

$$L + C^3 = RM^2$$

A Formula For Malpractice Risk Management

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Back in my Army days we were always looking for stimulating ways to express important concepts of how to get the job done. C³ stood for command, control, and communication, the *sine qua non* for any successful organization. These are not terms often used by lawyers when considering how they operate their practice, but are just as important to a lawyer in charge as they ever were to a military commander. Civilianizing C³ for lawyer risk management I came up with calendars, conflict checks, and computers. Automated systems that provide comprehensive work control and conflict of interest check systems give any firm from sole practitioner to mega-firm command over daily practice. These systems contain internal controls and communication channels that avoid disqualifying conflicts, missed deadlines, and procrastination. They pace the entire firm's work, directly support client service, and dramatically improve risk management.

Any member of the KBA that has been in practice more than 30 minutes has heard something about office calendars, dockets, and conflict checks. Most of you have heard a lot about these control measures. Unfortunately, as important as they are to a lawyer, a lecture on them tends to be terminally mind-numbing. In researching this article I found that there were a number of concise checklists, short definitions, and heads-up suggestions in developing effective work control and conflict check systems. What follows is a collection of these useful ideas. The purpose is to provide an outline for you to make a quick review of your systems with enough detail to get started on needed improvements or get going on a new approach.

At the outset I make full disclosure of my bias – every practice should use automated work control systems along with traditional paper systems. The ability of case management software to link all information relating to a matter that automatically updates all time sensitive actions, controls documents, and produces work schedules is overwhelmingly the way to risk manage a law practice. This is just as true for lawyers who never go to court. If you are practicing only using paper systems and rolodex for internal controls, instead of being on the cutting edge of the realities of modern practice you may find yourself on the bleeding edge.

WORK CONTROL

A. Generic Definitions

Calendar

Traditional: A calendar for client appointments.

Modern: A calendar for all appointments, client-related activities, office meetings, and other scheduled activities.

Docket

Traditional: Listing of court imposed deadlines.

Modern: Listing of all court dates, legal deadlines, business client legal deadlines (e.g., annual stockholder meeting), and self-imposed deadlines.

Tickler/Diary

A reminder system which causes a file to be brought to the lawyers attention on specific dates providing time to anticipate, prepare for, and meet deadlines.

B. Work Control Systems Characteristics -- "*Input – Come up – Follow up*"

Carol L. Schlien in her article "Calendar and Docket Control" appearing in the ABA publication *The Quality Pursuit*, describes an effective system as having these characteristics:

1. It must be easy to use and maintain.
2. It must be in writing.
3. It must be redundant.
4. All attorneys and staff should be involved in the system with at least three people tracking each item. (*For solo's the computer is your third "person."*)
5. It must assure accountability for each person involved.
6. Accurately calculate and record all deadlines.
7. Regularly remind all persons involved with the deadline with sufficient time to react and do quality work.
8. Include a system of cross checks so that if the responsible person is ill or unavailable, a deadline will not be missed.
9. Incorporate a method to regularly collect, record, and distribute schedules of information taken from docket slips.
10. Include a method to ensure that the required activity is performed before the reminder is removed from the system.

C. Docket Control And Time Deadline System Self-Evaluation

The ALI/ABA publication "*A Practical Guide To Achieving Excellence in the Practice of Law*" offers this self-evaluation test for work control systems:

1. Items to be calendared

- a. Do I have a docket control or tickler system for litigation matters to control time deadlines?

b. Does it include calendaring of

- (1) statutes of limitations?
- (2) due dates for pleadings?
- (3) due dates for motions?
- (4) due dates for briefs and other documents?
- (5) due dates for responses to interrogatories?
- (6) scheduling of depositions?
- (7) scheduling of trial and hearing dates?
- (8) notices of appeal?
- (9) other important deadlines?

c. Do I have a docket control or tickler system for non-litigation matters to control time deadlines?

d. Does it include calendaring of

- (1) filing and hearing dates for matters before administrative agencies, commissions, or boards?
- (2) corporate tax dates, stockholders' and directors' meetings, and filing dates required by the SEC?
- (3) renewal dates for copyrights, patents, or trademarks?
- (4) real estate closing dates?
- (5) individual tax return due dates?
- (6) review dates for estate planning and wills?
- (7) other important deadlines?

e. Do I also calendar such items as

- (1) periodic review of a matter?
- (2) preparation of status reports to clients?
- (3) professional meetings, conferences, and other commitments?
- (4) intra-firm meetings and other commitments?
- (5) personal commitments?

2. Selection of a docket control or tickler system

a. Am I familiar with the following types of systems for management of time deadlines:

- (1) double diary system?
- (2) file notation system?
- (3) perpetual calendar system?
- (4) multi-function docket control systems for large firms?

b. Have I adopted one of the above types of systems?

c. Another system?

d. Am I familiar with different systems available commercially or through bar associations, including

(1) manual systems?

(2) ready-made automated systems (such as Docket or Diarymaster)?

