

**THE  
FUNDAMENTALS  
OF  
LOSS PREVENTION  
FOR  
LAWYERS**

ISBA MUTUAL INSURANCE COMPANY

## CHAPTER 6.

### FILE DOCUMENTATION, MANAGEMENT AND RETENTION

File documentation plays several critical roles in the risk management process. First, an attorney who keeps detailed and neat files is less likely to misplace an important paper or skip a deadline. Second, an attorney who regularly corresponds with her client and documents all major decisions made by the client is less likely to be sued over a misunderstanding with the client. Finally, an attorney who has a complete file will be better prepared to defend herself against a malpractice claim.

Ask yourself this simple question: **If you were sued for malpractice on any given matter, would the paper file substantiate the legal services you performed and verify the client's consent to all vital decisions?** If not, your file documentation procedures need improving.

#### File Documentation

Time and time again attorneys who are sued for legal malpractice have no documentation to back up their version of events. Instead, it becomes a battle of the attorney's word against the client's — a battle the attorney rarely wins. In order to avoid such misunderstandings, attorneys should train themselves to document in the following circumstances:

1. **Document a client's instructions to proceed in a manner against the client's best interests.** Whenever a client instructs you to take a course of action against the client's best interests, an alarm should sound in your brain warning you to "document, document, document." If you don't document these instructions, the client may later regret her course of action and allege that you were not acting with her permission.

Example: Attorney represents Wife in a divorce action. Husband owns stock in a few small, closely held corporations. During a conference at which many subjects are discussed, Attorney advises Wife to hire an appraiser to establish a value for the shares. Wife is determined to keep the legal fees to a minimum and instructs Attorney to accept Husband's estimate of the stock's value. Attorney complies and the divorce is finalized.

A year later Wife is having financial difficulties and starts to believe that she did not receive her just share in the divorce. Wife believes Husband's stock was in fact worth far more than originally estimated. Wife doesn't remember her five minute conversation with Attorney regarding the decision not to obtain the appraisals and blames Attorney. She sues Attorney for legal malpractice alleging that the assets were undervalued due to Attorney's negligence. Attorney does not have any written proof to the contrary. Attorney should have taken ten minutes and drafted a letter to Wife memorializing her decision not to pay for the appraisals.

Lawyers who practice in highly emotional areas such as family law are more exposed to this problem. Clients who are under a great deal of stress or who are emotionally distraught often instruct their attorneys to pursue a particular course of action that they later regret. Common sense therefore dictates that attorneys document the representation more carefully in these situations.

2. **Document the unusual.** Get in the habit of identifying and documenting unusual circumstances that arise during the course of your representation of a client.

Example: Farmer owns 9/10ths of the family farm and his sister owns the other 1/10th. Farmer decides to sell the farm. He instructs Attorney to divide the proceeds of the sale equally between himself and his sister. Attorney completes the sale as requested.

Farmer dies a few months after the sale. Farmer's children sue Attorney for legal malpractice, alleging that Attorney negligently distributed 1/2 rather than 1/10th of the proceeds to their aunt, thereby depriving them of that portion of their father's estate. Attorney has no documentation to verify Farmer's instructions to her. This could have been accomplished with a letter to Farmer restating his instructions.

3. **Document the client's consent to all major decisions.** Despite the best efforts of any attorney, sometimes things just don't go your client's way. Unfortunately, many clients cannot accept defeat. Instead, they choose to second guess their attorneys or have selective memories regarding decisions that were made during the course of the representation. Let's look at a few examples:

Example A: Client hires Attorney to represent Client with respect to injuries Client suffered in a work-related accident. In addition to the worker's compensation claim, Attorney investigates the merits of a medical malpractice claim against the doctor who treated Client and a products liability claim against the manufacturer that produced the machine that injured Client. Client verbally agrees not to pursue either the medical malpractice or the product liability claim because the chances of success seem remote and the cost of pursuing the claims would be significant. After the statute of limitations period has run on these claims, Client sues Attorney for failing to pursue the additional causes of action. Attorney has no documentation of Client's decision not to pursue the additional actions.

Example B: Attorney represents Wife in a divorce. Wife instructs Attorney to waive maintenance because she wants to "preserve her friendship" with Husband. Attorney complies and the divorce is quickly finalized. A year later, Wife is barely making ends meet and regrets her decision to waive maintenance. She sues Attorney for legal malpractice alleging that Attorney was negligent in not recommending that Wife seek maintenance.

Both of these claims could have been avoided (or successfully defended) if Attorney had taken the time to send her client a letter verifying the client's instructions.

