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Top Ten Risk Management Tips for Solo Practitioners

Speakers: Erin McCartney, J.D. and Megan Zavieh, J.D.

August 26, 2020 12:00-1:00 p.m. CT 1:00-2:00 p.m. ET

▶ Speaker Bios:

Erin McCartney, J.D.

Erin earned her Doctor of Jurisprudence from Villanova University School of Law, and her Bachelors degree from Georgetown University. Erin began her career as an insurance defense attorney in Philadelphia. She later joined Fireman's Fund Insurance Company where she handled professional liability claims and acted as the risk and claims service consultant for the company's top accounts. Erin is currently the Risk Management Lead for Attorney Protective, which entails leading the development and implementation of risk management initiatives for insured law firms.



She is a member of the Pennsylvania Bar Association and has authored articles for several organizations including the *Chicago Bar Record*, *Independent Agent Magazine*, *Maryland State Bar Association's Bar Bulletin*, *Orange County Bar Association* and *AttPro Ally*. She presents CLE seminars for state bar associations and other organizations including the Claims and Litigation Management (CLM) Cyber, Management and Professional Liability Conference and the DRI Professional Liability Seminar.

Given Erin's unique experience as an attorney, legal malpractice claim specialist and risk management consultant, she brings a valuable and realistic perspective to the risks faced by lawyers in today's environment.

▶ Speaker Bios:

Megan Zavieh, Esq.

Megan focuses exclusively on attorney ethics, providing full and limited scope representation to attorneys facing State Bar disciplinary action, providing guidance to practicing attorneys on questions of legal ethics, writing about ethics at [CaliforniaStateBarDefense.com](https://www.californiastatebardefense.com) and [AttorneyatWork.com](https://www.attorneyatwork.com), and speaking on ethics issues at conferences and events. She is a runner, Spartan racer, and mother of four Montessori (now homeschooled) children.

Her mission is to provide tools to solo and small firm lawyers to enable practices to thrive within the bounds of the ethics rules.

Megan earned her J.D. at age 21 from the University of California at Berkeley School of Law (Boalt Hall) in 1999, graduating Order of the Coif. After clerking for the Honorable Evan J. Wallach at the U.S. Court of International Trade in New York, she went on to practice securities litigation at three top firms in the New York area before turning her attention to legal ethics.



▶ Top Ten Risk Management Tips for Solo Practitioners



- ▶ **Tip 1:** Don't be alone - establishing your network.
- ▶ **Tip 2:** Backup attorneys - not just for vacation.
- ▶ **Tip 3:** Establish infrastructure as if it weren't just you.
- ▶ **Tip 4:** Follow the calendar.
- ▶ **Tip 5:** No flying by the seat of your pants - have a real five-year plan.
- ▶ **Tip 6:** Routine, routine, routine.
- ▶ **Tip 7:** Know your resources.
- ▶ **Tip 8:** Be a good listener.
- ▶ **Tip 9:** If a client doesn't pay, don't ignore them.
- ▶ **Tip 10:** Under promise and over deliver.



▶ Some Unique Risks that Solo Practitioners Commonly Face

- ▶ Do you have a backup?
- ▶ Do you have a peer review resource?
- ▶ Sharing office space and other resources with other firms
- ▶ Ethical concerns when closing a practice



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◉ Tip 1: Don't be alone - establishing your network.

- ▶ **ABA Model Rule 1.3, Diligence:** “A lawyer shall act with reasonable diligence and promptness in representing a client.”
- ▶ Solos cannot always meet that duty alone
- ▶ Who are your network members?
 - Practice area
 - Geographic area
 - Non-lawyers
- ▶ Where do you find your network?
 - Friends/classmates
 - Connect over social media
 - Conferences



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▶ Tip 1: Don't be alone - establishing your network.

▶ How do you cultivate/maintain your network?

- Physical time together (lunches, drinks, conferences)
- Creative virtual time together when physical is not possible
- Collaborate professionally (speaking engagements, work cases together, ask questions)
- Social media (LinkedIn, guest posts on blogs)



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● Tip 2: Backup attorneys - not just for vacation.

▶ When?

- Any time you need help - out of the office, overwhelmed with client work/personal issues/medical issues, extremely difficult clients, COVID overwhelm

▶ Who?

