

MALPRACTICE ALERT!

PRACTICE MANAGEMENT ISSUE 2019

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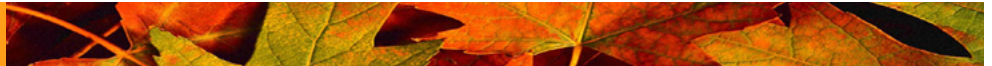
Fall is finally here! It signals the beginning of a new season and fresh starts. This is a good time to “dust off” office policies and procedures!

This Malpractice Alert will provide information to renew your practice. We hope it provides you useful practice tips to help how you meet the day-to-day challenges of practicing law.

As always, we welcome your thoughts and suggestions! Please let me know your comments and feel free to contact me with your questions. OBLIC is here for YOU!

**Gretchen K. Mote, Esq., Editor
MALPRACTICE ALERT**

REFRESH YOUR WEBSITE



Recent statistics indicate 96% of people seeking legal advice use a search engine. Further, 74% of consumers visit a law firm’s website to take action. What does that mean for your firm? You’ll need to tweak your website and maximize your law firm SEO (search engine optimization). How do you do that?

First of all, your website should be up-to-date with new content regularly added. Make your website landing page “pop”! It should promote the legal services you offer and easily lead potential clients to additional information about your firm.

Your website must be accessible from all devices. Make sure it’s fast and nimble! Most potential clients use their smartphone. For many users, their phone is the only internet source they have. If your website isn’t mobile device accessible with a continuous scroll feature – you’re going to be out of luck!

Remember, advertising is governed by the [Ohio Rules of Professional Conduct](#), Rules 7.1-7.5. Be sure under Rule 1.18 Duties to Prospective Client that you are not inadvertently creating an attorney-client relationship by learning client confidential information in response to an inquiry from your website.

What information do potential clients want to see?

- Law firm experience
- Pricing/rates/fee structure
- Past case results
- [Opinion 2016-8:](#)
Client Testimonials in Lawyer Advertising and Online Services
- [Opinion 2017-1:](#)
Advertisement of Contingent Fee Arrangements
- Legal information on their type of legal issues
- Client testimonials
- Office location
- Pictures of attorney(s) and staff
- Awards and memberships
- Videos and “news” features about the attorneys in the firm

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(Refresh your website, con't.)

You may also want to consider the [Web Content Accessibility Guidelines](#). These guidelines make content accessible to wider range of people with disabilities, such as blindness, deafness and hearing loss, and learning disabilities.

The time spent refreshing your website is well worth it to help you attract and maintain new clients!

See these additional resources:

- [Lawyers have many options when it comes to designing their firm's websites](#)
- [Did You Know 96% Of People Seeking Legal Advice Use A Search Engine?](#)
- [Law Firm SEO: 19 Actionable SEO Techniques To Dominate Google](#)
- [What information on a law firm's website matters most to consumers?](#)

USE CLIENT LETTERS AND FEE AGREEMENTS

With the advances in word processing tools for lawyers, there really is NO excuse for not communicating with your clients. Systems like Microsoft Office 365 include Word, Excel and Outlook.

Once you set up standard letters and agreements, you can use them for EVERY representation. Caveat: Be sure you are setting them up as templates that will not transmit the metadata, such as track changes, from previous uses.

Use these letters and agreements:

- [Engagement Letter](#)
- [Non-Engagement Letter](#)
- [Disengagement Letter](#)
- [Subsequent Appointment Confirmation](#)
- [Monthly Status Letter](#)
- [File Closing Letter](#)

Standard fee agreements include:

- [Hourly Fee Contract](#)
- [Contingent Fee Contract](#)

See [OfficeKeeper](#) for additional resources.

OBLIC also has [Evergreen Retainer language](#). Using this retainer can help avoid non-payment issues for lawyers.



IMPROVE CLIENT COMMUNICATION

Ohio Rule of Professional Conduct Rule 1.4 Communication instructs lawyers to promptly inform clients of any decision that requires the client's informed consent, reasonably consult with clients about their objectives, and keep the client reasonably informed about the status of the matter.

If questions later arise about what decisions were made and why, if it's not in writing, it may be difficult to prove that it happened. Legal malpractice cases often involve these issues. Documenting decisions as they are made can prevent relying on differing memories of conversations by the client and the attorney.



Busy attorneys can't write down everything! What to write down:

- [Decision to file / not file specific motion](#)
- [Whether to hire/not hire certain expert](#)
- [Specific term in transactional agreement](#)
- [Recommendations for a particular course of action](#)

Depending on the issue, the communication may be in the form of a Memo to the client, a client letter with sign-off, or an email. These communications then become part of the file that the attorney scans and keeps. In the event allegations of malpractice are made in the future, attorneys may be better able to defend their decisions.

