Welcome
Avoiding Legal Malpractice

Pennsylvania Bar Association
Professional Liability Committee

Director of County Bar Services
Susan E. Etter, Esq.
800-932-0311, x. 2256

Heinz 57 Center, 339 Sixth Avenue, Suite 760
Pittsburgh, PA 15222

As a PBA member, you get cost-saving benefits to help with your law practice

• Included with PBA membership
• Track billable hours spent doing online research for a client using the Client and Session Summary features
• App available for Android, iPhone and iPad
• Help is available by phone, live chat, free training webinars

Pennsylvania Libraries
PA Supreme Court opinions since 1754
PA Superior Court opinions since 1895 (includes unpublished opinions since 2009)
PA Commonwealth Court opinions since 1968 (includes unpublished opinions since 2008)
PA Court of Common Pleas opinions since 1918
PA Statutes, includes annual archived versions since 2010
PA Code
PA State Constitution
PA Court Rules – Civil and Criminal
PA Attorney General Opinions
PA State Ethics Opinions
Standard Jury Instructions – Civil & Criminal
Disciplinary Board Decisions

Federal Libraries
U.S. Supreme Court opinions since 1754
U.S. Circuit Court of Appeals opinions since 1789
District Court opinions since 1789
United States Court of Federal Claims opinions since 1855
Federal Register from 2001
U.S. Code (includes annual archived versions since 2000)
Federal Register from 2001
Federal Circuit from 1940
Federal Claims Court
General Services Administration
International Trade Commission
Patent Trial
Longshore and Harbor Workers Comp decisions since 1986

With payment of your PBA dues, you can activate up to $200 in tuition discounts for PBI courses!

www.pabar.org/site/ALM
ProPass Online

For just $399 ($199 for new attorneys), you have unlimited access for 12 months to PBI's award-winning selection of hundreds of on-demand videos and podcasts.

For the remainder of 2020, in response to COVID-19 restrictions, Pennsylvania lawyers are now able to meet their full 12-credit requirement with distance education.

Learn more on PBI's website: www.pbi.org

PBA Member Benefits

PBA Legislative Department

- Tracks over 4,000 bills per session – a few areas of legislative victories were in the areas of Uniform Fraudulent Transfer Act, Family Law, Custody, Real Property, Alimony, disposition of digital assets, terminally ill clients, Revised Uniform Arbitration Act/Collaborative Law Act.
- Lobbies on the Hill and builds relationships with legislators
- Services sections and committees with legislative agendas
- The PBA is an important partner in the effort to thwart any attempts to reduce advertising in county bar legal journals

The PBA has taken the lead, year after year, in opposing a sales tax on legal services. The threat of a sales tax on legal services typically comes up in the context of elimination of school property taxes. This year, a bipartisan, bicameral group of legislators along with representatives from the Governor’s office formed a work group on the issue of elimination of school property taxes. The threat of a sales tax on legal services is not going away!

Click on the Sales Tax on Legal Services Action Center for all the tools you need!

How to be an Effective Grassroots Activist Opposing A Sales Tax on Legal Services
Sales Tax on Legal Services Talking Points
Sales Tax on Legal Services News Articles
Find Your Legislators
Simple Legislator Email in Opposition to a Sales Tax on Legal Services
Contribute to the PABAR-PAC

PBA Member Benefits

PBA Law Practice Management

If you would like assistance on any business management challenge, please contact

PBA Law Practice Management Coordinator

Ellen Freedman, CLM
800-932-0311, x. 2228

There is also a resource section on the PBA website with a variety of helpful resources including articles, checklists, podcasts and listings of additional resources organized into categories to help you find what you’re looking for quickly and efficiently.

And, you can submit questions using the “Ask Ellen” link on the PBA web site.

