

REDUCING RISK THROUGH EFFECTIVE PRACTICE MANAGEMENT

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The practice of law is a life long study in the assessment and limitation of risk. This is true for our clients and ourselves. Success in the practice of law and our physical and mental health are dependant upon how well we complete that ongoing study. The purpose of this paper is to highlight areas of risk and suggest ways in limiting the effects of those risk areas.

A dictionary definition of risk is:

Exposure to the chance of injury or loss; a hazard or dangerous chance.

However that is too academic and staid for lawyers. Truly risk can be defined as your life as a lawyer. This definition expands as your practice grows and you become a partner in a firm.

The survival exercise is to identify areas of risk, confirm the worst possible outcome of that risk and then look for ways to lessen that risk. Go to the edge of the cliff, look over the edge, estimate the potential fatal drop to earth and then ensure you do not fall over the edge.

MANAGING KEY SOURCES OF RISK

HEDLEY BYRNE

A foundation case for the extent of professional liability. You are accountable if you communicate your special knowledge to another person and that person acts on that communication to their detriment. This is true for clients and non-clients and really anyone you come into contact with. You are a lawyer 24 hours a day, 365 days a year. Hard to relax and to decide who to relax with. As a result be mindful of what you say or write. Open an enquiry folder in your e-mail program to save e-mail responses sent o others. Especially helpful if you do not have a file open for that matter. If you do have a file open, print off a copy of the reply and put it in the file.

JOINT AND SEVERAL LIABILITY

The bane of the partnership existence as all of us sitting here, who are partners, are on the hook for 100% of our firm's losses. Thank God for errors and omission insurance. Also a

good idea to examine what you stand to lose if the firm is hit with an uninsured loss. Do you really want any personal assets in your own name?

VICARIOUS LIABILITY

Having employees can be both a blessing and a curse in many ways. You are accountable for your employees' actions and any resultant damage that may occur because of their actions. Only way to lessen this risk is through supervision of your staff. A loss here is usually because you are not minding the farm.

INCOME TAXES

In our experience the number one cause of why lawyers fail in private practice. For those of you who are employees, withholding taxes at source eliminates this risk for the most part. Lawyers live large and often beyond their means. Spending gross dollars not after tax dollars typically finances this. Then the April scramble arrives and the tax arrears treadmill commences. CRA is not a benevolent lender nor do they have to sue you to collect. The only way to lessen this risk is to pay your taxes. Good idea to have your firm act like an employer and withhold your taxes at source. Retain an accountant and examine tax-planning vehicles such as incorporating your practice and / or family trusts. Live a little less large but live CRA free.

BANKRUPTCY

Often a direct consequence of not paying your taxes. Is it a possibility in practice? Yes it is. Taxes, uninsured losses, underinsured losses, employee / partner fraud and theft all point to the potential risk. You lessen this risk by limiting the amount of personal assets that you would lose if forced to declare bankruptcy. We do not think it is fair to your family or yourself to have your personal assets at risk.

CLIENTS

Sometimes the road to hell is paved by good intentions. Often it is a client rolling you down that road. We must protect ourselves from our clients and in doing so we will also protect our clients from ourselves. Risk avoidance here is to only practice in areas you are competent. Only act for clients you like. Do not hesitate to fire a client. If you do not then you will wish you did. If you do you will find it is empowering.

MONEY

This takes the form of fees and disbursement recovery. You generate fees through your own sweat. Disbursement recovery is generated through you minding the farm. We suspect all of you have not reviewed your hourly rates and fixed fee rates for months or even years. You should do so on a timely basis and increase them on a timely basis. Far easier to have frequent small increases than occasional large ones. Retainers are far more efficient than receivables. When asking for retainers make sure you include a disbursement and sales tax (if applicable) estimate in the amount asked for. Partners and associates can become a financial liability by incurring and not collecting disbursements, especially those paid to third parties. Good idea to have all lawyers in your firm personally responsible for uncollected disbursements after remaining unpaid for 90 days. You collect directly off of their draw or pay cheque.