- Identify members of your network that you can rely on to back you up when you can't handle everything
- Most likely share a practice area

▶ What?

- Talk to those members
- Open lines of communication so you can reach out
- Call for help before it's a crisis



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▶ Tip 3: Establish infrastructure as if it weren't just you.

▶ Model Rules 5.1 through 5.3: Law Firms and Associations

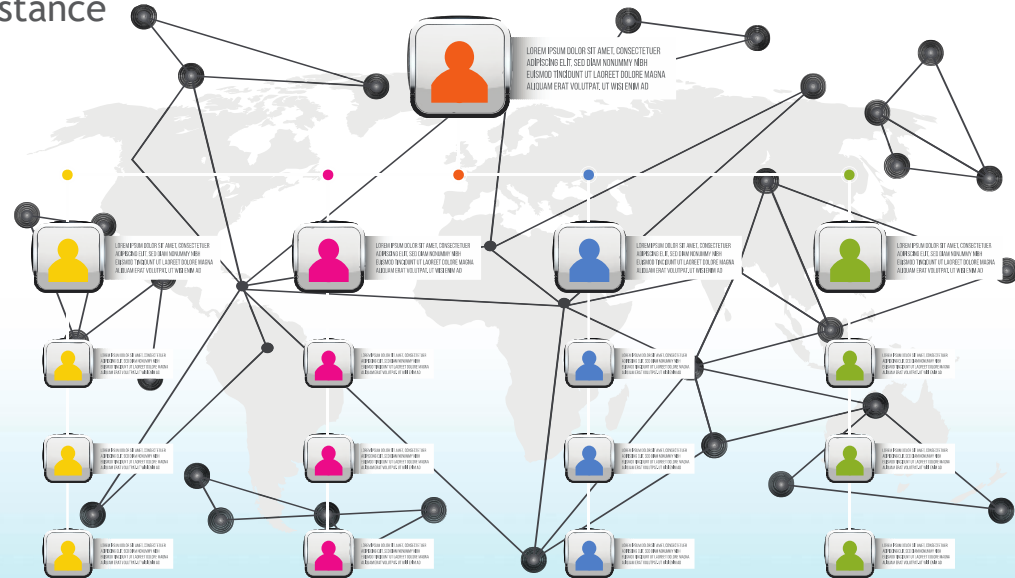
- Duties of Partner/Supervisory Lawyer
- Duties of Subordinate Lawyer
- Responsibilities Regarding Nonlawyer Assistance

▶ Even if you are a solo with no admin assistance, prepare your practice as if it were a fully staffed office

▶ List out the roles you play in your firm

▶ Draft an org chart - even if you hold every title

▶ Provide instructions for each role as if a temp was filling in on that job today



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• Tip 4: Follow the calendar.

- **Model Rule 1.1 Competence:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Critical to fulfilling your duties is not missing deadlines
- Deadlines include court filings and other external dates, but also internal admin functions
 - Billing
 - Filing



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- ▶ Tip 4: Follow the calendar.
 - ▶ Establish a calendaring system and use it for everything
 - Write down every deadline, appointment
 - Use it to keep track of routine tasks that have to be done periodically
 - Use ticklers that you can't ignore
 - Include personal matters, especially as they change dramatically
 - ▶ Reference the calendar constantly
 - At the end/start of each day
 - Throughout the day
 - ▶ Share the calendar with an accountability partner
 - Keep someone in the loop on your obligations to help you stay on track

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▶ Tip 5: No flying by the seat of your pants - have a real five-year plan.

- ▶ More than “I want to keep growing” or “I want to keep making money”
- ▶ Establish and write down financial goals
- ▶ Establish contingency plans
- ▶ Plan out ways to grow
 - Expand your practice into other substantive areas
 - Expand physically in office space
 - Expand with employees
 - Outsource tasks - which ones, why and when



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- ▶ Tip 5: No flying by the seat of your pants - have a real five-year plan.
 - ▶ Keeps you from being caught in traps common to the solo lawyer
 - Overwhelmed with too much work you are not prepared to handle - **Model Rule 1.1 (Competence), Model Rule 1.3 (Diligence)**
 - Taking on work in a new area that you are not ready to take on (usually out of desperation or inability to say no) - **Model Rule 1.1 (Competence)**
 - Drowning before asking for help- **Model Rule 1.1 (Competence), Model Rule 1.3 (Diligence)**
 - ▶ Allows exploration of ideas before a crisis hits

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- ▶ Tip 6: Routine, routine, routine.
 - ▶ Make administration of your firm as simple and routine as possible
 - ▶ Examples:
 - Time entered every day
 - All phone calls logged
 - All emails filed electronically
 - Paper files updated weekly
 - Trust account reconciled monthly
 - Invoices sent monthly



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▶ Tip 6: Routine, routine, routine.

