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PREVENTION AND AVOIDANCE OF PROFESSIONAL MALPRACTICE

I. WHAT IS LEGAL MALPRACTICE

A. Elements of cause of action. *Kendall v. Rogers*, 181 Md. 606 (1943).

1. Attorney-client relationship.

(a) No fee required. *Cent. Cab Co. v. Clarke*, 259 Md. 542 (1970)

(b) An intended third-party beneficiary is also the client. *Flaherty v. Weinberg*, 303 Md. 116 (1985); *Goerlich v. Courtney Indus., Inc.* 84 Md. App. 660 (1990).

(c) Establishment of attorney-client relationships can occur in a variety of non-traditional ways:

(i) Advice at a cocktail party.
(ii) "Over the fence discussions."

The determining question is whether a fact finder conclude the existence of the attorney-client relationship based upon the perspective of the client?

2. Breach of a duty fairly arising from the attorney-client relationship.

(a) Standard of care is what a reasonable attorney would do in like or similar circumstances.

(b) An expert witness is required if the breach is beyond the knowledge or experience of the average person, regardless of whether a jury trial or a bench trial is held. *Fishow v. Simpson*, 55 Md. App. 312 (1983).

(c) Some decisions are tactical, and those likely are not the basis of a legal malpractice claim. *Fishow*.

(d) Breach must arise from scope of employment. *Home Fed. Sav. & Loan Ass'n v. Spence*, 259 Md. 575 (1970). *See* MRPC 1.2 (Lawyer shall abide by client's decisions concerning objectives of representation, but may limit the scope of representation if the limitation is reasonable and the client gives informed consent).

3. Damages proximately caused by the breach. *Glasgow v. Hall*, 24 Md. App. 525 (1975).

(a) Sets up the "case within a case" aspect of legal malpractice in which the underlying case that was never tried is litigated before the malpractice

jury. *Thomas v. Bethea*, 351 Md. 513 (1998).

(b) Even with a breach of duty, if the client would not have prevailed in the underlying case, there is no cause of action. *Taylor v. Feissner*, 103 Md. App. 356 (1993).

(c) Plaintiff must prove collectability of damages. *Thomas; Glasgow*.

(d) Damages must be foreseeable. *Stone v. Chicago Title Ins. Co. of Md.*, 330 Md. 329 (1993).

II. TO WHOM ARE YOU LIABLE?

A. Strict privity relaxed. *Flaherty v. Weinberg*, 303 Md. 116 (1985).

B. Who or what is a specifically intended third-party beneficiary? Whose intent governs? *Flaherty*. Third-party beneficiary contract arises when two parties enter into an agreement with the intent to confer a direct benefit on a third party, allowing the third party to sue on contract despite lack of privity.

C. Classic situations of concern:

1. Real estate settlement.

(a) Send a letter to all parties prior to settlement stating who you represent and the scope of your employment, as well as advising all parties that they may bring their own counsel.

(c) Beware that, if you undertake to counsel someone at settlement, you could be liable, notwithstanding the letter. *Glanzer v. Sheppard*, 233 N.Y. 236, 135 N.E. 275 (1922).

(d) Duties assumed by issuing title insurance. Md. Code Ann. Insur. § 22-102 (2006) (The agent selling "Lenders Insurance" must offer "Owners Insurance".)

2. Will drafting situation.

(a) Generally, the attorney to the testator is not liable to the beneficiaries of a will. *Noble v. Bruce*, 349 Md. 730 (1998).

(b) Classic examples – *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685 (1961); *Kirgan v. Parks*, 60 Md. App. 1 (1984).

(c) Be cognizant of the scope of the employment.

(d) The attorney for the Personal Representative of an Estate is not liable to beneficiary. *Ferguson v. Cramer*, 349 Md. 760 (1998).

(e) Violation of Rule 1.8 by **including ones self in a will for non-relative will result in discipline.** *Attorney Grievance Comm'n v. Brooke*, 374 Md. 155 (2003).

D. Liability to nonclients.

1. Defamation. *Dixon v. DeLance*, 84 Md. App. 441 (1990); *Woodruff v. Trepel*, 125 Md. App. 381 (1999) (application of judicial privilege); *Norman v. Borison*, 418 Md. 630 (2011).

2. Motions for Costs (per Md. R. 1-341) for litigating in bad faith and without substantial justification. *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254 (1991); *Worsham v. Greenfield*, 435 Md. 349 (2013).

3. Fraud. Mallen & Smith, *Legal Malpractice* § 6.5 (4th ed. 2006).

4. Tortious Interference with Contract. *Kramer v. Mayor of Baltimore*, 124 Md. App. 616 (1999).

5. Malicious Prosecution/Abuse of Process. *Deitz v. Palaigos*, 120 Md. App. 380 (1998); *Cottman v. Cottman*, 56 Md. App. 413 (1983).

6. Conversion. *Humphrey v. Herridge*, 103 Md. App. 238 (1995).

7. Civil Conspiracy. Mallen & Smith, *Legal Malpractice* § 6.4 (4th ed. 2006).

8. Successor counsel can be responsible to their predecessor for malpractice. *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671 (2000).

III. PRACTICE AREAS OF SPECIAL CONCERN

A. Real estate work.

1. Accounts for 25% of all claims.

2. Is your title examiner insured at appropriate limits? Will that policy protect you if there is an error?

3. What does your agreement with the Title Insurance Company provide by way of liability?

4. If the title insurance company approves title, confirm it in writing.

5. Exclusions in your malpractice policy on disbursements of funds. Special riders. Talk to your agent.

6. Disbursing funds before the lender's check clears.

7. See the privity sections above. Consider a standard letter.

B. Estates and Trusts.

1. Do you regularly advise the client of changes in the estate and trust and tax field?

2. Duty to account: Trustees have a duty to render an accounting to future beneficiaries (including contingent, remote, or future beneficiaries) of Trusts upon request – regardless of instructions to the contrary from current beneficiaries. *Jacob v. Davis*, 128 Md. App. 433 (1999).

C. Debt collection/Debtor creditor relations.

1. Federal Fair Debt Collection Practices Act, 15 U.S.C. §1692, *et seq*.

(a) Attorneys are subject to Act's requirements. *Heintz v. Jenkins*, 514 U.S. 291 (1995).

(b) Mandatory disclosures to consumer debtors, 15 U.S.C. § 1692b (1)-(5).

(c) Validation requirement, 15 U.S.C. § 1692g.

(i) Debtor can request verification of existence/amount of debt during initial 30-day period.
(ii) If timely requested, collector must cease collection efforts until debt verified.

(d) Direct communication with debtor represented by counsel is prohibited, 15 U.S.C. § 1692c (a)(2).

(e) Overshadowing doctrine.

(i) Statutory notices must be effectively conveyed to debtor; otherwise, violation of FDCPA occurs. Court-made doctrine. *See Swanson v. S. Or. Credit Serv., Inc.*, 869 F.2d 1222 (9th Cir. 1988); *Miller v. Payco-Gen. Am. Credits., Inc.*, 943 F.2d 482 (4th Cir. 1991).

(ii) "Least sophisticated consumer" standard applied. *United States v. Nat'l Fin. Servs.*, 98 F.3d 131 (4th Cir. 1996).

(iii) Bottom line: avoid "threatening contradictions" in language of collection letter or different color, size, or placement of payment demand.

(f) Damages, 15 U.S.C. § 1692k.

(i) Actual damages (+) statutory penalty up to $1,000 (+) attorney's fees.

(ii) Actual damages not required for liability.

(iii) Class actions – potentially severe statutory penalty ($500,000 or 1% of collector's net worth, whichever is less).

(iv) No punitive damages.

(v) Validity of debt irrelevant.

(g) "Bona fide" error defense (unintentional violation despite procedures reasonably adapted to prevent violation), 15 U.S.C. § 1692 k(c). *See Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997).

2. State consumer protection/licensing statutes.

(a) Not preempted by FDCPA unless provide less protection, 15 U.S.C. § 1692n.

(b) Always check requirements carefully, e.g., Md. Code Ann. Com. Law, § 14-201, *et seq.* (Maryland Consumer Debt Collection Act).

