

AVOIDING MALPRACTICE

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I. HOW TO AVOID BEING THE TARGET OF A MALPRACTICE CLAIM¹

A. Standards for Potential Legal Malpractice: In order to recognize areas of potential legal malpractice, it is first necessary to understand the essential elements of a malpractice claim.

1. Basic Elements

The basic elements of a legal malpractice claim, which are set forth in *Harline v. Barker*, 912 P.2d 433 (Utah 1996), are as follows:

[A] plaintiff must plead and prove (i) an attorney-client relationship; (ii) a duty of the attorney to the client arising from their relationship; (iii) a breach of that duty; (iv) a causal connection between the breach of duty and the resulting injury to the client; and (v) actual damages.

Id. at 439; *see also Day v Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (1996) (“[A] duty owed to the client by the attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake.”).

The elements of a legal malpractice claim are nothing more than the fundamental elements of any negligence claim. *J. Randolph Evans*, *Legal Ethics*, 47 *Mercer L. Rev.* 197, 204 (1995). Other potential legal theories involving legal malpractice include breach of contract, malicious prosecution, fraud or defamation. Charles W. Stotter, *Legal Malpractice in New Jersey*, 608 *PLI/Lit* 249, 258-275 (1999); Michael F. Skolnick, *Understanding Legal Malpractice*, 11-Feb *UTBJ* 13, 16 (1998); Paul F. Mahaffey, *Legal*

¹ Addressing the issue of how to avoid legal malpractice claims is not only for the purpose of providing information to attorneys on how to avoid claims against them, but also, and, importantly, for the purpose of informing the practitioner of areas of potential malpractice in order that he or she can better protect the interest of the client.

Malpractice, An Overview, 61 N.Y.St.B.J. 32, 34 (1989). A legal malpractice claim can also be based upon a breach of fiduciary duty. The elements of a legal malpractice claim based upon a fiduciary duty are stated in *Roderick v. Ricks*, 54 P.3d 1119 (Utah 2002):

The essential elements of legal malpractice based on breach of fiduciary duty include the following: (1) an attorney-client relationship; (2) breach of the attorney's fiduciary duty to the client; (3) causation, both actual and proximate; and (4) damages suffered by the client.

Id. at 1125.²

As to claims based upon a breach of standard of care, such as a typical malpractice claim, an attorney is only held to the standard of a competent attorney, based on the circumstances. *Day v Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (1996). An attorney is not liable for malpractice if an attorney fails or is unable to provide extraordinary skill. *See generally*, Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 Geo. J. Legal Ethics, 915 (1998); Deborah J. Williamson, casenote, *Simko v. Blake: A Discussion of the Standard of Care in Legal Malpractice Cases*, 1996 Det.C.L.Mich. St. U.L. Rev. 129, 130-135 (1996); J. Randolph Evans, *Legal Ethics*, 47 Mercer L. Rev. 197, 204-05 (1995). If a matter is relatively simple, and the value of the matter does not justify a significant expenditure of time, the attorney is only required to expend an appropriate amount of time in preparation. *Id;* *but see*, Sheila Reynolds,

² Although the cases state that a claim of malpractice must be based upon an “attorney-client relationship,” *Bennett v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17, 28 (Utah 2003) (stating “ the existence of an attorney-client relationship is an indispensable element of a cause of action for legal malpractice”), as discussed hereafter, under certain circumstances a malpractice claim can be asserted by a third-party nonclient. *E.g.*, *Charleston v. Hardesty*, 108 Nev. 878, 882-83, 839 P.2d 1303, 1306-07 (1992). It is also noted that an attorney-client relationship can be created informally, and even if services are rendered gratuitously. *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 618 (1992).

Practice Traps in the Law Budget Case, 17-Fall Fam. Advoc. 44 (1994).³ Strategic or tactical decisions, made in good faith, generally cannot be utilized as the basis of a malpractice claim, unless the error is so gross that no reasonable attorney would have elected the strategy or tactic. Deborah J. Williamson, casenote, *Simko v. Blake: A Discussion of the Standard of Care in Legal Malpractice Cases*, 1996 Det. C. L. Mich. St. U. L. Rev. 129, 149-150 (1996). Although there is a trend in the courts to allow claims of malpractice to proceed based upon errors in strategy or tactics.

The American Law Institute (“ALI”) has adopted the “Restatement (Third) of the Law Governing Lawyers” (“Restatement”), which, in part, addresses attorney malpractice liability. James Podgers, *ALI’s New Standard for Lawyers Behavior Could Be the Basis for Malpractice Claims*, 81 A.B.A.J. 34 (1995). Some of the pertinent Rules of the Restatement include: Section 71: A lawyer is civilly liable to a person to whom the lawyer owes a duty of care within the meaning of § 72 and § 73, if the lawyer fails to exercise care within the meaning of § 74 and if the failure is a legal cause of injury within the meaning of § 75, unless the lawyer has a defense within the meaning of § 76.

Section 72: For purposes of liability under § 71, a lawyer owes a client the duty to exercise care within the meaning of § 74 in pursuing the client’s lawful objectives in matters covered by the representation and in fulfilling the fiduciary duties to the client set forth in § 28(3).

Section 74: (1) For purposes of liability under § 74, a lawyer who owes a duty of care must exercise the competence and diligence

³ If an attorney is considering not pursuing customary discovery or motions because a matter may not justify the cost, this decision should be disclosed and discussed with the client. See Utah Rule of Professional Conduct 1.1, which requires “competence” and Utah Rule of Professional Conduct 1.4(b) which requires that an attorney explain a matter to the client to enable the client to make informed decisions regarding the representation.

normally exercised by lawyers in similar circumstances, unless the lawyer represents that the lawyer will exercise greater competence or diligence.

(2) Proof of a violation of a rule or statute regulating the conduct of lawyers does not irrebuttably prove negligence or give rise to an implied cause of action for negligence; but a trier of fact applying the standard of care of Subsection (1) may be informed, by instruction and through expert testimony, of the content and construction of such a rule or statute that was intended for the protection of persons in the position of the claimant, and an expert witness may rely on such a rule or statute in forming an opinion as to that application.⁴

2. Applicability of the Utah Rules of Professional Conduct.

Rules of conduct and ethics, such as the Utah Rules of Professional Conduct, can be used to support a claim of legal malpractice. Although a violation of the ethical rules generally will not establish legal malpractice per se, a violation of a professional rule of conduct might be used as evidence of malpractice. Bruce S. Ross, *The Role of Ethical Rules in Malpractice Litigation*, SD63 ALI-ABA 393 (1999); Robert J. Haft, *Liability of Attorneys and Accountant for Security Transactions*, 896 PLI/Corp. 777, 827, n. 11 (1997); J. Randolph Evans, *Legal Ethics*, 47 Mercer L. Rev. 197, 202-04 (1995); William Freivogel, *Conflicts of Interest and the Business Lawyer: Professional Liability Epidemic*, 11-Wtr. Del. Law. 32 (1993). As noted in Douglas L. Christian, *Twice Bitten: Violation of Ethical Rules As Evidence of Legal Malpractice*, 28-SPG Brief 62 (1999):

The majority of courts considering this issue have held that the ethical rules can be used to show the standard of care for attorneys, and that if an attorney failed to meet the standard it is evidence that the applicable standard of care owed to the client has been breached. Typically, these cases hold that the breach of an ethical standard does not establish a cause of action by itself, but can be used to help prove the attorney breached a duty to the client.

⁴ Section 73 of the Restatement addresses attorney liability to third parties, and is discussed hereafter.

Id. at 63. *See also*, Scope Rules of Professional Conduct, ¶ 20. (“[S]ince the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a rule may be evidence of breach of applicable standard of conduct.” Some courts have held that the breach of the ethical rules is presumptive of legal malpractice, and other courts have gone so far as to hold that the violation of an ethical rule is conclusive evidence of malpractice. *Id.* The Utah Supreme Court has held that a violation of the Rules of Professional Conduct do not create a cause of action. In *Archuleta v. Hughes*, 969 P.2d 409 (Utah 1998) the court stated:

However, the Rules of Professional Conduct provide that a "violation of a rule should not give rise to a cause of action, nor should it create any legal presumption that a legal duty has been breached." Utah Rules of Professional Conduct, Scope. The Utah Court of Appeals has held that, "in describing legal malpractice based on breach of fiduciary duty as nonadherence to ordinary standards of professional conduct, we do not mean that violations of the Rules of Professional Conduct give rise to a cause of action for legal malpractice." *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1291 n.3 (Ct. App.), cert. denied, 919 P.2d 1208 (Utah 1996).

We agree with the court of appeals, and conclude that the Utah Rules of Professional Conduct are not designed to create a basis for civil liability. Other jurisdictions addressing this issue agree.

