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The E-mails—Loss Prevention and Ethics in Small Doses

*Peter J. Winders**

"*Even more effective than forced infusion is the administration drop by drop by drop . . .*" – Anonymous

(The quote actually is from a discussion of water tortures, but is equally apt to teaching ethics.)

As I have alluded elsewhere, I send out a lot of firm-wide emails, addressed usually to both lawyers and nonlawyers, having to do with a variety of loss prevention, policy, ethics, teamwork and related subjects. The better ones are short, and the best are those that are based on examples–a news article about another firm's troubles, a near miss because of a failure to follow procedure, etc.

Although irregular, these average once a week. On average again, I get 3 new responses to each, to the effect that this was a great idea and why hadn't they been told before. In fact, they have been told half a dozen times, and this one just happened to register. That is the point of doing it this way. A young associate has heretofore ignored advice about business intake because it seemed remote. A lateral from a smaller, do-everything-yourself firm has just had the awesome experience of receiving aid from an expert within the firm for a problem that seemed overwhelming. If just those who respond have now internalized a principle of loss prevention or an ethics risk, then 150 people a year have taken a step towards sophistication in those areas. After a few years, the sensitivity of the members of the firm has increased, which is in itself a safety feature–a more effective early warning system – that is hard to match.

Plus, as is the experience of every organization, the problems remain constant; we merely rotate new people through them. We had comprehensive training in August 2004 about audit letter responses. But with normal attrition and growth we have 100 new people since then. No matter how well done the 2004 training, it does not meet the present needs of the firm.

We have begun to make some of these annual messages. One is the series on the risks and dangers of outside directorships, which we send in advance of the inventory of such positions for the malpractice insurance renewal. Another is the reminder of the strict policy of notifying the General Counsel immediately of any circumstance that might lead to a claim, sent at least twice a year, once at insurance renewal time and once in connection with the firm's annual audit.

These do have critics. Some people prefer an Old Testament style with commandments to resent, as opposed to the New Testament method with parables to misinterpret. Some busy lawyers would rather have a bumper sticker "Don't screw up" reminder than an illustration of how a problem can arise and what to do about it. Everybody likes the lessons that can be learned from the mistakes of another firm because that dignifies gossip.

Here are some illustrations:

PROBLEMS: The "good client gone bad"; a lawyer putting too much trust in the good will of her client, and failing to precisely document each engagement or task:

LOSS PREVENTION—DO NOT TRUST YOUR CLIENT

Tue 7/8/2003 1:22 PM

Maybe more accurately, Do not rely on your client or his continued good will. Even if your client thinks you are the greatest thing to hit the legal profession since Blackstone, and even if the CEO is a lifelong friend, please remember that CLIENTS CHANGE. There are changes of ownership and control, and there are changes in cir-

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Loss Prevention, from page 1

cumstances.

I. OWNERSHIP CHANGES:

- The salt of the earth, hard working corporate founder and longtime CEO retires or dies, leaving his playboy son as president and his daughter as 50% owner. The dynamics have changed.
- The corporation goes bankrupt. Trustee whose fiduciary duty as he sees it is to collect as much money as possible, including any claim against the bankrupt's lawyer for getting it into this mess.
- The corporation is acquired by a conglomerate who wants to turn certain assets into cash.

In any of those situations, you will be glad that you documented in the engagement letters and the disengagement letters, and at times in between, that you were NOT employed to accomplish project X, but ONLY to EVALUATE the advantages and disadvantages of project X. If we completed that evaluation project, it is nice that the file says so and also has a letter to the client stating that, after the matter is considered by the board of directors, we will be pleased to discuss how we might be of further help. You will also be glad that you put in writing your advice that a specific risk should be separately insured, and that you confirmed the decision that the company's broker was to take care of that, not you.

Do not rely on your client or his continued good will.

II. CHARACTER TESTS:

Even without a personnel or ownership change, people do things in hard economic times or financial crisis for the organization that they would not even consider when times were good. Again, you will be glad of your habit of documenting and confirming what you have agreed to do, and who is responsible for doing it.

These ideas are part of the reason it is wise to habitually assure that an engagement letter defines the scope of the engagement, any changes to that scope, the completion of the project, and other significant events in the course of the matter.

