# PREVENTION OF LEGAL MALPRACTICE CLAIMS

**By**

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## I.

## INTRODUCTION

A legal malpractice claim or cause of action is uniquely characterized by the attorney-client relationship itself. Like most human relationships, the success of the interaction depends upon effective communication between the participants. Consequently, in developing a useful strategy to prevent legal malpractice claims, attorneys and law firms should focus upon the methods they employ in communicating with prospective clients, clients and even the so-called "non-client." In an era of increasing claims against attorneys, it is crucial that attorneys not only carefully choose their clients, but also communicate the scope of their representation at every turn of the legal transaction.

## II.

## WHO MAY SUE YOU ?

Liability for attorney malpractice no longer depends upon a contract between the attorney and client or even an intent by an attorney to represent someone.

In Washington, the formation of an attorney-client relationship may be based upon a client's subjective belief that the relationship was formed. [2] All too often, a malpractice claimant will contend that he thought the accused attorney was protecting his interests when in fact the attorney had no such intent. The Washington Supreme Court in Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992) held that the "subjective belief" of the client must, however, be reasonable based upon the circumstances of his or her interaction with the attorney. In Bohn, the Court found that the plaintiff did not produce sufficient evidence to contradict the attorney's disclaimers that any attorney-client relationship was formed.[3]

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[2] The essence of the attorney-client relationship is whether the attorney's advice or assistance is sought and received on legal matters. The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct. The existence of the relationship turns largely on the client's subjective belief that it exists. Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71, 75 (1992) See also In re: McGlothlen, 99 Wn.2d 515, 663 P.2d 1330 (1983).

[3] The Bohn court noted that an attorney's discussion of a business transaction with another party or the attorney's preparation of documents formalizing a business transaction do not alone create an attorney-client relationship. Whether a fee is paid is also not dispositive. 119 Wn.2d at 364, 832 P.2d. at 7. See also 1 R. Mallen & J. Smith, Legal Malpractice § 8.2, n. 22.

An attorney may also owe a duty of care to a third party, a person Washington courts often refer to as the "non-client",[4] under certain limited circumstances. For example, in Leipham v. Adams, 77 Wn.App. 827, 894 P.2d 576 (1995), the court held that an attorney performing estate planning for a client may be liable to a third party for errors in the estate plan if the plan was intended to benefit the third party.[5]

In general, whenever a third party coincidentally benefits by service to the client, an attorney should be alert to any potential duties of care to the third party created by the transaction. The historical expansion of liability for attorneys demands that once an attorney confers with any person regarding a legal matter, whether that person is a prospective client or not, the attorney must clearly communicate his or her role in the transaction.

## III.

## CAREFULLY SCREEN POTENTIAL CLIENTS.

Given the broadened spectrum of potential claimants, it is more important than ever for attorneys to carefully screen and interview prospective clients looking for signs which may indicate risk. Further, by establishing a routine manner of handling clients, an attorney can more easily counter non-clients' claims that they were treated like a client. Some of the important questions you should ask include:

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[4] Washington courts employ a "multi-factor balancing test" to determine whether an attorney owes a duty to a non-client. The multi-factor balancing test involves an analysis of six factors: (1) the extent to which the transaction was intended to benefit the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) the extent to which the profession would be unduly burdened by a finding of liability. See Trask v. Butler, 123 Wn.2d 835, 872 P.2d 1080 (1994); Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992).

[5] See also Strangland v. Brock, 109 Wn.2d 675, 747 P.2d 464 (1987) (attorney owes duty to beneficiaries of a will he drafted, but no duty to provide for events which he had no reason to anticipate). But see Bowman v. John Doe Two, 104 Wn.2d 181, 704 P.2d 140 (1985) (attorney has no duty to opposing party in litigation other than duty of courtesy and respect owed to all participants in the legal process); Harrington v. Pailthorp, 67 Wn.App. 901, 841 P.2d 1258 (1992) (divorce decree parenting plan governing parents and minor children did not create third party beneficiary right of ex-husband to sue ex-wife's attorney).

- **Do I have a conflict ?[6] If so, can the conflict be resolved ?[7]**

A conflict of interest may not only prohibit you from taking the new client but could also result in the loss of current clients or clients your firm hoped to secure in the foreseeable future.

- **What are the prospective client's expectations and how were they formed ?**

During the initial interview, an attorney should learn (if possible) what other advice or representation the prospective client has already obtained in the matter. A potential client who is changing attorneys may "red flag" a difficult client or one who is unable to pay fees. Defining from the outset the client's expectations and potential risks associated with any legal matter can offset later difficulties when things do not go exactly as planned.

