

Lawyers Professional Liability

Docketing each day keeps malpractice away

As technology continues to innovate and firms become more sophisticated, it is surprising that docket control continues to be a significant driver of claims. The most recent ABA study of legal malpractice claims for 2012 to 2015 indicates that more than 23% of all claims made against lawyers are administrative in nature. While this is a 7% decline from the last study, it is still too many. Further, of the administrative errors, almost 12% are directly related to calendaring issues. The calendaring mistakes include failure to properly calendar, subsequent failure to file a document or failure to react to a calendar entry.

We frequently see claims relating to deadlines where an attorney accepted the date a client provided without doing further investigation or failing to verify the date against documents in the attorney's possession. Unfortunately, the attorney relies on the date provided by the client and then misses a statute of limitations. Another common source of docketing claims occurs when an attorney or staff person makes a human error and simply calendars the date wrong. Another mistake that has been reported repeatedly is when, an attorney fails to complete a task - such as respond to discovery or contest a motion filed by opposing counsel - in a timely manner, even after entering the date in their agenda, which prejudices the client. A proper docketing system and consistent firm procedures will contain features and methods to avoid all these errors.

First and foremost, regardless of size, every law firm needs to have two things: 1. a docketing system which captures dates and 2. a written set of rules around the docketing system. The second part is just as important as the first. Purchasing the most expensive and advanced docketing software is no guarantee against claims if the proper dates are not put in to begin with or if ticklers are non-existent or ignored. Below find the features any good docketing system and guidelines should contain.

Capture all critical dates.

Ideally, a docketing or calendaring system should capture ALL important dates and deadlines. Every area of practice

generates critical dates and can benefit from an effective docketing system. These dates and deadlines will be different depending on an attorney's practice areas. A litigation practice will want to include dates associated with statutes of limitations, governmental entity notice deadlines, court appearances, depositions, expert disclosure, discovery closure, trial dates and appeal deadlines. A docket for a real estate practice will include contract deadlines, all loan and documentation deadlines, inspection and due diligence deadlines, all closing dates, lien notification dates and all recording deadlines. Every practice should also include docket dates for sending and receipt of the engagement letter for each matter as well as a date for sending a closing letter. The firm's written policy should clearly assign responsibility for inputting these dates into the system as well as what dates are required for each area of practice. The written policy should include instructions on handling and distributing incoming mail, faxes and emails as these documents frequently contain deadlines and are reviewed by staff at the firm prior to the attorney's review. When in doubt, the law firm's approach should be to input a date. Also, make sure every file has a future diary date.

Universal acceptance of a single userfriendly system.

Best practice is to require everyone at the firm to utilize the same centralized system. The rogue attorney who refuses to get on board with the firm-wide system is a liability as no one would be able to back him up if he is suddenly

absent and firm management may not know if the attorney is not meeting deadlines. Furthermore, in order to ensure that the system is used by everyone in the firm, it must be easy to learn and easy to use. Otherwise, you run the risk of attorneys and staff finding alternative docketing systems which defeats the purpose of having a centralized system.

Appropriate and customizable reminders are essential.

The system should include reminders or ticklers at various dates that assist the attorney in budgeting time. A single tickler set the day before a brief is due will not help an attorney manage his time or allow for enough time to draft a quality brief. However, one reminder set up before a court status date may be appropriate. Therefore, the system should be flexible enough to allow different amounts of reminders at various time frames (e.g., every 30 days vs. every three months). Again, if the system does not allow each attorney to adjust it to their individual practice, it will not be used. Finally, someone should be responsible for ensuring that the appropriate reminders are set up. This can be the attorney, an assistant or a docketing clerk. This should be an auditable function that is reviewed periodically by firm management to ensure compliance.

Two touch system for the most important dates.

A law firm will benefit from a requirement that the most important dates be diaried by at least two persons who independently determine the date. For instance, in a personal injury practice, the firm's policy could be that both attorney and secretary will determine the statute of limitations for a given file and input the date in the docketing system with their initials. In a patent practice, perhaps both attorney and paralegal would determine when the patent maintenance fees are due. This procedure demands ownership and accountability for the accuracy of the dates. This dual input system also mitigates the chances of a claim occurring from a wrong date being entered due to a simple human error of transposing a number or a calculation error.

The system should have a backup.

In case of fire, flood, theft or other disaster every system should have a backup. Whether a firm uses the most basic paper calendaring system, the most sophisticated computerized system, or something in between, there should always be a backup. For a paper system, this could be a copy of the docket that you take home every night. For a computerized system the backup should be stored off-site in case of disaster. A redundant system should be kept by each individual attorney too. This could include a paper calendar or the calendar on a smart phone.

Training is essential.

You can have the most perfect system and written procedures in the world and if no one knows them or fails to follow them, it won't help prevent claims. Therefore, it is vital to train all staff and attorneys at the firm about the system and the firm's expectations. Annual review and acceptance of the firm's policy is one way to ensure compliance. Another is to share with the firm's employees information on why docketing is important. If the firm has been unfortunate enough to have had a claim related to docketing, be open and share the past situation with attorneys and staff. If the firm hasn't been directly impacted by a docket related claim, share the ABA data and explain what sort of mistakes are made time and again that result in malpractice suits. A culture of openness without fear of punitive action is critical to a law firm's success.

Include docketing system compliance as part of the annual review.

The best way to ensure compliance with the firm's docketing system and procedures is to make it part of each attorney and staff member's annual review. Whether people are motivated by being rewarded or by avoiding punishment, knowing that docketing will be part of the annual review will certainly encourage most people to follow the firm's procedures. Spot checking by firm management throughout the year can identify any misunderstandings about the system and procedures as well as any rogue employees. Complete and consistent docketing is an easy way to cut down on your chances of a mistake occurring and a legal malpractice claim being brought against your firm. The system doesn't need to be expensive but it must be simple and customizable and paired with clear mandatory guidelines that are enforced.

We'd like to hear from you

If you would like to get more details regarding any of the above topics, join the mailing list, access any of our risk management resources, or tell us your suggestions, please contact your broker or Swiss Re Corporate Solutions' LPL Risk Manager at:

corporate_solutions@swissre.com