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PBA Member Benefits

PBA Law Practice Management

Ellen Freedman's Professional Experience

- Before joining the PBA, Ellen managed inside law firms for twenty years.
- Most of that time was spent in a mid-size (35+ attorneys) firm environment.
- Certified Legal Manager through the Association of Legal Administrators (ALA), the credentialing body for the CLM degree. Of the 11,000 members of the ABA, approximately 160 are certified legal managers.
- Author and frequent speaker on law firm management issues on a national, regional and local level.
- Associate member of the ABA and its Law Practice Management and General Practice & Small Firm sections.
PBA Member Benefits

PBA Law Practice Management
Ellen Freedman, CLM, assists the PBA members with management issues and decisions on the business side of their practice, including areas like:
- technology,
- risk management,
- setting up a practice
- strategic planning, retreat facilitation
- practice management audits, human resources
- marketing and client development
- bookkeeping procedures, financial management and profitability enhancement
- project management

PBA Member Benefits

1. A partner is leaving the firm. How do we handle future fees for flat-fee or contingent ongoing cases which stay or go?
2. What's the right software for my firm for time & billing and practice management?
3. How long do I have to keep client files?
4. My partners and I are all getting on in years. The youngest of us is over 65 years old. We have no written agreement. How do we handle retirement or disability?
5. We have a staff member who had been with us a long time, but has become increasingly difficult in a number of ways. How do we handle it?
6. Do I need cyber insurance? If so, how much?

PBA Member Benefits

PBA Ethics Opinions
Ethics opinions are issued by the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, which responds to requests of any PBA member concerning the impact of the provisions of the Pennsylvania Rules of Professional Conduct upon that member's prospective conduct. The committee does not address questions about a lawyer's past conduct, disciplinary matters, matters in litigation or questions of law.

Members have access to a searchable database of 65 formal and 1,278 informal opinions from the PBA Committee on Legal Ethics and Professional Responsibility.

Ethics opinions of the committee are advisory only and are not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other court. An ethics opinion carries only such weight as an appropriate reviewing authority may choose to give it.

PBA Member Benefits

PBA Ethics Hotline
Victoria L. White, Esq.
800-932-0311, x. 2214

Any PBA member with an ethical question concerning his or her own prospective conduct may call the PBA Ethics Hotline or submit a written request for an ethics opinion to Victoria.White@pabar.org. These services are not available to the general public or to lawyers who are not members of the PBA.

PBA Member Benefits

PBA Professional Liability Committee
Monitors and makes recommendations concerning:
- lawyers’ liability case law and related statutes;
- administrative developments, including lawyers’ liability insurance coverage and the market for that insurance;
- the formation and operation of any PBA-related lawyer liability insurer, and PBA-sponsored or endorsed lawyers’ liability insurance programs.

The committee shall explore and conduct legal malpractice avoidance and loss-prevention programs.

PBA Member Benefits

• 50 Committees and 18 Sections
• Solo and Small Firm Section Listserv
• Free one year section membership (conditions apply)
Succession Planning
A message from the D-Board...
Commencing with the 2019-2020 annual attorney registration, an additional section regarding succession planning will be on the registration form. The section will require you to indicate whether you have or have not designated a successor. Although you are required to provide a response in this section, failure to have a designated successor is NOT a violation of the Rules of Professional Conduct or the Pennsylvania Rules of Disciplinary Enforcement.

Succession planning is essential to every attorney’s practice. Recognizing that the future is unpredictable, attorneys should strive to lessen the impact of unexpected interruption in their relationships with clients by taking protective measures. We believe by asking the question and sparking dialogue in the profession, perhaps we can address the concern that exists nationwide.

Avoiding Legal Malpractice

The ABA reports that a whopping four out of five lawyers will get sued for malpractice at some point in their careers.

70% of malpractice claims are filed against firms with one to five attorneys.

This year’s materials and program are based on 13 examples of a phrase we’ve probably all uttered or thought at one point in our careers, “I’m not going to get sued…”

All of the materials covered today and many more valuable resources related to the featured professional liability and responsibility topics in this year’s vignettes are available online.
pabar.org/site/ALM

CNA Policy Highlights
• Coverage for disciplinary proceedings up to $50,000
• Assistance in responding to a subpoena
• Coverage for discrimination complaints up to $25,000
• Optional extended reporting period - tail
• 50% reduction of deductible for quick (364 days) claim settlement
• Broad settlement clause – no “hammer” clause
• 50% reduction of deductible up to $25,000, if insured used an engagement letter (as defined by the policy) in connection with the legal services that are the subject of the claim
Engagement Letters

- Insurance providers study numbers and data.
- CNA has determined that documentation of the attorney-client relationship - in the form of an engagement letter - represents a critical risk control technique.
- So much so, that they are providing a significant financial incentive to attorneys who use an engagement letter.
- 50% reduction of deductible up to $25,000, if insured used an engagement letter (as defined by the policy) in connection with the legal services that are the subject of the claim.