See: [Write.It.Down by S. Klevens and A. Clair](#)

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OPTIONS FOR LIMITED SCOPE REPRESENTATION

Unbundling of legal services has become popular with clients. Rule 1.2 *Scope of Representation and Allocation of Authority Between Client and Lawyer* allows a lawyer to limit the scope of a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client, preferably in writing. The best practice here is to put it in writing. To help you do just that, OBLIC drafted a [Limited Scope Representation Agreement](#).

Several amendments to the Ohio Rules of Civil Procedure that took effect July 1, 2018 are meant to encourage attorneys to assist pro se parties on a limited basis without undertaking full representation of the client on all issues in the legal matter.

The amendments to Civil Rule 3 (B) permit attorneys to enter a Limited appearance on behalf of an otherwise unrepresented litigant, as authorized by Professional Conduct Rule 1.2(c), if that scope is specifically described in a “Notice of Limited Appearance.”

This provision also provides that leave of court normally required if an attorney seeks to withdraw from representation, is not required to withdraw from the case at the conclusion of a properly noticed limited appearance, provided the attorney files and serves the proper Notice of Completion of Limited Appearance in accordance with Civil Rule 5.

USE EFFECTIVE FILE MANAGEMENT

This is a good time to reassess file management in the law office, reorganize systems where needed, and refocus on using effective file management to improve client services and help prevent potential ethics and legal malpractice problems.

If you have NO paper files and the law office is completely electronic, the systems should be encrypted and password protected. Make sure all firewalls and anti-virus systems are updated.



Even electronic files may need to be reorganized with closed files being moved to another segment of cloud storage, external hard drive or other digital device.

Consider using a cloud-base management system like [Clio](#). OSBA members receive a 10% lifetime discount on regular Clio subscription prices. [Affinity Consulting](#) is another resource.

If your office uses paper files or a combination of paper and electronic files, reassess office file management.

- Are paper files kept in locked, fireproof cabinets when not in use?
- Is there a system to keep track of who has the file and what is being done on it?
- Is there a “work in progress” file drawer to which files are returned at the end of the day to protect them from theft and damage by fire or other disasters?

Even if the above measures are the “official” procedure for your law office, in reality, is the “pile” system used? Are “piles of files” on the lawyer’s desk, credenza and maybe even on the floor?

If the lawyer is currently using the “pile” system, reassess the downside of doing this. Files kept this way are vulnerable to theft or damage. Often files cannot be located, necessitating a “search party” to find them.

If the lawyer is absent or something happens to the lawyer, it may not be clear which files are open and require immediate attention and which files are just lying around, waiting to be closed or closed waiting to be processed in keeping with the law office file retention plan.

Reorganize systems where needed.

- If there aren’t adequate locking, fireproof file cabinets, and the lawyer intends to continue to use paper files or a combination of paper and electronic files, consider investing in these cabinets.
- Set up a tracking system for the files. This can be a paper “outcard” system, listing the date checked out, who has the file and what is being done.
- Or better yet, use an electronic file checklist that everyone in the office can access via the office network that will show what is being done on the file, when and by whom. Be sure your network system is encrypted and password protected.

The file management procedures should be written out and followed by everyone. It must be a workable system that everyone can agree to use. No exceptions! Even the most experienced attorney(s) and support staff must be onboard with this to have it work!

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DEALING WITH CLOSED FILES

Ideally, at the end of the representation, the lawyer will return the original file to the client. The lawyer should first scan or copy the file. This is what the lawyer will retain for her/his records. It should contain information to reflect the representation sufficient to defend any future allegations of an ethics violation or legal malpractice.

Remember that pursuant to Rule 1.15(a)(1) of the Ohio Rules of Professional Conduct, the lawyer shall maintain a copy of any fee agreement with each client for seven years after termination of the representation.

When this process of scanning or copying the file is complete, the lawyer can return the original file to the client. It should be spelled out in the initial engagement letter and fee contract that the lawyer will return the original file and all original documents to the client at the conclusion of the representation.

The lawyer should prepare the [File Closing Letter](#), return the file to the client and have the client sign and date a receipt for the original file that should then be scanned into the lawyer's scan file or placed with the paper file the lawyer is retaining. It is a good idea to copy the photo id of the client onto the receipt so the picture of the client is on the receipt with the client's signature.