ALSO, these ideas underlie an alert that we have put out to Practice Group Leaders and the Business Intake Panel to be alert to the quality of EXISTING CLIENTS, not just new ones, as new matters arise. We have preached about background checks on new clients to assure that we do not unknowingly assist in shady deals and find ourselves accused by defrauded victims of aiding and abetting the client's scheme. Recently, some law firms have found themselves in such a position as a result of the actions of OLD ESTABLISHED CLIENTS that the firm had represented for years. Changing personnel and hard financial times had resulted in a changed client willing to resort to fraud. The existing clients were flying new red flags that would have probably made the firm cautious if a new client were flying them, but the assumption by the lawyers that the trusted client would never do such a thing prevented any scrutiny of the transactions that a new client may have received, and the aiding and abetting claim was a result.

PROBLEM: Assure that the Firm is in a position to respond to a threat to the firm or a client; discourage any temptation to the individual involved to try to handle the matter alone:

LOSS PREVENTION—IMPROPER CLIENT REQUESTS

Sun 6/29/2003 7:39 AM

"If my name is worth that much, I think I'll keep it." - Governor Doyle Carlton, when offered a huge sum by gambling interests to add his name to an endorsement of gambling legislation in the 1930s.

The above piece of Carlton Fields history needs no elaboration, but not everybody knows it.

Clients from time to time expect us to bend the rules, to endorse a scheme, a cover-up, a stretch of the truth, an opinion. It sometimes seems hard to refuse. We do not like to disappoint clients, or to turn away business. We do not like to invite the client's anger or disappointment or defeat. Words of those who use "zealous advocacy" to excuse just about anything may occur to us.

But it is not difficult, it is just uncomfortable. And this Firm makes it easier.

Much effort and cost has been invested over the last hundred years developing the Firm's reputation, and we simply do not dilute it for the benefit of one client. We owe that attitude not only to ourselves and those on whose life's work we continue to build, but also to our other clients, who choose us based on that reputation.

Decisions on uncomfortable matters of ethics or client relations will be better if made by the Firm rather than by the individual immediately involved, for reasons similar to those behind the principle that one should not attempt to be his or her own lawyer. Objectivity can be diluted.

One benefit of this Firm, with its sincerely held core values as a means of guiding decisions, and with its overlapping programs of professional support, is that no individual needs to worry about balancing the risk of behaving improperly against the possible financial gain. The Firm provides considerable support in structures that assure that no individual must make uncomfortable decisions, or respond to a pushy client, alone. Through the Mentor, or the Practice Group Leader, or Loss Prevention, or the Ombuds policy or most likely a combination, including the President if necessary, the Firm can decide how to handle the problem. The answer can range from an explanation to the client to withdrawal, and the Firm has experience to draw on in those responses and all in between. Financial considerations will not in any circumstances outweigh pro-

fessional ones, and the decision will have the full weight of the Firm behind it. The necessity of building business and generating income is not inconsistent with maintaining our good name. Instead, maintaining our name and our professionalism is essential to our continued success.

PROBLEM: To assure uniformity in audit responses, adherence to the ABA Statement.

LOSS PREVENTION—AUDIT LETTERS—THE REASONS BEHIND OUR RULES

Thu 12/28/2006 10:38 PM

INCREASINGLY, LAWYERS RESPONSES TO AUDIT REQUESTS ARE BEING USED AS A BASIS OF CLAIMS AGAINST LAW FIRMS. PROPER RESPONSES ARE VERY IMPORTANT.

The Firm has devoted an exceptional amount of attention to proper responses to requests for opinions to auditors. The Audit Letter Wizard is an invention that will cover almost any situation, and do it right. No audit response should be prepared other than by use of the Audit Wizard. If you use the Wizard, you will produce a good audit response. But I firmly believe that a basic understanding of the reasons behind any policy or rule is extremely important if we expect the rule or policy to be respected. It has been more than a year since we had a firm-wide discussion of the reasons behind our Audit Response Policies. That is the purpose of this message and others to follow.

Financial considerations will not in any circumstances outweigh professional ones....

