Best Practices for Avoiding and Defending a Legal Malpractice Claim

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I. Introduction

This article provides a list of best practice tips to avoid legal malpractice claims, but also illustrates, through examples from cases, how incorporating these best practices will help you better defend against a legal malpractice lawsuit.

However, this article first provides context as to why you should incorporate these tips into your practice. Namely, this article addresses the practice areas at most risk for legal malpractice claims, the rise of legal malpractice claims over the last 20-plus years, and the hurdles attorneys face as a defendant in such a lawsuit.

II. Top Practice Areas at Risk for Legal Malpractice Claim

According to a recent study by the ABA Standing Committee on Professional Liability, Plaintiff personal injury attorneys no longer represent the highest percentage of legal malpractice claims. Recent ABA Study Suggests Emerging New Trends in Legal Malpractice, Minnesota Lawyers Mutual (July 17, 2014), http://blogs.mlmins.com/ruatrisk/?p=1024. The top spot now belongs to real estate attorneys (the reasoning of which will be explained momentarily). Here is a breakdown by each practice area:

1. Real Estate: 20%
2. Personal Injury – Plaintiff: 16%
3. Family law: 12%
4. Estate & Probate: 11%
5. Bankruptcy: 9%
6. Other: 8%
7. Corporate: 7%
8. Criminal: 6%
9. PI Defense: 3%
10. Labor: 2%
11. Worker’s Compensation: 2%
12. Intellectual Property: 1%
13. Securities: 1%
14. Tax: 1%

III. Legal Malpractice Claims Are on the Rise

Even if your practice area is not represented near the top of this list, you should still have pause for concern. In 1995, studies showed that approximately 20 percent of attorneys were faced with the potential of being sued for legal malpractice on an annual basis. See Paul E. Kovacs, Craig G. Moore, Legal Malpractice Claims, Avoidance and Defense: If an Attorney Who Represents Himself Has A Fool for A Client, Who Are You Representing?, 61 J. Mo. B. 142 (2005); John Leubsdorf. Legal Malpractice and Professional Responsibility, 48 Rutgers L. Rev. 101, 102-03 (1995). That number has grown considerably in the last twenty-years.
One of the driving forces behind this increase was the Great Recession. See *Post-recession, legal malpractice claims on the rise*. Daily Journal, (July 16, 2014) [http://www.mckennalong.com/media/news/2140_DJ_20Post_20recession...7.29.13.pdf](http://www.mckennalong.com/media/news/2140_DJ_20Post_20recession...7.29.13.pdf). One of the hardest hit areas in the economy was the real estate market. As deals fell apart, and companies went belly up, they looked for someone to subsidize their losses. With most large firms carrying professional malpractice insurance, law firms became easy targets. This helps explains why real estate attorneys now have the highest risk of being subjected to malpractice claims.

However, claims did not drop as we pulled out of the recession. To the contrary, malpractice claims are steadily rising, and there is no perceivable end in sight. In 2013, Arnes & Gough Insurance Risk Management Inc., conducted a survey of the largest professional liability insurers regarding the rise of malpractice claims in recent years. See *Law Firms See Rise in Malpractice Claim Frequency, Severity*. Insurance Journal, (July 10, 2014), [http://www.insurancejournal.com/news/national/2013/06/27/296979.htm](http://www.insurancejournal.com/news/national/2013/06/27/296979.htm). The numbers were alarming:

- Five of the seven insurance companies reported an increase in claims from the previous year.
- Two of those five saw a 21 percent jump in claims.
- Another firm saw an increase between 11 to 20 percent.
- Six firms reported an increase in the number of claims of $50 million or greater.
- Three of those six indicated that the number of $50 million claims increased by at least 11 percent.
- And shockingly, one company reported a 50 percent increase in such claims.

Other studies have found that the average attorney will be faced with three claims of legal malpractice in his or her career. These numbers therefore suggest that it might not be a matter of if you get sued for malpractice, but rather when it will occur.

### IV. Attorneys Are in an Untenable Position as a Defendant

To make matters worse, attorneys are typically placed behind the proverbial eight-ball in the eyes of the jury if they end up being sued for malpractice. As one writer put it, attorneys place amongst societal ranks is “somewhere between that of an automobile salesman and an undertaker.” See, e.g., Richard D. Bridgman, Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff’s Case, 30 S.C.L.REV. 213, 214 (1979).