- **Am I qualified to handle the work ?**

An attorney is held to the standard of a reasonable and prudent lawyer practicing under the same or similar circumstances in Washington[8] and is not held to the standard of a specialist.[9] However, taking new work in an area of law in which you do not ordinarily practice or specialize can lead to trouble quickly. There are usually two learning curves associated with any new practice area. First, the attorney must learn the law. Second, the attorney must learn how to deal with the kind of client peculiar to the new practice area (e.g. - a business or an unusually emotional person). The difficulty of these tasks can lead to mistakes and added costs to the client.

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[6] The Washington Supreme Court decision in Eriks v. Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992) provides plaintiffs with a powerful argument that any representation of conflicting interests is grounds to disgorge the attorney's legal fees. It is absolutely crucial for every firm to maintain an up to date database of all current and former clients to ensure that there is no ethical violation of RPC Rule 1.7 (Conflict of Interest; General Rule). In addition, attorneys should circulate a brief description of any new business to all members of a firm and identify clients, adverse parties and all related parties thereto. This step is important because of the difficulty in maintaining a flawlessly complete database. Further, by identifying new business in this manner, a firm can discuss potential conflicts not only with existing clients but also potential clients from which the firm has been soliciting work. Often, a firm may wish to provide "protected status" to a potential client within its database and decline other work which may raise a future conflict.

[7] A potential conflict may be waived in writing by each client but only after consultation and full disclosure of the risks associated with the representation. RPC Rule 1.7. A letter seeking the written consent of the client should always advise the prospective client to obtain an independent opinion concerning the conflict.

[8] See Cook, Flanagan & Berst v. Clausing, 73 Wn.2d 393, 438 P.2d 865 (1968).

[9] See Hizey v. Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992). In Hizey, the court held that a specialist standard of care was inappropriate and that violations of ethical rules do not establish a breach of the duty of care. See also Deatherage v. Examining Board of Psychology, 113 Wn.2d - (Slip.Op., December 24, 1997) (distinguishing a civil malpractice action from a disciplinary proceeding).

- **Does the potential client appear honest ?**

Any indication that the prospective client is dishonest or unscrupulous in the practice of their business should be good reason for rejecting the relationship.

Obtaining answers to these questions is a good starting point from which to build an attorney-client relationship, however, this list is far from inclusive. Every attorney should build his or her own interview checklist suited to their own practice area, experience and communication style.

## IV.

## ACCEPTING OR DECLINING AN ATTORNEY-CLIENT RELATIONSHIP.

Once a decision has been made to accept a new client, an engagement letter should be prepared and signed by both the client and the attorney. The engagement letter must clearly describe, using lay-persons' terms to the greatest extent possible, the scope of the work to be performed and its estimated cost. The engagement letter should also briefly describe the objectives of the representation and discuss the risks involved. Finally, an outline of how the parties intend to meet their obligations to each other should be set forth including among other things:

- The timing of periodic status reports.
- The manner in which client approval of pleadings and important correspondence will be accomplished.
- A fee schedule and the expected timing of payment.
- The letter should specify that if the terms of the engagement letter are not met that the attorney reserves the right to withdraw from the relationship.

If an attorney interviews a potential client and is not hired, it is equally important to send a non-engagement letter recommending that the potential client seek legal advice and that you will not be representing them absent a formal retention agreement.

Keep in mind that the attorney's intent to form an attorney-client relationship may not determine whether one exists. Consequently, whenever an attorney is communicating with a third party to a legal transaction, it is crucial to document when representation is not intended and/or declined. It may also be prudent to send a non-engagement letter to third parties related to your client. For example, a non-engagement letter could be sent to partners of a business client or other persons with whom the client shared business ownership containing the advisement that you are not protecting their interests and that they should seek independent legal counsel.

## V.

## MANAGING THE WORK.

### A) Managing Deadlines.

A survey conducted in the mid-1980's by the American Bar Association determined that twenty-five percent of all malpractice claims resulted from alleged administrative errors. Nearly half of these claims related to a simple failure to properly calendar a matter. Some common examples of missed deadlines include failure to file an action within the applicable statute of limitations;[10] failure to file a responsive pleading; failure to comply with discovery deadlines established by the court; failure to bring a case to trial within the prescribed period; and the failure to appear at trial.[11]

Because they are so important, an attorney should identify and calendar potential statutes of limitation during the initial interview with a potential client. It is an advisable practice to write a letter to the potential client after the first interview indicating whether or not you have been retained and, if not, reminding the client of the applicable statutes of limitation which apply and that they should promptly engage some other attorney to protect their legal interests.[12]

All deadlines imposed by the court should be calendared incorporating lead times for accomplishment of a given task. For example, if there is a cutoff of March 1 to notice a motion for summary judgment prior to trial, the calendaring system should provide several months advance warning so that the motion can be prepared and timely filed with sufficient notice.

Finally, use task checklists. By calendaring all tasks which would typically be performed in a case, you will avoid reliance on the imperfections of human memory.