Engagement Letters

- Engagement letters are designed to establish client expectations, reduce client misunderstandings, improve client communications, and provide opportunities for additional services.
- An engagement letter may not prevent legal malpractice claims, but if you ask any defense attorney in a lawyer malpractice claim, they will tell you how helpful the documentation can be if a claim arises and that a good one can support a stronger defense.

Engagement Letters

- When lawyers apply for malpractice insurance, the majority claim to routinely use engagement letters in their practices.
- When a malpractice claim is asserted, the lawyer’s file rarely contains an engagement letter.

What is required for the CNA discount - and even if you are not insured through CNA - these are best practices for you to consider in avoiding legal malpractice and in establishing clear communication with your client and setting the tone for the future attorney-client relationship.

Engagement Letters

- Scope of representation
  Documentation of the scope of the representation and the mutual responsibilities of the attorneys and their clients can often be a deciding factor in determining the responsibilities of both parties.
- Identity of client
- Fee arrangement
- File retention and destruction procedure
- Signed by the client.

Disengagement Letters

The end of an engagement and the “closing of your file” should be documented in the same way the commencement of an engagement is documented. If you fail to affirmatively end your engagement, you are still engaged.
CNA has developed the Lawyers’ Toolkit to assist attorneys in creating documents that will enable them to better manage their interactions with potential and actual clients. These sample documents are provided as a convenience for use in the practice of law and include language that attorneys may wish to consider using in their own agreements, letters, and waivers. Certainly, each sample document should be customized for every engagement and prepared in accordance with applicable professional and regulatory requirements in your particular area of law.

Sample Language
File Retention and Destruction
Bottom of page 7  CNA Lawyer’s Toolkit

File Retention and Destruction: At the conclusion of your matter, this matter will be closed, and we will retain a client file of your matter for a period of ____ years. We may store some or all client file materials in a digital format. In the process of digitizing such documents, any original paper documents provided by you will be returned to you. Any copies of paper documents provided by you will not be returned to you unless you request such copies in writing. After any or all paper documents are digitized, we will destroy all paper documents in the client file, subject to the exceptions noted above. At the expiration of the ____-year period, we will destroy all client file materials unless you notify us in writing that you wish to take possession of them. This clause applies to any client file materials being held or stored by a third-party vendor. [Before including the following language, law firms should research whether their jurisdiction permits the following types of expenses to be charged to clients.] We reserve the right to charge administrative fees and costs associated with researching, retrieving, copying and delivering such files, as delineated in the Expenses section of the Engagement Agreement.

Questions or Concerns?
PBA Endorsed (CNA)
Claims Repair Hotline: 888-200-5212

Members covered by the PBA—endorsed professional liability insurance program can speak confidentially with a representative who may help them head-off or mitigate a potential malpractice claim. Your early call to the Claims Repair Hotline may make all the difference!

“Lawyers, judges and law students are faced with an increasingly competitive and stressful profession. Studies show that substance use, addiction, and mental disorders, including depression and thoughts of suicide—often unrecognized—are at shockingly high rates.”

The Path to Lawyer Well-Being: Practical Recommendations for Positive Change August 2017

The findings are characterized as “incompatible with a sustainable legal profession.”

Recommendations are directed to these stakeholder groups: judges, regulators, legal employers, law schools, bar associations, liability carriers and lawyer assistance programs.


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Let us help you successfully manage life’s challenges.

Since 1988, we have discreetly assisted thousands of lawyers, judges, their family members and law students struggling with:

- Anxiety
- Depression
- Stress & Burnout
- Problematic Alcohol Use
- Problematic Prescription & Illicit Drug Use
- Grief & Loss
- Problematic Gambling
- Eating Disorders
- Emotional & Vicarious Trauma
- Compassion Fatigue
- Compulsive Behaviors & Other Mental Health Concerns

Confidential Services, Support & Information

All services are 100% confidential, voluntary, and provided at no charge

Our toll-free helpline is answered live 24 hours a day, 365 days a year.