While this is better than most Americans views on members of Congress — who apparently are less popular than root canals, traffic jams, and cockroaches, see *Congress less popular than cockroaches, traffic jams*, Public Policy Polling, (July 16, 2014), [http://www.publicpolicypolling.com/main/2013/01/congress-less-popular-than-cockroaches-traffic-jams.html](http://www.publicpolicypolling.com/main/2013/01/congress-less-popular-than-cockroaches-traffic-jams.html) — attorneys still face an uphill battle to win over a jury. The harmful effects of this cannot be understated. Most legal malpractice actions involve a battle of “he said, she said,” with the tiebreaker being determined by who the jury finds more credible. Given the relative low stature attorneys possess within the eyes of the community, that tie breaker is usually broken in favor of the client. Thus, implementing best practice techniques to avoid (or at least minimize the exposure to) malpractice claims becomes all the more imperative.

Equally problematic is the pedestal upon which attorneys are placed in the eyes of a jury. While most jurisdictions require an attorney to be judged by the “reasonably prudent attorney standard,” see *Cooper v. Harris*, 329 S.W.3d 898, 903 (Tex. App. 2010); *Peterson v. Scorsine*, 898 P.2d 382, 387 (Wyo. 1995); *First Interstate Bank of Denver v. Berenbaum*, 872 P.2d 1297, 1300 (Colo.Ct.App.1993), juries often hold attorneys
to a hirer standard based on their education and training. As licensed professionals, juries usually expect and demand more from attorneys than the law requires.

Plaintiff’s attorneys know this and use it to their advantage, placing attorneys in the difficult position of having to win over a jury that not only views them unfavorably, but also expects more of them than other parties in the litigation. This puts an attorney that is a defendant in a legal malpractice claim in “a lion's den of high expectation and low regard.” Jeffrey M. Smith, Defending Lawyers’ Mistakes, LITIG., Winter 1985, at 18, 56.

V. Best Practices and Their Import in Legal Malpractice Proceedings

If the above statistics and trends do not get your attention, I am not sure what will. And now that I hopefully have your attention, below is a non-exhaustive list of seven “best practices” that you can and should incorporate into your practice. This list will not guarantee you a claim free career. But it will (i) minimize your exposure to claims, (ii) provide your client with better services, and (iii) help you in the event that you are sued for malpractice.

A. Screen Clients Ahead of Time

A high percentage of malpractice claims can be avoided if attorneys simply decline to represent problematic clients. It is not an easy thing to do – outside pressure to generate business and build your practice have led many attorneys to take on cases they should turn down. And determining which clients and/or cases to turn away takes a discernible eye that could take years to cultivate.

One way to proactively address this problem is to create a check-list of traits that you want to avoid with a client. Below are just some examples for you to consider.

- During the initial consultation, be mindful of how realistic the client is regarding the expected outcome of the case. Ask questions concerning what the client is hoping to achieve and pay close attention to how demanding the client seems. While it is understandable that a client might be emotionally invested in a case, too much emotion can be a bad thing. Do they expect you to respond to emails or calls immediately? Are they comfortable with you handling the case, or are they constantly second guessing the strategies that you suggest? All are tell-tale signs that a client might be a problem.

- Determine whether the client is willing to put forward the time, energy and expense that is needed to successfully defend the case. You should first evaluate whether it makes economic sense for the client to pay you to handle the matter. If your fees will not be cost prohibitive, prepare a budget that lays out how much each phase of the litigation is expected to cost. Doing so will not only help the client see the "big picture", but it should also make the client more reasonable when it comes to settlement discussions. Be mindful that a significant percentage of legal malpractice claims involve a dispute over attorney's fees. A client that seems unwilling to pay the associated costs will likely be upset with the legal services that you provide, regardless of how well you provide them.

- Determine whether the client has a history of changing attorneys. A tell-tale sign for a trouble client is one that has been through several attorneys, especially if this occurred in the case which the client is asking you to take on. Perform due diligence on the client's past attorney-client relationships. Ask colleagues in your legal community about their interactions with the client and the client's reputation. Is the client overly litigious? What was the reason for the previous law firm(s) to withdraw?
Do not just perform this analysis at the outset of the case. Constantly reevaluate whether the relationship is beneficial for you and your firm. Some of these issues take time to materialize, so it is important that you be on the lookout for the issues and have an idea of how you will address them should they arise.

In a legal malpractice case in which my firm was involved, the plaintiff had gone through five law firms before the case reached trial. An attorney reached out to my firm after being asked by the plaintiff to take on the case. We warned the attorney about the risk associated with representing the plaintiff, including the fact that the plaintiff had a reputation of being overly litigious, and had been through several other law firms during the case, with most disputes involving the plaintiff’s failure to pay legal fees. The attorney’s firm ignored our advice, and took on the representation. Unfortunately for the firm, the client failed to pay the bills, and eventually the firm withdrew. To make matters worse, that plaintiff sued the firm for legal malpractice. All of this might have been avoided had they simply declined the representation.