COMPLAINTS

These originate from, clients, other lawyers or by your own Law Society. They cannot be avoided. They can be lessened in number by your conduct but not made to disappear all together. Co-operating with the discipline process and responding within the time lines can manage the risk. Failure to do so will only escalate the problem. Certain practice areas have more potential complaint possibilities. Litigation often produces complaints from the losing other side.

ERRORS AND OMISSIONS INSURANCE

The absolute best protection for our clients and ourselves. How else could we sleep at night? However, E & O only reduces risk if we know how the claims process works and we properly follow it. You have an obligation to notify your insurer at the first hint of a potential claim. If you only file a claim, after you have tried to fix the problem or wait too long to file you may be denied insurance coverage. Not all E & O policies are the same. Ideally they contain an innocent partner protection clause but not all do. Also you must evaluate if you carry sufficient coverage by doing a risk assessment of the monetary size of files you are working on. It is just as dangerous to be under insured as not insured.

DISABILITY INSURANCE

There is a greater chance you will be disabled during your practice life than die. This is a risk and the way to protect yourself from the risk is through disability insurance. You cannot beat the odds but you can lessen the financial consequences. Overhead protection insurance fulfills this risk for your firm. CBIA has an excellent product line for this and all insurance, retirement and investment needs.

LIFE INSURANCE

Unfortunately some of us will die far too soon. The only way to protect your family is by maintaining adequate life insurance coverage. Ideally the coverage is sufficient to pay out your debts and leave a principal amount that can be invested and the income generated replace your practicing income. Also your firm should have life insurance in place so that the transition period caused by your death is funded. Good idea for your firm to carry life insurance on all partners and associates with insurance amounts tied to billing levels.

RETIREMENT

The risk in retirement is ensuring you will be able to but also to plan for what you will do. A life of leisure soon becomes unfulfilling. Affording to retire takes planning and time. The better you plan and the longer you contribute, the less money you will need to fund your retirement. There is nothing sadder than a lawyer who should retire but cannot afford to. This is a growing disaster for our Law Societies. Second aspect of this risk is what will you do? The answer will be different for all but you must somehow remain productive. Failure to do so often leads to a shorter retirement than hoped for.

PHYSICAL AND MENTAL HEALTH

The practice of law all too often is a direct threat to our physical and mental health. The stress, hours, client, family and firm expectations combine to become a weight often too heavy to bear. The solution is control. May sound simple but it is not. The sooner you start to limit the demands and throw in a little exercise and watch your diet you will be on the road to lessen this stress. Regretfully you cannot make this threat go away. The best you can hope for is to keep it in check. When the weight becomes too much seek help – call your Lawyers' Assistance Plan. They care and have a proven track record of helping.

In conclusion you have assumed risk voluntarily by being Called to the Bar. It is impossible to remove risk from your life as a lawyer. However, it can be managed if you actively attempt to do so. The points outlined above will provide help but administering them must come from you. Good luck, good health, good practice.

REDUCING RISKS THROUGH DAY TO DAY SOUND MANAGEMENT

MANAGING YOUR PEOPLE

Lawyers, like all people, are a diversified group of people and effective practice management commands that such diversity be respected, even embraced. For example, every successful firm should have fiercely driven people who are decisive and value their independence. But this success also passes through achieving balance and thus the firm should also embrace people who, while efficient, have more passive personalities or value collegiality over independence.

In order to maintain this desirable balance, a strong shepherd is essential to ensure that these people complement each other rather than overwhelm each other. Without this, the risk lies in the firm becoming dominated by the driven, resulting in a toxic environment in which eventually few people, no matter the financial incentive, will want to pursue their careers. On the other hand, should the passivist elements take over, the firm risks to fall by the wayside and lose its business focus, affecting profitability to the point where you will no longer be able to afford talent.

If a person is unwilling or unable to shed or shun the extreme elements of their personality (be it excessive drive or excessive passivity) despite your shepherding, you need to seriously evaluate the long-term risk that this person poses to the success of your firm.

