

# The New Malpractice Time Bomb: Problem Associates and Partners

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Is there a legal malpractice time bomb hidden in your office in the form of a troubled associate or partner? ISBA Mutual has noticed a disturbing increase in the number of legal malpractice claims associated with “problem” attorneys. Even more surprising, these claims are coming from smaller firms where problems should be easier to identify. It takes just one dysfunctional attorney to wreak malpractice havoc for years to come. A shameful number of coworkers simply ignore the impending crisis despite warning signs. The consequences of inaction can be devastating, as the following examples illustrate.

**The Incompetent Associate.** Firm has employed Associate for three years. Associate is a hard worker and well liked by the entire office. Unfortunately, Associate’s legal skills are substandard and the partners have limited time to devote to his future training. Firm takes a “wait and see” attitude, hoping the problem will correct itself. Associate is responsible for three legal malpractice claims over the course of the next two years. The claims include a dismissal for want of prosecution, an undetected encumbrance in a real estate closing, and an unfiled QUADRO in a divorce.

**The Dishonest Partners.** Firm has a lucrative general practice in which the partners specialize in different areas. Each partner sets his or her own office procedures. Partner A makes well-intentioned promises to clients that she can’t keep. She begins to use the client trust account money of one client to pay another. To make matters worse, she has been appointed by the other partners to handle Firm’s finances.

At the other end of the office, Partner B has been engaged to represent Client in a personal injury matter. Part-



***Are you sure there's not a problem at your firm? Here's how to identify — and help — the troubled attorneys who can cause big malpractice headaches.***

ner B settles the matter, forges the settlement check, and steals the proceeds. The other firm members had never heard of Client until they were served with the legal malpractice complaint.

**Clinical Depression.** Senior Associate has slowly but steadily been moving toward clinical depression and his work is suffering as a result. Firm is unaware that Senior Associate has repeatedly missed discovery request deadlines over several months on Client’s matter. The judge presiding over Client’s case finally has had enough and enters a default judgment against Client for over \$100,000 as a sanction for failing to respond. Firm

first learns of the problem when it receives notice of the sanction in the mail.

**Substance Abuse.** Partner has a drinking problem. The other firm members have their suspicions, but paralyzed by the thought of dealing with the problem, they ignore it instead. After all, they tell each other, Partner is capable of brilliant legal work and is going through a rough period at home. It will all blow over once the divorce is final.

Eventually, the relationship between Partner and Firm deteriorates. Partner leaves Firm and takes several files with him. Firm breathes a sigh of relief. Firm does not, however, review all of the files previously worked on by departing Partner and does not write withdrawal letters to the clients who are leaving with Partner. Firm also decides to split fees with departing Partner on certain files. Departing Partner neglected many files both before and after leaving Firm, resulting in fatal errors. Clients sue Firm and former Partner, who no longer maintains malpractice insurance.

In all of these scenarios, the tragedy of the troubled or problem attorney is compounded by the inaction of the firm. Yet in all cases the firm could have taken measures to detect and deal with the problem. Here’s how:

**1. Improved communications among firm members.** Does your firm convey an open door policy to its attorneys? Would an associate or fellow partner feel comfortable approaching a partner to discuss a problem? Too many firms today are partnerships in form but not in spirit. They view the partnership as a purely economic relationship and feel no sense of loyalty to one another. These are the firms in which dysfunctional or troubled attorneys have no place to turn. They are also law prac-

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tices in which dishonest and incompetent attorneys flourish.

Your firm can foster an atmosphere of openness and communication by meeting monthly at a minimum. Ask your co-workers for advice on sticky files, update one another on new statutes and caselaw, and discuss firm-wide procedures for servicing clients. You may also consider appointing a fair-minded and well-respected partner as an ombudsman to whom other attorneys can turn when problems develop.

**2. Work load management.** According to Jan Holcomb, executive director of the Mental Health Association in Illinois, stress can push predisposed attorneys into clinical depression or other mental illnesses such as anxiety disorders. To reduce stress and the incidence of depression in the legal community, she believes that firms must “*take an aggressive look at work loads.*”

Evaluate your firm’s work load practices. Is your firm measuring its members’ worth based solely upon the number of hours worked or quantity of open files? Find out what each attorney’s average case load is and then set limits on the number of files or cases that may be handled at one time. Are firm members encouraged to take an hour off to go to their child’s school activity or work out at the health club — or are they made to feel guilty when they do? Consider instituting a policy that *requires* attorneys to take vacation. Many firms find that such an approach keeps their attorneys fresh and enthusiastic.

