

We know you'll have resistance. Let's hope your anti-adopters are a bit less stubborn than Dan was.

I. How Checklists Can Help Your Practice

Earlier, we described a checklist as a system for ensuring that the essential pieces of legal practice get done correctly every time. Whether it is a new-hire checklist, a list of documents required in a particular type of case or transaction, or an intake form, checklists can take many forms. As we begin demonstrating how checklists can be used in practice, it is important to acknowledge that different types of checklists are appropriate in different situations.

A **Read-Do** checklist requires users to read each step and then take action. A **Do-Confirm** checklist requires users to perform the actions and then confirm that they did so correctly. Another type of checklist recommended in *The Checklist Manifesto* is **Pause-Check**. It requires users to pause and check to be sure nothing important has been missed. Critical to successful implementation of any of these is accountability. Sometimes this means initialing the line next to an item or giving others the authority to question whether something is or is not done. As Gawande discusses, checklists should be considered an element of teamwork. They help everyone do a better job.

The right combination of checklists makes law offices run more efficiently and effectively. Efficient means you can complete your work in less time. Effective means you do better work. For many lawyers, getting work done more quickly may not be that important—until, of course, a client objects to the amount of time billed—but everyone wants to make sure his or her work is the best it can be. Rest assured, at some point, someone in your office will make a mistake, and if it's a major error, that's when the lawyer (or the managing partner) will realize that things must change. In this section, we will discuss a few reasons that checklists make sense even for you.

I.1 Malpractice Prevention

Let's be honest: Nothing compels lawyers to change how they do things more than the need to avoid malpractice. After all, malpractice claims cost lawyers money and can lead to

professional discipline. Of the most common types of malpractice, the following could be avoided by using checklists:⁹

1. Failing to calendar properly or missed deadlines
2. Failure to file documents or no deadline
3. Failure to know deadlines
4. Procrastination
5. Failure to obtain client consent
6. Conflicts of interest
7. Ineffective client screening
8. Inadequate documentation of work
9. Planning errors
10. Inadequate discovery or investigation

A simple checklist eliminates many of these malpractice risks.

Checklist vs. Procedure

Throughout this book we refer to both checklists and procedures. We use these terms interchangeably at times and want to clarify that the lack of distinction is deliberate. As we said at the beginning, we are really talking about systems that make your practice more efficient and effective. Sometimes those systems are contained on a single page and have checkboxes next to them, and at other times those systems are on multiple pages containing step-by-step instructions and perhaps even pictures. Systems need to be tailored to individual preferences within the broader scheme of making sure that the system works. We adopted a broad view of what a checklist is for this book to demonstrate the power of these systems. If you need a checkbox next to each item on a list, go for it! If it makes more sense to you to have a checklist of the steps needed to do a particular task, great! Documenting procedures can also be the first step to creating checklists that refer back to the procedure. We cannot stress enough that this is an ongoing process and that there will always be the need and the ability to make modifications once the document has been tested.

⁹ See Mark C.S. Bassingthwaighe and Reba J. Nance “The Top Ten Causes of Malpractice—and How You Can Avoid Them” available at apps.americanbar.org/lpm/lpt/articles/tch12062.pdf. See also Dan Pinnington, “Are You at Risk? The Biggest Malpractice Claim Risks and How to Avoid Them,” ABA’s *Law Practice* magazine, 2010, available at http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is4_pg29.html.

Consider how we handle some of these situations in our office:

- 1. Failing to calendar properly or missed deadlines.** Whenever we open a new matter with any deadlines, we have a Do-Confirm checklist that reminds us to:
 - Enter the due date (and appropriate reminders) in our case management software.
 - Scan the notice or item with the confirmed deadline and attach it to the due date reminder in our case management system.
 - Write the deadline on the white board in Pam's office (adjacent to our kitchen), so that everyone sees it every time he or she goes to or from the kitchen area.We also have a Pause-Check weekly file review meeting to discuss any new cases and deadlines and to make sure that the Do-Confirm checklist items were done correctly.

