



LOSS PREVENTION: Risk Management Tips and Tools for Law Firms (LANEL)

Date: September 11, 2013

Presenter: Johanna G. Averill Gilsbar/LSBA Loss Prevention Counsel

Location: Chef Pat Nolan's, Monroe



Biography of Loss Prevention Counsel Johanna G. Averill

Ms. Averill is Professional Liability Loss Prevention Counsel for the Louisiana State Bar Association and is employed by Gilsbar, LLC, in Covington, Louisiana. She received her Bachelor of Science degree in Marketing from Louisiana State University in 1982 and earned her Juris Doctor degree from Loyola University School of Law in 1985. Prior to joining Gilsbar in January of 1999, she worked as a staff attorney for an Administrative Law Judge for the U. S. Department of Labor and as a judicial clerk for a Judge Pro Tempore for the Louisiana Fourth Circuit Court of Appeal. Additionally, she practiced law for an insurance defense law firm in New Orleans. Ms. Averill is a member of the Louisiana State Bar Association, and frequently lectures on ethics as part of Mandatory Continuing Legal Education requirements for attorneys licensed to practice law in the State of Louisiana. Ms. Averill has also published several articles for the Louisiana Bar Journal.

LSBA Resources

GILSBAR = “Group Insurance Louisiana State Bar”

Loss Prevention Program

- ! Louisiana's Loss Prevention Program was created in 1991 at the request of the LSBA's Legal Malpractice Insurance Committee and is operated by Gilsbar under the sponsorship of the LSBA.
- ! The purpose of the program is to assist Louisiana practitioners in preventing legal malpractice, improving office practices and procedures, and better serving the public.
- ! There are three in house loss prevention counsel: Beth Voss, Johanna Averill & Carol Rider
- ! lossprevention@gilsbar.com(985) 898 -1785

Loss Prevention Counsel

Serve the Louisiana bar by:

- ! Providing CLEs on ethics, professionalism, and law office management
- ! Providing workshops for non-attorney staff
- ! Authoring sample forms which can be found at www.gilsbarpro.com (loss prevention tab)
- ! Authoring Louisiana prescription quick reference cards, as well as statute of limitation cards for: Texas, Mississippi, Alabama, Georgia, Florida, North Carolina and Missouri
- ! Contributing to Lawyers Helping Lawyers in the Louisiana Bar Journal

Loss Prevention Counsel

Serve the Louisiana bar by:

- ! Telephone consults with Louisiana attorneys
 - ! Calls are confidential and privileged - LA.R.S. 37:220
- ! Co-authoring the Practice Aid Guide, found at www.lsba.org
- ! In conjunction with the LSBA, offering the fall CLE program where premium credit is earned. *
- ! Conducting law office audits or telephone consultations pursuant to consent agreement with LADB or orders by the Louisiana Supreme Court

Loss Prevention Counsel

- ! Cannot offer legal advice or legal opinions
- ! Cannot make professional liability coverage determinations
- ! Can explain malpractice policy provisions
- ! Can offer practice suggestions
- ! Can assist with most ethics questions

Other LSBA Resources

- | Ethics Advisory Service
 - | Richard Lemmler - (504)619 - 0144
 - | Staff of lawyers who issue written, non-binding ethics advisory opinions to LA attorneys.
 - | Published Opinions: www.lsba.org > Ethics Advisory Service > Public Ethics Advisory Opinions

Ethics Advisory Service

- ! 5 - 10 business day turn around on most requests
- ! No hypotheticals
- ! Not permitted to respond to general public
- ! Prospective conduct only
- ! Will not comment on matters subject to disciplinary action, legal dispute or litigation
- ! Requests for opinions are confidential but not privileged.
- ! Requests should be submitted in writing to Eric Barfield at ebarefield@lsba.org or by fax at: 504-598-6753
- ! Ethics Counsel will not offer legal advice or opinions or accept ethics complaints

Practice Assistance & Improvement Program

“Alternatives to discipline” assistance

! Attorney-Client Assistance Program

➤ Facilitates prompt resolution of complaints about attorney conduct

- Communication issues
- Non-ethical violations

Often referred by Disciplinary Counsel

! Diversion Program

➤ School for attorneys guilty of MINOR misconduct (with no prior discipline)

- Must sign a formal contract, and
- Attend Ethics or Trust Accounting School

Lawyers' Assistance Program

| Buddy Stockwell

1-866-354-9334 CONFIDENTIAL

- Substance abuse issues
- Impaired lawyer issues
- Depression issues
- Gambling issues

SOLACE & CNA

- ! Support Of Lawyers/Legal Personnel - All Concerned Encouraged
- ! Judge Jay Zainey – facilitator
- ! Assists anyone in the legal community in times of illness, hardship, death or injury.
- ! Coordinator roster at www.lsba.org
- ! CNA Risk Management Hotline – (866) 262 - 0034

Substantive Errors

- Conflicts of interest
- Inadequate discovery of facts or inadequate investigation
- Error in mathematical calculation
- Failure to know or ascertain deadline correctly
- Error in public record search
- Improper drafting
- Planning error in choice of procedures
- Failure to understand or anticipate tax consequences
- Failure to know or properly apply the law

Administrative Errors

- Failure to calendar properly
- Failure to react to calendar
- Failure to file documents where no deadline is involved
- Procrastination in performance of services or lack of follow-up
- Lost file, document, or evidence
- Clerical error