There are reasons behind the procedures for Audit Responses. Each requirement has a reason behind it, and they are important ones. In rough summary of a complicated subject, here is why they are done the way they are.

Clients, Auditors and Lawyers have conflicting goals. A Company's auditors and its outside lawyers, and maybe the Company, are interested in completely different things. The auditor must express an opinion about the financial status of the company that can be relied on by the company's bankers, stockholders, and prospective stockholders. If the auditor gets the financial condition wrong, he can be sued by one or more of those groups. The Company wants the financial picture to be as rosy as possible. If it needs to raise money, it wants investors to want to buy stock and bankers to want to lend it money at low rates. Its management wants stockholders to think it is doing a good job.

The auditor can test the accuracy of many things on the company books. He can test the inventories by physical count. He can test the accounts receivable by contacting the customer and confirming how much is owed. But what about the suits against the Company asking for millions of dollars? Are they bogus, or are they legitimate? Should the Company be certified as worth the $50 million shown on its balance sheet or only $10 million because of the lawsuit filed last December with all the publicity? Management says it is nothing to worry about, but the auditor must assume that management would say that whether true or not. Can the auditor "test" by going to the company's defense lawyer? The auditor wants the lawyer to put a percentage on the $40 million dollar lawsuit. If the lawyer says there is only a 10% chance of recovery, the auditor can value the Company at $46 million and blame the lawyer if plaintiff hits big. If the lawyer thinks he is going to lose, the auditor can reserve $30 million and let management be mad at the lawyer for the poor financial report.

No savvy lawyer, on the other hand, wants any part of saying something that will allow him to be credited with valuing the Company and setting himself up as a target for a disappointed investor. He also does not want the auditor's report to disclose that he is scared to death of the claim at a time he is trying to bluff his way through a settlement. Besides, what he knows about the case is confidential stuff that he is not supposed to talk about with third parties (such as auditors), and to make a thorough evaluation of the case public is antithetical to the maintenance of a proper attorney-client relationship.

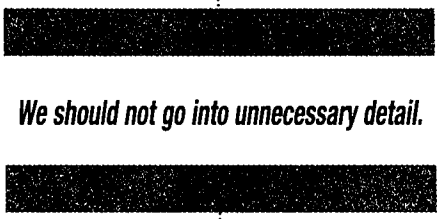
A treaty between the lawyers and the auditors was needed. For a while, there were few rules about how to resolve these tensions. Responses ranged from inappropriately chatty letters as to how a case arose to details appropriate to a report to an insurance adjuster to terse letters saying the lawyer cannot predict the outcome. A favorite trick of some lawyers was to say in response to a request for information about a lawsuit that there were "meritorious defenses". Accountants were happy because they thought that meant the lawyer thought the defenses would win the day. Management was happy because the financials were not discounted. The lawyer was happy because "meritorious" is a term of art, and meant only "having to do with the merits" rather than "procedural" — an answer "we deny everything" is a "meritorious defense" even if everything in the Complaint is true. Clever, but dangerous—but at the time lawyers were infrequent targets of disgruntled lenders or stockholders.

The result ultimately was a treaty between the accountants and the lawyers: *American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (1976).* In our audit responses, we refer to this as "The ABA Statement". Details of how Audit Responses should be handled are found on CFNet, Audits and Opinions. There you can find the Manual for Responses to Request for Audit Information; the Secretarial Procedure for Handling Audit Letters; and the tutorial for the Audit Letter Wizard, which is a Word Template service. But in summary, there are certain principles that we follow to both give the information we can and avoid the pitfalls that might lead to our being responsible for an inaccurate financial report or damage to our client. The ABA

Statement determines both what we should disclose and what we should not. Those general principles are:

1. No information unless requested by the client. There must be a limited waiver by the client if we are to discuss anything of a client's business with a third party, such as an auditor. That is why the request for information comes from the client, not the auditor, and that is why we require that the request be signed by an officer of the client.