▶ Why?

- Prevents problems from arising due to not keeping up with tasks (such as untimely billing)
- Increases profitability (billing/timekeeping in particular; other administration tasks take less time when routinized)
- Allows help to jump in when needed

▶ How?

- Case management software (Clio, MyCase, etc.)
- Mobile apps
- Team and task management tech tools (Basecamp, Basecamp3, Google Tasks, etc.)

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▶ Tip 7: Know your resources.

- ▶ Take stock of available resources before an emergency
- ▶ Keep ongoing list during emergencies, especially as worldwide crises (i.e. COVID) spawn new resources
- ▶ Possible sources:
 - Local/state bar association
 - Malpractice carrier
 - Section memberships
 - Vendors

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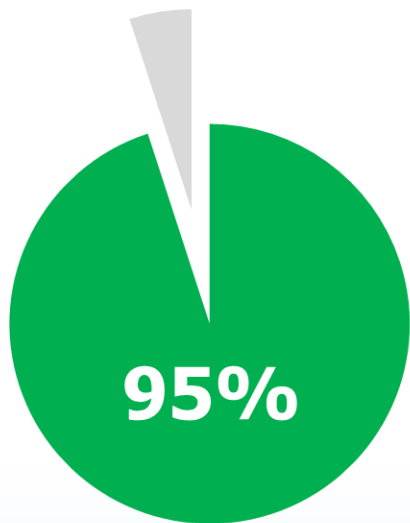


▶ Tip 8: Be a good listener.

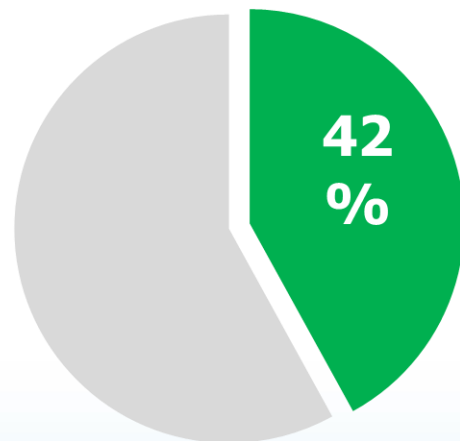
- ▶ Rule 1.4, “Communication”, of the Model Rules, describes a lawyer’s ethical duties with regard to client communication including the duty to:
 - Consult with the client about how you will accomplish their objectives
 - Keep the client reasonably informed
 - Promptly comply with requests for information
 - Promptly inform them of any matter requiring their informed consent
 - Explain the matter to the extent necessary to permit them to make informed decisions
- ▶ Poor listening would seem to be a part of client relations errors BUT really all claims stem from client relations and communication errors
- ▶ To listen you have to be engaged with the client and the matter, and that engagement cures many malpractice ills

▶ Lawyers don't get high marks for listening

A recent ABA study showed...



95% of *satisfied* clients reported their lawyer listened to them & paid attention to what they said



42% of *dissatisfied* clients said their lawyer listened to them & paid attention to what they said.

▶ What are the characteristics of good listening?



▶ 10 steps to effective listening*

1. Face the speaker & maintain eye contact
2. Be attentive but relaxed
3. Keep an open mind
4. Listen to the words & try to picture what the speaker is saying
5. Don't interrupt and don't try to impose your solutions
6. Wait for a pause to ask clarifying questions
7. Ask questions only to ensure understanding
8. Try to feel what they are feeling
9. Give the speaker regular feedback
10. Pay attention to non-verbal clues



▶ Don't interrupt & don't try to impose your solutions



- ▶ We are a society of interrupters - we used to teach our children not to interrupt
- ▶ What interrupting says*
 - ▶ I'm more important than you
 - ▶ I know more than you
 - ▶ I don't care what you have to say
 - ▶ I don't have time for you
 - ▶ This is a talking contest and I am going to win
- ▶ How long do lawyers listen on average in the initial interview before interrupting?