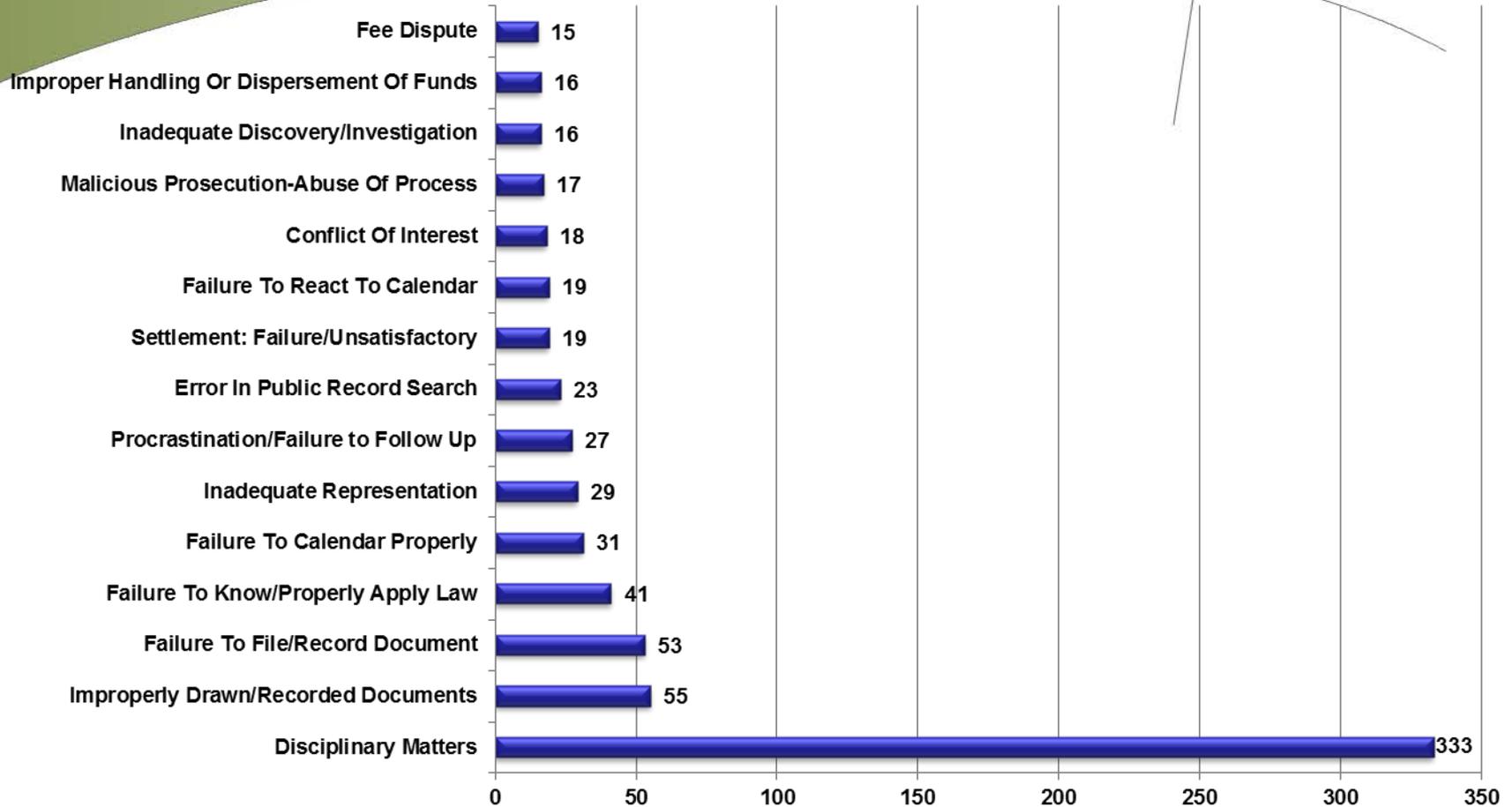
Client Relations Errors

- Failure to follow client's instructions
- Failure to obtain client's consent or to inform client
- Improper withdrawal from representation