2. No speculation. We are not required to put a percentage on the case. If it is plain that we will win or lose on summary judgment, we may say that recovery is "remote" or "probable", but words that describe an in-between likelihood are not used. It is not the lawyer's job to make such predictions for the purposes of financial statements, and it is detrimental to the ability to represent the client in the litigation to make such predictions that may become public. The auditors have rules about handling "remote" and "probable" evaluations, and about those where no such evaluation can be made. That is enough for audit purposes. If you believe the "remote" or "probable" characterization can or should be given, consult with a member of the audit review panel on that decision early on.



3. Do not comment on anything that we are not involved in, and give only the essential information. We can legitimately comment only on the things we have been actively working on. We are generally not intimately involved with everything the Company does, and we cannot, as the auditor can, inquire into various aspects of the Company's business looking for claims and irregularities. For litigation and overtly asserted claims, we describe the parties, the court if filed, the essence of the claim and the amount claimed, the fact that the company is defending, or is seeking arbitration, etc. We should not go into unnecessary detail.

4. Do not comment on anything we are not required to comment on by the ABA Statement. Recently, the auditors have drafted the letters the client sends to us with a statement something like: "We have told our auditors that there are no material unasserted claims against the company, and we ask that you confirm or supplement that statement." But we are not required under the ABA Statement to comment on unasserted claims unless the Company identifies them and specifically asks us to comment. Our letter to the auditor should so state, by strictly following our form (the Audit Wizard), even though we are not answering the improper questions. We should NOT confirm that there are no unasserted claims. How do we know? We should not confirm that we know of no unasserted claims. We have records of the litigation we are handling, not of what all three hundred of us know.

Auditors are inserting a number of other improper questions in audit letters:

a. The letter asks us to confirm that we will alert the client and the auditor whenever a matter that might call for financial statement disclosure comes to our attention. The proper question mirrors our form response. We are obligated to tell THE CLIENT whenever IN THE COURSE OF OUR REPRESENTATION, we have FORMED A PROFESSIONAL CONCLUSION that a matter requires or may require financial statement disclosure. We do not agree to watchdog the client's financial statement. We only promise that if we conclude, during the course of our representing the client that something should be disclosed. If we reach that conclusion, we do **not** contact the auditor, we consult with the client. In many litigation situations, our employment is limited to the litigation and we do not have the information on which we could conclude that the claim is material, or we may not have any occasion to form such a conclusion. We should never promise to alert the auditors or the client "when a matter comes to our attention" or the like.

b. Some letters ask for evaluations of the case in forms other than "remote" or "probable". Some even ask to express the odds of prevailing as a percentage. This is plainly not required by the ABA Statement, and we should NEVER give such an opinion to the auditors.

c. Increasingly, letters ask for other information - recent mortgages, IRS investigations, updates. We need to stay strictly within the bounds of our normal response.

NOTE: A YEAR OR SO AGO, I SENT TEN PAGES OF OTHER EXAMPLES TO THE AUDIT REVIEW PANEL. IF YOU NEED MORE EXAMPLES, PLEASE ASK

In most cases, our standard language will be a sufficient explanation as to why we are not responding to the questions. In some cases, more might be needed, and you should consult the audit review panel on the subject.

5. Be complete as of a certain date, but be sure we do not commit to additional information. Our present system requires that the firm be polled for information, and a response from each lawyer is required. But we cannot be responsible for matters that may arise during the week between the e-mailed request that firm lawyers provide information and the date the letter goes to the auditor.

6. Ask a member of the Audit Opinion Panel if you have questions.

The purpose of the exercise is to provide appropriate information to the client's auditors as a service to the client, but to avoid exposure to the firm from inaccurate information, speculation or information as to which our knowledge is not complete. Our job is not merely to answer the letter. In fact, if the letter departs from the proper scope of the

ABA Statement, our job is to give the information that we are required to give by the Statement and to make sure the letter says that is all we give. Usually, the form is sufficient. There is more risk in audit letters where the firm is general counsel to the Client, or is counsel in securities matters, than when we are hired only for a specific case or transaction, but proper responses, taking advantage of the protections provided us by the Statement, are necessary to properly steer through what is becoming another lawyer liability trap. It sometimes happens that a client or auditor will insist on deviation. Involve the Audit Opinion Panel immediately, and allow the Firm to negotiate or decide the solution. Do not compromise without them.