DEFINING YOUR PRACTICE

You don't need to be all things to all people. In fact, this is precisely the worst strategy to adopt from a risk management perspective. Your firm needs to identify the areas in which it excels in and refuse to stray from these areas, except in a deliberate, planned and organized way. The virtue of this proposition lies in avoiding costly mistakes in areas of the law in which your firm has no expertise. Also, in defining and clearly communicating your core competencies to the public, you place your firm in a leadership position in those competencies, differentiating yourself from the competition.

To define these key competencies, don't just listen to yourself. Include your partners, your juniors and all other members of the firm in this defining exercise. This will bring a heightened sense of inclusion in the exercise and, by the same token, adhesion to its results. It will also help you identify areas which you may not have thought of or were not even aware were being practised within your firm.

Finally, seek out opinions within your firm on practice areas which should be developed, thus enabling you to identify opportunities and ensuring that it is understood within your firm that business development is to be conducted in a focused fashion, within the parameters of such a consulting exercise, rather than in an independent and haphazard

way. This avoids you, your partners or your associates from going out on a limb and accepting a mandate for which no one in your organization has any expertise.

STRIVE TO UPGRADE YOUR CLIENT BASE

It is no secret that at the beginning of a young lawyer's career, particularly for those who have the courage to go it alone, almost any client or any work will do. While perfectly understandable, every lawyer must strive to drop this approach as quickly as humanely possible for it is a business strategy which is fraught with risks and will lead you to a dismal career of un-profitable work.

But how does one reverse this initial practice trend? The answer lies in business development and cultivating a higher quality client base. Very quickly, it becomes wise and indeed vital to your firm's long term viability that you step back a bit from this all-encompassing volume work and devote some time and sacrifice some revenue to the mission of seeking greener, more profitable, pastures through business development. This can be done in many ways, be it through cultivating relationships with your existing clients to identify premium work to be done for them by you or by connecting with entirely new clients.

The key is that you really have no choice to do it as, ultimately, you need to be able to choose your clients. If you simply let clients choose you, quickly those who do will be judgment-proof clients who don't pay your accounts, serial law society complaint filers and fraudsters.

KEEP YOUR CLIENTS HAPPY

Effectively managing your clients' expectations and being responsive to their needs is a key pillar to the overall success, not only of your business but of your risk management strategy. A client who is provided honest and timely advice about not only the advantages of your services but also of the limits of what can be achieved is less likely to turn on you when an unfavorable result to one of their problems transpires. This has the dual advantage of maintaining the client relationship for the future and, just as importantly, minimizes the risk that the client airs its grievances, be it through bad word of mouth or a complaint to the Bar or Law Society.

Involving your client in his or her file

Achieving the level of client satisfaction required to avoid a falling-out when an unfavorable result transpires goes far beyond the communication to the client of a simple assessment of the risks in adopting a legal strategy. Even when made aware of such a risk, the client will not accept the unfavorable outcome if he or she feels that you have not done the utmost to ensure ultimate success, regardless of the risk.

The key elements in achieving the client's confidence that you have defended, and always will, their interests to their expectations, are numerous. First, you need to involve your clients in the progress of the file and be available to discuss his or her concerns. This encompasses not only the prompt return of his or her calls but also proactive steps such as sending your clients copies of all important documents drafted and circulated in connection with the file and advising of all developments in a (very) timely fashion. In addition, constantly seek consent from your clients on the pursuing of the matter in light of such developments.

The unsung advantage of all this correspondence (if it is written, which it most definitely should be) is that it will constitute a vital paper trail of your work should things go wrong.

At the outset, client expectations need to be discussed and any unrealistic expectations tempered immediately and unequivocally. The client must also be apprised as to reasonable expectations regarding delays. Most clients want problems to go away now – you need to educate them about how the judicial system works so as to dissipate the impression that this is possible, before disappointment regarding the length of time to achieve resolution is placed on your shoulders. Again, all of this should be followed-up in writing.

Never lose sight of the fact that while the file may for you be but another one on the ever-growing stack of work on your desk, and a particular development trivial, the file may very well be one of the most important things on your client's mind and that trivial development of great interest to them.