- 2. Failure to file documents or no deadline.** We place a rough deadline in our system for any matters with a non-specific deadline, using a checklist that reminds us to:
 - Enter the estimated due date (and appropriate reminders) in our case management software.
 - Scan the notice or item with the confirmed deadline and attach it to the due date reminder in our case management system.
 - Write the estimated deadline on the white board in Pam's office (adjacent to our kitchen), so that everyone sees it every time he or she goes to or from the kitchen area.
 - Diary the item for a specified time to follow up to determine if a firm deadline has come in.

- 3. Failure to know deadline.** Whenever we receive any item without a deadline, we have a checklist that reminds us to:
 - Consult the court or court dockets (or client if we are preparing a brief for another lawyer) to determine the deadline.
 - Enter an estimated due date (and appropriate reminders) in our case management software if we are unable to determine a deadline.
 - Scan the notice or item with the confirmed deadline and attach it to the due date reminder in our case management system.
 - Write the estimated deadline on the white board in Pam's office (adjacent to our kitchen), so that everyone sees it every time he or she goes to or from the kitchen area.
 - Diary the item for a specified time to check again for the actual deadline.

- 4. Procrastination.** Sometimes procrastination is actually a lack of clarity about what to do next. For example, a young associate may simply not know what to do next on a file and, waiting for a “better time” that never comes, may put off asking what’s next. With clear, documented procedures for handling particular types of files, this kind of procrastination can be avoided, especially if the procedure includes pause points where associates are expected to reach out to discuss their progress. Pause points create the expectation of communication and can head off problems.
- 5. Failure to obtain client consent.** This is a great use for the Pause-Check. For example, identifying when client consent is required, such as prior to settling a case, is the first step to appropriately obtaining consent. Once the need has been identified we have a checklist that reminds us to:

 - Schedule an appointment or phone conference with the client to discuss the matter requiring consent.
 - Confirm the client’s agreement or assent in writing after the meeting.
- 6. Conflicts of interest.** Confirming that a conflict check has been performed should be an element of any file opening checklist. Whenever we have a waivable conflict of interest, we have a checklist that reminds us to:

 - Schedule an appointment or phone conference with the client to discuss the conflict.
 - Confirm the client’s waiver of the conflict in writing after the meeting.
- 7. Ineffective client screening.** The initial contact with a client is an area ripe for a checklist. There will always be additional questions, but an intake form, whether paper or digital, can build efficiency, and it can serve as a reminder for essential questions. Whenever we open a new file, we have a checklist that reminds us to:

 - Discuss the matter and any reservations about the client with all staff.
 - Do an Internet search for the client.
 - View any social media web pages for the client.
 - Setup a Google Alert for the client.

We also have documented policies about when we will and will not accept clients, for example, we do not accept clients whose statute of limitations is less than two months away.
- 8. Inadequate documentation of work.** Our checklist of training procedures includes a reminder to explain and demonstrate proper time recording of work performed, which includes descriptive and detailed notes on what work was completed.

9. Planning errors. Planning errors involving choice of procedure are second only to failure to know or apply law in most common malpractice error allegations.¹⁰ This type of error occurs in cases when the lawyer knows the law and facts but allegedly made errors in judgment. Although this area of malpractice is broad, it is also exactly the type of error *The Checklist Manifesto* addressed.

Checklists can mitigate these errors in several ways. A Read-Do checklist for particularly challenging procedural situations instructs others about how to handle the situation appropriately. Checklists can also insert pause points into your workflow where you force yourself, your associates, and others to stop and evaluate before making critical decisions. You could create a list of possible procedural options to think through and address, preferably with a colleague or in a team setting, before making critical decisions. Finally, written procedures documenting the information necessary for making procedural choices can help ensure you make an informed decision.

10. Inadequate discovery or investigation. We have developed checklists for proper discovery or investigation of different types of matters.

While checklists may not solve every malpractice threat, they can certainly reduce exposure and can help document good faith efforts to avoid these situations.

1.2 Ethics and Best Practices

When lawyers consider their ethical obligations, they tend to focus on issues such as conflicts of interest, confidentiality of client information, and similar topics. Lawyers don't usually associate checklists with these ethical obligations, but they should because checklists help lawyers provide competent representation.

In 2012, the American Bar Association amended various Model Rules of Professional Conduct, including Rule 1.1 (Competence), which states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The Comments to Rule 1.1 include the following:

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

¹⁰ Report of the ABA Standing Committee on Lawyers' Professional Liability's Profile of Legal Malpractice Claims 2004–2007 and 2000–2003.