PROBLEM: To encourage best practices in documenting the course of negotiations in a transaction file; to alert to malpractice trends:

SUIT AGAINST XYZ FIRM - learning from others' problems - **DOCUMENT CLIENT'S DECISIONS IN NEGOTIATIONS**

Wed 5/17/2006 3:12 PM

Four Venture Capital Companies (VCs) agreed to provide $16 million to a company in need of cash for operations. The VCs were to receive preferred "C" stock. According to the complaint, the deal was that if there was liquidation – including a merger or consolidation – the C stock would be paid first, at a certain rate, then B preferred and A stock – a "waterfall" provision in that the benefits roll downstream. [Contrary to popular stereotype, M&A lawyers are quite poetic in the sense that when they talk about deals there is lots of imagery and confusion.]

Making the deal is the client's responsibility.

But as drafted, three of the company's founders (Managers, who are B stockholders) were treated equally with C stockholders if C stockholders sold a large part of their holdings. That is all well and good, says the complaint, but that was not to be in the case of liquidation – what do you think "waterfall" means? If C stockholders did not get the exclusive preference, VCs would not have invested. It looks like someone cut and pasted a standard "tag along" provision (see!) from a voluntary sale clause into the liquidation provision, thus screwing up the waterfall.

Interestingly, when the VCs realized this, two years after the transaction, they sued the Managers and the Company they invested in to clarify that the 'usual' waterfall preferences, not the equal rights tag along, would apply to any liquidation. Managers resisted, saying this was the deal we made, and we are sticking to it. VCs ended up settling by paying Managers $5 million to give up the tag along rights as to the liquidation provisions.

Even more interestingly, this was not a suit to work out distribution of an actual liquidation or merger. There was none. The VCs just wanted it clear so that if and when a liquidation or merger opportunity came up, there would be no insider dispute that would derail it.

Now, having settled with Managers, VCs have sued XYZ FIRM, who represented them in the original investment, for bad drafting, seeking the $5 million settlement, among other things.

The above is the information in the news story. The following is observation and speculation.

1. The proximate cause question is interesting. If there is no liquidation, how did the lawyer cause damages by screwing up the liquidation clause? The settlement foreclosed a problem that did not exist except theoretically.
2. I will give odds that at least most of the following scenarios are involved in the situation. They always are:
   a. One of the four VCs was the lead, approved the various negotiated changes to the deal, and the others were not paying attention.
   b. One of the others discovered the provision two years later and realized it was out of that particular VC's guidelines, and the discoverer was embarrassed. He is driving the situation.
   c. The actual person at the lead VC who approved the final documents is no longer with the VC, could care less, and discarded his file.
   d. The Managers actually did object to the provision that would prefer the VCs exclusively –"Hey, we built this company and you are saying we get no benefit if there is a liquidation or merger? We need the VCs but we should be at least equal if a windfall opportunity arises."
   e. The negotiations were inadequately documented. There may have been a phone call but you can bet there is no memo to the lead or the others that "the Managers are insisting that they be treated equally in the event of a merger as well as in the event of a voluntary sale of a VC's interest. This may be a deal breaker. We can avoid that by making the Managers' shares equal in a merger or liquidation. What do you think?"

Making the deal is the client's responsibility; and making it safe and documenting it is the lawyer's. But the lawyer is frequently doing the negotiations, and when time is short, the roles blur. It is obviously important to keep the client involved, BUT IT IS EQUALLY IMPORTANT TO DOCUMENT THE INVOLVEMENT. An email to the negotiator that you tried to get provision X but the opponent will not budge, and confirming the client's decision, will come in handy.

We have talked before about other such situations. Remember the case where the widow sold her 50% interest in the company to her husband's partner, and when he later sold for a tremendous profit, she sued the lawyer for failing

to include an escalator clause providing a partial participation for her in that event. What had happened, though, was the lawyer had asked for such an escalator, but it had been refused unless the widow agreed to a corresponding rebate if the price went down, which she had refused. Again, there was a failure to document, and although the lawyer won, he did so only after years of litigation and lots of expense. The XYZ FIRM case is exceptional in that it involves sophisticated parties.