1-888-999-1941

100% Confidential Helpline for:
- Lawyers
- Family members
- Colleagues
- Law Students
- Judges

13 attorneys who said...

I’m not going to get sued

1 7 20

1: I’ve been practicing for 45 years...
2: I have a thorough client Billing system implemented by my staff...
3: My clients love me...
4: Cheaper clients can’t complain if I cut corners...
5: I’m just the scrivener...
6: I explain the risks and everything to my clients, if something goes wrong, they won’t blame me...
7: I lost a case, it was all my fault...
8: I’ve been practicing 45 years...
9: I often handle cases in other jurisdictions...
10: I’ve been practicing for 45 years...
11: I’m stressed, I can’t sleep, I’m worried about a case...
12: I practice in wills, estates, trusts and probate. The deceased don’t complain...
13: I’m a brand new lawyer...

Succession Planning


- A lawyer shall act with reasonable diligence and promptness in representing a client.
- Comment (5) To prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action.

Ways to Wrap-up Practice

Voluntarily

- Retire
- Sale
- Partner/Merger/Affiliation/Of Counsel

Involuntarily

- Disability
- Death
- Discipline
Concerns for Aging Lawyers

- Retire or Keep Working?
- Financial Pressures
- “My Files”
- Future Income
- Not knowing when to say when

Extended Reporting Period

Also called a Tail. Tail coverage addresses the continuing possibility of claims after:

- Law firm dissolves
- Attorney retires or leaves private practice, death, disability (Non-Practicing ERP)
- Generally provides coverage for claims arising from conduct within the policy period, which would otherwise be covered by the policy but the claim is first made during the extended reporting period.

Extended Reporting Period

If an insured ceases, permanently, and totally, the private practice of law during the policy period due to:

- Death or disability; or any other reason

Some carriers provide an Unlimited ERP at no additional charge if insured for 3 consecutive years

Deductible is sometimes waived

New Rule 1.17 effective October 2016

Area of practice can be sold if:

- Information exchanged appropriately
- Appropriate notice given to clients
- Lawyer ceases to practice in that area
- Conflicts addressed
- Orderly transition (fees etc.)

I'm a brand NEW lawyer …

I'm not going to get sued

- Competence
- Dabbling
- Client Selection
- Law Practice Management
- Duty to inform client of no insurance

Pa.R.P.C. Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
Pa.R.P.C. Rule 1.1: Competence

- A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.
- A lawyer can provide adequate representation in a wholly novel field through necessary study — [or] though the association of a lawyer of established competence in the field in question.

Dabbling

- More than 60% of claims involve attorneys who practice less than 20% of the time in the area that is the subject of the claim.
- Lawyers who practice almost exclusively in one area of law account for less than 7% of claims.

When is it worth the risk to dabble?

- Relative complexity and specialized nature of the matter.
- Lawyer’s training and experience in the field in question.
- Time and attention the lawyer is able to devote to the matter.
- Whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.
- In many instances, the required proficiency is that of a general practitioner.

Client Selection – Yellow/Red Flags

- Is the client unreasonably concerned about cost?
- Does the client have a history of drug use, addiction, spotty work history or bad credit?
- Does the client have unreasonable expectations?
- Is the client vindictive or motivated by revenge?
- Are you the second or third lawyer?
- Does the client appear to want to micromanage the case?

Explanatory Comment 1, Rule 1.1 (Competence)

Law Practice Management

- Manage Client Expectations
  - At start and throughout the course of the matter
  - Discuss outcomes, timing and fees/expenses
- Meet or Beat Deadlines
  - Under promise and over deliver
  - Avoid procrastination
- Communication
  - Document, document, document

Duty to inform client of no insurance

A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year ...and shall inform existing clients in writing at any time the lawyer’s professional liability insurance drops below either of those amounts or the lawyer’s professional liability insurance is terminated...