Id. at 413-414. The Rules of Professional Conduct, Scope, provide in part:

Violation of a Rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

Id. at ¶ 20. Regardless of the impact the Rules may have in a civil proceeding, the Rules do provide guidelines on appropriate conduct and can be the basis for expert opinion on compliance with the standard of care.

In accordance with Article VIII, the Utah Supreme Court adopted the Rules of Professional Conduct.⁵ Compliance with the Rules of Professional Conduct does not guaranty that no claims will be asserted against an attorney, but compliance with the Rules does provide some protection against liability. The Preamble and Scope of the Rules of Professional Conduct provides an overview:

[1] A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Every lawyer is responsible to observe the law and the Rules of Professional Conduct, shall take the Attorney's Oath upon admission to the practice of law, and shall be subject to the Rules of Lawyer Discipline and Disability.

Attorney's Oath.

"I do solemnly swear that I will support, obey, and defend the Constitution of the United States and the Constitution of this State; that I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty and fidelity; and that I will strictly observe the Rules of Professional Conduct promulgated by the Supreme Court of the State of Utah."

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others. A lawyer's representation of a client, including representation

⁵ Article VIII, Section 4 of the Utah Constitution grants the Supreme Court the authority to regulate the practice of law, and provides:

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.... The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply to lawyers who are or have served as third-party neutrals. See, e.g. Rules 1.12 and 2.4. In addition, these are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. IN addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance and therefore, all lawyers should devote professional time and resources and use civic influence in their behalf to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the Bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideal of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the adversarial system, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure

that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar. Every lawyer is responsible for observing the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the

client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon a settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of

conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of applicable standard of conduct.

[21] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative.

Obviously there is no sure way to avoid being the target of a legal malpractice claim. Even when the attorney has done everything possible, unsatisfied clients will bring an action or file a complaint with the Bar. The following discussion includes some ideas that may be useful in at least reducing the chances of a malpractice suit.

B. Screening the Client and Case:

Before accepting a new client and matter or a new matter from an existing client, the first action which must be taken is the verification that there is no conflict prohibited by the Rules of Professional Conduct (the "Rules"). The rules governing conflicts are contained in Rules 1.7, 1.8 and 1.9 of the Rules, which are discussed specifically hereafter.⁶

A practitioner, in addition to professional concerns, should also be aware of the fact that "problem clients" are more likely to bring malpractice claims or file complaints with the Bar. In screening a new client, the attorney should be aware of the signs of a potential problem client which include:

(1) History of litigation

⁶ Not only is the individual lawyer responsible for avoiding conflicts, so are the supervisory lawyers in a law firm who must make reasonable effort to ensure the firm has in place procedures giving reasonable assurance that all lawyers in the firm comply with the Rules. Rule 5.1(a) states:

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable 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 conform to the Rules of Professional Conduct.

- (2) History of different of attorneys on same matter.
- (3) History of different attorneys on different matters.
- (4) Referral of case from another attorney.
- (5) Client's intended involvement, e.g. provide staffing, or a lack of willingness to fully commit to the case and provide the necessary resources.
- (6) Client's stated objective, e.g. moral principle.
- (7) Client's expectations about the case.
- (8) Intuition regarding the client.
- (9) Potential involuntary pro bono client.
- (10) Time constraints or demands.

If an attorney elects not to accept a case for whatever reason but especially with a potential "problem client," a "non-engagement letter" is appropriate and can be used to avoid claims. The letter should specifically indicate that the attorney is not assuming the case, and advice of any time limitations or disclose if time limitations have not been reviewed or considered.

Screening the case includes performing some investigation into a claim. If the claim does not make some sense, further investigation is necessary. If it appears that the client anticipates or insists that the attorney will assert a position that could violate any of the Rules of Professional Conduct, the attorney must disclose that the representation cannot include conduct that constitutes a violation of the Rules, and, if the client insists on inappropriate conduct, the representation should be declined or terminated. See Rule 1.2

(Scope) and Rule 1.16 (Declining or terminating Representation). Pertinent rules governing the conduct of an attorney in pursuing a claim or position for the client include:

Rule 3.1. Meritorious Claims and Contentions:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law or fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.3. Candor Toward the Tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.⁷

Rule 3.4. Fairness to Opposing Party and Counsel:

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

1. the person is a relative or employee or other agent of a client; and,

⁷ The trial attorney is obligated to present the client's case with persuasive force. However, an advocate does not vouch for the evidence submitted in a case. It is the Court's responsibility for assessing the probative weight of the evidence. However, if the attorney knows the evidence is false, the attorney cannot offer it into evidence. If the attorney knows that the client has offered false testimony, the attorney should first attempt to persuade the client to rectify the situation. Otherwise, the attorney must take remedial action. Withdrawal is one of the alternatives to consider before disclosing the false testimony. In the Utah Ethics Advisory Opinion No. 00-06, the committee opined that an attorney's whose client has made a material misrepresentation to the court may not remain silent, but is required first to counsel the client to rectify the misrepresentation, and, if unsuccessful attempt to withdraw. If the court does not allow withdrawal, the attorney must disclose the fraud on the court. *See also* Utah Rules of Professional Conduct 3.1 (Meritorious Claims and Contentions) and 3.3 (Candor toward the Tribunal).

2. the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5. Impartiality and Decorum of the Tribunal:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; or
- (b) communicate *ex parte* in an adversary proceeding as to the merits of the case with a judge, juror, prospective juror or other official during the proceeding, prior to full discharge of that person's duties in the proceeding, unless authorized to do so by law, rule or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law, rule or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

Rule 4.1. Truthfulness in Statements to Others.

In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

In addition to the Rules of Professional Conduct, The Utah Supreme Court has adopted Rules of Professionalism and Civility. The rules states:

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called

upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

11. Lawyers shall avoid impermissible ex parte communications.

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections"

designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

If the client cannot abide with the attorney's compliance with the foregoing Rules, representation should be limited or terminated. Generally, a client which expects his or her attorney to violate the Rules is not a worthy client in any event.

C. Recognizing and Avoiding Prohibited Transactions with a Client:

The rules regarding prohibited transactions with clients are contained in Rule 1.8, which lists specific types of transactions with clients that are prohibited. The Rule states:

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the

transaction, including whether the lawyer is representing the client in the transaction.⁸

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or 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. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or an account based in substantial part on information relating to the representation.⁹

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

⁸ In *In re Spear*, 774 P.2d 1335 (Ariz. 1989), the court stated the following regarding investing with clients:

We realize that we hold the lawyer/businessman to a high ethical standard, particularly where the lawyer chooses to involve his own client in his business. The legal profession can afford no less. . . . When a lawyer accepts a client, he accepts that client's trust; he becomes not only the client's advisor, but his protector as well. The better rule may be to prohibit entirely lawyer-client business dealings. . . . As a general rule, and to minimize ethical problems, no lawyer should allow a client to invest or otherwise participate in the lawyer's business ventures unless the client obtains independent legal advice. Nothing else will protect our profession's integrity and the public interest. . . .

774 P.2d at 1344.

⁹ Comment 9 to Rule 1.8 states:

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation.

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation, and minor expenses reasonably connected to the litigation, on behalf of the client.¹⁰

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.¹¹

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless the person is advised in writing

¹⁰ In *Shade v. Great Lakes Dredge & Dock Co.*, 72 F. Supp. 2d 518, 521 (D. Pa. 1999) the court stated regarding Rule 1.9(e):

The traditional perspective suggests at least three harms that could result from permitting lawyers to provide living expenses to their clients: (1) loaning money to a client gives the lawyer an interest in the litigation that could cause the lawyer to act other than in the client's best interest; (2) permitting such advances might encourage attorneys to seek out marginal claims that would churn up litigation; and (3) permitting advances might degrade the profession by leading lawyers to compete for clients by offering the best financial assistance packages.