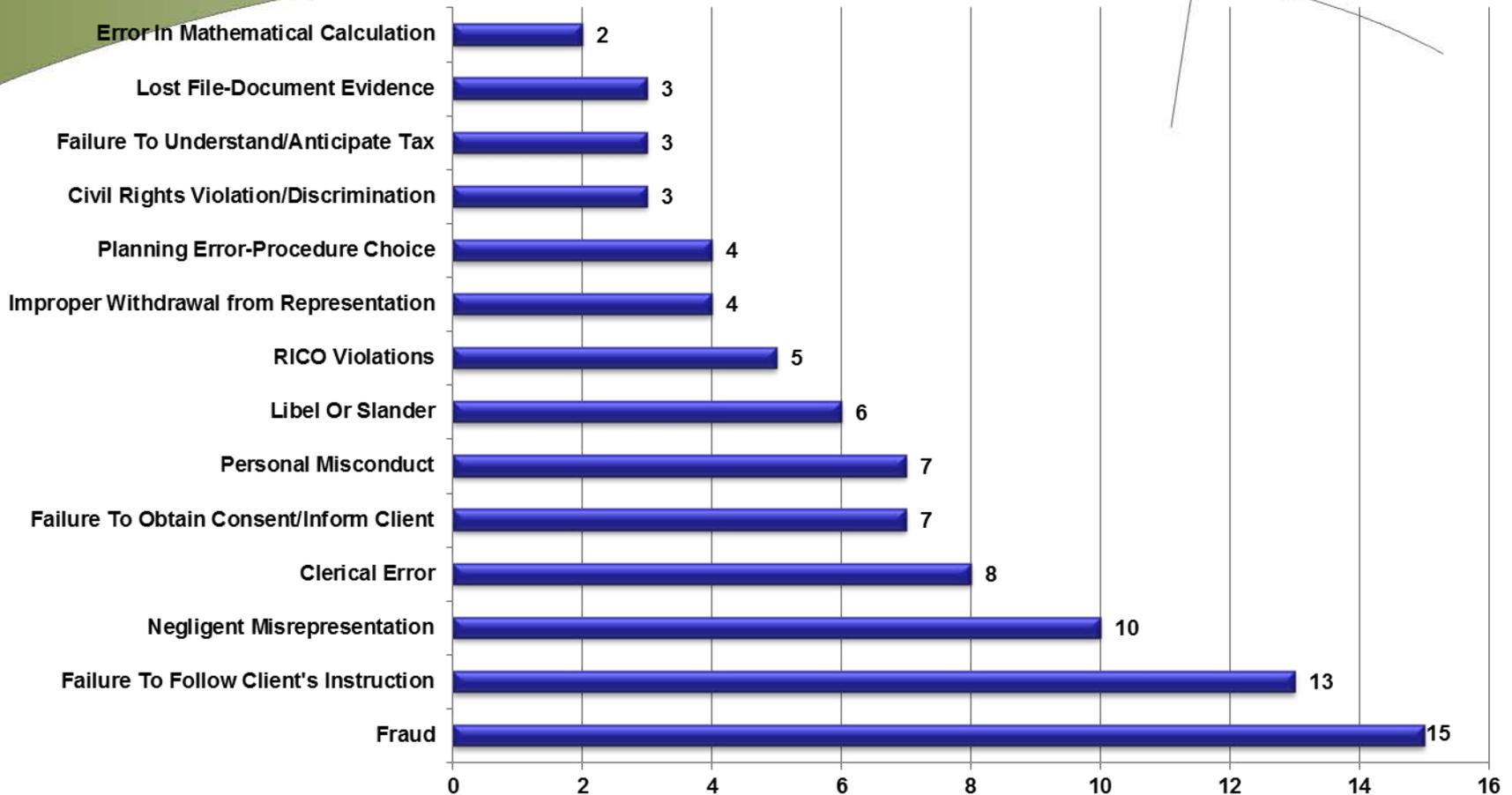
Intentional Wrongs

- Libel or slander
- Malicious prosecution or abuse of process
- Violation of civil rights
- Fraud

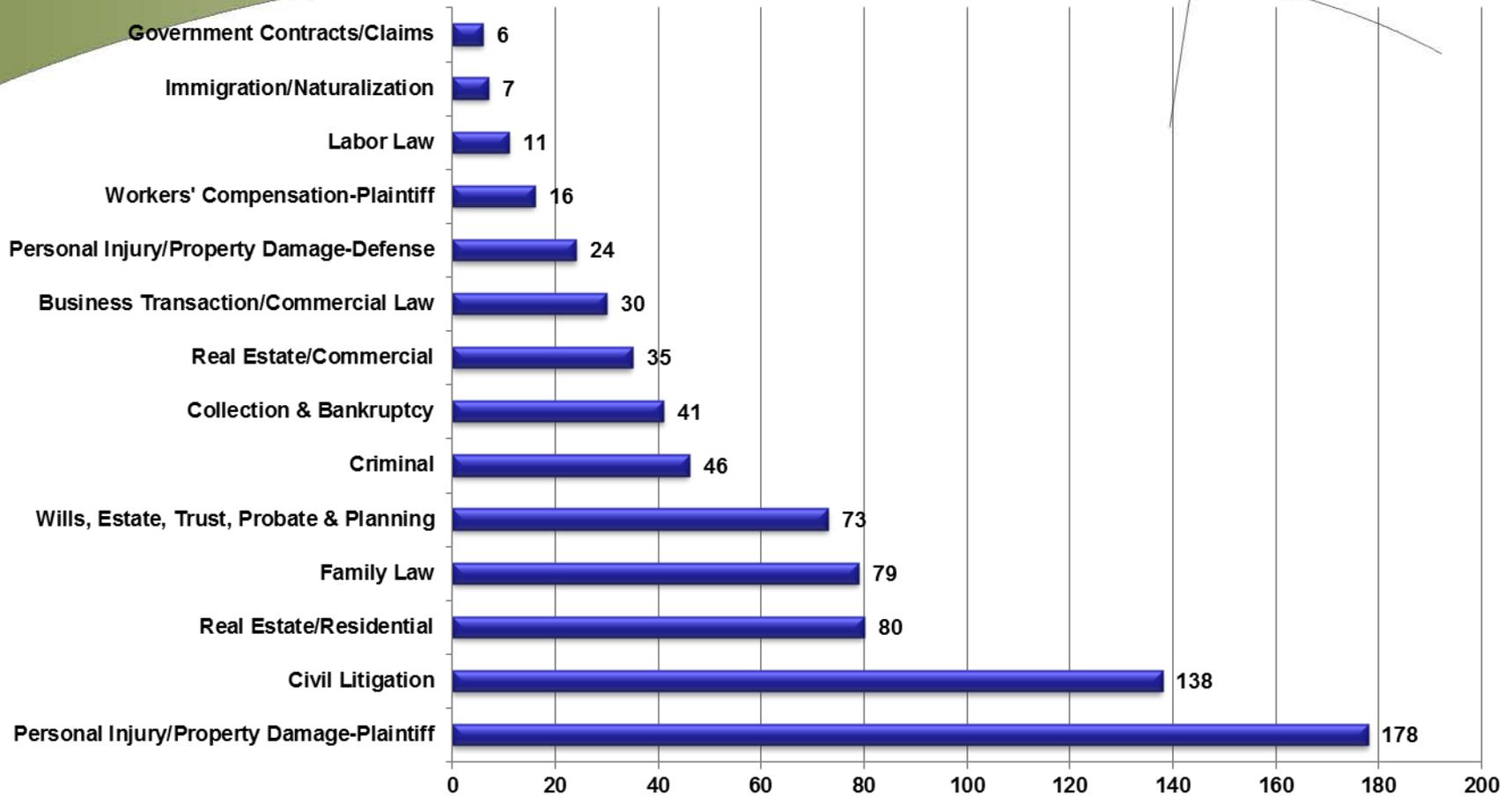
Claims by Type of Error in LOUISIANA 2010-2012 – Higher Frequency Errors