(3) relational data base automated programs (such as dBaseIII + or R:Base System V)?

e. If I use a previously prepared system, do I adapt it for the specific needs of my office?

3. Immediate and automatic calendaring of items

a. Do I always note and enter important deadlines

(1) when a new matter file is created?

(2) as I become aware of new deadlines?

b. Have I considered having someone else make entries automatically as pleadings or mail come into the office, even before the material is passed on to me?

4. Double-checking of entries and notification

a. When an entry is made, is a second person so informed?

b. Are both persons responsible for anticipating upcoming dead-lines?

c. Is there a third person responsible for checking the system if either or both primary responsible persons are unavailable?

5. Sufficient time for preparation and performance

a. Does the system generate periodic and timely reminders of upcoming deadlines?

b. Are the reminders timed to allow adequate preparation and performance?

6. Adequate follow-up

a. When a deadline is met, is that information entered into the system?

b. Is there a second person responsible for checking whether deadlines have been met?

7. Other features

- a. Do I have an office manual explaining the use of my docket control or tickler system?
- b. Do I periodically review the system to see if it is meeting my needs?
- c. Do I keep current on new systems available commercially or through bar associations?
- d. Do I consider whether adopting one of these systems might benefit my practice?

8. Law firm policies and procedures (see also preceding questions)

- a. Are all lawyers required to complete an original docket information sheet when bringing a new matter to the firm?
- b. Are all lawyers required to fill out a docket entry memo for important time deadlines?
- c. Is there a central docket, calendar; or file where all lawyers' commitments are recorded?
- d. Are all lawyers required to send original docket information sheets and docket entry memos to the person responsible for maintaining the central docket?
- e. Are all lawyers also required to notify their secretaries of important time deadlines and commitments?
- f. Does the docket control person generate timely reminders to both lawyers and their secretaries?
- g. Is an office calendar report sent to lawyers periodically indicating their commitments, by date, for a specific time period?
- h. Is there a person or committee assigned to periodically review the docket control system?
- i. Are there any policies and procedures for the use of the firm's docket control or tickler system?
- j. Are these policies and procedures communicated to all lawyers?
- k. In writing?

1. Does anyone periodically determine that the policies and procedures are being followed?

A Practical Guide To Achieving Excellence in the Practice of Law is the single best practice management book available, in my opinion. It costs \$75. If you are interested, call the ALI-ABA Committee on Continuing Professional Education at 800 CLE NEWS, ext.1650.

E. Automating Work Control

While any combination of manual and automated work control systems will work, a good system is for a lawyer and supporting secretary to each maintain a calendar/diary at their desks and input data to an office central computer work control program. The computer should at a minimum generate hard copy daily calendar updates for individual lawyers, hard copy tickler reminders, and an office master calendar. Richard L. Robbins in his article "Selecting A Docket and Calendaring System for a Law Office" appearing in the *Illinois State Bar Association Journal* recommends the following minimum system data inputs and report capability:

"Data on inputs of appointments or work requirements should contain most of the following information:

- a. Name of the person entering the data.
- b. Name of the lawyer or other person obligated to perform the work.
- c. Nature of the performance - an appearance, a memorandum of law, a deposition, an answer, review of a file.
- d. Time and date for start and finish time of the work as well as the actual work hours needed for the work.
- e. Location of the performance - a specific court, or office, with room number, city, even travel time appended.
- f. Name of the client (and matter) for whom the work is done or the particular office account to which it is to be charged.
- g. Other and related performances, perhaps noted by a specific linkage code appended to each.
- h. Other persons such as lawyers, court reporters, expert witnesses and staff who must help perform the task, supervise the work and be responsible to the client.

i. Specific tickler dates when notice of the impending deadline is to begin appearing.

j. A coded indication of the nature of the performance so that it can be retrieved on a general call for this type of work including those performances required by statute, regulation, court rule, court agreement, agreement with counsel and items which are highly discretionary such as luncheons or meeting with particular staff or lawyers."

"Reports, the output of the computer, are an important part of a docket system. A system should provide printed or screen reports on the following:

a. Schedules of daily, weekly or monthly activity.

b. Organized schedules by lawyer, by lawyer doing specialized functions such as corporate work, by client, by matter, and by location of performance.

c. Schedules of work that must be completed such as briefs, memoranda, estate plans and allocations of such work for individual staff members and lawyers.

d. Schedules of forms required, forms themselves, schedules of checks and cash required, reservations of conference rooms, movements of files, cases without activity and other reports."

CONFLICT OF INTEREST CHECK SYSTEMS

My impression after almost nine years of working with Kentucky lawyers is that many still rely on office memory, rolodex, and luck to "check" for conflicts. If there is anything in the practice of law ideal for computer management, this is it. There are numerous conflict check software programs that work well. The key is to input the data. Unfortunately the enormity of this task for long established firms often leads to no action at all. All I can advise is just do it. If nothing else, start data input with current business and go forward until you have something.