An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

While the focus of Rule 1.1 is competence generally, the 2012 amendments included Comment [8], which requires lawyers to understand the risks and benefits of technology.

Because procedure can sometimes be more challenging and difficult to grasp than the underlying law of a case, checklists can also help lawyers with their obligation to be thorough and prepared. As discussed in Section 1.1 Malpractice Prevention, procedural challenges can be exceedingly difficult and can result in severe losses to the client. Taking the time to develop quality Read-Do checklists on the procedure necessary to carry out a particular task may prove invaluable.

As for competence with technology, in light of the explosion of Cloud-based services, several state ethics opinions have been written on the topic, and they can be used as checklists by firms considering implementing Cloud-based technology in their offices.¹¹ Additionally, in our office we have updated our client intake form (essentially a Read-Do checklist) to address social media, after having client case values negatively impacted by posts on social media sites.

Now let's take a step back. Remember:

- Competence, an ethical obligation, includes taking the appropriate steps to avoid making mistakes and prejudicing clients.
- Being certain that you use the appropriate procedures, including checklists, is a part of being competent.
- And when you standardize your procedures, you
 - prevent mistakes.
 - prevent malpractice.
 - comply with your ethical obligations.

1.3 Writing

Writing is an area that lends itself to checklists. Included in our sample checklists are some created by state and federal courts to address the formatting of briefs and records. We also include a grammar review checklist and our own brief writing checklist.

¹¹ See e.g., Iowa, Ethics Opinion 11-01, "Use of Software as a Service—Cloud Computing."

In “The Legal Writer’s Checklist Manifesto,” a book review of Gawande’s *The Checklist Manifesto*,¹² Jennifer Murphy Romig suggests using pause points in legal writing instead of the traditional team-writing model. In the traditional model, a senior lawyer assigns writing to a junior lawyer and when the writing is complete, the senior lawyer reviews it and explains the revisions that the junior lawyer needs to make. According to Romig, this basic, linear model of assign-draft-review may be fundamentally flawed. Waiting until a full draft is complete and then using a checklist to diagnose the failings of that draft—while better than using no checklist—can waste both the writer’s and reviewer’s time. Making a comparison to Gawande’s construction industry example, Romig explains that a communication checklist would not be very efficient if the team waited to discuss potential problems and address flaws until after the building was constructed. The benefit of the checklist is that workers can discover and call managers’ attention to potential problems as they arise, so the team is aware of the problems and can generate solutions.

Similarly, in law practice, Romig suggests that writing teams could use a communication-based checklist consisting of pause points to foster problem-solving and efficient revisions at the critical stages of the writing process. Such checklists would work particularly well for longer or more difficult projects and those with particularly high stakes. For example, a legal writing team could meet to review and discuss a junior lawyer’s preliminary outline before the junior lawyer invested the time and other resources to complete a full first draft. These meetings would not necessarily involve written feedback—or even an exchange of the outline or draft—and they certainly would not involve a line-by-line edit by the senior member of the team. Romig says that premature line-by-line editing would be the equivalent of—in the construction analogy—pulling the project manager away from the management function to weld down two problematic bolts. Rather, these pause points would allow for the airing of questions and problems along the lines Gawande suggests. The supervising lawyer would gain the benefit of knowing and providing input on potentially significant questions, such as whether to include a policy argument in a brief or an arbitration clause in an agreement. Participating in the process in this way would also put the supervising lawyer in a better position to understand the final draft and deliver even more valuable suggestions to the writer.¹³

Like it or not, writing is an essential part of practicing law. Whether you are a transactional lawyer or a litigator, you can save time and produce better results for your clients by using checklists.

12 Romig, Jennifer Murphy, *The Legal Writer’s Checklist Manifesto* (March 3, 2011). *Legal Communication & Rhetoric: Journal of the Association of Legal Writing Directors*, Vol. 8, 2011; Emory Public Law Research Paper No. 11-145. Available at SSRN: <http://ssrn.com/abstract=1776107>.