D. Social Security Offsets

1. Beware of the provisions of Title 42 U.S.C. § 424a the "80%" rule.

(a) Pursuant to 42 U.S.C. § 424a (a) if a claimant is under 65 years of age his or her total combined monthly benefits under the Social Security Disability Act in the applicable workers' compensation statutes cannot exceed 80% of the average monthly wage which he or she had been earning from employment prior to the accident.

(b) For any month in which an individual is under the age of 65 and his or her combined monthly benefits exceed 80% of the pre-injury average monthly wage, there shall be an offset such that the monthly social security disability benefit shall be reduced by the amount which exceeds 80% of the pre-injury average monthly wage.

(c) In other words, whether the combined monthly benefits exceed 80% of the social security disability payments, those will be reduced so that the combined monthly benefit equals exactly 80%.

(d) A lump sum settlement from the workers' compensation carrier will not avoid the 80% rule.

2. While workers' compensation payments are made in a single lump sum, the Social Security Administration will "approximate" the monthly benefits which they believe the lump sum represents, the approximations are not usually to the benefit of the recipient.

3. Consider having the client accept a lump sum and simultaneously insert language in the settlement agreement to specify a monthly rate, seeking to make the rate as low as possible.

   (a) This can be done by indicating that the settlement agreement is supposed to compensate the client for the remainder of his or her life.

   (b) The Social Security Administration will then divide the lump sum payment by the recipient's life expectancy, rather than by the work life expectancy as it otherwise would have done.

   (c) This should cause the offset to be significantly lower.

IV. PREVENTION OF CLAIMS

A. Statistics indicate that the average attorney is sued once every seven years of practice. Both Real Estate and Personal Injury account for approximately 25% of all claims.

However, following certain common sense rules will greatly reduce the number of claims.

B. Client selection.

1. You need not take every case.

2. Clients hiring their second or third attorney are a problem.

3. Beware the client who enters your office with his papers in a shoe box or shopping bag.

4. Can you legally and ethically accomplish the client's desire?

5. Avoid creating or fostering unrealistic expectations. (Will the client accept a $5,000 settlement on a case you said was worth $100,000 before discovery?)

6. If you elect to turn down a case, do so in writing and:

   (a) Inform the client of the existence of other attorneys in the area who might be consulted, or direct them to the lawyer referral services;

   (b) Inform the client as to when the statute of limitations will expire, and explain the effect of the expiration of the statute of limitations; and

   (c) Create a general correspondence file for cases you do not accept and save the letter.

C. Conflicts.

1. A large number of claims originate in this area.

2. Don't let greed overtake common sense.

3. Read the Rules of Professional Conduct – particularly Rule 1.7.

4. Ignorance as to the existence or content of the Rules of Professional Conduct is not a defense to disciplinary action. *Atty. Griev. Comm'n v. Stein*, 373 Md. 531 (2003).

5. **Don't draft a will in which you are a substantial beneficiary without checking Rule 1.8.**

6. Conflict checks are critical.

7. Breach of fiduciary duty is not difficult to allege and creates a negative aura before a jury.

D. Termination of attorney-client relationship.

1. Fee issues. Upon termination of relationship by client without any cause or by attorney with cause, the attorney may be entitled to *quantum meruit* recovery from client. When client discharges attorney for cause, attorney may not be entitled to compensation. *Somuah v. Flachs*, 352 Md. 241 (1998).

2. Maintain a copy of the file.

3. Advise client of applicable limitations and deadlines.

E. Fee agreements.

1. It is suggested that fee agreements be in writing in all cases, but agreements must be in writing if the fee is contingent, or the attorney does not regularly work for the client. Rule of Professional Conduct 1.5.

2. Clearly delineate your responsibilities and charges in writing. The scope of your employment is critical. Provide for your consultation with other attorneys, where appropriate.

3. If your fee changes in the event of an appeal, say so. *See Attorney Grievance Comm'n v. Korotki*, 318 Md. 646. (1990).

4. Ambiguities will be resolved against you.

5. Provide for billing at frequent, regular intervals. Utilize retainers and give reasonable estimates. Closely monitor your accounts receivable to avoid bills getting "out of hand".

6. Consider whether the agreement should require disputes between you and your client to be settled in arbitration.

(a) *Haynes v. Kuder*, 591 A.2d 1286 (D.C. 1991) (use of arbitration in fee agreement).

(b) *See* Rules of Professional Conduct 1.8(h). (Lawyer shall not settle a claim for malpractice with unrepresented client or former client unless that person is advised in writing and given a reasonable opportunity to seek independent counsel).

(c) Your fee agreement must advise that the client, by entering the agreement, may be sacrificing the valuable right to trial by jury.

7. Provide for your ethical withdrawal in the event of non-payment.

8. Suing for your fee is likely to result in a malpractice counterclaim.

(a) Prior rule of *res judicata* in *Felger v. Nichols*, 35 Md. App. 182 (1977) now limited in *Rowland v. Harrison*, 320 Md. 223 (1990).

(b) Consider fee arbitration.

(i) Available through bar associations in Baltimore City, Baltimore County, Prince George's County and Montgomery County.

(ii) Where unavailable in local counties, the Maryland State Bar Association provides this service.

9. Fee disputes following discharge by a client. *Somauh v. Flachs*, 352 Md. 241 (1998).

(a) Discharge without cause, but in good faith.

(i) Almost any good faith reason asserted by the client may constitute cause to discharge an attorney.

(ii) An attorney discharged without cause but in good faith is entitled to compensation in a contingent fee case if, as, and when the contingency occurs, based on the reasonable value of services provided, but the value to the client and the nature and gravity of the "cause" that led to the attorney's discharge must be considered.

(b) Discharge without cause.

(i) An attorney is entitled to immediate compensation from the client in quantum meruit for the reasonable value of the legal services performed prior to the discharge.

(ii) Without cause means that there is no basis for the client to be dissatisfied with the attorney's services or the discharge is in bad faith.

(c) With cause – an attorney is entitled to no fee whatsoever.

(i) With cause means serious misconduct, fraud, illegal conduct, representing conflicting interest without full disclosure and voluntary and knowing waiver, etc.

F. Client Communication.

1. If you do the greatest job in the world, but the client doesn't know, what good does it do you?

2. Send the client regular status reports.

(a) Even if you simply advise why nothing is happening.

(b) Advise of major changes in evaluation of value of case, with an explanation your client can understand.

3. Copy the client on all letters you receive or generate.

4. Invite the client to attend proceedings, such as depositions and hearings.

(a) It is the client's case.

(b) It helps the client to understand obstacles to success.

(c) It will build a "teamwork" mentality.

G. Only handle those cases within your competency. *See* Md. R. 1.1.

1. Handling cases in jurisdictions where you are unlicensed is not wise.

(a) Associate with local, competent counsel immediately.

(i) Define your respective roles and the fee sharing arrangements.
(ii) Joint and several liability to the client.

(b) Avoid missing limitations or a local nuance.

2. Do not handle cases outside of your area of expertise.

(a) If you take the case, associate with competent counsel.

(b) So long as you do work, you may ethically share the fee.

(i) Fee disputes between attorneys are probably not covered by insurance and return of fees is almost always excluded.

(ii) I would not ordinarily do this, but…

H. Limitations/tickler. Docket control.

1. Do you have an effective system?

2. Is there a regular review of all cases in your office?

3. When you obtain a judgment, do you routinely advise the client as to the duration of the judgment (12 years and then must be renewed, Md. R. Civ. P. 2-625)?

4. Are UCC-1 filings made in the correct locations?

5. Are UCC-1 filings diaried for renewal (or is the client informed?).

I. Settlements "on the courthouse steps."

1. *Voir Dire* your client and your adversary's client to be certain of the agreement.