Our transaction lawyers tell me it is not possible to document everything that happens during negotiations, and I believe them. But the better job we do of trying to do so, even if it is just documenting the transmission of redlined changes to the client for review, and with emphasis on items requested and declined, the safer we are. Transaction claims tend to be few, but they tend to be huge, and it is worth it to take the time to tie down the negotiations history.

EMAILS PROVOKING DISCUSSION

A real bonus can arise when one of these emails provokes either agreement or disagreement. One of the best examples is shown by a follow-up email to the XYZ FIRM message just above:

The email below drew a number of responses, including one from someone who knows something about the facts and verifies that the speculation was pretty close. The following responses contain some comments better than the original endorsing the important points about documenting the transaction and containing hints about how that might be done. I pass them on because they are helpful.

Transaction claims tend to be few, but they tend to be huge....

LITIGATORS TAKE NOTE--You are often negotiating complex settlement agreements in business transactions. Do not make the mistake of thinking you are not exposed to the same risks the transaction lawyers face daily. Also, remember to involve the appropriate transaction lawyers in negotiating a business settlement. There are tax and other considerations that you are very likely to miss.

SENIOR CORPORATIONS LAWYER: Pete, as a transactional lawyer, I certainly confirm that it is virtually impossible to document each and every item or matter that is negotiated in a transaction. Having said that, most transactional lawyers do a very good job of keeping a solid trail of drafts of the major documents so that if a question arises, there is a clear record of when and which changes get made. I would be surprised if that didn't occur in this case as well. So I surmise that there are facts and circumstances about which we are unaware. Certainly, it is both prudent and advisable to document the paths of major provisions in an agreement, but what I have found most helpful is to also make sure that the client identifies the major issues in a transaction for the lawyer. It is very much a collaborative process and, as you say, the roles between negotiating the deal and documenting it do blur. But if the client gives the lawyer a clear picture of those issues which the client feels are essential or "deal killer" issues for the client, and the outcome of those issues is documented, through drafts or notes or both, then it makes hind-sight after the deal has closed less likely to generate problems.

This case also presents yet again the problem of using 'form' documents without proper review and critique.

TAX PRACTICE GROUP LEADER: One thing I do Pete is if I advise the client and the client refuses to take the advice or wants some particular thing notwithstanding my advice, I mark the draft with the comment, the advice given, the client's decision etc.

REAL ESTATE PRACTICE GROUP LEADER: It's not possible to document everything, but we have some tools to make it easier.

When we make changes in a document, we can show in the description of the new version why the changes are made — e.g., "changes requested by client per phone conversation on _____." Sometimes it's necessary to keep many drafts for this purpose and to avoid incorporating changes from all parties into a single draft.

E-mail makes it easy to document the process without looking like we are just protecting our own interests. E.g., "Enclosed is a new version of the document with the changes you requested" or "Enclosed is the revised version of the document. Note that I deleted section 6 at your request" or "Enclosed is the revised version. Please look especially at section 6 to be sure it provides the protection you need."

Occasionally, we get voice mail messages from clients and it's important to save the messages for one reason or another. We have the ability to forward the message for transcription.

SECURITIES PRACTICE GROUP LEADER: Good e-mail. And yes it is difficult, if not impossible to document the full history and every negotiated point. But that doesn't mean we shouldn't keep trying to do it better each time. There might not always be the opportunity to capture it all, but we should do what we can. With that said, I think all of our transaction lawyers do just that. The attorneys I have dealt with at this firm in the transactional areas are very thorough and careful.

PROBLEM: avoiding unworthy or undesirable clients

LOSS PREVENTION - THE CRAZY CLIENT AND YOUR QUALITY OF LIFE

Sun 9/11/2005 11:46 AM

Loss Prevention includes not only managing risks of claims against the Firm, but also avoiding substantial write-offs or forfeiture of fees, lost time in dealing with unnecessary problems, business lost to unreasonable conflicts positions of clients, and other things that subtract from the profitability of the Firm.

Some problems are inevitable. We have bizarre claims and grievances from time to time by non-clients. One of my favorites continues to be the *pro se* plaintiff who sued us in Admiralty, because we (and half the judges and banks in the Middle District) were "vessels of corruption" (get it?). These nutty claims of non-clients are irritating, but not avoidable, and not usually very time consuming.