13 Romig, Jennifer Murphy, *ibid.*

I.4 Training Staff and Related Costs

Hiring employees costs money and takes time. A new employee has to learn all of your office procedures and systems and needs to be able to learn the nuances that differentiate your office from others. According to a 2000 study,¹⁴ training costs for new employees include:

- Development costs (e.g., salaries and benefits of personnel, equipment)
- Direct implementation costs (e.g., training materials, technology costs, facilities, travel, equipment, instructor's salary and benefits)
- Indirect implementation costs (e.g., overhead, general and administrative)
- Compensation for participants
- Lost productivity or costs of "backfilling" positions during training

Imagine the difficulty facing a new employee, even one who only has to type a letter. The employee has to learn everything from scratch:

- Letterhead:
 - Does the firm use pre-printed letterhead or does letterhead get printed with the letter?
 - If it is pre-printed, what are the settings? Is there a template? Is the printer set up correctly?
 - If it is printed, where is the correct letterhead? Is there a template?
- Margins:
 - Does the firm use default or custom margins?
 - Is there a firm-wide standard or do individuals use their own settings?
- Fonts:
 - Is there a standard or custom font for the body of the letter? What size is it?
- Spacing:
 - Is the spacing single or double? Is there a space after each paragraph?
- Paragraphs:
 - Does the firm use full justified, or left justified margins?
- Signature:
 - How is it formatted?

This all comes before the substance of the letter is even addressed. Now consider the new employee who is handed a "Firm Style Guide" that answers these questions, or who is given a step-by-step instruction guide on how to navigate to the template with the firm's

¹⁴ U.S. Office of Personnel Management, A guide to strategically planning training and measuring results, 2000.

preferences. This new employee does not have to ask anyone for help, and, if he or she follows the procedure, the person will be able to format a letter correctly from the start.

Our office implemented a guide for uploading documents to a Social Security client's file complete with screenshots of each step. This guide is included in a section of checklists at the end of the book. With this guide, anyone can upload the documents; the task is not dependent on one person and it can be easily delegated. New employees are able to use it without a lawyer spending the time walking them through it repeatedly—all because of the humble checklist.

1.5 Don't Take Our Word for It

In the course of preparing this book, we spoke to several lawyers who have implemented checklists in their offices. Angela McIlvene practices in North Carolina at the McIlvene Family Law Firm. When she and her husband decided to open their own firm, they decided to use checklists extensively. McIlvene was introduced to checklists when she first worked in the local District Attorney's office. She remembered that she had a checklist of elements of crimes to make sure she addressed all the elements when questioning witnesses. In fact, she would use a checklist of elements to show to the jury at closing, visually demonstrating how she had proven her case.

She explained the flow of clients into the firm and how checklists follow them every step of the way. McIlvene said that there are checklists for everything, ranging from what the front desk person does before she leaves for the night (laminated and checked off with a dry erase marker), to the process of opening a file, to assembling the exhibits needed for a custody hearing.

At the McIlvene Family Law Firm, checklists allow anyone to walk in and perform a task without having to interrupt someone else's work to ask how the task should be done. They also provide accountability. Staff are required to initial next to completed items. McIlvene explained that this is effective at preventing errors and at identifying where staff or lawyers may need additional training.

Although the firm uses electronic case management, it also uses paper files. On each file, a half-sheet sticker contains a checklist of file-opening procedures. McIlvene said that she felt confident that someone could walk in and know what needed to be done to open a file, and if there were questions, the person would know the questions to ask.

She also suggested gearing checklists to the lowest common denominator. That allows everyone to do things properly without questions and get work done right every time. She was clear that checklists are not static documents—they sometimes need to be revised. She also acknowledged that some steps are duplicates, but that such redundancy is often beneficial.

The McIlvene Family Law Firm's culture of checklists supports the creation of new lists. Evidence of this culture is that a new associate has started creating a training manual for future new associates. McIlvene explained that the idea began when she suggested that the associate began documenting what was told to her. Once a process is documented, it becomes easier to teach and refine. In a busy office there isn't time to let each new associate shadow a partner for as long as it takes for them to feel comfortable. Checklists get people up to speed faster than explanations and save time on questions.

Now that we have, hopefully, convinced you that checklists will benefit your office, read on to find out how to create them.

<http://www.pbookshop.com>