2. If there is even the slightest hesitancy, do not proceed.

3. Promptly reduce the agreement to writing, or come prepared with appropriate release language.

J. Settlement advice.

1. Recognized cause of action. *Thomas v. Bethea*, 351 Md. 513 (1998).

2. Utility of 2nd opinion.

V. IF YOU RECEIVE A CLAIM

A. Make a complete copy of the file.

B. Do not give away your only copy.

C. Promptly inform your insurer.

D. Do not discuss the matter with your adversary.

E. You are still bound by the attorney-client privilege of confidentiality – Rule 1.6 of the Maryland Rules of Professional Conduct.

F. Concede nothing, there may be claims repair.

G. Personal counsel – uncovered/excess.

VI. IF SUED SHOULD YOU SETTLE

A. Publicity.

B. Exposure.

C. Future insurability.

D. Covered/uncovered claims.

MARYLAND

This list was updated on August 10, 2017. The law frequently changes. It is therefore necessary for you to make certain that there have been no significant changes to any of the following statutes.

Maryland Limitation/Deadlines[1]

1. General Statute of Limitations - 3 years from the date the cause of action "accrues." Discovery rule applicable to tort actions - the cause of action accrues, and limitations begin to run, when the Plaintiff knew or reasonably should have known of the alleged wrong. (CJ § 5-101).

2. Promissory note or other instrument under seal, bond (except a public officer's bond, *see* CJ § 5-104 – 5 years from the date of the bond), judgment, recognizance, contract under seal or "any other specialty" - 12 years after the cause of action accrues or within 12 years from the date of the death of the last to die of the principal debtor or creditor, whichever is sooner (CJ § 5-102).

3. Adverse possession - 20 years from the date the cause of action accrues. (CJ § 5-103).

4. Assault, libel or slander - 1 year from the date the cause of action accrues. (CJ § 5-105).

5. Medical malpractice (action against health care provider) - 3 years from the date the injury is discovered or 5 years after the date the injury was committed, whichever is sooner. (CJ § 5-109(a)).

6. Claim of injuries after improvements to property - 3 years after the cause of action accrues (i.e., when the injury or damage occurs, *see* CJ § 5-108(e)), but no more than 10 years after the date the entire improvement first became available for its intended use if claimed against architect, professional engineer or contractor (CJ § 5-108(b)), and no more than 20 years if against someone other than architect, professional engineer or contractor. (CJ § 5-108(a)).

7. Suit for damages against a municipality or its employees - Notice of intent to sue must be given within 1 year of the injury. (CJ § 5-304(b)(1)). Upon motion and for good cause shown, court may waive notice requirement unless defendant can affirmatively show that its defense has been prejudiced by lack of required notice. (CJ § 5-304(d)).

8. Suit against State - Must submit written claim to Treasurer within 1 year after injury to person or property that is the basis of the claim. If Treasurer denies claim finally, suit must be filed within 3 years after cause of action arises. (SG § 12-106(b)).

9. Employment discrimination claim - Claim must be filed with EEOC within 180 days after the allegedly unlawful employment practice (42 U.S.C. § 20000e-5(e)(1)), or with the Maryland Human Relations Commission within 6 months after the date on which the alleged

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discriminatory act occurred (SG § 20-1004(c)(1)). If Commission determines no probable cause and sends a right to sue letter, suit must be instituted within 90 days of the letter. (42 U.S.C. § 2000e-5(f)(1)).

10. Mechanic liens - Petition to enforce must be filed within 180 days after the date the work was finished or the materials furnished. (RP § 9-105(a)). Right to enforce any lien expires at end of 1 year from the day on which the petition is filed to enforce the lien. (RP § 9-109).

11. Claims against an estate – generally 6 months from the date of death or 2 months after Notice to Creditors, whichever is earlier. (ET § 8-103(a)). If the decedent was covered by a liability insurance policy, which at time action is instituted provides insurance coverage for the occurrence, then the filing of the claim is governed by the period of limitation generally applicable to such action. (ET § 8-104(e)(1)).

12. Workers compensation - Must file claim with Commission within 60 days after accidental personal injury (LE § 9-709(a)(1)). Failure to do so bars claim unless excused by Commissioner (LE § 9-709(b)(1)). Claim is completely barred, i.e., cannot be excused by Commissioner, if fail to file within 2 years from the date of the accident (LE § 9-709(b)(3)).

13. Bankruptcy – Generally, proof of claim must be filed within 90 days from the first date set for the first meeting of creditors. (BR Rule 3002). Chapters 7, 12, 13.

14. Federal estate tax return - 9 months from the date of death. (26 U.S.C.A. § 6075(a)).

15. Other statutory limitations - *See* CJ § 5-101 *et. seq*.

16. Contract provisions may shorten time to make claim, i.e., some AIA contracts specify that a party must request arbitration within 1 year or waive any claims.

17. Administrative claims - check Code and COMAR.

18. Other states - different limitations.

DISTRICT OF COLUMBIA

This list was updated on August 10, 2017. The law frequently changes. It is therefore necessary for you to make certain that there have been no significant changes to any of the following statutes.

District of Columbia Limitation/Deadlines[2]

1. General Statute of Limitations -- except as otherwise specifically prescribed, 3 years from the

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date the cause of action "accrues". (§ 12-301(8)) Ordinarily, action accrues on the date of injury. If cause unknown, discovery rule applicable. According to the discovery rule, cause of action accrues when Plaintiff knows or should know of (1) injury, (2) its cause, and (3) some evidence of wrongdoing.

2. Actions for the recovery of lands, tenements, or hereditaments -- 15 years. (§12-301(1)).

3. Actions for the recovery of personal property or damages for its unlawful detention -- 3 years. (§12-301(2))

4. Actions for the recovery of damages for an injury to real or personal property -- 3 years. (§12-301(3)).

5. Actions for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment -- 1 year. (§12-301(4)).

6. Actions on an executor's or administrator's bond -- 5 years; on any other bond or single bill, covenant or other instrument under seal -- 12 years. (§12-301(6)).

7. Actions on a simple contract, express or implied -- 3 years. (§12-301(7)).

8. Damages for injury to real property from toxic substances, including asbestos --5 years from date the injury is discovered or with reasonable diligence should have been discovered. (§12-301(10)).

9. Actions for breach of any contract for the sale of goods -- 4 years. (§ 28:2-725(1)). By the original agreement the parties may reduce the original period of limitation to not less than one year but may not extend it. (§ 28:2-725(1)).

10. Worker's Compensation -- Claim must be filed within one year after the injury or death. (§ 32-1514(a)). Time for filing claim does not begin to run until employee or beneficiary is aware, or should be aware, of the relationship between the injury or death and the employment. (§ 32-1514(a)).

11. Actions against an heir or legatee for the receipt of improperly distributed property and claims of personal liability against a personal representative (except for fraud) -- 1 year from the date of distribution of all assets and satisfaction of all known claims against the estate. (§ 20-1303(b)(1)).

12. Actions against the District of Columbia for unliquidated damages to person or property -- written notice to Mayor within 6 months after injury or damage sustained. (§ 12-309(a)).

13. Actions for damages for wrongful death within the District of Columbia -- brought by the personal representative of the deceased within 2 years after death. (§ 16-2702).

14. Other statutory limitations -- See § 12-301 *et. seq.*

VIRGINIA

This list was updated on August 10, 2017. The law frequently changes. It is therefore necessary for you to make certain that there have been no significant changes to any of the following statutes.

Virginia Limitation/Deadlines[3]

1. General Statute of Limitations -- unless otherwise specified, actions for personal injuries, whatever the theory of recovery, shall be brought within 2 years after the cause of action accrues. (§ 8.01-243A).

2. A cause of action shall be deemed to accrue on the date the injury is sustained for personal injury or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered. (§ 8.01-230).

3. Actions for damages resulting from fraud shall be brought within 2 years after the cause of action accrues. (§ 8.01-243A).

4. Damages for injury to property, including actions by parent or guardian of infant against tortfeasor, shall be brought within 5 years after the cause of action accrues. (§ 8.01-243B).

5. All personal actions, accruing on or after July 1, 1995, for which no limitation is otherwise prescribed, shall be brought within 2 years after the right to bring such action has accrued. (§ 8.01-248).

