

High Risk Conduct ***(Beyond Simply Practicing Law)***

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Undoubtedly, the risk of a lawsuit arising out of a law practice has increased steadily over the years. One reason is that there is less hesitancy by many lawyers to sue a fellow member of the bar. The number of regular plaintiffs' attorneys for legal malpractice claims continues to grow. Additionally, many more attorneys are filing claims against lawyers as part of their representation of existing clients. In short, the growth in the number of lawyers willing to sue another lawyer has resulted in more claims.

With the growth of claims has come a growth in the law. Whereas attorneys were once subject to a claim almost exclusively by the client, that is no longer the case. Most states now recognize some situations in which an attorney may owe a duty to a non-client or even an opposing party. With the growth in the potential number of opposing counsel has also come a growth in the potential number of claimants.

Many defense attorneys and some carriers have reported an increase in the number of legal malpractice claims since the current economic downturn. A significant part of this increase is due to claims having characteristics that might be called "bad economy" claims. Examples of these claims are claims that arise primarily out of failed business transactions under circumstances that likely would not have lead to a claim during the previous 35 years of nearly continuous economic prosperity. In considering risky behavior, it is worth noting some of these characteristics because they can teach attorneys better practices for malpractice claim avoidance.

Real Estate:

One of the largest areas of malpractice claims continues to be in real estate practices. The early part of this decade saw a rise in available mortgage funds, fast rising real estate prices and a huge drop in the quality of lender underwriting as the number of loans and closings grew. All of this coincided with huge instances of mortgage fraud. While many of these claims have already been filed and are working their way through the system, there are some lessons that should not be forgotten.

Another factor in real estate is the current trouble faced by many banks and financial institutions. The institutions are looking to recoup mortgage portfolio losses any way they can. Faced with defaults and foreclosures, old closing files are being scrutinized closely in hindsight. The loans were closed quickly. Everyone was busy. Everyone was making money. Now, all of the shortcuts allowed by the time crunch to get those transactions closed are being looked at as potential sources of recovery (or income) for a troubled industry.

Inaccurate HUD-1 statements: One of the methods used by real estate fraudsters to allocate the funds from closing was to ask that checks be written at the closing table to various

“vendors” and “contractors” to whom the seller allegedly owed money. These payments were often not on the HUD-1 because they did not have liens on the property. Since the money was the seller’s money anyway, what difference did it make if the attorney wrote a check to a party at the seller’s request?

A non-lienholder payout from the closing proceeds is now a well recognized indicia of mortgage fraud. Not only should every check written out of the trust account be identified on the HUD-1, but any last minute changes such as payments to previously unidentified third parties should be specifically approved by the lender. If it is not done, and the transaction goes south, the lender is more likely to file a claim. Even when it can be shown that the lender approved the HUD-1 with the check recipients’ name clearly listed on the HUD-1, the lender may simply shrug and proceed with the claim. It is fair to say that many lenders are willing to claim that the attorney should have caught everything that underwriting missed. Lenders are looking to closing agents and attorneys as the insurers of the transactions.

Identify the client: It is troubling to see how many attorneys do not recognize their role at a closing table. The typical closing attorney represents the lender. Most attorneys do recognize this, though many still will still say they represent the “transaction.” Attorneys become even less clear when asked who they represent in a cash closing. There is no such thing as representing a “transaction.” Attorneys have clients. The attorney needs to identify someone as a client and make sure everyone else knows it, too.

One good practice is to include a form in every closing that discloses who the attorney represents and advises everyone else that he or she can have an attorney at the closing if he or she so chooses. Many lender closing packages have similar language as part of their forms, but not all. Every firm should create its own form and make sure it is included with every closing. In Georgia, for instance, having one of these forms signed at the closing table can be the difference between summary judgment and going to the jury in a claim brought by a non-client at the closing table.

Independent Title Searches: Many attorneys save money having non-employees run title on closings. Even more money can be saved by hiring individuals with little experience or overhead to run title searches. However, the smaller the operation, the less likely that operation has E&O coverage.

Closing firms should require their outside title examiners to have E&O coverage. The law firm should also have written contracts with indemnity language in case of mistakes. Applying simple privity analysis, the lender typically will have every right to collect from the attorney for any damages flowing out of an improper title search, even though the law firm hired out the title exam. A title examiner with coverage and a contractual indemnity provision makes the claim downstream easier for the attorney.

Developer/Lender dynamics: In the world of development, it is not that uncommon for a developer to use a law firm to assist with all aspects of development. That firm may help with the property acquisitions and consolidation and may help prepare homeowner association or condominium related documents. Then, once the development is completed, the firm may be

asked to close sales to the ultimate purchasers of the property. Under these scenarios, if an issue comes up later that impacts the development, the lender or the developer may claim the firm should have provided more information, owed a duty even when the work was done for the other client, or was in a conflict of interest situation.

In any situation like the above where the law firm ends up handling two aspects of a transaction with two different clients, a conflict letter should be presented to and signed by all clients. That letter should include detail on the scope of the work being performed for each client. For example, the attorney should tell the lender for whom he is closing loans that he is closing loan transactions and not performing work related to the development already completed by the firm for the developer client.

