

Best Practice Tips  
to Incorporate

By Patrick M. Causey

**More claims for higher dollar amounts mean that attorneys must insulate themselves proactively from exposure to such claims.**

# Defending Against a Legal Malpractice Claim

This article will provide a list of five best practice tips to avoid legal malpractice claims, but it also illustrates, through examples from cases, how incorporating these best practices will help you

defend against a legal malpractice lawsuit better.

First, however, this article will provide context about why you should incorporate these tips into your practice. Namely, this article addresses the practice areas in which attorneys face the greatest risk of exposure to legal malpractice claims, the rise of legal malpractice claims over the last 20-plus years, and the hurdles that attorneys face as a defendant in such a lawsuit.

### Top Practice Areas Involving Legal Malpractice Claim Risks

According to a recent study by the ABA Standing Committee on Professional Liability, plaintiff personal injury attorneys no longer experience the highest percentage of legal malpractice claims. Todd C. Scott, *Recent ABA Study Suggests Emerging New Trends in Legal Malpractice*, Minnesota Lawyers Mutual (Oct. 24, 2012), <http://blogs.mlmins.com/ruatrisk/?p=1024>. The top spot now belongs to real estate attor-

neys, the reason for which will be explained momentarily. Here is a breakdown by each practice area:

1. Real estate: 20 percent
2. Personal injury—plaintiff: 16 percent
3. Family law: 12 percent
4. Estate and probate: 11 percent
5. Bankruptcy: 9 percent
6. Other: 8 percent
7. Corporate: 7 percent
8. Criminal: 6 percent
9. PI Defense: 3 percent
10. Labor: 2 percent
11. Workers' compensation: 2 percent
12. Intellectual property: 1 percent
13. Securities: 1 percent
14. Tax: 1 percent

### Legal Malpractice Claims Are on the Rise

Even if your practice area is not near the top of this list, you should still have cause for concern. In 1995, studies showed that approximately 20 percent of attorneys faced



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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 20 years.

One of the driving forces behind this increase was the Great Recession, which hit the real estate market the hardest. See Joshua Sebold, *Post-Recession, Legal Malpractice Claims on the Rise*, Daily Journal (July 29, 2013), available at [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). 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 explain 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 (June 27, 2013), <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 face three claims of legal malpractice during his or her career. These numbers suggest that it might not be a matter of *if* you get sued for malpractice, but rather *when* it will occur.

### Attorneys Have an Untenable Position as a Defendant

To make matters worse, an attorney typically is placed behind the proverbial eight-ball in the eyes of a jury if he or she is sued for malpractice. As one writer put it, attorneys' place in the 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). 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 (last visited July 16, 2014), <http://www.publicpolicypolling.com/main/2013/01/congress-less-popular-than-cockroaches-traffic-jams.html>.

But attorneys still face an uphill battle to win over a jury. The harmful effects of this poor societal standing cannot be understated. Most legal malpractice actions involve a battle of "he said, she said," with the tiebreaker going to who the jury finds more credible—the former client or the attorney. Given the relative low reputation that attorneys possess in the eyes of the community, that tie is usually broken in favor of the attorney's former client. Thus, implementing best practice techniques to avoid malpractice claims, or at least to minimize the exposure to them, becomes all the more imperative.

Equally problematic is the pedestal upon which juries place attorneys. 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). Unfortunately, though, juries often hold attorneys to a higher standard due to their legal education and training. Juries usually expect and demand more from attorneys than the

law requires, viewing it as appropriate for such licensed professionals.

Plaintiffs' 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 litigations. This puts an attorney that is a defendant in a case involving

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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.

### Best Practices and Their Import in Legal Malpractice Proceedings

If the above statistics and trends have not captured your attention, I am not sure what will.

And now that I hopefully have your attention, below is a nonexhaustive list of five "best practices" that you can and should incorporate into your practice. This list is not meant to safeguard sloppy lawyering. To the contrary, this list is consistent with trying to provide our clients the best legal services possible. The ancillary benefit to these "best practices" is that it will (hopefully) minimize your exposure to claims and help you in the event that you are sued for malpractice.

### 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 to build practices has led many attorneys to take on cases that they should turn down. And determining which clients or cases to turn away takes a discerning eye that could take years to cultivate.

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

First, during the initial consultation, ask questions concerning what a potential client hopes to achieve, pay close attention to how demanding the client seems, and be mindful of how realistic a client is regarding the

client to pay you to handle the matter for which the client has sought your service. If your fees will not be cost prohibitive, prepare a budget that lays out how much you expect each phase of the litigation to cost. This has proven very beneficial to clients, especially corporations, that are used to operating within budgetary confines. It will not only help a 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 attorneys’ fees. A client that seems unwilling to pay the costs associated with a case will likely find the legal services that you provide wanting, regardless of how well you provide them.