6. Actions to recover for injuries to property, real or personal, or for bodily injury or wrongful death, arising out of a defective and unsafe condition of an improvement to real property shall be brought no more than 5 years after the performance of such services and construction. (§ 8.01-250).

7. Action to enforce bequest or legacy -- 20 years. (§ 8.01-254).

8. Actions on written contracts, not otherwise specified and which is in writing and signed by the party to be charged, shall be brought within 5 years after the cause of action accrued. (§ 8.01-246(2)). Actions on unwritten contracts, express or implied, shall be brought within 3 years after the cause of action accrued. (§ 8.01-246(4)).

9. Actions for breach of any contract for the sale of goods must be commenced within 4 years after the cause of action has accrued. (§ 8.2-725(1)). By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. (§ 8.2-725(1)). A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of

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knowledge of the breach. A breach of warranty occurs when tender of delivery is made. (§ 8.2-725(2)).

10. Actions for wrongful death must be brought by and in the name of the personal representative of the deceased within 2 years after death. (§ 8.01-244B)

SOME BASIC DO'S AND DONT'S

- **DO BE SELECTIVE IN DETERMINING THE CLIENTS YOU REPRESENT AND THE CASES YOU HANDLE**
- **DO PUT ALL FEE AGREEMENTS IN WRITING**
- **DON'T SUE YOUR CLIENT FOR FEE**
- **DON'T EXERCISE YOUR RETAINING LIEN IN THE EVENT OF YOUR DISCHARGE**
- **DO CONFIRM YOUR DECLINATION OF ALL CASES IN WRITING**
- **DO ADVISE ALL TURNED DOWN CLIENTS OF THE STATUTE OF LIMITATIONS**
- **DO KEEP THE CLIENT REGULARLY INFORMED OF THE PROGRESS OF THE CASE**
- **DON'T HIRE UNINSURED TITLE RESEARCHERS**
- **DON'T HANDLE CASES OUTSIDE YOUR AREA OF EXPERTISE**
- **DON'T HANDLE CASES OUTSIDE OF AREAS WHERE YOU ARE LICENSED**
- **DON'T CONCEDE ANYTHING IF YOU ARE SUED**
- **DON'T EVER, UNDER ANY CIRCUMSTANCES, LIE TO A CLIENT**
- **DON'T GIVE THE CLIENT UNREASONABLE EXPECTATIONS AS TO THE POTENTIAL RESULT OF THE CASE**
- **DON'T IGNORE CLIENT PHONE CALLS**
- **DO REVIEW ALL CASES IN YOUR OFFICE ON A REGULAR BASIS**
- **DO CONFIRM YOUR ADVICE TO THE CLIENT IN WRITING**
- **DO CONFIRM A CLIENT'S REFUSAL TO FOLLOW YOUR ADVICE IN WRITING**
- **DON'T ATTEMPT TO NEGOTIATE A SETTLEMENT FOR YOUR OWN NEGLIGENCE WITH AN UNREPRESENTED CLIENT**
- **DON'T GIVE AWAY YOUR FILE WITHOUT MAKING A COPY**
- **DO CREATE A RATIONAL FILE RETENTION/DESTRUCTION POLICY**

ECCLESTON AND WOLF, P.C.
PROFESSIONAL COURSE
CONTINGENT FEE AGREEMENT

Disclaimer and Practice Pointer:
The information, examples and suggestions presented in this material have been developed from sources believed to be reliable, but they should not be construed as legal or other professional advice. This form draft fee agreement is intended to present ideas and concepts that may not be appropriate for use in every case. Consideration should be given to the type of matter and the client's level of sophistication. The mandatory fee arbitration provision is ethically proper as long as the client is advised that valuable rights are being waived and is afforded the opportunity to confer with independent counsel.

The enclosed should be used for ideas, rather than as a finished form. This form was prepared and last reviewed in August 2017. Because the law is subject to change, anyone using any portion of this form should ensure that there have been no significant changes in ethical practice or legal requirement since its preparation.

CONTINGENT FEE AGREEMENT

This is an agreement between _____ (hereinafter known as the "Client"), and _____, (hereinafter known as "The Law Firm"), whereby the Client is hiring The Law Firm to handle the following case or matter solely for the benefit of the Client:_____. This contract applies only to the case or matter that is specifically set forth above. The Law Firm is not responsible for handling any other case or matter, or any appeal or re-trial in the case, unless the terms and conditions of that retention are separately agreed upon in writing. The scope of our representation does not include advice or services regarding accounting, tax, personal financial matters or business management, or related non-legal matters. If you wish for us to consult with other professionals that you have retained regarding this matter, we will communicate with you in writing to confirm the scope of such consultations prior to initiating communication. You also acknowledge that we are not responsible for investigating the character or credit of persons with whom you may be dealing.

Our fee for handling this matter is contingent on the recovery obtained. This means that we receive no fee unless you recover in this case. In the event of a recovery, it is agreed that our fee shall be _____ percent (___%) of the total recovery. If some or all of the total recovery is in the form of an annuity, the legal fees shall be calculated on the present value of the annuity and paid when the annuity is purchased. This means that our fee is calculated on the total amount received before any deductions, offsets, or payments.[4]

Costs and expenses will be incurred during the course of handling this matter, including, but not limited to, deposition and other transcript fees, filing fees and costs, travel, parking, meals, lodging, computerized legal research, overnight and special postage, photocopying, trial presentation technology, delivery service charges, fact witness and expert witness fees, and matters of a similar nature. It is agreed that the Client shall be responsible for the payment of all costs and expenses. Prior to any money being paid to the Client in this matter, the Law Firm shall be reimbursed for all costs and expenses advanced on behalf of the Client. In the event that there is no recovery, the Client shall be responsible for payment and/or reimbursement of all expenses incurred in handling this matter.

It should be noted that you, as the Client, have the absolute right to terminate this agreement at any time, with or without cause. If you choose to terminate our services without cause, you are responsible for the immediate payment of the value of our services, as well as reimbursement for all costs and expenses advanced by The Law Firm on your behalf, that were

[4] Some attorneys utilize a sliding scale such as: The fee arrangement, as agreed, will be based on a contingency fee to be charged as follows:
____% of the gross amount recovered in a settlement before we have instituted a lawsuit;
____% of the gross amount recovered in a settlement after we have instituted a lawsuit;
____% of the gross amount recovered after trial has begun;
____% of the gross amount recovered if any judgment is appealed, either on your behalf or by an adverse party, or if garnishment or any proceeding after judgment is necessary to collect the judgment or any portion of it; and
____% of the gross amount recovered if the matter is the subject of a re-trial as ordered by a trial or appellate court.

incurred up to and including the date of your notice of termination. In order to avoid any dispute or disagreement concerning the value of those services, The Law Firm shall keep an accurate record of the time spent working on this matter, recorded with a minimum time entry of .10 hours.[5] In the event that you discharge The Law Firm without cause, it is agreed that the value of our services shall be the total number of hours, or fraction thereof, which we have devoted to your case, multiplied by $_____ per hour, which is a reasonable hourly rate for the services in this matter. We agree that those sums shall be paid to us promptly if, as, and when you recover in the underlying case. By signing this agreement, you authorize The Law Firm to file an assignment with any new counsel you may retain, and the defendant in your case and/or the defendant's insurance carrier, for our share of the recovery based upon the hourly rate set forth above and the hours we expended on your behalf. You hereby grant us a lien on any recovery.

