

LAWYER TO LAWYER MENTORING PROGRAM
WORKSHEET N
INTRODUCTION TO MALPRACTICE AND GRIEVANCE TRAPS

Worksheet N is intended to facilitate a discussion about common malpractice and grievance traps and how to recognize and avoid common pitfalls.

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- Discuss common malpractice mistakes, particularly in the mentee's practice area(s), and share ways to avoid them.
- Discuss a lawyer's obligation to act competently, work diligently, and communicate effectively with every client. See Prof. Cond. Rules 1.1, 1.3 and 1.4.

Discuss common grievance problems that arise, particularly in the mentee's practice area(s), and ways to avoid them. Discuss the listed and linked articles about common types of malpractice. *The Top Ten Malpractice Traps and How to Avoid Them*, ABA Standing Committee on Lawyers' Professional Liability

<http://www.abanet.org/legalservices/lpl/downloads/ten.pdf>; Jason C. Blackford, *Avoiding Unintentional Grievances*, CLEVELAND BAR JOURNAL, July/August 2003 (Attached); Donald R. Lundberg, *Ten Ways to Stay Out of Trouble*, RES GESTAE, May 2007 (Attached) *Avoiding Malpractice-Are You at Risk?* By Daniel E. Pinnington, Law Practice Management, July/August 2010.

<http://www.abanet.org/lpm/magazine/articles/v36/is4/pg29.shtml>

Give the mentee practical pointers on the types of practices the mentee should employ to minimize client dissatisfaction and client complaints, including the best ways to communicate with a client and to involve the client in their representation.

- Share with the mentee your firm's procedures to ensure that the law firm staff does not inadvertently disclose client confidences. Discuss the tips in the attached article, Kirk R. Hall, *Not So Well-Kept Secrets*.
<http://www.abanet.org/legalservices/lpl/downloads/secrets.pdf>
- Suggest resources that the mentee can consult for making important ethical decisions, including the following:
 - Identify the procedure for obtaining in-house ethics advice (if you are in an in-house mentoring relationship).
 - Provide suggestions for finding outside ethics counsel and when such action is recommended.
 - Identify other helpful ethics materials, where they can be found, and the importance of supplementing general ethics resources with independent research on Indiana disciplinary case law when the ethics resources reviewed are not based on the Indiana Rules of Professional Conduct.
 - Identify ethics inquiry services of bar associations.

- Discuss the reasons for maintaining malpractice insurance and considerations for choosing the right policy. Discuss the attached *Checklist for Purchasers of Professional Liability Insurance* of the ABA Standing Committee on Lawyers' Professional Liability. <http://www.abanet.org/legalservices/lpl/insurancechecklist.html>
- Discuss the best time to involve a malpractice carrier into a claim against a lawyer for malpractice liability or ethical misconduct.
- Discuss the natural concerns and fears that occur when allegations of malpractice or ethical misconduct are made and share ways to overcome such fears. Read the attached article, E. Kendall Stock et al., *Not to Panic – Suits Happen*. <http://www.abanet.org/legalservices/lpl/downloads/nottopanic.pdf>
- Discuss the impropriety of asking a client to sign a fee agreement which provides for arbitration in the event of a fee dispute, malpractice claim or ethical misconduct allegation. Discuss the propriety of settling claims for malpractice with a client. See Prof. Cond. Rule 1.8.
- Discuss the attached article Kevin P. McGoff, Charles M. Kidd, and Alex Gude, *The Top Ten Ethics Problems for Lawyers* (2009) (unabridged). (attached)

RESOURCES

ABA Center for Professional Responsibility: <http://www.abanet.org/cpr/home.html>

ISBA Mutual Insurance Company, *New Lawyer Survival Guide: Advice from the Trenches on How to Live Your Life in the Law*, 2003.
<http://www.isba.org/sites/default/files/mentorcenter/New%20Lawyer%20Survival%20Guide.pdf>

The Top Ten Causes of Malpractice – and How You Can Avoid Them, ABA Techshow, 2006.
<http://www.abanet.org/lpm/lpt/articles/tch12062.pdf>

American Bar Association Standing Committee on Lawyers' Professional Liability:
Understanding Your Insurance Coverage
<http://www.abanet.org/legalservices/lpl/insurancecoverage.html>

ABA ETHICSearch: 1-800-285-2221 or ethicsearch@staff.abanet.org. For information, see <http://www.abanet.org/cpr/ethicsearch>

The Indiana Rules of Professional Conduct:
http://www.in.gov/judiciary/rules/prof_conduct/index.html

Rule 23 of the Indiana Admission and Discipline Rules (Disciplinary Commission and Proceedings): http://www.in.gov/judiciary/rules/ad_dis/index.html#_Toc241999447

The Indiana Supreme Court Disciplinary Commission: <http://www.in.gov/judiciary/discipline/>

Indiana State Bar Association Legal Ethics Committee/Telephone Advisory Panel.
ISBA phone: (317) 639-5465 (ask for referral to lawyer volunteer for particular county).

Indianapolis Bar Association Senior Lawyer Executive Committee "Safe Ask Program."
IBA phone: (317) 269-2000 (ask for referral to senior lawyer volunteer).

American Legal Ethics Library: <http://www.law.cornell.edu/ethics/>

LegalEthics.com: www.legalethics.com

Association of Professional Responsibility Lawyers: <http://www.aprl.net>

National Organization of Bar Counsel: <http://www.nobc.org>

NeoEthics: Law and Insurance Resources for the ABA's Tort Trial and Insurance Practice Section: <http://www.edicta.org/NeoethicsBucklin/Neoethics.htm>

practicePRO by the Lawyers' Professional Indemnity Company: <http://www.practicepro.ca/>

sunEthics (Florida and national issues): <http://www.sunethics.com/>

Ohio Supreme Court Board of Commissioners on Grievances and Discipline Ethics Advisory Opinions http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/default.aspx

INDIANA RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.1: COMPETENCE

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

RULE 1.3: DILIGENCE

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

RULE 1.4: COMMUNICATION

- (a) A lawyer shall:
 - (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;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (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 or assistance limited under Rule 1.2(c).
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

- (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 that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

To view comments to these rules, *see*
http://www.in.gov/judiciary/rules/prof_conduct/index.html