Pa.R.P.C. Rule 1.4(c)
My clients LOVE me …

I'm not going to get sued

- Not recognizing risk of a claim
- Client communication
- Managing client expectations

Pa.R.P.C. Rule 1.4 - Communication

(a) A lawyer shall:
   (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
   (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
   (3) keep the client reasonably informed about the status of the matter;

Pa.R.P.C. Rule 1.4 - Communication

(a) A lawyer shall:
   (4) promptly comply with reasonable requests for information; and
   (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Manage Client Expectations

- Don’t Allow Unreasonable Expectations To Exist
- Don’t Guarantee Outcomes
- Discuss All Potential Outcomes – Good and Bad
- Identify and regularly revisit the client’s goals and expectations of the process and outcome.
- Educate the client on the process and its unpredictability
- Stay in touch!

Avoid Missed Deadlines

- Missed deadlines
- Duty to supervise
- Delegation of work
- Responsibility for subordinate mistakes

I have a terrific diarying system implemented by my staff…

I'm not going to get sued

- Missed deadlines
- Duty to supervise
- Delegation of work
- Responsibility for subordinate mistakes

Manage Client Expectations

- Don’t Allow Unreasonable Expectations To Exist
- Don’t Guarantee Outcomes
- Discuss All Potential Outcomes – Good and Bad
- Identify and regularly revisit the client’s goals and expectations of the process and outcome.
- Educate the client on the process and its unpredictability
- Stay in touch!

Avoid Missed Deadlines

- Calendar system with one point of entry
  - Don’t have multiple calendars – one at home, one at the office and sticky notes elsewhere – disaster waiting to happen
  - Centralized shared calendar
  - Easy to use system
  - Train office staff on use of calendar
  - Take time to review calendar
Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers

a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm confirm to the Rules of Professional Conduct.

b) a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Rule 5.3 Responsibilities regarding nonlawyer assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

a) a partner and a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.

b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.

Pa.R.P.C. Rule 5.5

Comment 2: Unauthorized Practice

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.

Signing Up the Client

Engagement/Disengagement/Termination Letters

Rule 1.5(b)
When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

Rule 1.2
Lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 1.4
Advise the client in writing if the lawyer doesn’t meet the professional liability requirements.

Engagement Letters

- When lawyers apply for malpractice insurance, the majority claim to routinely use engagement letters in their practices.
- When a malpractice claim is asserted, the lawyer’s file rarely contains an engagement letter.
- You must save your engagement letter for 5 years.

I explain the risks and everything to my clients, if something goes wrong, they won’t blame me. I’m not going to get sued.
Engagement Letters

Policy Endorsement:
“If the Insured utilized an engagement letter in connection with the legal services that are the subject of a claim, and such claim is otherwise covered under the Policy, then the Insured’s deductible applying to such claim will be reduced by 50%....”

Engagement Letters

Include, at a minimum, the following information:
- Scope of undertaking
- Identity of client
- Fee arrangement
- File retention and destruction procedure
AND
- Signed by the client.

Pa. R.P.C. Rule 1.4 (a) Communication

A lawyer shall:
1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent is required
2) reasonably consult with the client...
3) keep the client reasonably informed...
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.

Cheap clients can’t complain if I cut corners...

- Declining representation
- Low/no pay = impaired judgment
- Low/no pay = sloppy work
- Document advice / decision to cut any corners

Accepting or Rejecting a New Client or a New Matter?

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

Accepting or Rejecting a New Client or a New Matter?

- Rule 1.16 – A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.
Pa.R.P.C. Rule 1.1: Competence

- A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.
- A lawyer can provide adequate representation in a wholly novel field through necessary study — [or] though the association of a lawyer of established competence in the field in question.

Attorney / Client Relationship?

- Privity
- Implied attorney-client relationship
  - Purported client sought advice from the attorney;
  - The advice sought was within the attorney’s professional competence;
  - The attorney expressly or impliedly agreed to render such advice; and
  - The putative client reasonably believes that the attorney is providing representation.