In the event that a dispute concerning fees or expenses should arise, it is agreed that we will resolve any such dispute by arbitration in order to avoid extensive litigation. The aggrieved party shall notify the other party within thirty (30) days after the dispute arises that a demand for arbitration has been made. Fifteen (15) days after the written notice of intention to arbitrate, the parties shall agree on the forum and the rules to be followed in arbitration. In the event that the parties cannot reach an agreement as to an acceptable arbitrator, forum and/or rules to be followed within fifteen (15) days of the demand for arbitration, then, in that event, the fee arbitration shall be conducted by an arbitrator selected by _____ under the Rules of the American Arbitration Association for Resolution of Commercial Disputes [or substitute the Maryland State Bar Association Fee Arbitration Committee]. The arbitrator shall have

[5] **Note to attorneys:** We recognize that no one likes to keep track of time spent in a contingency case, but it is the easiest way to achieve a *quantum meruit* recovery. If you use this provision, you must actually keep time.

complete authority to determine the facts and apply the applicable law, as well as to award any damages that are appropriate. The parties to this agreement will share all fees incurred and expenses charged by the arbitrator equally. The parties shall be responsible for their own costs incurred in the arbitration, including, but not limited to, their own attorney's fees, expert witness fees, and all costs and expenses related to the arbitration, other than the fees and expenses charged by the arbitrator. Unless otherwise agreed or set forth explicitly in this agreement, any arbitration that begins under this agreement shall be governed by the provisions of the Courts and Judicial Proceedings Article Section 3-102 and those sections that follow as set forth in the Annotated Code of Maryland, as amended from time to time.

The use of arbitration eliminates a valuable right that otherwise would be available to you, namely the right to trial by jury. By agreeing to this provision, The Law Firm is giving up this same valuable right. Before signing this agreement, you should carefully consider whether to surrender your right to trial by jury. It is both your right, and appropriate that you seek independent counsel from an attorney other than this Law Firm to advise you of your rights and privileges under this agreement. It is our practice to advise our clients concerning the progress of their matters. At your request, we will forward copies of all documents and papers either generated by our office, or received by our office, relative to your matter to you. Additionally, our file is open for your review at any reasonable time. The Law Firm will make every effort to expedite the handling of your matter promptly and efficiently, and to keep you informed of the progress of your matter.

We reserve the right to withdraw from representation of you in the event you fail to honor this agreement, you fail to take our advice, or for any other reason that is permitted or required under the laws of the State of Maryland, or the Maryland Rules of Professional Conduct. In the

event we seek to withdraw, we shall do so in accordance with the Maryland Rules of Civil Procedure, and at a minimum, notify you of our intention to do so in writing.

Once our representation terminates for any reason, you are entitled to receive all papers that you furnished to us during the representation. We will retain a copy of your file in our storage facility for a period of ___ years from the date our representation ends. Thereafter, the file shall be destroyed, at no cost or expense to you. If you would like a copy of the file to be provided to you, we will do so on request, provided that you bear the cost of duplication.

You have an obligation to repay any health insurance companies and/or the government that paid medical bills relating to the Incident. You agree and understand that such a repayment will be withheld from your total recovery in this matter, and repaid directly to the insurance company or governmental entity after legal fees and expenses are deducted.

You agree to be truthful and cooperative with us, to promptly respond to our inquiries and communications, and to promptly provide all information and documentation known or available that may be relevant to our representation. You will provide us with factual information and materials as we require in order to perform the foregoing services. It is your duty to keep us informed of your mailing address and other contact information. If at any time during the course of this representation, your address becomes unknown, or we are otherwise unable to contact you, you agree that we shall be permitted to withdraw from this representation by sending both a certified and regular mail letter to your last known address.

As a matter of professional responsibility, and as long as in our judgment it will not substantively injure your position in this matter, we retain control over decisions affecting our reputation and professionalism. Such decisions include, but are not limited to, whether to extend deadlines at the request of opposing counsel; whether to cooperate with opposing counsel in

scheduling or similar matters; and whether and how matters should be argued in correspondence, pleadings, or to a court or administrative body.

It is important to preserve relevant documents, data, tangible things and all information, particularly in electronic form. There is law from several federal courts requiring the preservation of all relevant information once litigation is anticipated. In addition to paper document retention, electronic information is a far more complex area. Please ensure that all paper and electronic documents relative to the matter for which The Law Firm is being retained are preserved. You must immediately review your document storage and archive systems and ensure that any material that could potentially be relevant is not accidentally lost, erased or destroyed due to your normal file retention/destruction policies. For example, you must not only ensure that material on the computer network is protected, but also that computer files maintained on individual hard drives, etc. are preserved. Also, by way of example, to the extent matters are preserved on tape and then re-recorded, please cease that process for anything relative to the matter for which The Law Firm is being retained. Should you have any questions regarding the preservation of documents, please contact me as soon as possible.

It should be noted that "documents, data, and tangible things" are generally interpreted broadly by the courts to include writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, electronic messages, voice mail, E-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data, removable computer storage media such as tapes, discs and cards, printouts, document image files, Web pages, databases, spreadsheets, software, books, ledgers, journals, orders, invoices, bills, vouchers, check statements, worksheets, summaries, compilations, computations, charts, diagrams, graphic presentations, drawings, films, charts, digital or chemical process photographs, video,

phonographic, tape or digital recordings or transcripts thereof, drafts, jottings and notes, studies or drafts of studies or other similar such material. Information that serves to identify, locate or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition. Until and unless the parties reach an agreement on a preservation plan or the Court orders otherwise, you must take reasonable steps to preserve any documents that could conceivably be considered relevant to the matter for which The Law Firm is being retained. Continuing to use or reissue computers to new employees without taking the necessary precautions to preserve electronically stored information that may be stored on a separate hard drive at a reasonable price is not acceptable in most Courts. With the reality of today's devaluation of computer hardware, a one-for-one swap out of a computer's hard drive for less than $100, or the temporary replacement of an entire computer for less than $500, may be required to comply with one's duty to preserve all relevant electronically stored information.

There is a developing body of law to the effect that use of an employer's server to convey email may jeopardize the confidentiality of the email document. That is, ordinarily all communications that are between a lawyer and a client (without the presence of any third person) are confidential and privileged. Absent a Court Order or certain very limited circumstances, neither the lawyer nor the client can be required to reveal the information that is conveyed. The purpose of that rule is to encourage clients to be open and candid with their lawyers in order that lawyers may provide full and complete advice and information to their clients.

The American Bar Association has recently opined that any email communication affixing to an employer's server, even if used on the client's private email, *i.e.,* Yahoo, Bing, MSN, etc., may, nonetheless, not be confidential or privileged because it is attaching to the employer's server, and therefore, subject to review by the employer. To that end, if you elect to

communicate with The Law Firm via email, please do so from your home or someplace that you are absolutely sure is completely confidential, rather than from your employer's computer. If you prefer, we can avoid email communication.

Secondly, sharing advice given to you by The Law Firm could jeopardize the confidentiality that attaches to that advice. Today, many people are involved in social networking, Twitter, Facebook, etc. Posting attorney/client information on any of those social networks jeopardizes, if not eliminates, the privilege associated with the communication, and may eliminate the privilege in its entirety.

This writing contains the entire agreement between the Client and The Law Firm. This agreement may not be modified except by a writing signed by all of the parties. This agreement shall be binding upon the parties and their respective heirs, executors, representatives and successors. We intend and desire that this agreement be construed under the laws of the State of Maryland. All of the paragraphs of this agreement and each part of the agreement shall be considered as severable, one from the other. In the event any part of this agreement shall be considered by a court of appropriate jurisdiction, or an arbitrator, to be invalid, null or void, the agreement shall be construed as if the offensive paragraph had never been included within it, and shall, nonetheless, be binding in all other respects.

By signing this agreement you indicate your consent to the terms and conditions set forth herein. It is essential that you consider your rights and obligation with regard to this agreement, which sets forth certain terms and conditions that materially affect your rights. We urge you to carefully consider whether you desire to retain The Law Firm's services, and to the extent you deem appropriate, consult with an independent lawyer concerning your rights and obligations as

set forth in this agreement prior to signing it. Once signed, this agreement shall become binding in all terms and respects.

This Contingent Fee Agreement is intended to cover the scope of The Law Firm's services for the matter identified on page 1 of the agreement, from the inception of the matter through, and including, the end of trial. In the event of a mistrial, an appeal, a re-trial, or any other activity beyond that set forth, we agree there shall be a separate fee agreement. Specifically, this agreement does not cover costs and expenses of an appeal or re-trial or any activity undertaken after the representation is terminated. Unless terminated earlier by either the Client or The Law Firm, this agreement and the legal representation called for herein terminates at the conclusion of any trial, or in the event a settlement is reached, when distribution of the settlement funds is made.