¹¹ A typical example of the application of Rule 1.8(f) is the insurance company paying for the defense of the insured. Attorneys engaged by the carrier sometimes forget the insured in the principal client. In fact, a common malpractice claim can arise when the attorney for the insured reveals a confidence to the carrier that provides the carrier with a basis to deny coverage to the insured. See *CHI of Alaska v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1128 (Alaska 1993).

of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and,

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not engage in sexual relations with a client that exploit the lawyer-client relationship. For purposes of this Rule:

(1) "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; and,

(2) except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.¹²

(k) While lawyers are associated in a firm, a prohibition in the foregoing (a) through (i) that applies to any one of them shall apply to all of them.¹³

¹² Sexual relations with clients is becoming a more common basis for malpractice claims. Larry Bodine, *How To Avoid Seven Malpractice Perils in Divorce Practice*, 39 Res Gestae 36 (1996); John Freeman, *Sex With Clients – A Recipe for Disaster*, 8 S.C. Law. 10 (1996). The primary reason for prohibiting sexual relations with clients is that the attorney will lose objectivity, reasonableness and independence. *Id.* at 11; *People v. Good*, 893 P.2d 101, 104 (Colo. 1995). See generally, ABA Comm. On Ethics and Professional Responsibility, Formal Op. 92-364 (1992). Lawyers who have engaged in sexual relations with clients have been sued on the basis of intentional infliction of emotional distress, negligent infliction of emotional distress, assault and battery, fraud, negligence, breach of contract and breach of fiduciary duty. A. Craig Fleishman, *Sexual Malpractice*, 26 Colo. Law. 93 (1997). But see, Linda Fitts Mischler, *Reconciling Rapture, Representation and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 Geo. J. Legal Ethics 209 (1997); 1997-Mar. Andrew's Professional Liability Lit. Rep. 11 (1997) (Malpractice award reversed against lawyer who had sex with client). In *Kling v. Landry*, 1997 WL 627516 (Ill. App. Sept. 10, 1997), the court held that an attorney-client sexual relationship is not per se malpractice unless the quality of the representation is affected. However, in *Doe v. Roe*, 681 N.E.2d 640 (Ill. Ct. App. 1997), the same court held that an attorney who used his position to obtain sexual favors breached his fiduciary duties to the client.

¹³ Related to prohibited transactions contained in Rule 1.8 are the prohibitions contained in Rule 5.4. "Professional independence of a lawyer":

D. Scope of Retention

Perhaps the most fundamental rule governing the lawyer-client relationship is Rule 1.2 which discusses the purpose, scope and limitations of the relationship. The Rule states:¹⁴

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4 [communication], shall consult with the client as to the means by which they are

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and.

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A nonlawyer is a corporate director or officer thereof; or.

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer may practice in a non-profit corporation which is established to serve the public interest provided that the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer.

¹⁴ In *Hofmann v. Fermilab NAL/URA*, 205 F. Supp. 2d 900, 903 (N.D. Ill. 2002) the claim of malpractice was based upon a misunderstanding regarding the scope of representation. In fact, the scope of representation as stated in Rule 1.2 can establish the duty owed to the client for purposes of malpractice claims. In *Dahlin v. Jenner & Block, L.L.C.*, 2001 U.S. Dist. LEXIS 10512 (N.D. Ill. 2001) the court stated: "Accordingly, in order to properly state a claim for legal malpractice where an attorney has failed to advise a client, the client must allege that the scope of representation sought by the client included the advise that the defendant failed to give." See also *Gaddy v. Eisenpress*, 1999 U.S. Dist. LEXIS 19710 (S.D.N.Y. 1999) (same); *Jackson v. Pollick*, 751 F. Supp. 132, 134-135 (E.D. Mich. 1990) ("I find that after adequate discovery, plaintiff cannot produce more than a scintilla of evidence that he had an attorney-client relationship with defendants as to any other matter than the workers compensation claim.").

to be pursued.¹⁵ A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.¹⁶

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances¹⁷ and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent,¹⁸ but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and

¹⁵ The distinction between the "objective" of the representation and the "means" is not a clear line. Generally, the objective of the representation is the purpose of the engagement, and the means of achieving the purpose are the tactics or strategy used. See Hazard & Hodes § 5.6. Of course, the client, who must be consulted about the means, has the ultimate authority regarding the means, since the client can unilaterally terminate the relationship.

¹⁶ The Rule is clear that the client makes the ultimate decision on whether to make or accept a settlement. The fee agreement cannot be used may the lawyer to effectively shift the decision making regarding a settlement to the attorney. See *In re Lansky*, 678 N.E.2d 1114 (Ind. 1997). Likewise it is unethical to use coercive means to force a client to settle. For example, threats of withdrawing for the sole purpose of forcing a settlement is inappropriate. See *Kay v. Home Depot, Inc.*, 623 So.2d 764 (Fla. Dist. Ct. App. 1993); *McGann v. Wilson*, 701 A.2d 873, 877 (Md. Ct. App. 1997) (malpractice claim based upon coercion of the client to accept a settlement). Malpractice claims are based upon the failure of the attorney to allow the client to make its decision regarding a settlement. See *Perez v. Trahant*, 806 So. 2d 110, 117 (La. Ct. App. 2001); *Cannistra v. O'Connor, McGuinness, Conte, Doyle, Oleson & Collins*, 728 N.Y.S.2d 770, 771-772 (N.Y. App. Div. , 2001) (malpractice claim based upon failure to inform client of deadline for settlement.). "[T]he trial lawyer is not permitted to withdraw due to the client's refusal to settle. The prohibition applies even if the lawyer thinks that the settlement offer adequately reflects the worth of the case and that the client is acting unreasonably." *Gary L. Stuart*, *Ethical Litigation* § 20.1 (1997).

¹⁷ "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer. Rule 1.0(h). A reason to limit the scope of the engagement may involve a situation where the amount involved in the transaction does not warrant the amount of time an attorney would normally allocate to a case of the complexity involved. If reasonable, the scope of the engagement can be limited to a more superficial representation regarding the matter. Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 *Geo. J. Legal Ethics* 915 (1998).

¹⁸ The terms "knowingly," "known," or "knows" requires actual knowledge of the fact in question. However, a person's knowledge may be inferred from circumstances. Rule 1.0 (f).

may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.¹⁹

Fundamental to the scope of the attorney-client relationship is its creation. The Rules do not define the attorney-client relationship. Fundamentally, the relationship is one of contract, and, accordingly, contract principles apply. As a result, whether or not a relationship exists depends on a meeting of the minds. Hazard & Hodes § 2.5. (“The law looks primarily to the manifest intentions of the parties to determine whether they have entered into a client-lawyer relationship.”). The client is given the benefit of any doubt as to the creation of the relationship. *Id.*; see also *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995)(“The attorney-client relationship is viewed as a contractual relationship in which the attorney agrees to render professional services on behalf of the client.... The attorney-client relationship can be formed by explicit agreement of the parties or may arise by implication from the parties' actions.”); *Resolution Trust Corp. v. Gibson*, 829 F. Supp. 1121, 1127 (D. Mo. 1993) (“An [attorney-client] relationship results from "the manifestation of consent by one person to another

¹⁹ Referring to Rule 1.2(d), it is noted in Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* (3rd Ed. 2000) (“Hazard & Hodes”):

The dividing line is simply this: while a lawyer may discuss, explain and predict the consequences of proposed conduct that would constitute crime or fraud, a lawyer may not counsel or assist in such conduct.

Id. at § 5.12. Further:

[I]t is often difficult for a lawyer to discern the client’s intentions, and difficult as well to draw a line between innocent discussion and active participation. A variation on this theme occurs when a lawyer gives little or not direct advice, but provides “information” about the law that is likely to be put to illicit use by the client. In this context, the problem is to assess not only the passive versus active quality of the lawyer’s conduct, but the level of certainty that the client will actually misuse the information.

Id. at § 5.13.

that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

E. Time Limitations:

There are two time limitations that can lead to malpractice claims. The time limitations imposed by the rules of procedure or other applicable rules or statutes, and the other is the attorney's work load or commitments to other matters. The attorney needs to be aware of both of these limitations. The Rules provide that a lawyer shall diligently pursue the claim for an attorney and do so competently:

Rule 1.1. Competence:

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

Rule 1.3. Diligence:

A lawyer shall act with reasonable diligence and promptness in representing a client.

An attorney's work load should be managed in order than each client's matters can be handled competently. Rule 1.3 Comment 2. There is probably no more frequently complaint against the legal profession than a lack of diligence. Rule 1.3, Comment 3. Obviously the failure to meet statutory and other deadlines is a lack of diligence. *See, e.g. In re Juarez*, 24 P.3d 1040 (Wash. 2001). However, the duty of diligence requires more than merely meeting any applicable deadlines. In Comment 1 to Rule 1.3, it is stated:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or

endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

The duty of diligence does not preclude the lawyer from granting professional extensions and courtesies, or require the use offensive tactics with opposing counsel. Rule 1.3 Comment 1.

F. Internal Controls:

As noted above, a partner in a law firm is required by Rule 5.1(a) "to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."

There must be internal controls to avoid administrative problems such as meeting deadlines. This can be addressed and resolved by an *effective* calendaring system. Firms have a master calendar system, where all matters handled by the firm are placed on the calendar, and internal notices are sent by a staff member to the responsible attorneys. Individual calendaring systems are also used. Regardless of how a matter is calendared, i.e. firm-wide calendaring or individual calendaring, or manual calendaring or electronic calendaring, the most important thing is to get the matter calendared immediately in order to avoid having it over looked until the date has passed. Frequently, attorneys receive a matter or document that requires a timely response, and the matter remains on the attorney's desk without calendaring for whatever reason. This can certainly lead to a malpractice claim. At some point, the document will be buried on the desk and forgotten. Accordingly, calendar every matter immediately.