Occasionally, though, we take someone with a similarly special personality or brain chemistry as a client. We regret it. Always.

We all know (I hope) the gratifying experience of working with the client who gives us the information we need, listens to our advice, recognizes its quality, understands what decisions the client must make and makes them, understands risks, appreciates our efforts, and pays the bill. We ought to confine ourselves to representing that sort of client.

In contrast, the undesirable client questions everything, believes that he should be given a law school course on the legal issues so he can decide the legal stuff (including strategy), argues that the law could not be as it is, refuses to decide the client issues, assures that the routine matter takes three times the time it should, complains about that time, blames the lawyer for the fact that the client has the problem, and in the end treats the lawyer as the enemy everybody else is.

The undesirable client is not just burdensome and unprofitable.

We cannot avoid all difficult personalities, of course. In a recent in-house CLE, a former FBI profiler pointed out that a sociopathic personality aids equally in such diverse professions as CEO of competitive businesses, university fund raiser, con man and serial killer. And people are often thrust into making business decisions for which they are unprepared by events such as inheritance or divorce. Many of our criminal clients are by definition outside the norm and not to be trusted. However, some of the people who need our help accept it, follow advice, make decisions when they must, and are appreciative. Those who will not accept advice, who cannot make decisions, and who will blame the lawyer for something they got themselves into, we can do without.

Some of you (and I can name most) think it is wrong, insensitive, and cruel to avoid representing people simply because they are crazy. "Those people need our help, maybe more than the others, and we should give it willingly". I am not unsympathetic at all. But being sympathetic and knowing better are not inconsistent. I can donate to the efforts to save endangered chimps, but still know better than to keep one as a pet - eventually the short little bastard will want to chew my face off. Trying to help these people is not the way to eternity; it just makes this part seem longer. If your conscience still bothers you when wisely turning down this potential client, offer to represent his or her guardian as soon as one is appointed.

We do seem to be getting better. Of the four that are giving individual lawyers most trouble currently, we have terminated three and are dealing with them at arms length. I do not believe that any of our current lawyers (one former client was brought in by a lawyer who is no longer with the Firm) would accept any such client again. The third is still a client. Termination seems inevitable, and we are evaluating whether the time has arrived or whether we should wait until next week. On the other hand, we reject such potential clients with increasing frequency, recognizing that adding them as clients will be a net loss. Our Business Intake Process helps, as does the increased awareness of each of us that we are not obliged to, and should not, represent everybody who says he or she wants us to.

The undesirable client is not just burdensome and unprofitable. It does the Firm's reputation no good to handle matters for clients who will never be happy with the service. Please continue to exercise judgment in accepting clients, and in turning down the clients who will interfere with our ability to serve the clients who know good service when they see it.

2007 Gambrell Professionalism Award Recipients

The ABA Standing Committee on Professionalism has announced the Indianapolis Bar Association Professionalism Initiative, the Vermont Law School's General Practice Program and the Tenth Judicial District/Wake County Bar Association's Professionalism Committee as the recipients of the 2007 E. Smythe Gambrell Professionalism Awards.

The Indianapolis program includes, among other things, a leadership development and professional enhancement program for young lawyers in their first three to ten years of practice, an applied professionalism course for new attorneys, and programs that educate the public and respond to instances of perceived unfair criticism of judges and lawyers.

The Vermont course is a two-year certificate program that integrates substantive law, professional skills and professional responsibility using a simulated-based methodology. It integrates professional skills and values with 13 substantive areas of law—mostly those common to general practitioners, such as domestic relations, business planning, estates and bankruptcy—and contains a mentorship component.

The Tenth Judicial District/Wake County Bar Association committee has implemented, among other things, a program that provides confidential peer counseling for attorneys and judges perceived to have evidenced a lack of professionalism; an annual round-table discussion on ethics and professionalism issues; and a county-wide mentoring program.

This year's winners bring the total of Gambrell Award recipients to forty-five over the course of the seventeen years the award has been presented. Information about the awards can be found at http://www.abanet.org/cpr/awards/gambrell.html.