Scrivener/Lawyer for the Transaction

As evidence of the dangers associated with being the “lawyer for the transaction” see:
- Fiorentino v. Rapoport, 693 A.2d 208 (1997)

Rule 1.2 (c) – Limiting Scope of Representation

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Engagement Letters

- When lawyers apply for malpractice insurance, the majority claim to routinely use engagement letters in their practices.
- When a malpractice claim is asserted, the lawyer’s file rarely contains an engagement letter.
- You must save your engagement letter for 5 years.
Policy Endorsement:
“If the Insured utilized an engagement letter in connection with the legal services that are the subject of a claim, and such claim is otherwise covered under the Policy, then the Insured’s deductible applying to such claim will be reduced by 50%....”

Engagement Letters
Include, at a minimum, the following information:
- Scope of undertaking
- Identity of client
- Fee arrangement
- File retention and destruction procedure
  AND
- Signed by the client.

Conflicts
- Rule 1.7 Conflict of Interest: Current Clients
- Rule 1.16 – A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.
- Can one lawyer represent a married couple in the creation of an estate plan? Are there circumstances when both husband and wife require separate counsel? (Rules 1.7, 1.8)

Pa.R.P.C. Rule 1.1: Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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- A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.
- A lawyer can provide adequate representation in a wholly novel field through necessary study... [or] though the association of a lawyer of established competence in the field in question.

Conflicts were meant to be waived...
I’m not going to get sued
- Non-waivable conflicts
- Protecting confidential information
- Advanced conflict waivers
- Informed Consent
Advance conflict waivers

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer’s representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.


Advance conflict waivers

Requires “predicting the future” to obtain the client’s full, intelligent, informed and free consent.

A client’s open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter and has had the opportunity to receive independent legal advice about the consent.


Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1) the representation of one client will be directly adverse to another client; or
2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.7 Conflict of Interest: Current Clients

• Informed consent is required to waive a conflict.
• Informed consent – requires that each affected client be aware of the relevant circumstances and of the material and foreseeable ways that the conflict could have adverse effects on the interest of that client...including effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.

Rule 1.7, Comment 18

Pa. R.P.C. 1.7 - Comment 8

(8) Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Conflicts

• Rule 1.7 Conflict of Interest: Current Clients
• Rule 1.16 – A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.
• Can one lawyer represent a married couple in the creation of an estate plan? Are there circumstances when both husband and wife require separate counsel? (Rules 1.7, 1.8)
I practice in wills, estates, trusts and probate. The deceased don’t complain … I’m not going to get sued.

- Areas of practice with higher risks of claims
- Duty of care/privity
- Defining the client
- Defining the engagement
- Claims/Challenges to fees/Risks of surcharge

Wills, trusts and estates matters require a thorough knowledge of multiple areas of the law including:

- Wills
- Probate
- Trusts
- Taxation
- Insurance
- Property
- Real estate issues
- Executor
- Domestic relations
- Guardianship
- Corporate and business issues
- State and federal laws

Malpractice Errors

Most frequent malpractice errors claimed against wills, trusts and estates practices
- Improperly drawn/recorded documents
- Improper handling/disbursement of funds
- Conflicts of interest
- Failure to follow client’s instruction
- Failure to understand/anticipate tax
- Failure to know/accurately apply the law

Attorney / Client Relationship?

- Privity
- Implied attorney-client relationship
  - Purported client sought advice from the attorney;
  - The advice sought was within the attorney’s professional competence;
  - The attorney expressly or impliedly agreed to render such advice; and
  - The putative client reasonably believes that the attorney is providing representation.


What is the Undertaking?

- What are you going to do for the client(s)?
- What are you not going to do for the client(s)?
- Are you the lawyer or the fiduciary? Or both?

Engagement Letters

- When lawyers apply for malpractice insurance, the majority claim to routinely use engagement letters in their practices.
- When a malpractice claim is asserted, the lawyer’s file rarely contains an engagement letter.
- You must save your engagement letter for 5 years
Engagement Letters

Policy Endorsement:
“If the Insured utilized an engagement letter in connection with the legal services that are the subject of a claim, and such claim is otherwise covered under the Policy, then the Insured’s deductible applying to such claim will be reduced by 50%....”