B. Document Key Decisions and Client Instructions, Regardless of Whether the Client Will Pay for It

I’ve written about this before – but documenting the file is vital. Patrick Causey, Documenting the File, ABA Young Lawyers Division, 101 Practice Series, (July 10, 2014), http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/documenting_the_file.html. Often, key decisions will be made over the phone or during an in person meeting: which defenses to raise, witnesses to depose, or discovery to pursue. But the lawyer fails to confirm the decision in writing. When asked why no written evidence exists that supports the lawyer’s position, the lawyer often explains that the client would refuse to pay for the follow up reports or that there simply was not enough time to send one.

Regarding the former point, explain to the client at the outset of the relationship that it is your practice to confirm key decisions in writing. Ideally, this will be included within your retainer agreement. Otherwise, put this instruction in an email to client. If the client still refuses to pay for the status updates, send them anyway, free of cost. The cost of providing this report free of charge will pale in comparison to cost incurred in defending a malpractice claim.

Regarding the latter: make time. Most lawyers use lack of time as an excuse to justify poor case management habits. The letter or email does not need to be profound; it can be short and to the point. I understand that we are not in the business of writing “CYA” letters, especially if it risks rocking the boat on an otherwise harmonious relationship. But this is not just done for your benefit; it is for the client’s benefit as well. Legal issues are complex, especially to a client with little to no experience with the legal system. While you may leave a meeting thinking that you agreed to one course of action, the client could have a totally different impression. A follow up letter confirming the agreed upon decision provides both attorney and client the opportunity to ensure that they are on the same page.

This will also safeguard you and your firm in the event that the decision leads to an adverse outcome for the client. Malpractice claims often come after a case has run its course through appeal, meaning years could go by from the time a key decision was made until the time a lawsuit is filed. A client could simply forget that he or she was advised regarding the important decision. Even worse, a client, especially one being encouraged by a savvy plaintiff’s attorney, could simply look to exploit the lack of documentation to his or her advantage.

It is an unfortunate truth about the society in which we live, and failing to document the file could mean the difference between successfully defending a legal malpractice claim versus being on the wrong side of a jury verdict. For example, in one case, a senior advisor to a bank from Iran brought an action against an attorney and his firm for legal malpractice, alleging that the firm failed to protect the advisor’s interest in a lawsuit in which the advisor was named a defendant. See Hashemi v. Shack, 609 F.Supp. 391 (S.D. N.Y. 1984).
However, the advisor and firm never formally entered into an attorney-client relationship. Moreover, the lawyer's written confirmation made clear that he was not representing the advisor in the lawsuit, but was working to help the advisor secure an attorney. The client confirmed this understanding in responses to the attorney's letters. Armed with this evidence, the court granted summary judgment in favor of the attorney and law firm.

Comparatively, another law firm failed to provide a non-engagement letter to a potential client and was subjected to a $600,000 jury verdict. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980). This occurred despite the fact that the firm never received a fee from the potential client. The jury had to weigh inconsistent testimony from both the attorney and potential client regarding whether an attorney-client relationship was formed. In making that credibility determination, the jury (not surprisingly) sided with potential client. Had the firm properly documented the file, that adverse outcome might have been avoided.

**C. But Avoid Documenting the File in Bad Ways**

In legal malpractice cases, the attorney-client privilege is waived, and all communications from the law firm – including internal emails amongst your colleagues – are subject to discovery. *Reilly v. Greenwald & Hoffman, LLP*, 196 Cal. App. 4th 891, 900, 127 Cal. Rptr. 3d 317, 323 (Cal. Ct. App. 2011). You might be surprised to learn how often these emails provide the proverbial smoking gun in a malpractice action. They typically come in one of two forms. The first instance involves an attorney emailing his or her colleague and acknowledging that a critical mistake was made: missing a deadline, failing to pursue the proper defense or counterclaim, or wishing you had approached a certain deposition or hearing in a different manner. As with the emails stating the worth of the plaintiff’s claim, the plaintiff’s attorney will make this the focal point of the trial. Any attempts to distance yourself from this mea culpa will seriously undermine your credibility in the eyes of the jury.