Firms should also be sensitive to and accommodate an attorney who is wrestling with the added stress of a personal crisis. During this period, try to lessen the work responsibilities of the affected attorney. Everyone has a breaking point. Don’t wait until your colleagues reach theirs.

**3. Uniform and strict office procedures.** Firm-wide procedures insure that all attorneys are maintaining the same quality and standards in their practice. It should be impossible for an attorney to accept a new client and obtain a new file number without following the firm’s procedures. It is also recommended that firms establish checks and balances for monitoring all money flowing in and out of the firm. For example, is more than one signa-

ture required on checks for significant amounts? Does more than one partner review the books periodically?

In addition, establish guidelines for dealing with departing attorneys. When an attorney leaves the firm and takes files, we recommend that a withdrawal letter be sent by the firm to the client and, for litigated matters, that the firm seek formal withdrawal from the court. If you don’t take these steps, there may be a dispute as to whether or not you continued to represent the client in a co-counsel capacity. Finally, if an attorney leaves under less-than-cordial circumstances, we suggest reviewing all files previously handled by that attorney for hidden errors that can still be corrected.

**4. Peer review and client satisfaction surveys.** Firms can insure that their members are producing quality legal work by implementing a peer review system. The basic premise of peer review is simple — a random sampling of each attorney’s files are reviewed on an annual basis by another member of the firm. (No partner’s files should be exempt.) The file should be scrutinized not only for the quality of the legal work but with an eye toward documentation. Does the file contain, for example, an engagement letter or fee agreement, proof that a conflict check was performed, a record of research conducted, and evidence of regular oral and written communication with the client?

These reviews not only uncover the incompetent lawyer but provide you with early notice of an attorney who is neglecting matters because of depression or substance abuse.

Client satisfaction surveys may also reveal that a particular attorney is dodging client telephone calls or otherwise neglecting matters. Just send a survey to each client for whom work has been performed over the past 12 to 24 months. The survey should ask the client to rate the firm anonymously on a variety of topics, such as timeliness, cost, courtesy, responsiveness, and result.

**5. Know the signs for common mental illnesses such as clinical depression and substance abuse.** There are several symptoms associated with clinical depression, according to Jan Holcomb, and they can often be detected by astute

coworkers. They include (1) tardiness or chronic tiredness, (2) restlessness or irritability, (3) difficulty concentrating, remembering, or making decisions, and (4) persistent sad, anxious, or empty moods. (See sidebar for more on the symptoms for clinical depression and how to get further information on depression and other mental illnesses.)

According to the Lawyers Assistance Program (LAP), the following are some noticeable symptoms of substance abuse: (1) tardiness, (2) missing deadlines, neglecting mail or failing to keep appointments or answer phone calls; (3) and defiance, impatience, intolerance, or impulsiveness (see sidebar for self-test).

**6. Seek help from professionals in cases of mental illness or substance abuse.** There are numerous resources available if one of your attorneys is struggling with a mental illness or a substance abuse problem. Two good places to start are the Mental Health Association in Illinois and the Lawyers Assistance Program. LAP is dedicated to assisting attorneys with both chemical dependency and mental health problems. As a concerned member of a firm, you can call LAP confidentially and discuss the options for assisting the troubled attorney.

You can also check whether your group major medical or disability insurance policy has an employee assistance program (EAP). EAPs usually provide employees and their families with a hotline to seek assistance for a wide variety of personal problems, including depression and drug and alcohol abuse. Under these programs, both the concerned co-worker and the troubled attorney can reach out independently and confidentially for advice.

**7. Remember that mental illness and substance abuse are treatable, particularly if detected early.** Don’t give up on a fellow attorney without a fight. Mental illnesses such as clinical depression and substance abuse are treatable, particularly if recognized and dealt with at an early stage. Watch for warning signs and seek help before the attorney’s behavior causes irreparable damage. By helping troubled attorneys, we benefit the entire profession and retain a bit of our humanity in the process.