Returning the file to the client at the conclusion of the representation saves the problem of trying to locate the client at the end of the firm's record retention period.

The ultimate file management dilemma is dealing with closed client files. The Ohio Supreme Court Board of Professional Conduct issued [Ohio Ethics Guide: Client File Retention](#) to provide guidance to Ohio lawyers. If the lawyer has closed client files in storage, this may be a good time to begin going through them.

WHAT IF MY ATTIC, BASEMENT, SHED OR GARAGE IS FULL OF FILES?

- Are these files adequately stored?
- Are they protected from the elements?
- Could they be subject to flooded floors, leaking roofs, chewing rodents?

If any of these apply, the files should immediately be moved to a safe location. Then the file review process can begin.

Here are suggested steps to follow for the review process:

- Inventory the files to know what files exist. This should include all locations and how many files at each location.
- Organize or list the files by year closed.
- Decide where and how to store the files the lawyer will retain.
- If it is decided to scan files for future storage, purchase appropriate equipment and learn how to operate it or hire competent persons to handle it.
- If using cloud storage, be certain data is adequately protected (Rule 1.6).
- Consider how to dispose of the files and purchase appropriate equipment.
 - * Files CANNOT be thrown in a dumpster or landfill.
 - * If shredded, they must be shredded beyond any recognition, usually by cross-shredding, not just "ribbon" shredding.
- Set aside a particular day of the week and make it "Closed Client File Day." Set a specific goal for what will be accomplished. For example, "We will go through one entire file box."
- The individual review process by should include tasks:
 1. extraneous materials are removed from files (paper clips, legal pads, pens).
 2. original documents are set aside to return to clients (wills, deeds).
 3. documents are scanned or copied to be kept in perpetuity (releases).
 4. relevant file portions are copied or scanned for duration of file retention.
 5. a date is determined for file destruction.

Even if the client previously has been advised of the file retention period, it is a best practice to send a final file destruction notice to the client before any client files are destroyed.



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(Closed Files, con't.)

After files are checked to be sure documents to be retained in perpetuity are safe and the file to be kept is actually on the scanned disc or in the retained file, THEN the discarded file can be shredded.

If a lawyer is reviewing long-closed files, it may be useful to consider publishing a newspaper notice advising that any former clients can contact the office to arrange to pick up files.

Questions of who owns the file of a deceased client will require careful consideration. When releasing the file, proper identification that the person is who they purport to be and a signed and dated receipt for the file is also prudent.

REMEMBER: The file belongs to the client and disclosure of confidential lawyer-client information must be in accordance with Rule 1.6.

The Board of Professional Conduct recently issued [Opinion 2019-6 Ethical Obligation to Deliver a Former Client's File](#). The Opinion said that a lawyer's file related to the representation of a client constitutes the "papers and property" of the client. However, a lawyer is not required by the Rules of Professional Conduct to maintain a former client's file for a minimum period of time after termination of representation.

The Opinion found that when a lawyer has maintained a former client's file for a substantial period of time after termination of representation, he or she is required to promptly deliver the file upon the client's request. The lawyer should deliver a former client's file in the same manner it was maintained or in an accessible format if the file was stored digitally.

CLOSING A LAW PRACTICE

Whether for retirement or other life-cycle changes, OBLIC receives requests for information on closing a law practice. Discussing this well in advance of the planned closing is advisable.

[The Checklist for Closing a Law Practice provides some helpful guidance.](#) There is also a [Sample Letter For Closing Law Practice](#). It may also be helpful to place a [notice in a local newspaper](#) like a "Neighbor News" or similar publication in order to reach clients for returning files. There is a Sample Newspaper Notice.

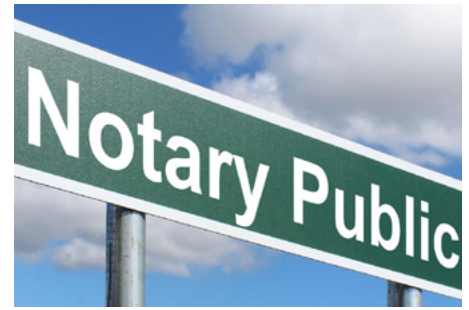
Attorneys closing a practice should contact their OBLIC Underwriter to discuss ["tail" coverage](#). As always, we are here to assist with your practice transition.

OPINION ADDRESSES T.O.D. OF LAWYER'S SHARE IN FIRM

[Ohio Board of Professional Conduct Opinion 2019-2 Transfer on Death of a Lawyer's Shares in a Law Firm to a Revocable Trust](#) says that a lawyer may not participate in a law firm in which a member, partner, or other equity holder is a nonlawyer or practice in a law firm if a nonlawyer will own any interest in the law firm.