I acknowledge that I have fully read this agreement and understand its terms and conditions, and have been afforded an opportunity to ask questions and to seek independent counsel before signing this agreement.

Date:_____ _____
Client

Date:_____ _____
Client

RETAINER LETTER – INVESTIGATION ONLY

RE:

Dear _____,

This letter is intended to confirm our agreement with respect to the undertaking of an investigation of your potential cause of action in the matter of _____.

Please understand that at this time we have only agreed to undertake an investigation. The cost of such an investigation, including any cost for expert review, will be paid by _____ [firm or client]. In the event that we agree to accept representation of you and are ultimately successful on your behalf, the cost and expense of the expert will be deducted from the recovery prior to distribution of the proceeds and calculation of those sums due to you. In the event that we do not undertake representation, those fees and expenses will be paid by _____.

In undertaking an investigation as to whether a viable claim exists, we are not expressing an opinion with respect to the merits of this matter. As we previously discussed and now reiterate to you, there is a statute of limitations issue applicable to your case. In the event a claim is filed after the statute of limitations has expired, that claim could be barred even though it is otherwise meritorious. The statute of limitations is a complex issue and depends upon when a person of reasonable and ordinary prudence either knew, or had reason to know, of the existence of a claim, or from the date of the occurrence. In most instances the statute of limitations runs three years from the date of the occurrence. It has also been determined that the earliest possible date the statute of limitations might run in this matter, based upon the disclosures you have made to us, is _____. Accordingly, we will advise you by no later than the _____ day of _____, 20_____, with respect to whether this firm will undertake your representation. Please understand that if the firm declines representation on or before that date, you will have only a limited period of time in which to seek another opinion. Our experience in matters of this nature has been that at least 180 days are required to obtain an expert review.

If you are in any way uncomfortable with the manner in which this firm has chosen to proceed in investigating this matter, please advise the undersigned immediately. Upon such notice from you we will promptly return all of your documents, there will be no charge for our time or expenses incurred to that point, and we will take no further action on your behalf. If you agree with the terms and conditions of our initial investigation and understand the fee conditions and arrangements in the event we accept representation in this matter, please sign the enclosed copy of this letter and return it to me in the envelope provided.

Should you have any questions or require further clarification of any aspect of this letter, please give me a call.

Sincerely,

ECCLESTON AND WOLF

By:_____
Erin A. Risch

Enclosure

Dated: _____ _____
NAME

DECLINING REPRESENTATION

RE:

Dear _____,

I appreciated the opportunity to [meet/speak] with you concerning your potential cause of action. Following a careful review of this matter, I am hereby advising you that our firm must decline representation of you in this case. Our decision not to undertake representation of you should not be construed to mean that the matter is one without merit. Another attorney may view this matter from a different angle and hold a far different opinion as to its merit, and you should therefore consider obtaining another opinion.

Please be aware that you may be facing deadlines insofar as the timely filing of this cause of action, as all matters are subject to the doctrine of statute of limitations. In its most simple terms, this means that unless a claim is timely filed, recovery will be barred regardless of how meritorious the action is. The statute of limitations is a difficult concept to describe because in some instances it depends upon when a person of reasonable or ordinary intelligence either knew, or had reason to know, of the existence of a claim.

I regret that we will be unable to assist you in this matter, but urge you to consult immediately with other competent legal counsel concerning its viability.

Sincerely,

ECCLESTON AND WOLF

By:_____
Erin A. Risch

FOLLOW UP - DECLINATION OF CASE AFTER INVESTIGATION

RE:

Dear _____,

In accordance with my letter to you dated _____, an additional copy of which is enclosed for your ease of reference, we undertook an investigation of your potential cause of action. Based upon our findings, we must decline to undertake representation of you in connection with this matter. Pursuant to our agreement, all costs and expenses incurred as a result of our investigation will be paid by _____. All original documents that you made available to us are being returned with this letter. Please understand that this office will take no further action on your behalf.

Our decision not to undertake representation of you should not be construed to mean that the matter is one without merit, and we would suggest that you seek a second opinion from competent legal counsel. As we discussed previously and as is set forth in the enclosed letter, time limitations may affect your ability to advance a claim. You may wish to consider contacting the Lawyer Referral Service of the local bar association in your area for assistance in obtaining the name of another attorney.

I regret that we will be unable to assist you in this matter, but once again recommend that you consult with other counsel concerning the propriety of advancing a claim.

Sincerely,

ECCLESTON AND WOLF

By:_____
Erin A. Risch

LETTER AWAITING FURTHER INSTRUCTION

RE:

Dear _____,

This letter is intended to confirm our discussion of _____, concerning _____. On that date I advised you _____.

As of this writing I have not heard from you concerning how you wish me to proceed in this matter. No further action will be taken until such time as I have been advised of your position. If I have not heard from you within _____ days of the date of this letter, I will assume that you do not wish me to act further on your behalf, no further action will in fact be taken, and I will proceed to close my file for this matter.

I look forward to assisting you with respect to this matter.

Sincerely,

ECCLESTON AND WOLF

By:_____
Erin A. Risch

SPACE SHARING CONSIDERATIONS

The offices of I.M. Kuhl are being retained in this matter - no other lawyer. In the event it is believed to be in your best interest to have additional counsel, this agreement shall be amended. Kuhl, however, may associate with other attorneys to assist in your representation, provided the association is at no additional cost or expense to you, and the additional attorney agrees, in writing, to be responsible to you. It is recognized that Kuhl is currently in an office sharing arrangement with other attorneys, client acknowledges having been informed that only Kuhl is being retained, and that the other attorneys sharing the office suite owe no duty to and are not responsible in any manner for the client's case.

NOTE:

HOW DO YOU PROTECT YOURSELF FROM THE FAILURE OF THE OTHER ATTORNEYS TO PROTECT YOU IN THEIR RETAINER AGREEMENT.

LESSONS FROM THE "GOOD OLD DAYS" FOR PRACTICING LAW WITH MODERN TECHNOLOGY

Conventional wisdom holds that instant communication, via e-mail and text messaging, has been a boon for the practice of law. In the wink of an eye, the modern attorney can communicate with clients, courts, witnesses, other attorneys – in short – just about everyone in the known universe. Even more amazing is the fact that the cost of this instant and unrelenting communication is virtually free. So long as the attorney knows how to type, even if only at the speed of two thumbs or one finger, she is in business long before her secretary arrives for work. Instant communication now follows most attorneys wherever they might travel. While attorneys may not be physically in their office, their availability is now virtually guaranteed by the ubiquitous cell phone and the rapidly expanding use of blackberries and iPhones, tablets, and laptops. Indeed, many clients not only assume, but demand that their attorneys be continually accessible through these miracles of modern technology. Fine linen paper and expensive engraved or embossed letterhead are largely a thing of the past, and use of the postage machine and United States mail is rapidly dwindling. Instant, nearly free and all-pervasive communication must be a terrific advance in the practice of law – or is it?

E-mail, in particular, has rapidly become the favorite method of communicating among not only many attorneys, but also among a huge swath of society in the 21st Century. Text messaging among the younger set occurs at a rate and in a language that seems foreign to the vast majority of attorneys who have been practicing law for at least 15 to 20 years. E-mail, and to a lesser extent text messaging, present a number of opportunities, while simultaneously posing an even greater number of challenges and risks. The pervasive use of computers, laptops, cell phones and blackberries has quite simply revolutionized the practice of law both for better and worse.

Only a few of the oldest curmudgeons still deny the significant benefits to be derived from the use of e-mail as a cost effective, nearly instantaneous and flexible way of communicating. E-mail has

become an integral part of virtually every attorney's practice. It is easy to understand why e-mail has become so ubiquitous. It carries the advantage of allowing the attorney to create a record of what was said in a highly usable, storable and retrievable format. Indeed, it has become the expected method of communication in many situations. Most people not only expect and accept e-mail as an appropriate and desirable method to communicate, but would be shocked if they dealt with an attorney who did not possess access to e-mail.