To provide additional assurance that matters are properly calendared, have at least two calendars maintained by two different people. Although this is not a fail safe method, it improves the chances that a deadline will not be missed.

Once the matter is calendared, the next important step is the retrieval of the information. A matter can be properly calendared, but if it is not retrieved, the calendar provides no benefit in protecting your client's interest and avoiding a malpractice claim. Accordingly, any good calendaring system should require periodic review by the responsible attorney, and a back-up system to make sure the responsible attorney receives notification.

One commentator suggests the following for a proper calendaring system:

- Easy to learn and use, for beginning and advanced users.
- Flexible enough to accommodate different work styles and areas of practice yet simultaneously uniform so that someone else could easily identify your commitments.
- Redundant. Keep paper calendars and back up your electronic time control system on disk or tape daily. Store back-up calendars and disks off site.
- Coordinated among all members of the firm. A common docket not only helps your staff plan work flow, it sometimes uncovers potential conflicts of interest.
- Habitual. Checking your time control system needs to be an integral part of your daily routine. Your system should provide a reminder to review all open files on a routine basis, even when no action is anticipated.
- Leakproof. Develop a procedure to make sure the necessary work is completed before an entry is removed from the system.

Ann Massie Nelson, *Fail-Safe Time Control System Can Reduce Malpractice Risk*, 70 Wis. Law. 27 (1997).²⁰

Related to internal controls are the allocation of responsibilities between lawyers in a law firm or association of lawyers. These rules of allocation of responsibility are contained in Part 5 of the Rules and include:

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 comparable 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 conform 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.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2. Responsibilities of a Subordinate Lawyer.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

²⁰ Like calendaring, the failure to obtain messages can form the basis for a malpractice claim. An attorney who failed to obtain a message that is wrongful death case was proceeding to trial the next day was held to have committed malpractice. *Missed Messages Mean Malpractice Suit for Atlanta Attorney*, 1997-Appr. Andrew's Prof. Liability Lit. Rep. 6

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of a question of professional duty.

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 possess comparable 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; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or,

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

G. Competency Issues:

The guidelines on competency are contained in Rule 1.1, which states:

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

The rule of competence does not require that the attorney possess the knowledge and skill to handle a matter before assuming responsibility for it. A lawyer can provide adequate

representation in a wholly novel field thorough study. Rule 1.1 Comments.²¹ Required preparation and thoroughness depends in part on the complexity of the matter and the amount involved. As noted in the Comments:

Competent handling of a particular matter includes inquiry into and analysis of the actual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

The requirement of legal knowledge requires basic legal research and knowledge of applicable procedure. *See Attorney Grievance Comm'n v. Zdravkovich*, 762 A.2d 950 (Md. 2000) (lawyer filing petition for removal from state court to federal district court did not read the federal removal statute). Competence may also require the knowledge and effective use of technology. *See generally*, Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet has Raised the Bar on Lawyers' Professional Responsibility to Research & Know the Law*, 13 *Geo. J. L. Ethics* 607 (Summer 2000); John Healy, *Joining the Technology Revolution is No Longer an Option*, 26 *San Francisco Att'y* 32 (Aug/Sept 2000); Bernice H. Cilley, *Same Rules, New Applications: Ethical Obligations and Practice Technology*, 9 *Prob & Prop* 4 (1995). A lawyer may limit the

²¹ In *Beverly Hills Concepts v. Schatz & Schatz*, 717 A.2d 724, 730 (Conn. 1998) the court affirmed the trial court's finding a junior associate committed legal malpractice because, in her position, she failed to seek appropriate supervision based upon the provisions of Rule 1.1 of the Rules of Professional Conduct. The court noted that the commentary to Rule 1.1 provides in part that a lawyer who lacks relevant experience may "associate or consult with, a lawyer of established competence in the field in question. . . ." The court concluded that "[h]aving little experience in franchising, [the associate], therefore, could have rendered competent representation by seeking appropriate supervision. She failed to do so." *Id.*

scope of the representation under Rule 1.2(c), if it is reasonable to do so, to exclude matters that he or she is not capable of handling.²²

The resources of the attorney are also a factor in competency to handle a matter. For example, a medical malpractice case can be expensive for an attorney and, without the resources, the case may not be properly handled.

Related to competency is the rule of communication. Utah Rule of Professional Conduct Rule 1.4 requires that the lawyer keep the client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. Further, the Rule requires that a lawyer explain a matter to the extent necessary to permit the client to make informed decisions regarding representation.²³

The best “client relationship” to avoid malpractice claims is to keep the client satisfied or happy, which includes frequent, prompt and clear communications with the

²² The duty of competence can extend beyond the actual performance of legal services. For example, there are cases where the attorney making a referral who has selected an incompetent or dishonest attorney has been held liable. At a minimum, the referring attorney should verify that the attorney selected for a referral is competent to handle the matter. *See generally*, Jeffery P. Miller, *Liability for Attorney Referrals*, 1 Legal Malpractice Rep. 17 (1996).

²³ Rule 1.4 *Communication*:

(a) A lawyer shall:

(a)(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;

(a)(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(a)(3) keep the client reasonably informed about the status of the matter;

(a)(4) promptly comply with reasonable requests for information; and

(a)(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.

client. Informed clients are generally more satisfied and less likely to assert a claim against their attorneys. Larry Bodine, *How To Avoid Seven Malpractice Perils in Divorce Practice*, 39 Res Gestae 36 (1996); Robert W. Martin, Jr., *Practical Ways to Avoid Unhappy Clients and Most Especially to Avoid Malpractice Claims*, 4-Nov. Nev. Law. 6, 8 (1996).

H. How To Identify Routine Errors:

The following includes a discussion of some of the common competency issues in addition to those discussed elsewhere in this paper:

Intentional Wrongs: Intentional wrongs contributed to 9.29% to all claims of malpractice. This includes claims for malicious prosecution, fraud, violation of civil rights and defamation. Except to the extent the attorney is in fact intending to commit a wrong against his client or other protected third party, the attorney should verify to the extent possible claims asserted against third parties, which includes complying with the requirements under Rule 11 under both the Fed. R. Civ. P. and Nev. R. Civ. P. *See e.g., Dutt v. Kremp*, 111 Nev. 567, 894 P.2d 354 (1995)(Malicious prosecution claim brought against attorney).

Aggressive action by an attorney is sometimes appreciated by the client, but, that appreciation will vanish when sanctions are imposed for overly aggressive behavior that violates Rule 11 requirements, or the client's pleading is stricken or the client is pursued for malicious prosecution. Attorneys must reflect on the true merits of their actions, and comply with common decency, common sense and civility.

Directory/Attorney: A common situation that gives rise to claims of malpractice involves the attorney who serves on the Board of Directors of a client. The problems that can arise are multiple, and most pundits strongly suggest that the practice should be avoided. Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 Geo. J. Legal Ethics 271, 282 n.63 (1997); Rian D. Jorgensen, *Lawyers' Professional Liability: Overview and Current Issues*, 563 PLI/Lit 89, 89 (1997); Robert P. Cummins, *The Conflicting Roles of Lawyer as Director*, 23 Litig. 48 (1996). Some of the common problems of serving on the board of directors of a client include:

Loss of Independence: As a director, an attorney may be required to vote on matters that indirectly affect the income of the attorney's firm. For example, whether or not to bring an action that will presumably be handled by the director/attorney's firm. If the attorney abstains from voting, then the corporation loses the very benefit of having the attorney on the Board.

Loss of Objectivity: The attorney serving on the Board is placed in the position of providing legal advice to him or herself. The attorney/director is making business decisions based upon the attorney's own advice.

Conflicts of Interest: As noted above, the attorney may be placed in the position of making decisions that directly affect the income of the law firm. Likewise, although the client is the corporation, the attorney represents the corporation by dealing with officers and agents, who at times have positions contrary to the best interest of the corporation, as deemed by the attorney/director. Additionally, a board of directors will have differing views, and the attorney will be placed in the position of attempting to provide independent advice, while at the same time siding with one group of directors or the other.

Disqualification: The attorney/director may be a necessary witness in a case, which may disqualify the attorney from

representing the client, and causing the client to obtain new counsel, and perhaps incur additional costs.

Loss of Attorney-Client Privilege: Communications with the attorney/director believed to be confidential, may be determined to be business communications, as opposed to legal communications, and therefore no privilege attaches. This obviously can result in communications that the parties intended to keep confidential available to opposing sides. *See e.g. Wardleigh v. Second Judicial District Court*, 891 P.2d 1180 (Nev. 1995).