It discussed Rule 5.4 and stated that a lawyer must avoid designating his or her interests or shares in a law firm as transfer-on-death to the successor trustee in a revocable trust, becoming an irrevocable trust upon death, when one or more beneficiaries of the trust are nonlawyers. The fact that a lawyer's trust has a licensed lawyer as trustee does not avoid the problem created for the remaining lawyers in the law firm if the beneficiaries are nonlawyers.



NOTARY PUBLIC MODERNIZATION ACT

Ohio attorneys often notarize documents. Effective September 20, 2019, the [Notary Public Modernization Act](#) allows online notaries. However, to do so the online notaries public may only perform online notarizations while physically present in Ohio.

Additionally, attorneys who apply to become notaries after the effective date will be required to complete an education program authorized by the Ohio Secretary of State.

The Ohio State Bar Association (OSBA) formed [Ohio Notary Services, LLC](#), (ONS) a unique partnership between the OSBA and five metropolitan bar associations, including Akron, Cincinnati, Cleveland, Dayton and Toledo. ONS will provide statewide notary education and testing services for current and future Ohio notaries public, as well as for those who wish to add the new designation of online notary public.

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LLC MODERNIZATION PROPOSAL

The OSBA is proposing the LLC modernization amendment in the Ohio Senate. Since the original Ohio Limited Liability Act was enacted in 1994, many lawyers have structured their practices as LLC's. The Ohio Secretary of State records indicate there are nearly 900,000 active Ohio LLCs and fewer than 240,000 active Ohio corporations.



The proposal seeks to provide:

- Additional clarity in the language and structure of the original statute.
- Flexibility in organizational structure
- Series Limited Liability Companies
- Consistent terminology

Stay tuned for updates on this legislation as it moves through the Ohio General Assembly.



STAY ALERT TO PREVENT CYBER ATTACKS!

The FBI reported that the cost of cybercrimes reached \$2.7 billion in 2018. Lawyers and law firms are increasingly targets of cyber crimes.

These can include:

- Phishing scams
- Fraudulent wiring instructions
- Ransomware threats
- Fake client inquiries
- Viruses and worms

OBLIC provides basic cyber coverage in its policy to all our policyholders. The Cyber Toolbox on the OBLIC website provides a host of information to protect against cybercrimes. You may also want to look into purchasing additional cyber coverage. If you have ANY questions, please contact us.

What can you do?

- Implement or update your IRP (Incident Response Plan). If you don't have one – see OBLIC website
- Train all lawyers and staff to recognize potential fraudulent emails. Have procedure to report them
- Follow OBLIC's Preventing Fraudulent Wiring Instructions
- Implement safe user policies for ALL electronic devices
 1. Update passwords
 2. Don't use public Wifi without a VPN
- Keep current all antivirus and firewall protection
- Backup all systems regularly
 1. Run a test with your IT person – try to set up your system and run your office from your backup as if everything had been destroyed!
 2. Correct any "holes" you find in your backup!

ATTORNEY-CLIENT PRIVILEGE

In a decision involving a multinational company, the High Court of Australia allowed the Australian Taxation Office (ATO) to use privileged information obtained from the "Paradise Papers" data breach to make assessments of the company's tax obligations.

The Law Council of Australia and the Australian Bar Association are working with the ATO to develop new protocols on privilege. This might seem like it's worlds away from your practice, but in our cyber-connected world, it offers a cautionary note to protect potentially privileged information. See *Glencore Int'l AG v. Comm'r of Taxation*, [2019] HCA 26, 14 August 2019 (High Court of Australia)

Another note of caution sounds in *Universal Standard Inc. v Target Corporation, et al.* Case No. 1:2018 CV 0642 (S.D.N.Y. 2019), which held that emails between the company, its attorneys and a public relations firm involving a trademark case against Target are not protected by attorney-client privilege. The court agreed that privilege was waived and that the work product doctrine did not apply.

Attorneys should carefully review decisions in their applicable jurisdictions and caution clients to limit third-party involvement in correspondence with attorneys to only those necessary to the litigation or to those who are aiding in the litigation.



Your OBLIC team has been hard at work to bring a fresh, new look to our logo and materials! While the look is new, we still provide you with the same dependability and service, just as we've done for the past 40 years! Visit our website to see more resources for YOU!

We hope you find this Malpractice Alert Practice Management Issue useful in your day-to-day practice. If we can answer any questions or assist you, please feel free to contact us.

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