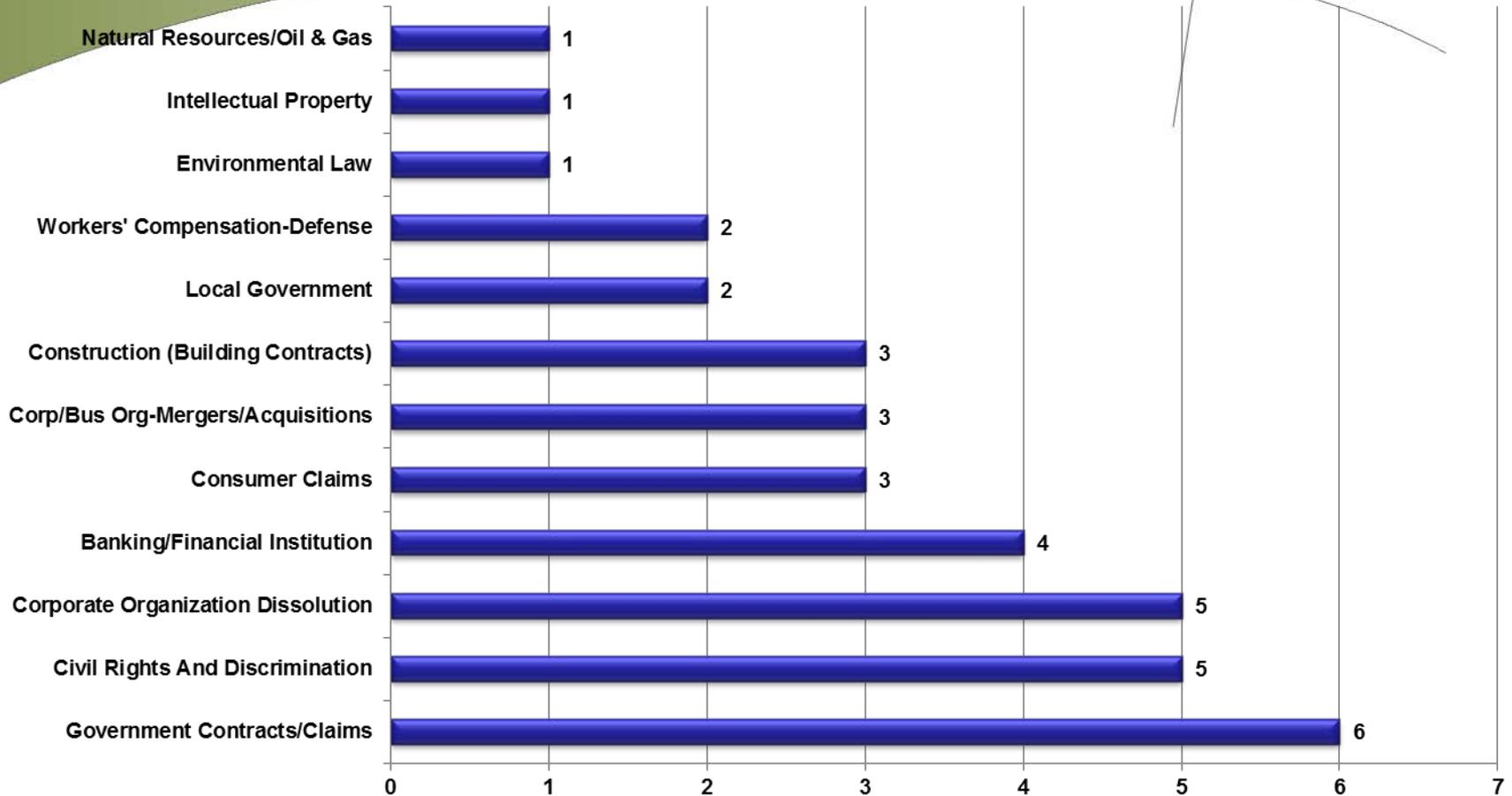
Claims by Type of Error in LOUISIANA 2010-2012 – Lower Frequency Errors