Third, determine whether a potential client has a history of changing to other attorneys. A tell-tale sign of a troublesome client is that the client has been through several attorneys, especially if this has already occurred with the case for which the client has sought your service. Perform due diligence on a client’s past attorney-client relationships. Ask colleagues in your legal community about their interactions with a potential client and the client’s reputation. Is the client overly litigious? Why did one or more previous law firms withdraw?

As mentioned above, do not just perform this analysis at the outset of the case. Constantly reevaluate whether the relationship is beneficial to you and your firm. Some of these problematic signs take time to materialize, so it is important that you be on the lookout for them 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 that the plaintiff had a reputation of being overly litigious and had contentious relationships with several other law firms during this one case, and they withdrew, 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 the firm simply declined to accept the representation.

#### Document All Key Decisions and Client Instructions

Document key decision and client instructions, regardless of whether a client will pay for the documentation. I’ve written about this before, but documenting a file is vital. Patrick Causey, *Documenting the File*, ABA Young Lawyers Division, 101 Practice Series (last visited Aug. 19, 2014), [http://www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/documenting\\_the\\_file.html](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 to discuss which defenses to raise, witnesses to depose, or discovery to pursue. But a lawyer often fails to confirm the decisions in writing. When asked why no written evidence exists that supports a 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.

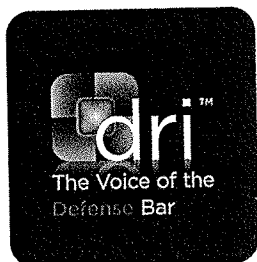
Regarding payment, explain to a client at the outset of the relationship that it is your practice to confirm key decisions in writing. Ideally, this will be included in your retainer agreement. Otherwise, put this instruction in an e-mail to a client. If a client still refuses to pay for status updates,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

Regarding time constraints: make time. Most lawyers use not having enough time as an excuse to justify poor case management habits. A letter or e-mail does not

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expected outcome of a case. While it is understandable that a client might be emotionally invested in a case, too much emotion can be a bad thing. If you do agree to represent the client, be on the lookout for this behavior throughout the litigation. Does a client expect you to respond to e-mails or calls immediately? Is a client comfortable with you handling the case, or does the client constantly second-guess the strategies that you suggest? All these areas are tell-tale signs that a client might become a problem.

Second, determine whether a potential client seems willing to put forward the time, energy, and expense that is needed to defend a case successfully. You should first evaluate whether it makes economic sense for a



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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 one risks rocking the boat on an otherwise harmonious relationship. But this is not just done for your benefit; it is for your 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 a decision leads to an adverse outcome for a client. Malpractice claims often come after a case has run its course all the way through an appeal, meaning years could go by from the time that a key decision was made until the time that a lawsuit was filed. A client could simply forget that he or she was advised regarding an important decision. Even worse, a client, especially one that a savvy plaintiff's attorney has encouraged, could simply exploit the lack of documentation to his or her advantage.

It is an unfortunate truth about the society in which we live that clients sue attorneys even when they have represented clients well. Failing to document decisions and instructions in a case could mean the difference between successfully defending against a legal malpractice claim and ending up 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 formed 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.

In comparison, another law firm failed to provide a nonengagement 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 the potential client regarding whether an attorney-client relationship had formed. In making that credibility determination, the jury—not surprisingly—sided with the potential client. Had the firm properly documented the case, that adverse outcome might have been avoided.

### Keep Expectations Realistic

It is imperative that lawyers are clear when communicating 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, courts in 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 the attorney failed to obtain a result that the attorney guaranteed); *Mecca v. Shang*, 258 A.D.2d 569, 685 N.Y.S.2d 458 (1999) (holding that an attorney could not be held liable for breach of contract because the attorney did not guarantee particular result). Unlike a legal malpractice action, a client suing an attorney for breach of contract is not required to use an expert witness to establish the attorney's liability. A 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 when an attorney oversells the relative strength of a client's case or comparative weakness of an opponent's. That temptation is often the strongest during the initial consultation when an attorney does not possess all of the key facts and is potentially trying to convince a client to hire the attorney's firm.

It is therefore important that you are measured in your evaluation of a 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 e-mail or letter, make sure that your standard retainer agreement includes a "no guarantee of success" provision.