4. **Document all demands/offers and the client's response.** All settlement demands and offers should be documented so that an attorney has proof of what transpired. If demands or counteroffers are conveyed verbally during the heat of battle, write the demand or offer on a piece of paper and have your client sign it, indicating her approval or rejection. At a minimum, confirm the day's events with a letter to the client later that day. If you don't take this precaution and things turn sour, it will be your word against the client's.

This precaution is particularly important for defense attorneys who may be dealing with several different corporate representatives. For example, the claims handler who verbally approved a defense strategy yesterday may be gone or outranked by a superior tomorrow.

5. **Increase your documentation for troublesome clients.** What do you do with a troublesome client who is second-guessing you every step of the way? Document the representation very carefully (assuming withdrawal is not an option). In our experience, these clients are the first ones to sue you over an unfavorable result or their legal bill.
6. **Send letters to unrepresented parties.** As noted in Chapter 2 on Conflicts of Interest, attorneys who are involved in matters with unrepresented parties are sometimes later sued by the unrepresented individual who claims that an attorney-client relationship in fact existed. In order to avoid such claims, we recommend that you send a letter to the unrepresented party as soon as possible stating that you do not represent the individual, that the interests of your client are or may be adverse to that individual, and that the unrepresented individual should seek independent legal counsel immediately. **(See Attachment No. 4 for a Sample Letter to an Unrepresented Party.)**
7. **Document telephone calls.** Get into the habit of documenting all significant telephone calls, including conversations with clients, witnesses, opposing counsel, and experts. These telephone records will provide proof that you were attentive to the client, particularly if you work on a contingency fee basis and will not have the luxury of producing time sheets.

There are several ways to document telephone conversations. Some attorneys document important calls on the notepad section of their computers. Others keep a pad of paper handy at their desk. When they receive a call, they jot down the date, the caller's name and anything of significance that is said. Still other attorneys use preprinted telephone conference pads on colored paper. They record all significant conversations on these pads and then file them in the client file. **(See Attachment No. 11 for a sample Telephone Conference Memorandum.)** If all else fails, keep the "pink slips" your receptionist fills out when a call comes in and write down on the pink slip the date you returned the call and a brief notation on anything of substance that was discussed.

8. **Retain a record of your research.** Attorneys should maintain notes on the research they perform. While you do not have to retain a copy of every case or statute which you consulted, you should at a minimum keep a list of the citations.

Furthermore, if you retain a printout of your Lexis or Westlaw searches, you won't end up re-running them months later when you can't remember exactly how you phrased the search. In addition, by maintaining research notes, others in the office will be able to pick up the file and continue where you left off. Finally, if sued, you will be able to prove that you adequately researched the case or matter in question.

9. **Retain copies of all drafts of agreements and contracts.** During contract negotiations, many provisions are revised and/or deleted from the original draft. Retaining copies of prior drafts with notations as to why changes were made will enable you to later prove that critical provisions were revised or deleted at the client's instruction. Some attorneys accomplish this task by making handwritten notes in the margins of draft documents indicating whether the client instructed them to pursue or drop a specific provision. This is particularly important when your client asks you to drop a critical provision because it is a "deal breaker." (Note: You may destroy drafts that contain only typographical corrections.)
10. **Send a disengagement letter when you are withdrawing from representation.** Attorneys who withdraw from representation prior to the completion of a matter should send the client a withdrawal letter, even if the client is the one who requested the withdrawal. The withdrawal letter serves as proof of the date the representation ended. This can be important in establishing your innocence if a subsequent attorney commits malpractice with respect to that file. It also puts the client on notice of her need to seek other counsel.

In addition, never rely on the subsequent attorney's entrance of an appearance to terminate your representation. You must independently withdraw so there is no confusion as to when representation was terminated. (See Attachment Nos. 12 and 13 for sample withdrawal letters.)

### File Management

Implementing the following procedures in your office is one of the best ways to reduce the likelihood of a malpractice claim:

1. **Establish routine procedures for file openings.** Files should be opened immediately after an attorney accepts a new matter or client. The new file should contain copies of: (a) the New Client/Matter Intake Form; (b) the engagement letter or contingency fee agreement; and (c) the completed Conflict of Interest Search Form.
2. **Establish standard subfiles by practice area for all new files.** Take an afternoon and make a list of each area in which you practice. Then determine standard file and subfile names for each of these practice areas. For example, a medical malpractice file might contain subfiles for: medical authorizations and records, expert reports, correspondence, pleadings, depositions, and research. Once you have established the standard file categories, your secretary can automatically prepare each new file. If you practice with other attorneys, try to

establish standardized files throughout the firm. This process will make filing easier for everyone and insure the quality of the firm's documentation.