Insurance: If an attorney/director is sued, the legal malpractice carrier may deny liability on the policy because the suit is not based upon legal malpractice but the actions of an attorney acting as a director. See First Circuit Affirms Finding of No Coverage For Legal Malpractice, 20 Mealey's Engineering Ins. Disputes 11 (1997); *Coregis Ins. Co. v. Bartos, Broughal & DeVito*, 37 F.Supp.2d 391 (E.D. Pa. 1999)(Attorney's unlawful promotion, sale and management of four unlimited partnerships fell within exclusions in firm's professional liability practice).

Increased Likelihood of Claims: The attorney/director is more likely to be sued because it is generally known that the attorney has malpractice insurance, and because of the multi-conflicts the attorney/director has, the claim may withstand a motion for summary judgment.

Craig C. Albert, *The Lawyer-Director: An Oxymoron?*, 9 Geo. J. Legal Ethics 413, (1995).

Litigation: The courts are starting to allow claims of malpractice based upon errors in tactics or strategy, such as the witnesses who were or were not called, or exhibits which were not introduced. Previously, the exercise of judgment was not a basis of for a malpractice case. As noted above, "planning error-procedure choice" accounted for 10.87% of malpractice claims, and "inadequate discovery/investigation" accounted for 10.24%. The most frequent basis for malpractice claims in the litigation arena include procedural errors, such as (i) the failure to timely object or respond to discovery, (ii)

timely identify an expert witness or other witness, (iii) failure to properly plead a claim or defense, (iv) failure to properly disclose exhibits, and (v) the failure to timely file a complaint within the statute of limitations or perfect an appeal.

Another issue concerns the preservation of evidence or testimony. For example, the physical evidence is lost by the attorney in a products liability case, or an important witness dies or leaves the area before being deposed is not available for trial. Likewise, original documentary evidence needs to be preserved. Clients which have a document destruction policy need to have the custodian of records responsible for document destruction advised to retain documents that may have any relationship to the litigation. It should be clearly understood between attorney and client regarding the risks involved with preservation of evidence, and the division of responsibility regarding this matter.

Except as to issues regarding the failure to timely file a document or make a disclosure, claims involving the exercise of judgment, strategy or tactics can be avoided to some extent if the client is informed of and/or involved with the decision. The involvement of the client with any significant decisions should, of course, be documented.

Settlements: Claims of malpractice are based upon faulty drafting or misunderstandings regarding settlements. The settlement of the case does not preclude a subsequent claim of malpractice. *Malfabon v. Garcia*, 111 Nev. 793, 898 P.2d 107, 109 (1995). Claims against attorneys are asserted because a party has lost indemnification, contribution or subrogation rights against third parties because of the provisions in the settlement documents. There are instances where the client has been left exposed to additional claims because the settlement documentation was not sufficiently broad or

inclusive. Additionally, claims are asserted because the client was not fully apprised of the effect of the settlement, such as the loss of indemnification rights. Indeed, claims of malpractice have been asserted merely because the client subsequently determined the settlement was not enough. Larry Bodine, *How To Avoid Seven Malpractice Perils in Divorce Practice*, 39 Res Gestae 36 (1996); ALAS, Whiner-Crybaby Clients-They're More Dangerous Than They Look , XII Loss Prevention Journal, 10, 11-12 (Summer 2001).

Failure to Inform an Insurer: Attorneys must be aware of claims asserted against their clients that may be covered by insurance, and advise the carrier of the claim. The failure to timely advise a carrier of a claim can result in lost coverage. The attorney can eliminate this issue by simply notifying the client to inform its insurance agent of the claim and determine applicable coverage. If there are questions about coverage, prudence dictates that the attorney review the policy.

Confidentiality: Rule 1.6 sets forth the ethical rule of confidentiality and states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(6) to comply with other law or a court order.

The duty of confidentiality is a fundamental principle in the attorney-client relationship that, in the absence of informed consent, requires that the attorney not reveal information relating to the representation. This contributes to the trust between the attorney and client, and encourages clients to seek legal assistance and to communicate freely, fully and frankly.

Although the Rule is entitled "confidentiality," all information, regardless of the source, is subject to the rule of confidentiality, if it relates to the representation. Comment 6 of Rule 1.6 states:

The confidentiality rule, for example, applies not only to information communicated in confidence by the client but also to all information relating to the representation, whatever source.

However, an attorney is permitted to make disclosures when appropriate in discharging the representation.

Rule 1.6(b) (2) and (3) are responsive to the corporate accounting scandals of recent date. It is important to note that both subparts require that the lawyer's services

have been used by the client to commit the fraud or crime. If the lawyer only discovers the crime or fraud, but his or her services were not used, the lawyer may not make a disclosure.²⁴

Rule 1.6(b)(3) contemplates a “noisy withdrawal” when necessary. As noted in Hazard & Hodes:

When a lawyer learns that a client is engaged in fraudulent activity and that the lawyer has been an innocent participant up until the moment of discovery, there is no wholly satisfactory way of resolving the competing demands of the situation. The lawyer must disengage rather than continue the representation (now as a knowing accomplice). The basic confidentiality rule is still in play, however, and the lawyer may not promiscuously disclose the client’s ugly secret.... Sometimes, the lawyer’s escape from the dilemma will take the form of a “noisy” withdrawal, which has the effect of “blowing the whistle” on the client’s wrongdoing, or at least “waving a flag” of warning.

Id. at § 9.31.

Conflicts: In the Preamble to the Rules of Professional Conduct, the following is stated regarding conflicts:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the adversarial system, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

²⁴ See also Rule 1.13 regarding the representation of an entity and the duties of the lawyer when he or she discovers criminal or fraudulent acts by officers that could adversely impact the entity.

The conflict rules are designed to foster the duty of loyalty the lawyer must have for the client and the exercise of independent judgment. The Rules address conflicts as three different categories: conflicts resulting between existing clients; conflicts that exist with former clients; and, conflicts that exist because of the type or subject matter of the contemplated transaction or relationship. Conflicts based upon the transaction were discussed separately regarding Rule 1.8. The other basic rules regarding conflicts are contained in Rules 1.7 and 1.9.

Rule 1.7, which is the general rule of conflicts, addresses conflicts between the attorney and existing or potential clients and states:

Rule 1.7. Conflict of Interest: Current Client:

(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 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) above, a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Resolution of a conflict of interest problem under Rule 1.7(a) requires the lawyer to (i) clearly identify the client; (ii) determine whether a conflict of interest exists; (iii) decide whether the representation may be undertaken despite the existence of a conflict, i.e. whether the conflict is *consentable*; and, (iv) if so, consult with the clients affected under paragraph (a) and obtain informed consent, confirmed in writing. *See* Comment 2, Rule 1.7.

What is or is not directly adverse for purposes of Rule 1.7(a) is not clear. In Hazard & Hodes, the authors state: “In any event, the “direct” versus “remote” distinction in Rule 1.7(a)(1) call attention not to the kind and degree of adversity as an abstract proposition, but to the matters in which the clients employ the common attorney’s services, whether these are litigation or transactional matters.” *Id.* at § 11.4²⁵

Because the duty of loyalty that is preserved by the rules on conflicts, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest. *See* Comments, Rule 1.7

The rules regarding conflicts with former clients is contained in Rule 1.9, which states:

Rule 1.9 Duties to Former Clients:

²⁵ Cross-examination of a client in an unrelated matter has been held to be sufficiently adverse to create a conflict. *See Hernandez v. Paicius*, 134 Cal. Rptr. 2d 756 (Cal. App. Ct. 2003). In *Hetos Investment, Ltd . v. Kurtin*, 1 Cal. Rptr. 3d 472 (Cal. App. Ct. 2003) the court held that an attorney had a personal conflict because the firm had drafted the promissory note that it now sought to have declared illegal.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and;

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information related to the representation except as these rules would permit or require with respect to a client.²⁶

Rule 1.10. Imputation of Conflicts of Interest: General Rule.

²⁶ In *Jessen v. Hartford Casualty Ins. Co.*, 3 Cal Rptr. 3d 877 (Cal. App. Ct. 2003) the court defined "substantially related" when the evidence before the court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues. In *Robbins v. Gillock*, 109 Nev. 1015, 862 P.2d 1195 (1993), the court stated that the burden of proving two matters are the same or substantially related matters is on the party seeking disqualification, and the moving party must have evidence that supports the disqualification. *Id.* at 1017, 862 P.2d at 1197. To make the determination, the court must make a realistic appraisal of whether or not confidences might have been disclosed which will be harmful to the prior client. *Id.* at 1018, 862 P.2d at 1197. See also *Belmontes v. Woodford*, 335 F.3d 1024, 1048 (9th Cir. 2003) ("Conflicts of interest based on successive representation may arise if the current and former cases are substantially related, if the attorney reveals privileged communications of the former client, or if the attorney otherwise divides his loyalties."); *Moss v. United States*, 323 F.3d 445, 462 (6th Cir. 2003) (same); *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985) "Substantiality is present if the factual contexts of the two representations are similar or related.").