Claims by Area of Practice in LOUISIANA 2010-2012 – Higher Risk AOP

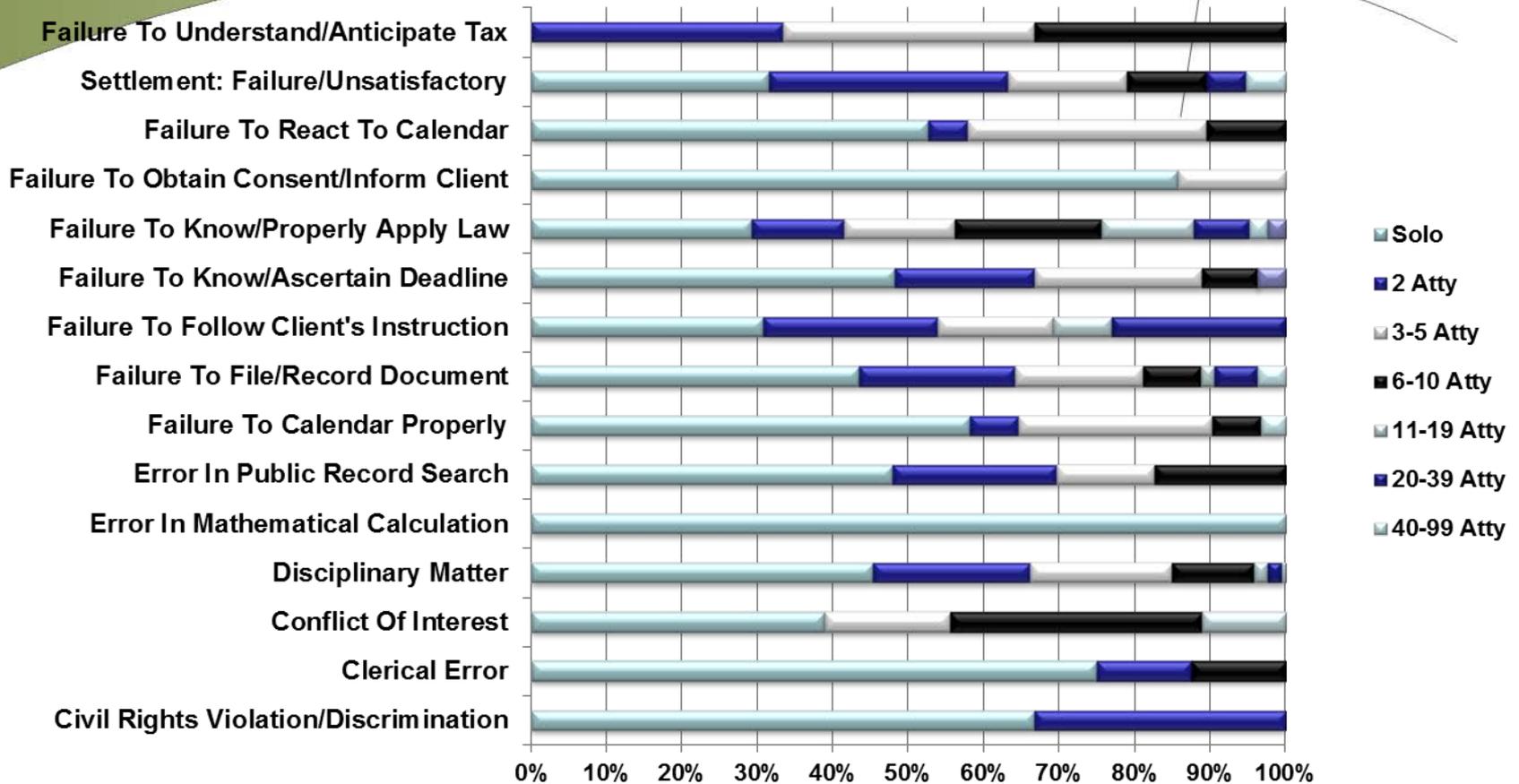


Claims by Area of Practice in LOUISIANA 2010-2012 – Lower Risk AOP

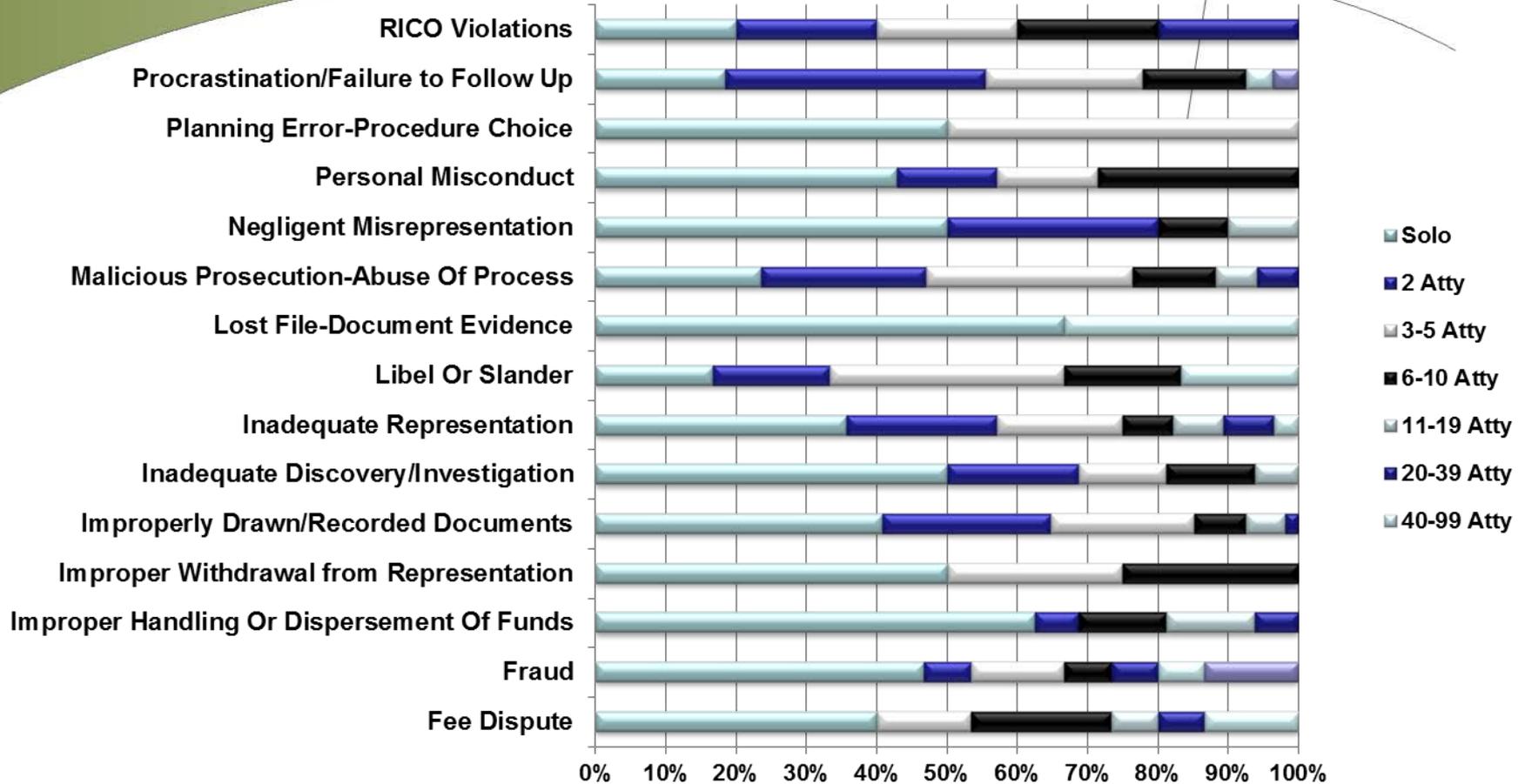


Claims by Type of Error in LOUISIANA

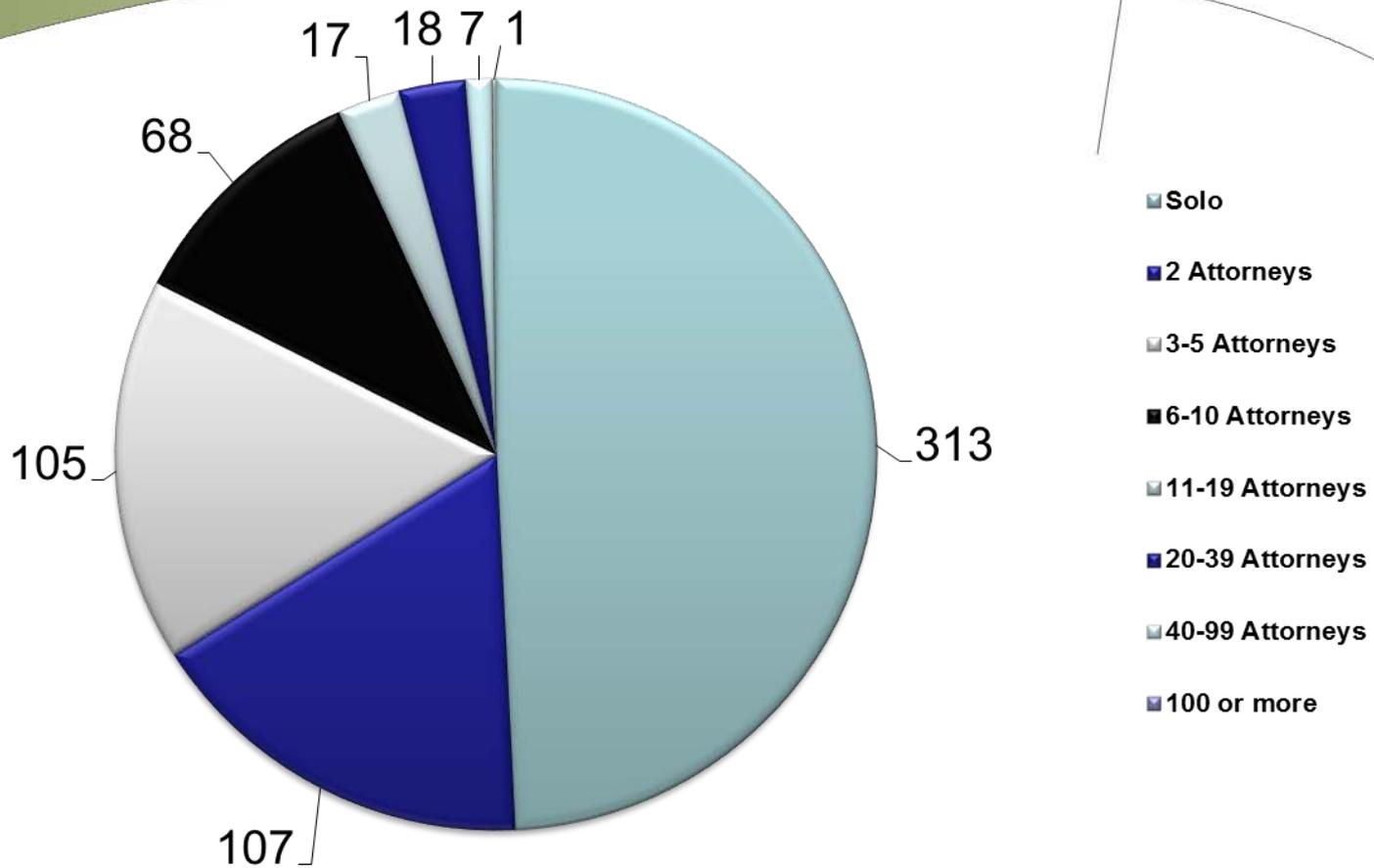
Firm Size Comparison 2010-2012



Claims by Type of Error in LA Firm Size Comparison 2010-2012



Claims by Size of Firm in LOUISIANA 2010-2012



Confidentiality

Lawyers have a duty to keep client matters confidential.

The most basic principle underlying the lawyer-client relationship is that lawyer-client communications are privileged, and must be kept confidential. This means that lawyers cannot reveal clients' oral or written statements (nor lawyers' own statements to clients) to anyone, including prosecutors, employers, friends, or family members, without their clients' consent. This duty of confidentiality survives the representation.

Louisiana Rules of Professional Conduct

Rule 1.6. Confidentiality of Information

(a) A lawyer **shall not reveal information** relating to the representation of a client **unless the client gives informed consent**, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Louisiana Rules of Professional Conduct

Rule 1.6. Confidentiality of Information

- (b) A lawyer **may reveal** information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to **prevent reasonably certain death or substantial bodily harm**;
 - (2) to **prevent the client from committing a crime or fraud** that is reasonably certain to result in **substantial injury to the financial interests or property of another** and in furtherance of which the client has used or is **using the lawyer's services**;