The second form involves an attorney criticizing a client. This latter form happens more often than you think. Most legal malpractice claims stem from a situation where an acrimonious relationship existed between the attorney and client. The temptation in these situations is to send an innocuous email to a colleague complaining about how difficult a client can be. Do not do it. Draft the email if you must. But do not hit send. The last thing you need when faced with a significant legal malpractice claim is an email with you calling your client a “moron” – even if that description carries some truth.

In one of the more notable examples of this, DLA Piper brought suit against a former-client for failing to pay approximately $675,000 in legal fees, and the client counterclaimed for legal malpractice. Discovery revealed internal emails from DLA Piper attorneys that joked about the amount of work done on the client's file. Examples included:

- One attorney stated “I hear we are already 200k over estimate – that’s Team DLA Piper!”
- Another DLA Piper attorney quipped that one of his colleagues had “random people working full time on random research projects in standard ‘churn that bill, baby!’ mode.”
- While another email simply stated “That bill shall know no limits.”


While the case ultimately settled, it serves as a harrowing reminder of the dangers of sending internal emails that can incriminate you or your firm.
D. Keep Expectations Realistic

It is imperative that lawyers are clear in communications with their clients from the outset. Never guarantee a particular result in a case. Doing so is not only irresponsible, but it also could expand the scope of liability that an attorney might face. For example, some jurisdictions have found that failing to obtain a guaranteed result could provide the basis for a breach of contract action. *Brownell v. Garber*, 199 Mich. App. 519, 525, 503 N.W.2d 81, 83-84 (1993) (recognizing that a client could pursue a breach of contract cause of action against an attorney if he failed to obtain a result which he guaranteed); *Mecca v. Shang*, 258 A.D.2d 569, 685 N.Y.S.2d 458 (1999) (attorney could not be held liable for breach of contract because he did not guarantee particular result). This cause of action allows a client to avoid having to use an expert witness to establish that the lawyer acted below the standard of care – *i.e.*, below the standard of an attorney of ordinary skill in the community. In a breach of contract action, no such expert evidence is needed. The client can simply establish that the attorney guaranteed to achieve a specific result, but failed to satisfy that guarantee. *Brownell*, 503 N.W.2d at 83-84.

A less obvious trap exists where the attorney oversells the relative strength of the client's case or comparative weakness of the opponent's. That temptation is often strongest during the initial consultation, when the attorney does not possess all of the key facts and is potentially trying to convince the client to hire the firm.

It is therefore important that you are measured in your evaluation of the case, address potential issues that could arise, and (you guessed it), make sure that you confirm this in writing. In addition to conveying these thoughts in an email or letter, make sure that your standard retainer agreement includes a “no guarantee of success” provision.

In like manner, if your client has a counterclaim for damages, do not be overly aggressive about the claim's value. It is impossible to accurately predict how a jury will value the claim. So leave the valuation to the experts. If you don't, you run the risk of giving the other side a key piece of evidence to use against you in the subsequent malpractice claim. For context, in a legal malpractice action the plaintiff is entitled to recover the damages he or she would have received in the underlying case but-for the attorney's negligence. Thus, the plaintiff is required to prove up the value of the underlying claim. If you sent an email or letter to the client bloviating about how that claim is worth millions of dollars, you can rest assured that the plaintiff's attorney will use that evidence at trial. The jury will hear over and over again about how they should use your valuation of the plaintiff's damages. It is exceedingly difficult for defense counsel to minimize the effect of that document without coming off as disingenuous in the eyes of the jury.

This precise thing happened in a recent legal malpractice case that my firm handled. While the case ultimately settled before trial, a key piece of evidence was an email from the attorney to the client explaining, in rather strong terms, that the case was worth approximately $30-60 million in damages. When the client recovered far less than that amount, and subsequently sued the attorney for malpractice, that email was used repeatedly during fact and expert witness depositions to try to establish the value of the plaintiff’s claim. Needless to say, that email would have been a critical piece of evidence at trial that would have carried significant weight in the eyes of the jury.

E. Steer Clear of Conflicts

Clients frequently allege that a conflict of interest prevented an attorney from representing the client's interest to the fullest. These conflicts can arise in a number of ways. In real estate transactions, attorneys are often asked to represent both parties to the deal so as to streamline the process and limit legal fees. In litigation, attorneys are asked to represent co-defendants (or plaintiffs) that appear, at least initially, to have mutually aligned interests.
Most professional conduct rules require that the clients provide informed consent to the joint representation. This often requires that the client be provided an explanation of the conflict in writing and the opportunity to seek independent legal advice. Do not short change this process, no matter how longstanding of a relationship you may have with one, or both, of the clients.

