related emails <input type="checkbox"/> Email form to Accounting: ____/____/____ (Iolita 2, or Receipts) <input type="checkbox"/> Email form to Closing atty/para: ____/____/____ (Real Estate Iolita)</p> <p>Assistant Initials: _____</p>	<p>STEP 3: DELIVERY OF FUNDS VERIFICATION</p> <p><input type="checkbox"/> Confirm receipt of <i>incoming</i> funds Date: ____/____/____ Atty Initials: _____</p> <p><input type="checkbox"/> Attorney authorized <i>outgoing</i> wire Date: ____/____/____ Atty Initials: _____</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px; background-color: #f0f0f0;"> <p style="text-align: center; color: red;"><u>Only for use by Accounting/Closing atty/para</u> <u>OUTGOING WIRES ONLY</u></p> <p>Date: ____/____/____ <input type="checkbox"/> Outgoing Wire entered <input type="checkbox"/> Wire approved/released to BB&T (Cash manager online approval – 1 of 5 approved attorneys) <input type="checkbox"/> BB&T call back verification <input type="checkbox"/> BB&T cash manager online verification</p> <p>Atty Initials: _____ (only by approved attorneys) Initials of Accounting/Closing atty/para: _____</p> </div> <p><input type="checkbox"/> confirm receipt of outgoing wire Assistant Initials: _____</p> <p><input type="checkbox"/> Completed form w/supporting docs put in file. Assistant Initials: _____</p>
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****Must use separate form for each set of wire instructions/transactions**

SMITH LAW FIRM
Seller's Proceeds Directive

It is our goal to make the net proceeds available as soon as practical following closing. However, North Carolina law and State Bar ethics rules expressly prohibit disbursing prior to: (1) receiving authorization from the buyer's lender, (2) updating the title search and (3) recording at the local register of deeds office.

Please check the appropriate box below indicating how the proceeds should be directed:

In person pick-up

- ☐ I will pick-up the check in person. I understand I will be required to show photo ID to receive the proceeds. (No additional charge)
- ☐ I authorize _____ to pick-up the check in person. I understand the recipient will be required to show photo ID to receive the proceeds. (No additional charge)

Mail/FedEx

- ☐ I request the check be mailed USPS first class mail service to the following address (no additional charge):
- ☐ I request the check be overnighted to the following address (\$35.00 additional charge):

Wire (\$50.00 additional fee) .

- ☐ I request all proceeds be wired to the account indicated below. I understand THIS OFFICE WILL NOT ACCEPT CHANGES TO WIRING INSTRUCTIONS and any request to change instructions will be assumed to be fraudulent requiring the issuance of a check. This office will not send wires outside the United States. If this directive is not signed in the presence of a SMITH LAW OFFICES employee, I understand I will be contacted via a previously provided telephone number to verify wiring instructions and funds will not be transmitted until telephone verification is completed.

Bank ABA Number:	
Bank Name:	
Bank Location (City and State):	
Beneficiary Name:	
Beneficiary Address:	

Sellers:

_____ (SEAL)

_____ (SEAL)

STATE OF NORTH CAROLINA
COUNTY OF _____

Sworn to (or affirmed) and subscribed before me this day by _____ (name of principal).

Date: _____

My commission expires: _____

Notary's printed Name: _____

Sample Advice to Clients Regarding Social Media

SOCIAL MEDIA AND NETWORKING SITES

The North Carolina State Bar promulgated a new Ethics Opinion stating:

A lawyer must advise a client about information on social media if information and postings on social media are relevant and material to the client's representation. The lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.

If you post to Facebook, Reddit, Instagram, or if you Tweet, blog, post to YouTube, or use any other form of social media, be completely aware that whatever you write or post (or anything in your history or timeline) will likely become known during the course of your family law case. Searches and investigation into your online presence is now a standard practice. Your passwords and account credentials can be demanded in discovery. Login information is not privileged information and, in all probability, I will not successfully be able to mount a challenge to keep login credentials from being disclosed.

For all online accounts, you should immediately verify that all your settings are on PRIVATE (the highest setting possible) and that nothing is public. Even with the highest privacy settings, you should only write or post items that cannot be used to hurt you. Moreover, my suggestion is that you DEACTIVATE all your accounts. Do not delete or destroy any accounts, account history, postings, writings, video, or anything else you may have posted online.

If you decide to keep your site(s) open, consider the following specific recommendations:

Do Not:

- Allow anyone to become a "friend" on a website such as Facebook unless you are absolutely sure you know that person.
- Post any photographs or video of yourself (or enable others to "tag" you).
- Write or disclose anything about yourself, your personal or professional life, your friends, family, spouse, or any other third party that you will regret when it is displayed in front of a judge, or for which you would have to apologize for, or which can be interpreted as an "admission" against your interest, or anything else that can cast you in a negative light.
- Send e-mails, texts, posts or make any written statements regarding your case to anyone except your lawyers and our consultants.
- Participate in blogs, chat-rooms, or message boards.

If you do not take precautions, your online presence can be a treasure trove of information to be used against you. Your online material can be obtained and used to embarrass, humiliate or hurt you, or to compromise your legal claim and interests. Pictures, videos, and comments by you or your friends can be discovered and used.

Asking you to limit your social networking is a great inconvenience. I want you to be fully informed about the consequences of not being circumspect when using social media.