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(b)(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(b)(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(c)(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(c)(2) written notice is promptly given to any affected former client.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

In Mark C.S. Bassingthwaighe & Robert D. Reis, *The Top Ten Malpractice Traps & How to Avoid Them*, 25 Montana Lawyer 7 (Jan. 2000) the authors suggest the following to avoid conflict issues:

1. Establish conflict systems to disclose conflicts as early as possible.
2. Avoid suing former clients.

3. Take only one side of any case or transaction. Confirm this in writing.
4. Avoid becoming a director, officer or shareholder of a corporation and the lawyer for the corporation at the same time. Don't accept stock for fees.
5. Avoid joint representation in potential conflict situations if you perceive any risk that a real conflict will materialize.
6. If any possibility of conflict exists, seek permission from each client to disclose your representation and its effect on the others before proceeding. If permission is not granted by any to be served in the representation, the only option is withdrawal. If you proceed, give a full disclosure to all clients concerning the potential and reasonably foreseeable conflicts of interests and their ramifications for the multiple clients. Discuss the effect of both potential and actual conflicts upon your representation of the clients. Advise the multiple clients that there is no confidentiality between them concerning the joint representation. Discuss that they should seek the advice of independent counsel on the issue of whether joint representation is appropriate. Obtain the written consent of each of the multiple clients after full disclosure and before continuing the representation.
7. Strongly urge consultation with independent counsel in cases of actual conflict. Seriously consider not proceeding for any if the clients refuse to seek independent counsel.
8. Have independent counsel acknowledge his involvement in the case of multiple clients, in writing.
9. Don't work for a real estate commission (which is based on percentage) if you are being asked as an attorney whether or not the client should proceed with the transaction or project.
10. Don't represent clients with potentially inconsistent defenses or differing liability in civil or criminal cases without written disclosures, as described above, and the clients' written consent. If their interests actually become conflicting, you can't represent them jointly, even with their informed, written consent.

There have been recent amendments to the Rules of Professional Conduct regarding the duties an attorney owes to prospective clients.

Rule 1.18 “Duties to Prospective Client”

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(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, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective 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, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(d)(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;

(d)(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(d)(2)(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(d)(2)(ii) written notice is promptly given to the prospective client.

Insurance Defense: An insurance defense practice can raise several interesting conflicts problems. One conflict issue arises when the insurer provides a defense and defense attorney, but reserves the right to deny coverage. The attorney assigned the matter could handle the suit in such a fashion that liability against the insured is ultimately based upon grounds subject to the reservation. Likewise, if multiple claims are asserted, some of which are covered by insurance and some of which are not covered, the attorney assigned the matter could negligently or improperly handle the matters that are not covered by the insurance, leaving the insured without insurance coverage.

Another conflict arises in the insurance defense arena when the insured is exposed to a claim in excess of coverage. The insured's interest is to have the matter settled within coverage limitations, whereas the insurer may be inclined to defend the matter because its maximum exposure is the policy limits. This places the attorney in a potential conflict situation. This situation can compromise the attorney's duty of loyalty and independence to the insured.

It is noted that the Utah Rules of Professional Conduct 1.8(f) applies to insurance defense and the duty of loyalty to the insured. The Rule states:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(f)(1) The client consents after consultation;

(f)(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(f)(3) Information relating to representation of a client is protected as required by Rule 1.6 [Confidentiality].

It should also be noted that although the insurance company engages the attorney to represent the insured, the insurance carrier also has an interest in the litigation, and can sustain a claim against the attorney for malpractice. *American Cas. Co. v. O'Flaherty*, 67 Cal. Rptr. 2d 539, 542-43 (Cal. App. Ct. 1997). This exposure could result in the attorney losing independence and allowing a conflict to develop.

Divorce: A divorce or family law practice has several potential areas of malpractice that are not necessarily common to other areas of the legal practice. A major distinction with a divorce practice is that emotions would seem to always run high and therefore interfere with independent and objective actions by the attorney.

A frequent problem in divorce cases is the tax consequences of a settlement. Larry Bodine, *How To Avoid Seven Malpractice Perils in Divorce Practice*, 39 Res Gestae 36 (1996); Cheryl L. Young, *Avoiding Malpractice Traps in Divorce Cases*, 40 Prac. Law. 15 (1994). Divorce attorneys are not necessarily tax attorneys, and they very well may not understand or recognize the tax consequences of some aspects of a settlement. The client should be advised to seek specialized representation regarding tax consequences in divorce proceedings where tax consequences can be significant to the client.

Perhaps because of the emotions involved with a divorce, second thoughts by the client concerning the settlement is not uncommon. Larry Bodine, *How To Avoid Seven Malpractice Perils in Divorce Practice*, 39 Res Gestae 36 (1996). The client should be fully advised of the ramifications of the settlement and fully understand the basis for the settlement.

The failure to discover assets is also a basis for a claim of malpractice, even if the other party is hiding the asset. Larry Bodine, *How To Avoid Seven Malpractice Perils in Divorce Practice*, 39 Res Gestae 36 (1996). To avoid this problem, the attorney should discuss the various methods of locating assets, and obtaining the clients impute as to the methods to use to locate assets and costs.

Local Counsel: Although in practice “local” counsel may have less responsibility for a case, if the results of the case are unsatisfactory to the client, the local counsel can be blamed for the results by the “lead” counsel and the client. If you elect to accept the position of local counsel, document your duties and responsibilities with both

the attorney engaging your services to act as local counsel and the client. Then make sure you in fact discharge the duties you have assumed.

Referrals: Malpractice claims can be and are based upon negligent referral of a matter to another attorney. There are numerous reasons for referrals of a matter to another attorney, and, in fact, the failure to make the referral can result in a claim of malpractice. These reasons can include:

- Nature of relationship with client, i.e., the attorney is a member of the Board of Directors of the client.
- The attorney has a conflict that precludes representation of the client.
- The attorney does not have the specialty to represent the client effectively.
- Business reasons, such as the fee arrangement, may be a basis for a referral.
- Time limitations, i.e., the attorney has insufficient time to handle the matter effectively.
- Distance from the forum.

There are four basic types of referrals, which each present a unique issue, which include:

Referral with a Retention of the Fee: This situation, which is authorized by the Utah of Professional Conduct under certain circumstances, Rule 1.5(e), can result in a malpractice claim against the referring attorney, even if the attorney has no direct responsibility for the case. The courts have held that the referring attorney is basically a joint venturer or partner with the attorney responsible for the matter, and may be liable for malpractice of that attorney. *See generally*, David A. Grossbaum, *Watch Your Back of Referrals*, 83-May A.B.A.J. 86 (1997); Anne E. Thar,

Don't Be Sued For Another Attorney's Malpractice, 83 Ill. B. J. 199 (1995).

Referral Without Any Retention of the Fee or Involvement:

There are cases where the attorney making the referral has selected an incompetent or dishonest attorney and was held liable. At a minimum, the referring attorney should verify that the attorney selected for a referral is competent to handle the matter. *See generally*, Jeffery P. Miller, *Liability for Attorney Referrals*, 1 Legal Malpractice Rep. 17 (1996).

Referral of the Case, With a Retention of a Portion of the Responsibility for the Case: Liability can be based upon the joint venture theory, or directly on simple negligence. A common basis for the malpractice is that it was unclear which attorney was responsible for what aspects of the case or matter, resulting in something being overlooked. *See generally*, David A. Grossbaum, *Watch Your Back of Referrals*, 83-May A.B.A.J. 86 (1997); Anne E. Thar, *Don't Be Sued For Another Attorney's Malpractice*, 83 Ill. B. J. 199 (1995).

Referral After Some Work Has Been Performed, But for Whatever Reason the Case Must Be Referred: A primary basis for malpractice claim under these circumstances is the referring attorney fails to inform the client or the new attorney of pending dates, or statutes of limitations, or fails to identify or disclose relevant information that is

subsequently lost. *See generally*, Jeffery P. Miller, *Liability for Attorney Referrals*, 1 Legal Malpractice Rep. 17 (1996).

“Of counsel” and Affiliated Attorneys: There are various affiliations between attorneys. For example, a firm may have “of counsel” relationships with attorneys, or simply office sharing relationships, but give the appearance of a firm relationship. There are also law firms and/or attorneys affiliated with other firms or attorneys. For example, a law firm in Salt Lake City may be affiliated with a firm in St. George, and reflect the affiliation on the letterhead and give other indications of affiliation.