A. System Basics

Beverly A. Michaelis, Practice Management Advisor, with the Oregon Professional Liability Fund identifies the following characteristics of a good conflict check system:

1. The system is integrated with other office systems;
2. The system provides for easy access to conflict data for everyone in the office;

3. Checks are conducted at the three key junctures: before consults, before a new file is opened, and when a new party enters the case;
4. Searches check for varying spellings of names;
5. Conflict entries show party's relationship with client;
6. All parties connected with a case are entered into the system; and
7. Conflict searches are documented in the file.

B. Data Input

Lawyers Mutual Insurance Company of California in the publication "*Effectively Handling Your Client Relationship*" suggests that a firm's conflict data base include the following information:

Persons And Entities To Include:

Include information ... for:

- a. *Every* person or entity you or your firm has represented; AND
- b. *Every* person or entity involved in *every* matter that you or your firm has handled;
- c. *Every prospective* client from whom you receive confidential information, even if you declined to represent him or her; AND
- d. Any corporation or business entity for which *you* or other attorneys in your office serve as an officer or director.

Information To Include In Database:

You or someone in your office enters into list or database:

Identity:

- a. All current names of *each* person or entity...;
- b. All former names of *each* person or entity (e.g., if corporation has merged, include names of pre-existing corporations);

Nature of Relationship:

For *each* person or entity in the database, identify relationship with you.
e.g.:

- a. Client;
- b. Potential client;
- c. Client's agent;
- d. Adverse party;
- e. Adverse witness;
- f. Creditor of party;
- g. Corporation for which you serve as a director.

Nature of Matter:

For *each* person or entity in the database, identify the matter in which relationship with you occurred. *e.g.*, real estate sale transaction, personal injury litigation, probate.

Status of Matter:

For *each* person or entity in the database, identify whether matter is currently active or inactive.

When To Update:

Add to your conflicts database and check for conflicts:

New Client: When you accept a new client or matter.

Representation Declined: If you receive confidential information but reject client.

- a. Incorporate name of rejected client in your conflicts data base;
- b. Indicate that you are precluded from representing adverse parties.

Add Parties, Witnesses: When you or opposing parties add new parties or witnesses to existing cases.

Relations Change: When relationship of parties changes, *e.g.:*

- a. One plaintiff decides to name other plaintiff as defendant;
- b. Client gets married or divorced;
- c. Corporate or business client buys, sells, merges, takes over another entity or is bought, sold, merged, or taken over.

Witnesses: You learn names of material witnesses.

C. When and How To Do Conflict Checks -- "*Do them early; do them often; do them accurately.*"

At the Fall 1995 National Legal Malpractice Conference Carol N. Cure of O'Connor Cavanagh , Phoenix, Arizona offered the following list of times to do conflict analysis:

- I Before promoting a specific new client.
- I Before the initial consultation about a new matter.
- I After the initial consultation, whenever new names are obtained.
- I When opening a new matter, whether for an old or new client.
- I Before any pleading is filed that names new parties.
- I Before naming a non-party at fault, where required to do so.
- I Before noticing formal discovery on a non-party (e.g., a subpoena).
- I Whenever new experts are identified by any party.
- I Before any new transaction is undertaken.
- I Before a major business transaction by a firm attorney.

Nancy Byerly Jones, a Risk Management Consultant and leader in the field of malpractice prevention, suggests this "How To" conflict checklist:

1. Gather name information for clients, opposing parties and associated persons & entities BEFORE confidential disclosures are made
2. Remember to ask if other names ever used (i.e. maiden names, other marital names, etc.)
3. Check master listings (manual or computerized) of clients, opposing parties and associate persons & entities for possible conflicts

4. Report any conflicts found immediately to responsible attorney
5. Prepare & distribute uniquely color-coded new matter alert memo to all attorneys and staff for their review
6. Follow-up with any persons failing to initial & return conflicts check memo within 24 hours of distribution
7. Report failure to return memo to appropriate person
8. Remember to rerun conflicts check as new parties are added to case or other changes occur prompting a new check
9. Be aware of the potential consequences if conflicts checks are ignored (i.e. malpractice claims, grievance claims, return of all fees collected; mandatory withdrawal from case; reversal of proceedings, etc.)
10. Be aware that prior work with other firms by self or others including staff may cause a conflict situation for firm
11. Obtain written confirmation of having informed client of potential conflicts and of their agreement to consent to firm proceeding with case even though the rules may not require such confirmation and permission in writing!
12. Be aware of possible business and personal interests that may cause conflict for firm.

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Recent malpractice statistics show that lawyers are doing a much better job of calendaring work, but continue to have serious problems with procrastination in performance and follow up. An automated work control system is the answer. A conflict of interest malpractice claim remains a lawyer's worst nightmare. The computer is your friend and a good automated conflict check system will minimize claims exposure. Lawyers plus calendars, conflict check systems, and computers equals outstanding law office risk management. How well does your office stack up with the experts cited in this article? If you are uncomfortable with the answer, it's time to apply $L + C^3 = RM^2$.