 - (3) to **prevent, mitigate or rectify substantial injury to the financial interests or property of another** that is reasonably certain to result or has resulted from the client's commission of a crime or fraud **in furtherance of which the client has used the lawyer's services**.

Louisiana Rules of Professional Conduct

Rule 1.6. Confidentiality of Information

- (4) to **secure legal advice** about the lawyer's compliance with these Rules;
- (5) to **establish a claim or defense on behalf of the lawyer** in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to **comply with other law or a court order.**

Confidentiality

Example: Mary Jane (MJ) Hemp is charged with possession of illegal drugs. At the request of MJ's mother, attorney Joe Lawless talks with Mary Jane in jail and offers to represent her. MJ decides not to hire Lawless, and instead retains Bill Beaucoup as her lawyer after she bails out. At trial, the prosecutor calls Lawless as a witness and asks him to reveal what MJ told him in their jail conversation. Lawless cannot testify. Lawless spoke to MJ in his capacity as an attorney, so their conversation is confidential even though MJ decided to hire a different attorney.

Confidentiality

Example: Same case. MJ tells her lawyer that the drugs belonged to her, and that she bought them for the first time during a period of great stress in her life, just after she lost her job. MJ authorizes her lawyer to reveal this information to the D.A., hoping to achieve a favorable plea bargain. However, the D.A. refuses to reduce the charges, and the case goes to trial. Cross-examining MJ, the D.A. asks, “Isn’t it true that you admitted to your lawyer that the drugs were yours?” This is not a proper question. MJ authorized her lawyer to reveal her confidential statement to the D.A. But a statement made for the purpose of plea bargaining is also confidential, so the D.A. cannot refer to it at trial.