They type of affiliation has various problems. The majority of the cases dealing with these various types of relationships concern disqualification. Ronald E. Mallen, ‘*Of Counsel*’ And ‘*Affiliated*’ Attorneys Can Cause Disqualification, *Vicarious Liability*, 7 Law Firm Part. & Ben. 1 (1995).²⁷ However, the relationship can also result in liability for the firm and/or affiliated attorneys. The appearance to the client of a relationship between the attorneys or firms may result in a finding that the firms or attorneys are a single law firm. *Id.* at 3. *Mustang Enters. v. Plug-In Storage Sys.*, 874 F. Supp. 881, 884 (N.D. Ill. 1995); *Compl. of Maritime Aragua, S.A.*, 847 F. Supp. 1177, 1181 (S.D.N.Y. 1994). *See generally*, Christopher Wilson, *The “Of Counsel” Professional Liability Risk*, 609 PLI/Lit 649 (1999). Even office sharing can result in a finding that the attorneys are a single firm. Anne E. Thar, *Don’t Be Sued For Another Attorney’s Malpractice*, 83 Ill. B. J. 199 (1995).

²⁷ Although disqualification does not necessarily result in malpractice action, it can result in the return of fees that have already been paid, or can result in a malpractice action upon a conflict of interest.

To avoid the claim against an affiliated firm or attorney, the following procedures are suggested:

- If the affiliated attorneys or firms intend to isolate malpractice liability to the attorney or firm performing the work, then the client must be fully advised, of course in writing as part of the engagement letter, that affiliated firm or attorneys, are not part of the firm or associated with the attorneys performed the specific services for that client.
- When checking conflicts, the clients of affiliated attorneys must also be determined, and conflicts checked, because the affiliated firms or attorney can be found to be a single firm, with appurtenant conflict issues.

Technology: The new technology has created new malpractice concerns. *See generally*, Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet has Raised the Bar on Lawyers' Professional Responsibility to Research & Know the Law*, 13 Geo. J. L. Ethics 607 (Summer 2000); John Healy, *Joining the Technology Revolution is No Longer an Option*, 26 San Francisco Att'y 32 (Aug/Sept 2000); Bernice H. Cilley, *Same Rules, New Applications: Ethical Obligations and Practice Technology*, 9 Prob & Prop 4 (1995). Some of the new concerns include:

- **Loss of Privilege:** A lawyer who uses a mobile phone arguably has no right to expect privacy and therefore, the attorney-client privilege does not attach.

Likewise, if a law firm inadvertently allows a client access to the firm's computer files,

the firm could be liable for malpractice if the sensitive information is obtained and used against a client. The firm must take reasonable steps to assure its files are secure.

- Facsimile transmissions, voice mail messages, and E-mail: Electronic messages can and do get to the wrong addressee. On occasion, a facsimile transmission intended for the client is sent to opposing counsel. The attorney must exercise reasonable precautions that information sent electronically is reasonably addressed.²⁸

- Legal Research: There is case authority that use of information available from a computer data base is part of the legal standard of the care. Failure to use such information can support a claim of malpractice.

²⁸ The issue is one of what is the standard of care imposed on an attorney when using technology. In ABA Formal Opinion 99-413, the ABA concluded that:

[A] lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail.

As a result of the ABA opinion, a violation of the standard of care will not occur if non-encrypted emails are used by attorneys. In Mitchel L. Winick, Brian Burris, Y. Danai' Bush, *Playing I Spy With Client Confidences: Confidentiality, Privilege And Electronic Communications*, 31 Tex. Tech L. Rev. 1225 (2000):

Traditionally, malpractice claims are measured against the standard of reasonable lawyers within a particular jurisdiction. The question is whether the language of the ABA or state bar association ethics opinions have created a special standard of protection for e-mail communications. Based upon the ABA opinion, it is unlikely that a lawyer will be required to use encryption or other levels of security for non-confidential attorney-client communication. In addition, the Attorney's Liability Assurance Society, a legal malpractice underwriter for many of the large law firms in the United States, has taken a stance on encryption identical to that of most state bar associations and the ABA. ALAS takes the position that the failure to encrypt communications over the Internet does not waive the attorney-client privilege, nor does it create any ethical or liability exposure. However, ALAS also recognized the exception for using e-mail in matters so important that any threat of interception must be avoided.

Id. at 1254-1255; see also Matthew J. Boettcher and Eric G. Tucciarone, *Concerns Over Attorney-Client Communication Through E-Mail: Is The Sky Really Falling?*, 2002 L. Rev. M.S.U.-D.C.L. 127,146 (2002) ("The ABA's rules of professional conduct, as well as those of many states, allow for the use of unencrypted e-mail for attorney client communications, without waiving confidentiality.").

Business Transactions with a Client: Although not uncommon, attorneys frequently do invest with clients. Because of the duty of loyalty and the fiduciary relationship between an attorney and the client, the transactions are closely scrutinized if the attorney obtains an advantage over the client. Indeed, there is a presumption of impropriety, which can only be overcome by clear and satisfactory evidence that the transaction was fundamentally fair, free of professional over-reaching and fully disclosed. *In re Singer*, 865 P.2d 315, 317 (Nev. 1993); *Williams v. Wadman*, 108 Nev. 466, 471, 836 P.2d 614, 618 (1992). The attorney must ensure that the client had independent advice in the matter or is given the same information as would have been given by a disinterested attorney. *Id.* See Utah Rule of Professional Conduct 1.8(1).

One court has held that lawyers should altogether refrain from investing with clients, unless the clients are independently represented. In *In re Spear*, 774 P.2d 1335 (Ariz. 1989), the court stated:

We realize that we hold the lawyer/businessman to a high ethical standard, particularly where the lawyer chooses to involve his own client in his business. The legal profession can afford no less. . . . When a lawyer accepts a client, he accepts that client's trust; he becomes not only the client's advisor, but his protector as well. The better rule may be to prohibit entirely lawyer-client business dealings. . . . As a general rule, and to minimize ethical problems, no lawyer should allow a client to invest or otherwise participate in the lawyer's business ventures unless the client obtains independent legal advice. Nothing else will protect our profession's integrity and the public interest. . . .

774 P.2d at 1344.

Third-Party Claims: At common law, a claim of legal malpractice could only be asserted against the attorney by the client, *i.e.* a party in privity with the attorney. Indeed, the definition of legal malpractice recited in the case of *Day v. Zubel*, 112 Nev.

972, 922 P.2d 536 (1996) required an attorney-client relationship. As expressed in *McCamish, Martin, Brown & Loeffler v. F.E. Applying Interests*, 991 S.W.2d 787 (Tex. 1998):

At common law, the rule of privity limits attorney liability to third parties. (Citations omitted). The general rule is that persons who are not in privity with the attorney cannot sue the attorney for legal malpractice. (Citations omitted). In practical terms, this privity requirement means that an attorney is not liable for malpractice to anyone other than her client. (Citations omitted).

991 S.W.2d at 792. *See also, Shivers v. Hertz Farm Management, Inc.*, 595 N.W.2d 476 (Iowa 1999) (“Ordinarily, an attorney owes a duty of care only to his or her client.”).

However, the requirement of privity has been eroded. In the case of *Charleson v. Hardesty*, 108 Nev. 878, 882-83, 839 P.2d 1303, 1306-07 (1992) the Court joined the majority of states by holding that privity between the attorney and the claimant is not required to sustain a claim of malpractice. In the *Charleson* case, the court held only that when an attorney undertakes to represent a trustee, the attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law. The Nevada Supreme Court relied upon California cases for its conclusion.

The California courts, which have been followed by other jurisdictions, have adopted a balancing test to determine if an attorney owes a duty to a third party. The test in essence considers: (i) the extent to which the transaction was intended to benefit the plaintiff, (ii) the foreseeability of harm to the plaintiff, (iii) the degree of certainty that the plaintiff suffered injury, (iv) the closeness of the connection between the defendant’s conduct and the injury suffered, (v) the moral blame attached to the defendant’s conduct and (vi) the policy of preventing future harm. *See Lucas v. Hamm*, 364 P.2d 685, 687-88

(Cal. 1961) *cert. denied* 368 U.S. 987 (1962). For a general list of cases applying the various methods to avoid privity, see Tona L. McDowell, *Torts Legal Malpractice: No privity required*, 18 American J. Trial Advoc. 491 (Fall, 1994). See generally, Comment, *Attorney v. Client - - Privity, Malpractice and the Lack of Respect for the Attorney-Client Relationship in Estate Planning*, 68 Tenn. L. Rev. 261 (Winter 2001); Notes & Comments, *Attorney Malpractice Liability to Non-Clients in Washington: Is the New Modified Multi-Factor Balancing Test An Improvement?*, 71 Wash. L. Rev. 233, (Jan. 1996); Ronald Volkmer, *Attorney Liability to Nonclients: The Need to Re-Examine Nebraska's Privity Rule*, 29 Creighton L. Rev. 295 (Dec. 1995); Jennifer R. Rossi, Note, *Professional Responsibility – Negligent Misrepresentation*, 26 Seton Hall L. Rev. 1301 (1996); Jonathan L. De Jon, *Attorney Liability to Third Party Non-Clients*, 5 Kan. J.L. & Pub. Pol'y 161 (Fall 1995); Symposium, *The Lawyer's Duty and Liability to Third Party*, 37 S. Tex. L. Rev. 1191 (Oct. 1996); Annot., *What Constitutes Negligence Sufficient to Render Attorney Liable to Persons Other Than Immediate Client*, 61 A.L.R. 4th 464 (1989).