Consider, however, some of the potential pitfalls of e-mail. The amazing speed of e-mail is not necessarily a good thing. How many attorneys receive a pleading or motion and draft an immediate response? Would it ever be wise to "file" the response without thoroughly considering the options, performing appropriate research or review of other materials or even proofreading the response? Certainly no competent lawyer would file any formal paper in such a haphazard manner. Yet, when it comes to communicating via e-mail, or text messaging, instant, haphazard response is the norm rather than the exception. Often, the desire for instant response means the attorney will perform no spell check, and may not carefully check the names and addresses of those who might receive a "reply." Clearly little, if any, time elapses for careful consideration and the weighing of options before a response is flashed back through this modern miracle of technology. Yet, such e-mail and, on occasion, text messages are regularly sent to clients, adversaries and others. There is little doubt that adversaries are expected to use every weapon in their arsenal to further the interests of their clients. A poorly worded e-mail sent without appropriate consideration has therefore become an increasing problem in the modern practice. The shorthand method of replying often leads to situations where clients' interests are compromised by the inadequacies of communication which are fast, tersely worded, and unconsidered.

In many instances, ambiguity, confusion and poor advice can be at least partially attributed to this great reliance upon e-mail as a primary method of communication with clients. E-mail communications tend to be cryptic, shorthand and colloquial in nature. The use of abbreviations and a typically laconic method of writing leads easily to confusion. This is even truer with regard to text

messaging and the use of blackberries where the use of abbreviations and the emphasis on terse messages is even more prevalent. Your client might very innocently misunderstand your hasty e-mail or text message, and the potential for adverse consequences is obvious. In recent years, the incidence of e-mail being used as an exhibit in legal malpractice cases has exploded.

Reflections on the "days of old" is sufficient to illustrate the point. Merely recalling the 1980s is sufficient in this context to bring us back to the "good old days." Prior to the common usage of computers and complex electronic devices so common in today's society, lawyers communicated typically in a more formal manner. To a far greater extent, communications took place via the United States mail, the telephone or an in-person meeting. Because of time constraints, formal written communication was typically the accepted form for important communications for which a record was desirable.

Contrast for a moment the difference between writing a letter to a client and sending an e-mail. In drafting a formal letter, the lawyer would either first handwrite the letter herself, or more commonly, dictate the letter for transcription by a secretary. The secretary either later in the day, or within a day or two, would create a written draft of the lawyer's communication. That draft would usually be presented to the lawyer for review, editing and reconsideration over the course of the next few business days. This permitted the attorney to mull over the communication, and to not only ensure that the precise content was clear and unambiguous, but to also attend to the more stylistic aspects of the communication. In fact, ensuring that the appropriate tone of the communication had been achieved was often an important consideration. Time for reflection and opportunity to ensure that both the content and tone of the communication was being properly conveyed was a little recognized, but important, part of the process. Typically, the lawyer would have at least one more opportunity to consider the communication before it left her control when the secretary presented the final edited version for signature. It is hard to imagine that there are any attorneys who have not, in the heat of the moment, dictated a response to a client or

opposing attorney which upon an hour or a day's reflection was not modified. The great difficulty with instant communication is that the time for reflection and consideration is virtually eliminated.

In the good old days, the "final form" of the letter was usually presented on a high linen content paper, with raised and embossed letterhead clearly identifying the lawyer and firm. Once signed, that letter represented a well thought out, carefully crafted communication expressly intended by the sender to reflect her training, education, experience and professionalism. Compared to the process of receiving an e-mail from a client and immediately striking the reply key and personally stroking out a brief response before clicking the send key is a far cry from the earlier method. While certainly unfortunate communications occurred in the good old days, which method of written communication is more likely to reflect well upon the sender? Which has the greater potential to be sloppy, ambiguous, convey the wrong tone, include excessive spelling and punctuation errors, and misconvey the truly well thought out and considered position of the sender?

Obviously, many communications are innocuous and/or ministerial in nature and the opportunity for reflection and careful crafting is largely irrelevant. In this field, there is no doubt that the ability to receive and send e-mail or text messages is incredibly convenient, and permits the attorney to respond in a manner that enhances her representation of a client. The process of scheduling meetings, mediations or depositions, by way of example, are greatly enhanced. No longer in a large case involving multiple parties is the mind-numbing and seemingly endless round of telephone calls and messages necessary. Moreover, the ability to instantly deliver well thought out and crafted material or to attach complex documents to advance the goal of providing clear, precise, well thought out communications are obviously enhanced. There is nothing that inherently mandates that an attorney respond instantly simply because that option is available. The receipt of an e-mail does not require that the attorney instantly reply. Indeed, in many situations, it is far more appropriate for the attorney to dictate, after careful consideration, an extensive and formal reply in just the same manner that would have occurred in the bad old days of the 1970s and 1980s. Once again, the attorney would receive a draft back from her

secretary for further consideration and contemplation, and the use of the new technology is reduced simply to a quick, efficient, cost-effective delivery method.

Security.

Far too few attorneys have considered the question of whether e-mail is secure. For the most part, attorneys assume it is secure without ever giving the issue much contemplation. Unfortunately, the question is not as simple as it might appear at first glance inasmuch as the answer must be sought from both an electronic perspective as well as from the human perspective.

Electronically, the answer is a definitive – maybe. Most people have no idea how e-mail is actually routed from one place to another. It does, however, generally arrive more times than not at its appropriate destination. It is suggested that communication via e-mail be covered in an attorney's Engagement Agreement with language along the following lines:

> "E-mail is a fast and convenient means of communication that is not guaranteed to be secure. Because of the ease of use and the rapidity of communication, the parties believe it to be in their best interest to communicate in that fashion and we are therefore authorized to communicate with you, even with confidential communications, by e-mail."

Including language similar to the above certainly should not be taken as providing the attorney with full protection from any subsequent claims or suits related to difficulties which might arise in this field. It should also not be taken as license by the attorney to be sloppy or careless with regard to the use of any method of communication, including e-mail and text messaging.

The question regarding security is always incomplete without considering the human perspective. As the old adage goes – to err is human – and certainly we must assume that mistakes will be made. Unfortunately, the natural tendency to be sloppy or to make careless mistakes is heightened given the fast paced demands of modern practice in this electronic age. People tend to perform in a sloppy manner when they try to accomplish too many things at the same time or in a compressed period of time. While multitasking may be an unfortunate fact of life, it does raise the chances that sufficient attention will not be paid to one or more of the tasks involved. This, of course, can easily lead to security breaches inasmuch as it is incredibly easy to misdirect an e-mail, particularly with computers

that now automatically "guess" who the correct addressee is when you simply type in a letter or the first several letters of your proposed addressee. Moreover, errors often follow when a reply is sent to all addressees. Thus, it is essential that attorneys take the time to carefully review exactly who might be receiving such a communication.

The consequences of misdirected communication vary greatly from jurisdiction to jurisdiction. While no developed body of law on misdirected e-mail is extant at this time, a clear analogy to telefaxes is apparent. There is law on the issue of misdirected facsimiles which should provide guidance on this issue.

Aside from the obvious risk of embarrassment and the possibility of providing an opponent with tactical or strategic advantages, at least two other questions are immediately raised by misdirected communications. The first relates to the transmission of information protected by the attorney/client privilege; and, the second relates to the transmission of work/product material. Generally speaking, in every jurisdiction of the United States, attorney/client-privileged materials belong to the client and may not, except in rather narrow circumstances, be waived by the lawyer without express client approval. The mental impressions and thoughts of the attorney, on the other hand, belong to the attorney and can therefore be waived by the attorney without the consent of the client.

Consider for a moment a highly contentious matter with difficult clients on all sides. Suppose an attorney erroneously forwards an e-mail analysis of the case intended solely for her client to an adversary. What is the risk and what duties are placed upon the adversary who is the recipient of a clearly misdirected e-mail? Some jurisdictions have adopted ethical rules that require the recipient of a misaddressed communication to return that communication to the sender, substantially unread if possible. Other jurisdictions have no clear law on the subject. At a minimum, as officers of the Court and attorneys seeking to uphold the highest ethical standards and to maintain the integrity of the profession and the appearance of fairness and propriety so important to our profession, the recipient of a clearly misdirected communication ought to advise the sender of the error as soon as possible.