### B) Managing Money: The Retainer.

All clients who are not institutional in nature or who pose an unknown financial risk should be required to post a retainer at the time of engagement. A retainer will allow you to bear the

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[10] See Brust v. Newton, 70 Wn.App. 286, 852 P.2d 1092 (1993); Daugert v. Pappas, 104 Wn.2d 254, 704 P.2d 600 (1985); Cunningham v. State, 61 Wn.App. 562, 811 P.2d 225 (1991).

[11] See Sherry v. Dierks, 29 Wn.App. 433, 628 P.2d 1336 (1981), rev. denied, 96 Wn.2d 1003 (1981).

[12] In Togstad v. Vesely, Ott, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) the defendant attorney informed a prospective client that she "did not have a case" but failed to perform necessary background research and investigation. The attorney also failed to inform the plaintiff of the applicable two-year statute of limitations running on her medical malpractice action. The Minnesota Supreme Court found that an attorney-client relationship had been established during the initial interview and that the plaintiff was injured by the attorney's advice and failure to advise.

burden of necessary administrative protections and avoid the risk of economic loss from nonpayment of fees. The retainer should be sufficient to cover the cost of services to be provided through at least the next 90 days of service. At least 120 days before any trial, the attorney should require a retainer sufficient to take the matter through trial and should withdraw immediately if it is not provided. A retainer not only alleviates immediate financial risks, but can also eliminate claims which often arise when an attorney is forced to sue a client for fees.

### C) Managing People: Delegating Work.

Delegation of work to other attorneys, secretaries and paralegals is a common requirement of practice. However, the client must be advised from the outset if any work may be delegated.[13] Further, it is good practice to personally introduce the client to all persons who will be working on the client's file. A face to face meeting between the client and the legal staff can build valuable rapport and diminish any propensity of the client to rectify an error by legal action.

## VI.

## AVOID ENTREPRENEURIAL ACTIVITIES.

Although RPC 1.8 (Conflict of Interest; Prohibited Transactions; Current Client) and interpretative case law[14] do not flatly prohibit doing business with clients, an attorney should avoid this practice because of the risks involved.[15] If you must enter into a business relationship with a client make sure the following tasks are accomplished. First, review your E&O policy to determine whether you will be covered if you get sued by the client. Second, require the client to obtain an independent opinion regarding the propriety of the transaction. Third, ensure that there is some objective means of establishing the fairness of the transaction. But remember, the best way to prevent claims arising from a role in business ancillary to one's practice is not to engage in the activity.

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[13] Short v. Demopolis, 103 Wn.2d 52, 691 P.2d 163 (1984). See also Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573 (4th Cir. 1973) (attorney's failure to file a notice of appearance and his subsequent reliance on another attorney in the case to keep him informed was deemed actionable negligence).

[14] See In Re McGlothen, 99 Wn.2d 515, 663 P.2d 1330 (1983).

[15] RPC 1.8 prohibits a lawyer from entering into a business transaction with a client or acquiring a pecuniary interest adverse to the client unless certain stated conditions are met. The transaction and terms on which the lawyer acquires the interest must be fair and reasonable, fully disclosed in writing and consented to by the client. In a 1986 report of the American Bar Association Commission of Professionalism entitled "In The Spirit of Public Service: A Blueprint For The Rekindling of Lawyer Professionalism" the reason for the rule was described this way : "It seems clear to the Commission that the greater the participation by lawyers in activities other than the practice of law, the less likely it is that the lawyer can capably discharge the obligations which are profession demands." In Washington, attorneys can incur liability under the Consumer Protection Act (RCW 19.86) for entrepreneurial activities of law practice. See Quinn v. Connelly, 63 Wn.App. 733, 821 P.2d 1256 (1992); Short v. Demopolis, 103 Wn.2d 52, 691 P.2d 163 (1984).

## VII.

## CONCLUDING THE ATTORNEY-CLIENT RELATIONSHIP.

Follow through and document communications with the client until the attorney-client relationship is concluded by way of a disengagement letter. A disengagement letter may serve the purpose of documenting an attorney-client relationship which has failed. However, a disengagement letter may also memorialize the conclusion of a successful relationship. It is often unclear in the course of complex business transactions or litigation whether the attorney has some continuing obligation to protect the interests of the client. As a result, it is always a good idea to confirm in writing that the objective(s) of the retention have been fulfilled as outlined in the initial engagement letter and that no foreseeable additional work is contemplated. In this manner, the client can compare the work offered and performed to confirm that you have completed the job and to determine whether any additional work is desired. It is a good idea to incorporate the disengagement letter along with the transmission of a final bill.

By implementing all of the foregoing communication and task management techniques, an attorney or firm can greatly reduce the risk of a legal malpractice claim.