Engagement Letters

Include, at a minimum, the following information:
- Scope of undertaking
- Identity of client
- Fee arrangement
- File retention and destruction procedure
AND
- Signed by the client.

Surcharge Actions

“Importantly, an estate counsel must exercise the required degree of skill, knowledge and diligence, and [where an attorney’s] negligence results in loss or waste to the estate, the court may impose a surcharge by way of awarding reduced compensation or no compensation at all.”


Pa.R.P.C. Rule 1.1: Competence

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

Pa.R.P.C. Rule 1.1: Competence

- A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.
- A lawyer can provide adequate representation in a wholly novel field through necessary study ... [or] though the association of a lawyer of established competence in the field in question.
Dabbling

- More than 60% of claims involve attorneys who practice less than 20% of the time in the area that is the subject of the claim.
- Lawyers who practice almost exclusively in one area of law account for less than 7% of claims.

When is it worth the risk to dabble?

- Relative complexity and specialized nature of the matter.
- Lawyer’s training and experience in the field in question.
- Time and attention the lawyer is able to devote to the matter.
- Whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.
- In many instances, the required proficiency is that of a general practitioner.

Pa.R.P.C. Rule 5.5 Comment 1

(1) A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer’s direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person’s jurisdiction.

Manage Client Expectations!

- Don’t guarantee success or assure something bordering on success
- Disabuse client of notion that their matter will end the same way as their friend’s or family member’s matter
- Update client on developments which change early risk assessments

When Do I Report a Claim?

- What is a claim for insurance reporting purposes?
- Do I have to report potential claims to my carrier?
- What happens if I switch carriers?
- What are claims made policies?
PBA Avoiding Legal Malpractice

Notifying Insurer of Claims

**Claim**
A demand made upon any insured for loss, ... including, but not limited to service of suit or institution of arbitration proceedings or administrative proceedings against any insured.

..... must always be reported to your insurer.

**Potential Claim**
Any act, error, omission, circumstance or personal injury which might reasonably be expected to give rise to a claim.

..... Need not be reported if you are a CNA insured and you continue to renew your CNA policy from year to year.

**Notifying Insurer of Claims**

- Reporting to carrier
- Communicating with client
- Duty to keep client reasonably informed
- Duty of candor
- Personal interest conflict

**Pa.R.C. Rule 1.4 - Communication**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
Pa.R.P.C. Rule 1.4 - Communication

(a) A lawyer shall:
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Duty of Candor to Client

- Pa.R.P.C. Rule 1.4(a) requires an attorney to keep a client informed about the status of a matter and promptly reply to reasonable requests for information
- Pa.R.P.C. Rule 1.4(b) requires a lawyer to explain matters to a client to the extent necessary to permit the client to make informed decisions regarding the representation
- Pa.R.P.C. Rule 8.4(c) prohibits "dishonesty, fraud, deceit or misrepresentation."

Must you tell the client?

Rule 1.4 "requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client’s representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client’s representation."

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 481

I’m stressed, I can’t sleep, I’m worried about a case …
I’m not going to get sued.

PBA Ethics Hotline

Any PBA member with an ethical question concerning his or her own prospective conduct may call the PBA Ethics Hotline at 800-932-0311, ext. 2214

• Call the Claims Repair Hotline
• Call the PBA Ethics Hotline
• Report to the Carrier
Claims Repair Hotline

- Free, confidential call with an attorney
- Objective advice from experienced attorneys who practice in lawyer liability
- Can help with claims repair or avoidance
- Call has no impact to premium because it is not reported to carrier

888-200-5212

Notifying Insurer of Claims

Claim
A demand made upon any insured for loss, ... including, but not limited to service of suit or institution of arbitration proceedings or administrative proceedings against any insured.

... must always be reported to your insurer.

Notifying Insurer of Claims

Potential Claim
Any act, error, omission, circumstance or personal injury which might reasonably be expected to give rise to a claim.

... Need not be reported if you are a CNA insured and you continue to renew your CNA policy from year to year.

Notifying Insurer of Claims

Better Practice
Report even potential claims to receive claims repair advice and to assure that insurer does not later deny coverage by contending that what you thought was a “potential claim” was really a “claim.”