Moreover, if the material can at least in theory be legally utilized in the litigation, failure to inform the sender of the error could in some jurisdictions form a roadblock to its later use if the sender is unfairly surprised.

If the recipient practices in a jurisdiction without clear ethical rules or rules of evidence, civil procedure or common law directly on point, the unintended recipient will often be placed in a quandary. If that recipient returns the e-mail substantially unread out of the sense of honor or belief that it is the proper ethical response, that attorney might face serious consequences for failing to adequately advance the client's case. Assuming that the client learns that his attorney has returned, substantially unread, a misdirected e-mail (or any other form of written communication), it is not hard to imagine that the client might believe that the attorney had breached her obligations to zealously protect and advance the client's interests. Under those circumstances, the client would argue that there were no laws or rules requiring his attorney to return such materials unread and that the client's case has been damaged by not taking tactical or strategic advantage of the error by opposing counsel. If the missive contained material that would have inured to the client's benefit, the argument could be legitimately advanced that the attorney had prejudiced her client by not taking full advantage of the situation.

Instead of responding with the knee jerk reaction out of a sense of honor to return the materials substantially unread, what else could the recipient have done? Consider the following:

1. Notifying the sender that the e-mail had been received.

2. Confirming that it was and is substantially unread once the lawyer determined that it might have been misaddressed.

3. Printing and placing the communication in a sealed envelope, which will not be opened for a reasonable period of time allowing the sender to consider her options. These options might include briefing why the recipient is NOT entitled to the matter or seeking court intervention. Once that reasonable period of time has gone without either an explanation or a court intervention, the envelope can be opened and the material to the extent possible will be used.

In that fashion a lawyer could advocate zealously on behalf of her client while at the same time observing ethical and/or honorable tenants.

Clearly, one does not want to be in the position of the sender who at a minimum will be embarrassed, and may well incur substantial costs and expenses in dealing with the issue, worst that individual may suffer the ire of a client whose case is prejudiced because of a failure to exercise care and caution before pressing the send button on a computer.

Then there is the "added" feature of scanning documents and conveying them via e-mail. In a flash of time a lawyer can receive a proposal from his adversary, scan it and e-mail it to the client so that both may consider the document, almost simultaneously.

If this all worked as intended, the system is flawless. The lawyer and client may view the communication and jointly construct a response. What, however, happens if the administrative person charged with responsibility for scanning the document doesn't quite understand his assignment and scans and e-mails the wrong document – perhaps something that relates to a different client and is confidential.

The lawyer, busy and multitasking as usual, receives the scan from her administrative assistant, presumes it is correct, crafts her own e-mail to her client and sends it without ever checking the content of the scan. The recipient at best recognizes the error, and destroys the document but would still lose some level of confidence in the lawyer's ability to competently represent his interests and preserve his client confidences. Bear in mind that is the best result in this scenario. The parade of potential adverse consequences requires little imagination. The wrong client may learn something that was otherwise secret and use it to his advantage. For example, buying a parcel of real property out from under the first client.

Metadata.

The concept of metadata has confused the world of e-mail. It is suggested that when considering the concept of metadata, one think in a multidimensional form as opposed to the two-dimensional world of paper. That is, e-mail and electronic communication are in multiple dimensions. Unlike a sheet of paper that can be reviewed but not modified or changed in any fashion, e-mail is like an onion with various layers that can be peeled to reveal information contained on earlier layers.

By way of example, most lawyers use certain forms regularly in their practice. Family law practitioners have many common forms for property settlement and separation. Suppose, in the course of one's practice, a lawyer prepares a form separation agreement for a client and sends it to the client for review and comment. It is not uncommon for the client to respond by modifying that agreement in a redline version explaining to the lawyer the "bottom line" or final position acceptable to the client.

The lawyer might then change the proposed agreement and transmit the draft settlement agreement to the lawyer's adversary for review and comment. If the adversary counters with a negotiated position that cuts to the very heart of the client's parameters of settlement -- *i.e.*, skips to the bottom line in every instance as to the lowest or highest amount the client will absolutely accept, there may have been a breach of security.

If the lawyer receiving the e-mail has the ability to decrypt the e-mail, and this is not at all a complex or difficult program to obtain, the lawyer can literally peel away all of the layers of the e-mail she received. The separation agreement, as sent by the attorney after modifying her client's redlined version is only the outer skin of the e-mail onion. The recipient may be able to find the opposing client's comments and proposals. Further layers might be peeled away to reveal the comments, names and other information of every other client for whom that settlement agreement has ever been used.

The initial reaction from hearing this information is shock, fear and dismay. First, can one possibly ethically do such a decrypting?

The answer to that question is totally unclear. As of this writing there have been five jurisdictions that weighed in with ethics opinions on this subject. In the State of Maryland, there is an ethic's opinion from the State Bar Committee on Ethics, placing an obligation on the sender of the e-mail to ensure that the sender can protect client confidences. No duty is placed on recipients – in essence inviting open season on decrypting e-mails. In other jurisdictions, such as Florida and New York, an opposite view is emerging. That is, it is improper to deliberately try to invade the attorney/client privilege.

The easiest and most efficient way to avoid doing this is to obtain an e-mail scrubber that eliminates metadata from all e-mail leaving anyone's computers. There are a variety of services that have this available at reasonable cost. In addition, one can go to the website of many of the computer program services available, and obtain their "fix" for metadata attachments on e-mail.

Bear in mind, however, that in the event that litigation arises and electronic data is involved in that litigation, a plethora of issues arise with regard to preservation of metadata and other information. In a recent legal malpractice case filed in Maryland against a local attorney and a large out-of-state firm for having failed to timely file a tort action in the proper jurisdiction, a metadata program was used to establish that the large out-of-state "specialist" firm brought in by the solo practitioner was intimately involved in the drafting of the Complaint and the determination of the proper jurisdiction. The out-of-state firm attempted to deny participating in the drafting of the Complaint and the decision as to the proper jurisdiction. The large firm attempted to argue that it only participated in preliminary discussions which took place with a view toward the firm's possible involvement at a later point in time. This position was severely undercut by metadata retrieval which demonstrated the firm's involvement in the review, redrafting and alteration of the defective Complaint, and established the firm's early involvement in the process.

Many computers now automatically insert the addressee's name in an e-mail based on the prior addressees used by the owner of the computer. Not infrequently, the person sending the e-mail doesn't carefully scrutinize the addressees, and information may well be sent to the wrong place.

Equally prevalent is the problem of scanning in documents and having them sent to lawyers by support staff. How many lawyers carefully review the scanned material prior to attaching it and sending it via e-mail? It is not unusual for support staff not to understand where one document ends and another begins and accordingly the wrong information can inadvertently be sent to others.

What happens to attorney/client privilege with an inadvertent disclosure? Again, the answer to that question depends in large measure on your jurisdiction. Some jurisdictions have taken the position that inadvertent disclosures, particularly in the electronic age, do not constitute a waiver of the attorney/client privilege. Other jurisdictions make the information fair game. Why subject yourself to the potentiality of being caught in the switches in a matter of that nature? Obviously, the smartest thing to do is to avoid the problem arising, which requires care and careful review of those items being sent from your office.

Some words of guidance. It is strongly suggested that all lawyers have metadata scrubbers installed as promptly as possible. For reasons as noted, it is extraordinarily easy to avoid the metadata issue and the scrubber is the most available means to accomplish that end.

Slow down. Is there really a need <u>to reply to communication instantly</u>? If not, dictate a response, edit it and send that response via PDF through an e-mail. By so doing you will be more inclined to carefully craft a communication and nonetheless speed the process. If there is in fact a need for an immediate response, exercise care in its crafting. Read, re-read and spell-check the response. Avoid informality. Avoid slang and abbreviations or acronyms. Treat the e-mail as if it will be an exhibit in a civil or disciplinary matter brought against you – because it just might be. Open and review all attachments before sending them to be certain that you are in fact, sending the correct material.

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