As with difficult clients, conflicts of interest are often hard to perceive at first. Be mindful that circumstances can and often do change as the case or deal progresses. You must monitor the case for potential new conflicts that can arise, and immediately advise clients in writing about the existence of the new conflicts.

Of course, the best practice is simply to avoid the conflict altogether. Declining the representation at the outset will ensure that you will not face allegations of wrongdoing at a later date.

F. Be Nice to the Opposing Counsel and Court

Being nice to opposing counsel and the court is an often overlooked, but important consideration. Of course, it is a goal that we should all strive to obtain in every case, regardless of how contentious it might become. But beyond the obvious reasons – to uphold the integrity of the profession, to maintain a positive reputation in your community, and to ensure that your emotions aren’t impacting the services you provide to your client – there are also selfish reasons to play nice.

One of the first people that I call after receiving a legal malpractice case is the opposing counsel in the underlying litigation. They usually have the best – and most honest – insight into the level of competence from the attorney-client. As a former law partner of mine used to say, “Your actions now control how your opposing counsel testifies later.”

Consider the following bar complaint filed against an attorney named Jared E. Stolz. (See http://www.njd.uscourts.gov/sites/njd/files/MatterofJaredEStolz.pdf). Mr. Stolz was suspended by the New Jersey bar for improper and sarcastic communications to opposing counsel, as well as a failure to properly manage his caseloads. Mr. Stolz sent the following emails during the course of a single litigation:

• “Don’t feel you have to email me daily and let me know just how smart you are.”
• This will acknowledge receipt of your numerous emails, faxes and letters….In response thereto, Bla Bla Bla Bla Bla Bla.
• “Did you get beat up in school a lot?, because you whine like a little girl.”
• I’d send you the delivery receipt, but I put both your email addresses in my ‘Junk Mail’ box, because that is all I get from you, JUNK.”

Most – but certainly not all – lawyers would never even dream of sending emails like this to anyone, let alone opposing counsel. But the problems extend beyond the obvious. Lawyers that make it a habit of engaging in personal or petty attacks with opposing counsel, especially during discovery disputes, find themselves in hot water in a subsequent legal malpractice case. Why would your opposing counsel go out of his or her way to provide favorable testimony on your behalf if you spent months, or even years, berating them via email, correspondence or in pleadings?

The same problems must be kept in mind when addressing the court. One of the most damning pieces of evidence in a legal malpractice action is an opinion from the presiding judge criticizing your client. This can occur for any number of reasons, but the most common include: attacking the other side unnecessarily in written submissions to the court, engaging in nefarious conduct during the discovery process, acting inappropriate during trial, or openly questioning the court’s judgment or ruling.

issued this stirring rebuke of an attorney who had a reputation of being untrustworthy in the community:
“[Party’s] brief contains this representation: “I, [Attorney’s name], counsel for the defendant-appellant...state
that the appendices submitted with this brief on appeal incorporate the material required under Circuit Rule
30(a) and (b).” This representation is false. [The attorney] may not have set out to develop a reputation as a
lawyer whose word cannot be trusted, but he has acquired it. This opinion serves as a public rebuke and as a
warning that any further deceit will lead to an order requiring [him] to show cause why he should not be sus-
pended or disbarred.”

It bears repeating that such an order from the court can be highly problematic in a legal malpractice
case.

G. Avoid Fee Disputes with Clients

The reasoning behind this is obvious: a client will look for any form of leverage that it can gain in
negotiating down your demand, and a legal malpractice claim – alleging that you overbilled the file or com-
mitted some other breach of the controlling standard of care – provides easy fodder to manufacture that lever-
age.

A recent survey backs up the associated risk: as many as two of five clients sued for unpaid attorney
fees file a counterclaim for legal malpractice. See Browne, “Fee Collection Checklist,” Lawyers Perspectives News-
letter 2 (Sept. 2010), www.cavignac.com/publications/publications-lawyers-perspec-
tives-suing-for-unpaid-fees-think-again. Sometimes, the issue is unavoidable. But to the extent reasonably
practicable, you should avoid filing any such claim.

VI. Conclusion

Legal malpractice claims have steadily risen in the last 20 years. The recession saw a sharp increase in
claims, most of which were tied to the real estate market collapse. But as the economy improved, the malprac-
tice claims continued to increase. While the exact cause is unclear, the results are anything but. More claims
at higher dollar amounts means that attorneys must be proactive about insulating themselves from exposure
to such claims. This article sought to provide attorneys with tips for effectuating that goal, and illustrated the
benefits of doing so through case examples and fact patterns. It is by no means full proof. Even the best attor-
neys can be sued for malpractice. But it is a start.