Confidentiality

Example: Same case. MJ's mom is paying the bills of Bill Beaucoup because MJ has been out of work. Since she is paying the bills, MJ's mom asks the lawyer if her daughter is guilty; and wanting to help her daughter, asks for more details about their conversations. Bill Beaucoup cannot reveal this information. Even though MJ's mom is paying the bills, MJ is the client and Bill's duty is to her.

Soon after her arrest, MJ speaks to her mother in jail. MJ's case goes to trial, and the prosecutor calls MJ's mother as a witness and asks her to reveal what MJ told her. MJ's mother would have to answer questions under oath about what MJ said to her. This might be excluded as hearsay; but if not, most states have not created privileges for conversations between parents and children.

TIPS for maintaining Confidentiality

Lawyers must **train non-lawyer staff** on the ethical duty to keep client information confidential. Lawyers must ensure that all staff members who have access to client information understand the importance of protecting client confidentiality and know how to preserve it.

There should be a firm rule of “**no discussions of client matters with third parties**”. Create a **Staff Confidentiality Policy** and have all employees sign the policy.

Install antivirus and antispyware software and **maintain a firewall** network on every machine that can access client information. Update the software frequently.

Institute a “**clean desk**” **policy** when meeting with clients to avoid the possibility that one client could read another client’s file or related notes.

TIPS for maintaining Confidentiality

Be aware of your surroundings when speaking with clients. Cell phone conversations might be overheard in public, speakerphones may project beyond the confines of a room. Warn clients not to divulge confidential information when you can't ensure privacy.

Install a password-protected screen saver on computers and laptops to reduce the risk that someone will see confidential client information.

Maintain vigilance even after you no longer represent the client. Remember, the duty of confidentiality extends after the representation ends, and only the former client can waive the obligation.

Compliance Action Points

1. Review policies and procedures for ensuring protection of client confidences.
 - a. Review controls and protections in place regarding:
 - (1) Public display of files, papers.
 - (2) Access by outsiders to lawyers' offices and support areas.
 - (3) Use of e-mail and other electronic communications technologies.

Compliance Action Points

2. Review knowledge of lawyer and professional staff regarding these policies and controls, including scope of training and dissemination of the information.
 - a. Review compliance with these policies and controls.
 - b. Review policies and procedures for communicating confidentiality protection issues to and obtaining appropriate instructions from clients.

Conflicts

The duty to keep client information confidential is coupled with the duty to check for conflicts of interest. Any conflict of interest must be eliminated or reduced and mitigated against. A conflict could arise because two current clients have adverse interests, or a new client has interests materially adverse to a former client.

Louisiana Rules of Professional Conduct

Rule 1.7. Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer **shall not represent** a client if the representation involves a **concurrent conflict of interest**. A concurrent conflict of interest exists if:
- (1) the representation of one client will be **directly adverse** to another client; or
 - (2) there is a significant **risk** that the **representation** of one or more clients will be **materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Louisiana Rules of Professional Conduct

Rule 1.7. Conflict of Interest: Current Clients

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer **may represent** a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide **competent and diligent** representation to each affected client;

(2) the representation is **not prohibited** by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives **informed consent, confirmed in writing**.

Ethical Walls/Information Barriers

An Ethical Wall or Information Barrier is an internal measure adopted by a firm to ensure that information gained while acting for one client does not leak to people in another part of the same firm who are acting for another client to whom that information may be highly relevant.

There are a variety of different procedures for achieving this, for example, locked rooms for relevant documents, separate teams working on the different sides to the matter, written rules on maintaining confidentiality and restricted access to certain parts of a building and monitoring of those who enter those areas.

How To Build an Ethical Wall

Example: *Rivera v. Chicago Pneumatic Tool Co.*, [unpublished opinion, No. 51-63-64 (Superior CT., Judicial District of New London, Conn., 8/5/91)], set forth the criteria for a successful ethical wall in a case where a paralegal formerly employed by defendant's attorneys is now employed by plaintiff's counsel:

- (1) the paralegal will not be permitted to disclose or discuss any information acquired while employed by defendant's counsel concerning the cases in question;
- (2) the files in question shall not be accessible to the paralegal;
- (3) the paralegal will not be permitted in the vicinity of the files when others are working on them;

How To Build an Ethical Wall

- (4) the paralegal's supervising attorneys will not work on the case in question, or maintain any files involving defendant;
- (5) the paralegal will sign an affidavit and agreement that she will have no contact with the files, nor will she discuss the files with anyone in plaintiff's firm or disclose any information she acquired in her former position; and
- (6) the attorney who will be handling the files will have no direct contact with the paralegal.

Additional tips for a successful ethical wall

(7) “Red Flag” the files which are affected by the wall. Staple bright red paper on the outside of these file folders with a confidentiality notice;

(8) notify (in writing) the conflicted employee that if he sees one of these files, he is not to go near the file; and

(9) send a memorandum to everyone in the firm explaining what the wall is, and why it was constructed and state that they should have no discussions with the “tainted” employee about the wall or about the case to which the wall pertains.

Ethical Wall Compliance Action Points

Most firms manage ethical walls manually by relying on application administrators to set security on a per application basis. This leaves room for inconsistencies and is prone to human error. As you review existing walls across multiple systems, there may be support personnel who are on multiple sides of ethical walls, or there may be lateral hires that have access to client/matter folders and they should not.

Plan ahead. Come up with standard conflict resolution models to follow. E.g. secretaries can be allowed to be on multiple sides of the wall for a specified period of time, until reassignments can be established. Anticipate possible conflict scenarios and have a written plan in place on how to address them. Educate employees on the plan, and enforce it.