In like manner, if your client seeks advice regarding a potential claim for damages, take a measured approach to the

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claim's value. It is impossible to predict accurately how a jury will value a 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 a subsequent malpractice claim. For context, in a legal malpractice action a plaintiff is entitled to recover the damages that he or she would have received in the underlying case but for the attorney's negligence. Thus, a plaintiff is required to prove the value of the underlying claim sufficiently. If you sent an e-mail or letter to a client bloviating about how that claim is worth millions of dollars, you can rest assured that the client's attorney will use that evidence against you at trial. Then a jury will hear over and over again how the members should use your initial valuation of the plaintiff's damages. Your defense counsel will have an exceedingly difficult time minimizing the effect of that document without coming off as disingenuous in the eyes of a 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 e-mail 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 e-mail was used repeatedly during fact and expert witness depositions to try to establish the value of the plaintiff's claim. Needless to say, that e-mail would

You must monitor a 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 a conflict altogether. Declining the representation at the outset will ensure that you will not face allegations of wrongdoing at a later date.

#### Avoid Internal Communications that Can Cast You (and Your Firm) in a Negative Light

In legal malpractice cases, the attorney-client privilege is waived, and all communications from the law firm—including internal e-mails among 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 e-mails provide the proverbial smoking gun in a malpractice action. They typically come in one of two forms. The first form involves an attorney e-mailing 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 that he or she had approached a certain deposition or hearing in a different manner. As with e-mails stating the worth of a plaintiff's claim, a plaintiff's attorney will make such an internal e-mail the focal point at trial. Any attempts to distance yourself from this mea culpa e-mail will seriously undermine your credibility in the eyes of a jury.

The second form involves an attorney criticizing a client. Unfortunately, this happens more often than you think. Most legal malpractice claims stem from an acrimonious relationship that existed between the attorney and the client. The temptation in these situations is to send an innocuous e-mail to a colleague complaining about how difficult a client can be. Do not do it. Draft the e-mail if you must. But do not hit send. The last thing that you need when faced with a significant legal malpractice claim is an e-mail in which you disparage the client.

In one of the more notable examples of the harm that internal e-mails can cause, DLA Piper sued a former client for failing to pay approximately \$675,000 in legal

fees, and the client counterclaimed for legal malpractice. Discovery revealed internal e-mails written by DLA Piper attorneys that joked about the amount of work done on the client's file. Examples included the following:

- 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 e-mail simply stated, "That bill shall know no limits."

The case gained national attention, with articles in the *ABA Journal* and *Abovethelaw.com*, to name a few. See Martha Neil, *DLA Piper Settles Fee-Dispute Case that Brought 'Churn that Bill, Baby!' Email to Light*, *ABA Journal* (Apr. 18, 2013, 10:40 AM), [http://www.abajournal.com/news/article/dla\\_piper\\_settles\\_fee-dispute\\_case\\_that\\_brought\\_churn\\_that\\_bill\\_baby\\_email\\_/](http://www.abajournal.com/news/article/dla_piper_settles_fee-dispute_case_that_brought_churn_that_bill_baby_email_/); David Lat, *Overbilling Gone Wild: Paying the (DLA) Piper*, *Above The Law* (Mar. 26, 2013, 2:40 PM), <http://abovethelaw.com/2013/03/overbilling-gone-wild-paying-the-dla-piper-plus-interesting-lateral-moves-into-and-out-of-dla/>.

While the case ultimately settled, it serves as a harrowing reminder of the dangers of sending internal e-mails that can incriminate you or your firm.

#### Conclusion

Legal malpractice claims have steadily risen in the last 20 years. The recession in part fueled a sharp increase in claims, most of which were tied to the real estate market collapse. But as the economy improved, the malpractice claims continued to increase. While the exact cause is unclear, the results are anything but. More claims for higher dollar amounts mean that attorneys must insulate themselves proactively 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. Following these tips is by no means full proof. Even the best attorneys can be sued for malpractice. But following these tips is a start. **FD**

### 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.

have been a critical piece of trial evidence that would have carried significant weight in the eyes of a jury.

#### 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 to streamline the process and limit legal fees. In litigation, attorneys are asked to represent co-defendants or co-plaintiffs that appear, at least initially, to have mutually aligned interests.

Most professional conduct rules require that co-defendants and co-plaintiffs provide informed consent to the joint representation. This often requires that these clients receive 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 a relationship you may have with one or both of the clients that you may represent jointly.

As with difficult clients, conflicts of interest are often hard to perceive at first. Be mindful that circumstances can and often do change as a case or a deal progresses.