With this in mind, be wary of clients who wish to undertake proceedings on a question of principle – while principles may be laudable, our judicial system is not one of absolutes and the best resolution to almost any dispute is to seek a consensual resolution. A client who does not understand this carries many risks: he or she could unduly complicate the matter without necessarily be willing to assume the financial consequences of this and, should you not achieve a perfect result, your relationship could turn very sour.

There is very little downside to maximizing client involvement – the client will simply tell you that they don't care. There is tremendous downside in under-emphasizing client involvement – you will never see them again.

Being reliable – and effectively projecting that you are

The client also needs to be comforted in the feeling that you are reliable. One way of gravely eroding this confidence is by not being prepared for your calls with them and leaving things to the last minute. Show your client that you are in control – be on top of your file every time you speak and communicate deliverables to them reasonably in advance. This will ensure that if things do not go exactly as planned, the client is less likely to look to your work ethic as a source of blame.

The discussion around fees

Be transparent about fees. You will rarely, if ever, maintain a client relationship following a bitter dispute about your fees. Your retainer must be explicit and reviewed very early in the relationship. For new clients, at least, always ask for an advance, advising in writing of the work that needs to be done urgently but that will not be undertaken until such advance is paid, placing the burden of inaction on your client, not you.

You must assess and have a frank discussion with your client about his or her ability to pay your fees. If you take on a client who cannot afford you, at some point a dispute will arise and instead of admitting that he or she cannot afford your services, they will attack the quality and the value of services rendered.

Never underestimate fees or be optimistic in budget forecasts – you will be wrong and the client will call you on it. When presenting budgets and forecasts, be ready to demonstrate their proportionality with the result sought. If such proportionality is lacking, encourage your client to find alternative solutions for resolution of the dispute. If you expect to deviate, advise the client immediately, preferably in writing.

As for the preparation of accounts, it is vital that you keep track on a daily basis of hours worked on each file and be able to provide a reasonably detailed narrative of the work performed during these hours. Do not simply try to figure out what you have done in a month at the end of the month, but keep track as you do it. This will lead to accurate billing that your clients will appreciate and will have less of a propensity to contest, all while improving your firm's profitability, as most of us underestimate billable hours when we try to figure things out after the fact.

When you render an account, which should be done at regular intervals, review it with the client and address issues immediately – don't just collect. Never render this account without having first revised it, even if you are the only one on the file. You may spot issues of contention right away and take it upon yourself to correct it before it becomes a focal point of a dispute with your client.

AVOID ACTING FOR YOUR FRIENDS AND FAMILY

You are most certainly a good-natured person who wants to lend a helping hand to those you love, but don't try to do it by the provision of legal services. Friends and family have the same rights as any other clients and more often than not greater expectations as to your competence. They will ask you to do work you know nothing about and if you err, the family or friendship bond which led you to accept the mandate will often count for precious little in their decision to file a complaint against you. If this has not convinced you to avoid acting for a friend or a family member, treat them like any other client.

CLOSING A LAW PRACTICE: STRATEGIES FOR AN EFFECTIVE EXIT

There are few more vexing challenges in running a law practice than having to shut it down. Unless you are lucky enough to sell or transfer your practice, as is, you will have to face this challenge. A little advance planning can avoid a lot of headaches.

THINGS YOU CAN DO NOW

File storage

Your practice may end, but your obligation to retain files does not. Manage and minimize your storage requirements. Have a storage and destruction policy and make sure your clients know it (*i.e.* in your retainer agreement).

- I. Follow it. Review your files regularly.
- II. When closing files, return original client documents and pleadings to your clients.
- III. Consider whether you want the responsibility of holding original wills, or corporate records, or acting as registered office or agent.
- IV. Go paperless (if acceptable by your law society).

THINGS YOU SHOULD THINK ABOUT IN THE LAST FEW YEARS

Premises and Office Equipment

- I. Try to negotiate for terms that end at the time of your planned departure. Consider options for subletting or assigning.

Accounting and Taxes

- I. Consult with your accountant or financial advisor. Make sure you understand the effects of shutting down, especially if you are deferring taxes or income.