▶ Don't interrupt & don't try to impose your solutions



- ▶ Practicing good listening runs the gamut of the representation - from client intake to billing issues to settlement decisions - it even should drive attorney marketing
- ▶ **Listening can be learned . . .**
 - ▶ don't put furniture barriers between you and your client
 - ▶ display open body language
 - ▶ insist on **no interruptions**
 - ▶ give them the time they need to tell their story
 - ▶ show empathy
 - ▶ ask open-ended questions
- ▶ **Practice Tip:** Listening is good marketing tool - See e.g. Global Client Feedback Initiatives, LexisNexis®, Martindale-Hubbell® in association with the Wicker Park Group, 2011, available at <http://www.martindale-hubbell.co.uk>

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- Tip 9: If a client doesn't pay, don't ignore them.
 - ▶ **Lawyers get in trouble when they don't manage receivables**
 - ABA Model Rule 1.5 “Fees”, provides that a lawyer shall not charge unreasonable fees or expenses. The Rule provides a lot of guidance on what factors to consider when determining the reasonableness of the fee.
 - The comments to the rule add some practical tips on how to deal with fees with a new client, recommending that a written memorandum or fee schedule be given to the client that outlines the general nature of the services to be provided, the basis for the fee, and how expenses will be handled, among other things.



▶ Make sure your fee agreement is clear

- ▶ It is important that your fee agreement is clear AND that you and your client have a clear understanding of the agreement.

- ▶ In re Fink, 22 A.3d 461 (Vt. 2011).
 - The court disciplined a lawyer for violating Rule 1.5(b), even though he did not attempt to collect on the subject fee agreement: “The purpose of the rule was not fulfilled because the parties were unclear about the exact terms of the agreement.”

- ▶ In re Van Camp, 257 P.3d 599 (Wash. 2011).
 - The court held that the failure to explain the confusing phrase “earned retainer” contained in the fee agreement violated Rule 1.5(b).

- ▶ **Practice Tip:** Sit down and go over the fee agreement with your client to make sure they understand each aspect of the agreement.

Suits for fees & billing tips



- If the client is not paying you there are generally three reasons why (and all three will get you in trouble)

- **Seven billing tips**

1. Manage the client relationship - “Happy clients don’t sue”
2. Effective use of the sticker-shock call
3. Include a personal touch like a hand-written note or client newsletter with the bill
4. Bill immediately when you achieve a major milestone
5. Disclose inefficiency and write it off on the bill
6. Tie items billed to client’s hoped for results
7. Have the tough conversation “Why aren’t you paying the bill?”

▶ Do manage your receivables & don't sue for fees



▶ Managing your receivables

- ▶ External expectations - let your client know upfront that you expect to be paid on time
- ▶ Internal expectations - let your lawyers & staff know that you expect them to record & bill time contemporaneously
- ▶ Don't let the overdue amount get out of hand - easier to pay a small bill than a large one
- ▶ If you cannot resolve it, withdraw - easier to withdraw earlier rather than later
- ▶ Don't ignore non-payment - call and ask why your bill isn't being paid
- ▶ Suing for fees should be an absolute last resort - in most states a claim for malpractice is a compulsory counterclaim

▶ Alternative dispute resolution to recover fees



- How to ethically include an arbitration provision in your fee agreement:
 - ▶ Fully disclose to your client the risks and benefits of arbitrating a fee dispute
 - Provide your client with sufficient information to permit him/her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the fee agreement. Your explanation will depend on the sophistication of your client.
 - The lawyer should make clear that arbitration typically results in the client's waiver of significant rights (the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal).
 - Explain that the case will be decided by an individual arbitrator or panel of arbitrators.
 - Inform the client of any obligation that the lawyer or client may have to pay the fees and costs of arbitration.
 - ▶ Ensure that the arbitration provision does not insulate you, as the lawyer, from liability or limit the liability to which you would otherwise be exposed under common and/or statutory law.