Based upon the cases, and the commentaries regarding the liability to third parties, it appears that even under the balancing test the factor of the extent to which the transaction was intended to benefit the plaintiff is the most significant factor. *E.g.*, *B.L.M. v. Sabo & Deitrsch*, 64 Cal. Rptr.2d 335 (Cal. App. Ct. 1997). In *Francis v. Piper*, 597 N.W.2d 922 (Minn. Ct. App. 1999), the court observed:

The requirement that the third party be an intended beneficiary is a threshold requirement for an attorney to have a duty to a third party. In [*Marker v. Greenberg*, 313 N.W.2d 4 (Minn. 1981)] and subsequent cases the supreme court's

and this court's analyses of an attorney's liability to a third party begin with an examination whether the third party was an intended beneficiary.

597 N.W.2d at 924; *see also, Hewko v. Genovese*, 1999 WL 543229 (Fla. App. 4 Dist.)

("The rule of privity in legal malpractice actions is relaxed when the plaintiff is the intended third-party beneficiary of the contract between the client and the attorney.")

Accordingly, when an attorney prepares opinion letters for a client that the attorneys should reasonably anticipate or foresee will be relied upon by a third party, the attorney may have assumed a duty of care in favor of the third party. Accordingly, when preparing documents or undertaking any work that directly benefits a third party, the attorney must consider the effects on the third party, notwithstanding the fact that the duty of loyalty runs to the client.

The ALI's rules on duties to third parties are contained in §73, which provides:

For purposes of liability under §71, a lawyer owes a duty to use care within the meaning of §74:

(1) To a prospective client as stated in §27;

(2) To a non-client when and to the extent that the lawyer or (with the lawyer's acquiesce) the lawyer's client invites the non-client to rely on the lawyers' opinion or provision of other legal services, the non-client so relies, and the non-client is not, under applicable tort law, too remote from the lawyer to be entitled to protection;

(3) To a non-client when and to the extent that the lawyer knows that a client intends the lawyer's services to benefit the non-client, and such a duty substantially promotes enforcement of the lawyer's obligations to the client and would not create inconsistent duties significantly impairing the lawyer's performance of those obligations; and

(4) To a non-client when and to the extent that circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to

prevent or rectify the breach of fiduciary duty owed by a client to a non-client, when the non-client is not reasonably able to protect its rights and such a duty would not significantly impair performance of the lawyer's obligation to the client.\

II. WHEN A CLAIM IS ASSERTED.

If a claim is asserted against the attorney, the attorneys should immediately begin to act like a client. Certain guidelines should be followed and include:

1. Do Not Ignore The Claim:

When a claim is first made or threatened by a client or third party, you and/or, your firm should immediately take action. Do not merely hope that the claim will simply go away or resolve itself. In any event, do not believe that your actions were so far beyond reproach that no reasonable person could possibly believe that you are infallible or could not commit malpractice. Attorneys frequently complain about clients who fail to address issues immediately. After a claim has been asserted against you, you are not going to be somebody's "client". Address the matter immediately.

2. Engage an Independent Attorney:

a. Engage a second attorney to assist you that has not been involved in the matter subject to the claim or has any association with the client asserting the claim.²⁹ Firms should have a mandatory practice that requires a second attorney or committee to become involved in handling the matter on behalf of the firm, and preclude

²⁹ This situation may result in larger firms where the attorney assigned to supervise malpractice claims in-house, has also worked for the client asserting the claim or potential claim. This could effect privileges that may otherwise apply to communications between the attorneys regarding the claim. For example, it could be argued that the communications related to representations of the client, and, therefore, any privilege may be waived. *See e.g., In re Sunrise Savings & Loan Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989).

the involvement of the attorney subject to the claim or any attorney who has provided any services to the client asserting the claim, whether it relates to the specific claim or otherwise. The attorney subject to the claim will be too personally involved to objectively and rationally address the issues and may perhaps exacerbate the problem. A second attorney can handle the claim as a claim against a client in a professional, rational manner on your behalf. In this regard, a firm would be well advised to engage an attorney outside of the firm to represent it. Even a member of a firm who did not directly handle the subject matter will still lose objectivity. Remember the saying, “Any lawyer who represents himself has a fool for a client”.

b. Do not admit an error to the client or promise to resolve the problem. This can void insurance coverage. Allow an uninvolved attorney to address the client, and/or the client’s new attorney.

3. Review Available Insurance Coverage:

Review your errors and omissions or malpractice insurance policy to determine when claims or threats of claims must be reported to the insurance carrier. Generally, claims must be reported immediately, or coverage can be effected, including denied. Review the provisions to make sure that you do not do anything that would void or constitute grounds to deny coverage. A policy may or may not allow the attorney for firm to select its own counsel, and, make sure that if you do engage an attorney, the attorney is aware of any and all policy limitations.

4. Evaluate the Propriety of Continued Representation:

The client asserting the claim on a specific matter regarding a specific attorney in a firm may have other matters being handled by other attorneys in the firm. The firm must make the ethical determination if the firm can continue to represent the client with the pending claim.

5. Evaluate the Propriety of Early Communications and/or Settlement with the Client:

After an independent attorney has been selected, either inside or outside, an evaluation should be made of the risks and intangible factors, such as publicity or continuing relations, and determine whether or not the client (or the client's new attorney) should be contacted immediately to discuss the matter and, perhaps, resolve the matter. In some cases, it may be that the client is still disappointed about the results of a matter, and, after discussions, determine not to pursue any claim. Of course, the client may be known as litigious, and it would be a waste of time, and perhaps send the wrong signal, to even attempt to discuss the matter.

Of course, in these discussions, if the firm elects to proceed in this manner, effort should be made to avoid an acknowledgment of error, and, at least initially, no offers of settlement, including reimbursement of fees should be made, just as would be done in any other claims situation. If it appears that settlement can be achieved, an offer of free legal services should be avoided. This will be a "can't win" situation. The client will already have lost confidence in the attorney's or firm's advice, and regardless of the outcome of the next matter, it will not be well received. Additionally, since free work is now being

provided, the attorney may have a tendency to give other paying work a higher priority. This will lead to another malpractice claim.

6. Do Not Prepare Any Internal Memorandum:

Internal memorandum describing the events or analyzing the claim may not be privileged and, therefore, subject to discovery and used against you. However, once counsel has been engaged to represent you, either by personal engagement or appointment by your insurance carrier, he or she can make the determination as to the propriety of preparing memoranda and obviously significantly increases the likelihood that the memorandum will be privileged and not subject to discovery based upon attorney-client privilege or work product doctrine. There are cases that recognize the “in-house” memorandum as privileged communications: *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996); *In re Sunrise Savings & Loan Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989); *Hertzog, Calamari & Gleason v. the Prudential Ins. Co.*, 850 F. Supp. 255 (S.D.N.Y. 1994). Also, cases have recognized that work product immunity may apply to investigatory materials. *See e.g., Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981). However, allow your attorney to make the decision about preparation of new memorandum, and whether or not protection will be afforded.

Another consideration about preparing an internal memorandum after a claim has been made is that the memorandum may not be reliable. At that point, the attorney, as would a client, will obviously be in a defensive mode and may make inaccurate statements that ultimately prove to undermine credibility or the defense of the case.

7. Make a Copy of the File:

If practical, make a complete copy of the file and retain it in a separate and secure area. Once your attorney and others start reviewing the matter, the organization of the file can be compromised, and documents lost. It could prove to be invaluable to have an original copy, with all the documents in order.

8. Act Like A Client:

When a claim is made against you, at that point you become like any client you may represent. Reflect on your personal experience and how you have advised clients to act after they have been sued or a claim has been made. You now need to take on the roll of the client, and act like it. Follow the advise of your attorney regarding the matter, including settlement.

9. Attorneys Make Mistakes:

Remember, an attorney does make mistakes, both in judgment and in the law. Do not allow the mistake, if one, or the claim to consume you. Continue to practice in the same competent fashion you have in the past. Suits against attorneys, including attorney's who enjoy excellent reputations, happen every day, and are a part of doing business. Claim, suit or whatever, get on with you life and practice.