THINGS TO DO IN THE LAST YEAR

Files

- I. Don't take files you can't finish.
- II. Advise clients in writing that you are closing your practice. Refer them to new counsel or a lawyer referral service.
- III. Get written authorizations or receipts for returning or transferring files.
- IV. Provide your clients' new lawyers with a detailed memo on the nature of the file, the work still required, and all significant dates including limitation periods.
- V. For insurance/collection purposes, copy files before transferring them.
- VI. In the case of litigation files, where the client refuses to change counsel, serve your client, opposing counsel, and the courts with formal notice of your intention to withdraw as counsel.

- VII. In the case of legal aid files, request a change of counsel from the referring office.
- VIII. In the case of criminal files, write to the Criminal Court Registry and Crown to advise that you are no longer counsel.
- IX. In the case of corporate clients, seek instructions respecting registered and records offices, or changing the attorney and head office for extra-provincial companies.
- X. File a change of address if your firm is the address for service or notice for any builders' liens, trademark registrations, or corporations.
- XI. If transferring wills, file will notices with the appropriate agencies. Review wills to determine whether you have been named as executor or trustee. Consider asking the testator to appoint someone new, or attaching a renunciation to the original will.
- XII. Locate all certificates of title and other important documents or property held in safekeeping by your firm. Determine if these are being held on undertakings, conditions of trust or agreement
- XIII. Arrange to have telephone calls to your firm forwarded to another number, perhaps another firm, for at least a year.
- XIV. Place an ad in your local paper/firm website stating when your practice will be closing and who may be contacted after closing date about files, wills, etc. Retain copies.
- XV. Determine where you will be storing closed firm files. In the event the files are stored by another firm, determine that it will accept responsibility for the files's destruction. Consider the possible violation of solicitor-client confidence by delegating the responsibility of destroying the file to someone else.

Subscriptions

- I. Cancel all firm subscriptions.

Undertakings/Obligations

- I. Don't take on obligations that you can't finish. If you know you will not be able to complete any existing undertakings, advise your client/their new lawyer of this and obtain the written commitment of the successor lawyer to honour the undertaking. If this is not possible, satisfy the undertaking yourself or seek relief from strict compliance from the person to whom you gave the undertaking.
- II. Review your obligations respecting the retention of Corporate records not transferred to new counsel.
- III. Review your law society rules respecting the retention of trust and general account records.
- IV. Check into Revenue Canada's requirements for the keeping of accounting records.

Finances

- I. Render final accounts and return balances. Ensure clients understand the importance of promptly cashing your cheques. If any cheque is outstanding more than 30 days, call them.
- II. Consider a collection agency for unpaid accounts.
- III. Before disposing of trust funds be certain they are not being held pursuant to undertakings or court orders. Be familiar with, and plan to make, stakeholder applications to pay money into court.
- IV. Check with your law society to determine your obligations and options respecting unclaimed trust funds.
- V. Close trust accounts once all trust funds have been disbursed.
- VI. Leave a general account open with a reserve to cover outstanding obligations and to receive outstanding accounts receivable.

Staff

- I. Give staff as much notice as you can.
- II. Consider temp services, staff sharing arrangements or severance packages for staff prepared to stay on to the end.
- III. Cancel or otherwise deal with employee benefit plans.
- IV. Direct your accountant to prepare Records of Employment, calculate necessary holiday pay or other benefits accrued, prepare T4 slips, and make necessary remittances.

Insurance

- I. Determine whether to cancel your practice insurance. Determine what coverage, if any, is available against future claims arising from services rendered while insured. If you purchased excess insurance, contact your broker to ensure your interests are protected into the future.
- II. Contact your broker to discuss terminating your property and general liability insurance. Check with your broker to determine what coverage is available to cover your stored files and records.

Premises and equipment

- I. Contact the law schools, community colleges, or other firms to see if anyone will consider purchasing your library.
- II. Office furniture stores may take furniture and equipment on consignment. Alternatively, consider donating the furniture or equipment to staff or charity who will haul it away.
- III. Do not sell or donate firm computers until their hard data has been permanently deleted.
- IV. Notify your suppliers and public utilities. Advise them of the address to which future correspondence can be directed.