3. **Weekly filing.** Establish a rule that all new correspondence and other materials must be filed in the appropriate client file by Friday of each week. If the filing is delayed for weeks, an attorney reviewing the file may miss an important document or piece of correspondence.
4. **Maintain files in a central location.** All files should be kept in a centralized location when they are not being used by an attorney. Require all attorneys and staff to fill out a file "out" card when withdrawing a file from the central filing location.

### File Retention and Destruction

How long should an attorney retain a client file after the matter is completed? This is an important question because an attorney who destroys client files too quickly may be destroying her best defense to a legal malpractice claim. Unfortunately, there is no simple answer to this question. There are, however, general guidelines that private practitioners can follow in determining when to retain and when to destroy a file.

#### 1. **File Closing Procedures**

Your file destruction procedures should begin the moment you close a client file. First, the file should not be officially closed until the attorney who is primarily responsible for the matter has determined that all work on the matter has been completed, including routine post-judgment and post-closing duties. Such clean-up work might consist of filing a UCC statement or verifying that the beneficiary on an insurance policy has been changed. Second, the contents of the file should be carefully reviewed. Does it contain all documentation relating to the client representation, including fee agreements, conflict waivers, client consents, drafts of contracts, research, telephone slips and the like? Nothing should be discarded except duplicate copies and drafts that involve typographical changes.

Finally, the file should be reviewed to insure that all documents or materials originally furnished by the client are returned. If the original client papers contain substantive information, they should be copied before being returned to the client.

The file is now ready to receive a file-closing date. These dates are valuable because they allow the firm to track how long a closed file has been retained. In this manner, the firm can review its closed file list annually and destroy only those files that have been retained for the required number of years. Many firms also add color codes to closed files or write the word "CLOSED" on the file covers so they cannot be confused with active files.

#### 2. **When to Destroy Files**

First and foremost, never destroy a file until both the statute of limitations and repose for bringing a legal malpractice action with respect to that file

has expired. Currently, all legal malpractice actions accruing on or after January 1, 1991 must not only be brought within two years from the time the plaintiff knew or reasonably should have known of the injury for which damages are sought (the statute of limitations), but additionally "may not be commenced in any event more than six years after the date on which the act or omission occurred," (the statute of repose). We therefore recommend that lawyers keep their files for at least six years, subject to the exceptions noted below. Many lawyers round off that six-year period and keep all files for a minimum of ten years.

### **3. Exception for Wills**

Attorneys should retain their wills and estate planning clients files until at least two years after the death of the client, unless letters of office are issued or the person's will is admitted to probate within that two-year period, in which case the legal malpractice action may be commenced within the time for filing claims against the estate or a petition contesting the validity of the will, whichever is later. (Although the Civil Justice Reform Amendments of 1995 eliminated the exception in the statute of limitations for causes of action accruing upon the death of a client, the Act was declared unconstitutional in 1998.)

### **4. Other Exceptions**

The following is a list of other files that should be kept more than ten years:

- matters involving a minor or disabled individual who is still a minor or disabled at the end of ten years
- contracts or judgments to be paid off in excess of ten years
- files establishing a tax basis
- adoption files
- patent files that may have to be retained in excess of ten years according to patent office rules
- corporate books and records
- some support and custody files

### **5. Label files with special retention requirements**

In order to avoid destroying files with unique retention issues, it is recommended that firms mark these files ("REVIEW BEFORE DESTROYING") so that they can be easily identified as files that should not be destroyed without further investigation.

## **6. Ethical Rules Regarding Record Retention**

The Illinois Rules of Professional Conduct are silent with respect to retention of client files. The Rules do however require practitioners to retain other client-related documents for specific time periods. In particular, the Rules set forth time limits for maintaining trust account records (seven years after the representation, Rule 1.15(a)) and advertisements and communications concerning the lawyer's services (three years, Rule 7.2(a)(1)). In addition, the Illinois Supreme Court Rules require lawyers to retain financial records relating to their practice for not less than seven years. (Rule 769) Finally, Supreme Court Rule 769 requires attorneys to keep a record of the names and last known addresses of all past and present clients.

## **7. File Destruction Procedures**

There is no direct guidance in the Illinois Rules of Professional Conduct on file destruction. The best approach is to obtain client consent regarding file destruction procedures at the beginning of the representation. We suggest including a provision in your engagement letter or contingency fee agreement that specifies when the file will be destroyed and provides the client with procedures to obtain his portion of the file prior to its destruction. For a detailed discussion of what parts of a file the client should have access to, see ISBA Advisory Opinion 94-13.

Lastly, make sure that you destroy the files in a manner that does not compromise client confidences. Merely placing the files in the garbage is not sufficient. Destruction should be by shredding or incineration. (Many file storage companies provide these services.)

Above all, don't forget that the client file is your most valuable weapon in a legal malpractice action. If you destroy that file prematurely, you are destroying the ability to defend yourself.