Conflicts Action Points

1. Identification and Analysis of Conflicts

a. Review all new client/prospective client information forms; determine whether, when properly used, they will identify:

- (1) Conflicts between or among **existing and/or former clients** of the firm and clients of individual lawyers who have joined laterally, as well as staff (such as secretaries and legal assistants) with access to confidential information.
- (2) Entrepreneurial activities** and other personal interest conflicts involving lawyers, staff, and prospective clients.
- (3) “Positional” or **issue conflicts**.
- (4) Use and screening for conflicts of **temporary or contract lawyers and staff**.

Conflicts Action Points

- b. Review all systems and procedures for collection and distribution of **new client forms and for scope of information** required.
 - c. Review **procedures used by administrative staff** in checking for conflicts.
 - d. Review policies and procedures for **firm management oversight** regarding (1) client acceptance and (2) disclosure decisions when actual or potential conflicts are identified.
 - e. Review policies and procedures for engaging in “**beauty contests**,” including prior discussion of potential conflict:
 - (1) With potential clients.
 - (2) Within the firm: review the adequacy of the process
- “**beauty contest**” – process of interviewing multiple firms where a firm not chosen might end up on other side of the litigation

Conflicts Action Points

2. Waivers and Consents

- a.** Review standard form letters, or procedure for preparing and issuing client-specific letters requesting client consent to act where potential conflict exists, including appropriate disclosure language.
- b.** Review procedures for ensuring use of standard form, or for obtaining a variance or specially prepared letters, where potential conflicts have been identified.
- c.** Review sample files to determine whether proper waivers, based on adequate disclosure, were actually obtained.

Conflicts Action Points

3. Oversight, Control, and Avoidance

a. Review claims of conflicts in the three years before current audit.

b. Review level of knowledge among partners and professional staff, and level of compliance with policies and procedures for:

(1) Conflicts checking.

(2) Use of new client forms.

(3) Procedures for obtaining exceptions, if any.

(4) Pre-notification of participation in “beauty contests”.

(5) Making adequate disclosure and use of standard form or client-specific letters regarding waivers.

Conflicts Action Points

- c.** Review policies and procedures for monitoring changes in client composition (e.g., changes in corporate structure, change in status of client, substitution of client in same matter, etc.).
- d.** Review policies and procedures for restarting or completing conflicts-checking process when client composition changes.
- e.** Review level of knowledge among partners and professional staff and level of compliance with these policies and procedures.

Limited Scope Engagement Letters

The best time for lawyers and firms to protect themselves is when a client first seeks to engage them. Firms and clients should agree and have a clear meeting of the minds on the scope of services to be provided, including any limitations imposed by either party. For example, a lawyer may want to exclude any actions that the lawyer regards as repugnant or imprudent. The firm may want to include provisions allowing them to assign attorneys competent to work on the matter (when client seems to want someone whose expertise lies elsewhere).

Louisiana Rules of Professional Conduct

Rule 1.2 Scope of Representation

...

(c) A lawyer may limit the scope of the representation if the **limitation is reasonable** under the circumstances and the client gives **informed consent**.

...

Engagement Letter Tips

Boilerplate language may be dangerous. Carefully tailor engagement letters to protect the firm. Spell out the work to be performed, and when applicable, the work that will not be performed. Protect the firm from being forced into objectionable positions by its client. Reduce to writing any verbal limitations that the client or firm has expressed in regard to the representation. E.g. “We will provide only legal services, as previously described in the “Scope of Representation” and “Limited Scope of Representation” sections of this engagement agreement.” (See CNA Lawyer’s Toolkit: Guide to Managing the Attorney-Client Relationship” for sample letters.)
https://www.lawyersinsurance.com/spln1/lawyerspbc/lawWAR/static_html/rmanagement.html

Limited Scope Engagement Tips – sample exclusions

Limited Scope of Representation: The scope of our representation does not include advice or services regarding accounting, tax, personal financial matters or business management, and related non-legal matters and advice. If you wish for us to consult with other professionals retained by you regarding this matter, we will communicate with you in writing to confirm the scope of such consultations prior to initiating same.

(For representations involving real estate, consider including the following language: The scope of our representation does not include title searches, surveys, inspections, and other non-legal work relating to real estate. You may wish to engage a title insurance company, abstractor, surveyor, or other licensed professional to provide you with these services.)

Engagement/Non Engagement Letter Action Points

1. Confirm requirement to use engagement letters for new clients, scope of engagement confirmations for new matters for existing clients, and non engagement letters where initial contact does not result in engagement, including following beauty contests.
2. Confirm existence of requirement that new clients countersign engagement letters.
3. Confirm existence of review procedures to ensure compliance with engagement letter and non engagement letter requirements, including actual receipt of countersigned engagement letters.

Closing Letters Action Points

1. Confirm existence of, and review policy requiring issuance of, client/matter closing letters at end of engagement (or new engagement letters, for which the firm accepts continuing review obligations).
2. Review standard forms; check for language stating that no follow-up work will be performed, and no client notification of changes in law will be provided, without a new engagement letter.
3. Review knowledge of lawyers and professional staff regarding need for, and policies regarding use of, closing letters.
4. Review policies and procedures for compliance (e.g., reminders, or billing system fail-safe requirements).
5. Check a random sample of files to confirm that closing letter compliance system is working.

Record Retention & Destruction

CNA loss prevention counsel indicate that their Record Retention and Destruction Policy will be updated by 2014.

<https://www.lawyersinsurance.com/spln1/lawyerspbc/lawWAR/static.html/rmanagement.html>

Or

<http://www.gilsbarpro.com/NewsAndInsights>

Critical Tips

- | Keep detailed notes of everything that goes on in your clients matter.
- | Confirm important information in writing.
- | Kept drafts of documents that you produce and send out externally.
- | Save copies of the entire client file.
- | Keep files organized and retain them for the required period of time after the attorney client relationship has terminated.
- | Don't forget your P's.
 - | Professionalism
 - | Passion
 - | Patience
 - | Personality
 - | Preparation
 - | Presentation
 - | Punctuality