

**THE  
FUNDAMENTALS  
OF  
LOSS PREVENTION  
FOR  
LAWYERS**

ISBA MUTUAL INSURANCE COMPANY

## CHAPTER 6.

### FILE DOCUMENTATION, MANAGEMENT AND RETENTION

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

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

#### File Documentation

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

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

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

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

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

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

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

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

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

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

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

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

