

# It's fundamental: Sweating the small stuff pays big dividends

By Emily Eichenhorn

Risk management is not as complicated as one might assume. While that may sound like blasphemy to my peers, there's no denying that the most effective risk management techniques often are the simplest ones. With apologies to author Robert Fulghum, when it comes to lawyers' risk management, all we really need to know we probably learned in our first few years in practice. (Arguably, we *should* have learned it in law school, but that's a topic for a different time.)

Why, then, are those fundamentals so often overlooked? Things that seem so simple that they aren't worth mentioning are, in fact, the things that ought to be mentioned above all else. With that in mind, I offer a list of 11 simple risk management techniques that never should be forgotten.

## **Be organized**

Missed deadlines continue to be one of the greatest sources of professional liability in just about every area of practice. Every matter has deadlines, whether they be statutes of limitations, discovery deadlines, regulatory deadlines, or ones imposed by the opposite party in a transaction. And every deadline presents risks: the risk that you'll miss it and harm your client's interests; or the risks associated with the stress of rushing to meet the deadline as it looms nearer.

The best way to address these risks is to establish a good calendaring system and use it well: calendar deadlines as soon as you become aware of them; maintain at least two separate calendars so that you have a back-up should one calendar be lost or become corrupted; make sure at least two people are aware of every deadline to help avoid things falling through the cracks; and calendar interim deadlines to help give you enough time to complete the work thoroughly and without unnecessary rushing.

## **Use checklists**

When something is so familiar you could do it in your sleep, beware, because it's often the familiar or routine that ends up causing trouble. Missed steps, lost documents and overlooked regulations all are malpractice. The best risk management for this is to develop thorough checklists and then to use them regularly. Saying, "I know the title search is in box 17 of the closing documents because I always put the title search in box 17 of the closing documents," is no substitute for having a check beside the item on the list that says the title search is done.

## **Say please and thank you**

Civility can be a powerful risk management tool. Be civil to your opposing counsel, and you may just get an ally in the face of a claim later on. Who better to testify that you ran them ragged, forced them to consider every point and raised a thorough defense, than the lawyer on the other side? And who better to testify that your client would never have been able to prevail in the underlying case, despite any mistake on your

part? More importantly, a lawyer on the other side to whom you've been good will be more willing to grant extensions of time, go with the flow when an angry client gives you fits, or overlook a lapse here and there.

And say "please" and "thank you" to staff regularly. They are the ones who do the tedious grunt work of risk management: inputting data into the conflicts system; preparing and delivering bills; informing the client that you are unavailable to come to the phone. They also are the ones who are in a position to alert you to trouble when it first arises because they often talk to the angry client before you do. So, the first response to a staff member who alerts you to a potential problem should be, "thank you for telling me." Good manners will encourage your staff to be motivated and loyal and willing to help.

### **Follow the rules**

Our rules of professional ethics and accompanying jurisdictional rules and regulations regarding firm management issues are designed to protect our clients' interests from our human frailties and other, less-controllable, forces. If you regularly review the rules and strive to adhere to them, you automatically will be managing your clients' risks and yours, as well.

### **Avoid conflicts of interest**

Check for conflicts with every new matter, every time. Step carefully when considering whether or not to ask for waivers of potential conflicts and be clear in multi-party representations about whom you are and are not representing and what are each party's obligations with regard to conflicts and confidentiality.

### **Don't share secrets**

Always respect your clients' right to confidentiality. And don't take on representations that conflict with your duty of confidentiality to past or current clients. Think further than just attorney-client privilege in this regard. Your duty of confidentiality extends beyond that relatively confined evidentiary rule to an obligation to guard in any context any information your client has not given you permission to share. A sure way to anger a client and tempt a claim is to be cavalier about your clients' confidences.

### **Be selective**

Matters you don't have time for, matters in areas of practice you have no interest in pursuing, matters which require more resources than you can provide – either in terms of people or money or both – are all high-risk ventures. Be willing to walk away from business that falls outside your tolerance for risk or your ability to provide appropriate representation.

### **Don't be afraid to talk about money with your clients**

Sit down at the beginning of a representation and have a face-to-face discussion with your client about the business aspects of the representation. Help make sure your client has realistic expectations about the costs associated with the representation so that you can avoid fee disputes that are so often the root of professional liability claims.

Explain directly and succinctly that you will charge for your services and that the client will be obligated to pay you on time and according to whatever rules the two of you establish. Explain what can or will happen if the client fails to pay on time. And explain exactly what you charge for and how you calculate the charge. This is especially important in contingency cases; make sure your client understands just what his actual net portion of any size judgment will be.

### **Communicate regularly with clients and colleagues**

In addition to talking about money, talk regularly with your clients about what is going on with their matters. The more you keep in contact with the client, the better they will feel about you and the efforts that you are making. Along these lines, make certain to introduce each of your clients to at least one other lawyer or person in the office so that the client has a familiar face to turn to if you are unavailable and they need information or assistance.

Also, make sure to maintain regular and open lines of communication with colleagues about all aspects of firm activity. This includes everything from sharing information about new clients and matters, to regular formal group meetings to discuss new developments in areas of practice, to informal discussions in the hallway about firm procedures and policies, to social activities that promote friendly interchange among the professionals in the firm. The more you talk, the more you'll be able to spot potential trouble and the more you'll be able to help one another out of jams.

### **Tell the truth**

If you've made a mistake, or you think there is a potential claim out there, tell your carrier. If you don't, you're risking your coverage under your claims made and reported policy. Will having a claim affect your premium in the future? Possibly, depending upon how much it costs the carrier and depending upon how many claims you have. But, having your premium go up is likely much better than losing coverage altogether.

### **Do your best**

Finally and most importantly, exercise your independent professional judgment the best you can toward what you believe to be the best interest of your client. Will doing your best completely eliminate the possibility that you'll face a lawsuit? No, but it will decrease that risk significantly. Will it eliminate all mistakes? No, but it likely will reduce them. Will it increase the likelihood that you'll prevail should you face a claim despite your best efforts? Absolutely.

The "things that go without saying" really do need to be said from time to time. As noted motivational speaker Jim Rohn preaches, "Success is neither magical nor mysterious. Success is the natural consequence of consistently applying basic fundamentals." So, don't give short shrift to the basics of risk management – they may seem simple, but they are very effective. .

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