▶ Happy clients pay their bills

- ▶ Be consistent - establish consistent policies and procedures for billing & collection that all attorneys and staff must follow
- ▶ Be predictable - no bill should be a surprise, be sure you have discussed possible outcomes and costs along the way
- ▶ Be timely - don't underestimate the importance of timeliness as an effective risk management tool, both in doing the work and billing for it
- ▶ If you have too many clients not paying their bills, there is a systemic problem to address with the firm or with a lawyer

Happy Clients + Happy Staff = Lots of Business

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- Tip 10: Under promise and over deliver.
 - ▶ Lawyers get sued because we are too slow & are seen as not keeping our promises

 - ▶ Note Model Rule 1.3 Diligence
 - A lawyer shall act with reasonable diligence and promptness in representing a client.
 - Comments elaborate and say that a lawyer’s work load should be controlled so that each matter can be handled competently. They add that no professional shortcoming is resented more than procrastination and emphasize that a client’s interests can often be adversely affected by the passage of time or change in conditions. Further, unreasonable delay can cause a client “needless anxiety” and “undermine confidence in the lawyer’s trustworthiness”.

 - ▶ See *Dayton Bar Ass’n v. Brown*, 921 N.E.2d 220 (Ohio 2009) (lawyer delayed over a year transferring elderly clients' assets into trust, thus delaying their eligibility for Medicaid and their anticipated move into nursing home); see also *In re Rodriguez-Quesada*, 122 A.3d 913 (D.C. Ct. App. 2015) (lawyer delayed 4.5. months in filing immigration documentation, thus delaying client’s citizenship).



▶ Other rules affecting diligence

- ▶ Other pertinent Model Rules of Professional Conduct:
 - ▶ Rule 1.1 Competence
 - ▶ Rule 1.4 Communications
 - ▶ Rule 1.16 Declining or Terminating Representation
 - ▶ Rule 3.2 Expediting Litigation
- ▶ Rule 3.2 Expediting Litigation – “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”
 - ▶ Comment 1 makes it clear that the lawyer may not fail to expedite litigation solely for his own personal reasons. The comment also emphasizes that delays bring the justice system into disrepute.
 - ▶ *But see Alan C. Eidsness & Lisa T. Spencer, Confronting Ethical Issues in Practice: The Trial Lawyer's Dilemma, 45 Fam. L.Q. 21 (Spring 2011) (acceding to divorce client's request to delay proceeding to explore possible reconciliation is likely not ethical violation).*



▶ Don't act like the cable company

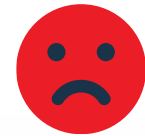
- ▶ They are evasive and unresponsive-the time estimate they give you is always too far away, inconvenient and fluid
- ▶ They over promise & under deliver
- ▶ Instead, make it your goal to “wow” clients by under promising & over delivering on both results & timeliness; don't ask clients to understand your busy schedule - it's not their problem
- ▶ ABA Formal Ethics Op. 465 (2013) (lawyer considering offering Groupon or “daily deal” coupons must limit number of deals offered, to preserve lawyer's ability to handle caseload promptly, competently, and diligently); Ala. Ethics Op. 2012-01 (2012) (lawyer's participation in “daily deal” marketing arrangement risks creation of unmanageable caseload).
- ▶ **Practice Tip:** Return calls – Be timely – Stand Out!



Excellent



Good



Poor

▶ Responsiveness will both get you the client & lose them



- ▶ Atman Weil has consistently found, in data gathered from over 100,000 buyers of legal services, that the #1 reason clients fire their law firm is “lack of responsiveness.” *
- ▶ This is supported by other data, including studies performed by the Association of Corporate Counsel (www.acca.com).
- ▶ In a 12-9-13 survey of Avvo “responsiveness” was consumers #1 reason for hiring a lawyer.
- ▶ Do our ideas of responsiveness match up with client expectations?
- ▶ **Practice Tip:** Discuss turn-around times for phone calls and emails at the beginning of your attorney-client relationship. Confirm expectations on both sides.

▶ Clients will judge you on the things they can



- ▶ They cannot always judge you on the quality of the legal work or whether another lawyer could have gotten a better result or would have charged less
- ▶ But they can judge you on how nice your staff is to them, whether you complete items when you said you would and how fast you return their calls
- ▶ Speed is equated today with good service, even for lawyers
- ▶ Under promise and over deliver!

▶ Resources



- ▶ E-Myth Revisited by Michael Gerber
- ▶ Zapier software tool
- ▶ Essentialism: The Disciplined Pursuit of Less, by Greg McKeown

▶ Q&A:



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