Litigation:

Litigation attorneys are as exposed as real estate attorneys when it comes to malpractice claims. Personal injury plaintiffs attorneys are still the most likely litigation attorney to be sued, but they are not alone, as the below high risk activities prove.

Procrastination: The highest risk behavior for a litigator is procrastination. Missed deadlines result in the most malpractice claims. While it is easy to say “don’t procrastinate,” it is hard not to do when you are busy.

For the plaintiff’s attorney, however, waiting to file a lawsuit truly increases risk. It increases the risk that the statute of limitations will slip by without notice. It increases the risk that once filed, there may be issues locating the defendant for service. It increases the risk that a target of the lawsuit will suffer financial hardship and make collecting damages difficult. All of these risks are lessened by not postponing the intended suit once negotiations have reached an impasse.

Calendaring: Although calendaring and procrastination are related, they are really quite different. Once a case is underway, the busy attorney will not be able to prepare every document well in advance of deadlines. At this point, it may be enough to meet deadlines. To ensure that happens, at least two calendars should contain all important events and deadlines. There should be notices and reminders before those dates as well. They can be written on paper or automatically generated in computer-based calendars. Additionally, someone in the firm other than the attorney should be responsible for getting all such dates in the system as documents that create such deadlines are received.

Settlements: More and more claims are arising out of settlements. Originally, and still in many states, the only settlement claims that could survive a dispositive motion were based upon overlooked issues that changed the nature of the settlement, such as tax issues in divorce cases, or allegations of fraud by the attorney to induce the settlement. Some states now allow these claims to proceed without restriction. Other states, like Georgia, fall somewhere between these two extremes.

More and more reported opinions are arising out of settlement claims of regular litigation. It is difficult to identify a common high risk behavior behind the claims, but there are some litigation avoidance measures that can be taken.

Identify the clients most likely to be the Monday Morning Quarterback. Some clients are more likely to complain about a settlement after the fact. Did the client seem genuinely unhappy with the settlement? Did the client complain that he felt pressured into the settlement? Does the settlement include any type of future performance by the opposing party that might be breached? Each of these increases the risk of a negligent settlement claim.

To head off negligent settlement claims, a wise practice would be to document the method and decision making process behind the settlement, perhaps in a letter that terminates the representation at the conclusion of the litigation. For example, in a pre-suit settlement, include that the client knew that discovery was taken but that the early settlement was agreed upon as the best choice at the time. That way, when the claimant finds out later that the other driver had a positive drug test after the accident that was never seen because discovery had not been completed, there is documentation that such a risk was known.

The highest risk settlements however are those that include future payments or conduct. The attorney should write a letter explaining the settlement to some degree and point out that there are risks that the other side will not live up to the agreement, but that the protections in place were considered adequate at the time of the settlement.

Non-retention/discharge: A major area of claims in litigation malpractice comes from the issue of whether the claimant still was (or ever was) a client at the time of an event. Often attorneys believe that turning down a case or being discharged from a case ends the obligations to the client or prospective client. That is not always true.

The issue comes up multiple ways, but there some common themes. When turning down a case or terminating a representation, do it in writing. Put the prospective/former client on clear notice that you will no longer be working for her. Provide some information that will minimize any harm that might come to the client after the discharge/rejection of the case. For example, tell her when the statute of limitations runs on the claim you turned down so the client understands she must get another attorney or file suit herself by a certain date if desired. Cooperate with the new attorney who takes over your case.

Many malpractice claims involve a person who thought the attorney was representing him. The attorney disagrees. The case is a swearing contest unless there is a document that can terminate the question. These cases can be highly fact intensive and difficult to obtain summary judgment. The documentation will make the difference in the strength of the defense and possibly whether a claim is brought at all.

Other Claims

Conflicts of interest are a growing area for legal malpractice claims. These claims are especially troubling in a number of jurisdictions because they invariably create potential

exposure for punitive damages under the “breach of fiduciary duty” label. Doubly dangerous is that every unhappy client with whom there was a conflict can make the claim that you favored a different client more to his or her detriment. The fact that every such client is making the same claim, and they can’t all be correct, is little defense. Conflicts can arise in any context (see developer/lender discussion above), but here are some common situations or scenarios that seem to be trending:

Business partners with one attorney: Two business partners go into business and have one attorney prepare the business form documents, agreements, and related documents. Then the business gets in trouble or the partners have a falling out. The attorney becomes an easy scapegoat and someone that can help ease the losses from a failed business.

Multiple plaintiffs – limited pool: Many plaintiffs’ attorney will represent more than one plaintiff against a common defendant. For example, one lawyer represents several friends or family members that were in a motor vehicle accident. The available insurance is insufficient to cover all claims, or perhaps the defendant makes a lump sum settlement offer for all claims without breaking it out among claimants. The attorney must be careful not to take sides against some of the clients if there is a disagreement whether to accept or how to divide the money.

Two clients do business with each other: An attorney who represents many small businesses, may find that some of his clients do business with each other. The attorney will need to be careful not to get entangled in the areas where their business overlaps, though not directly. There is even risk lurking where it is not obvious.

If a client takes a loan to build out a new business site, and another client is the builder, some questions are easy. Avoid preparing the contract between them for the build out. But what if the lender fails to provide funds because it is unhappy with the progress? Does the attorney defending the builder in unrelated cases in which it is alleged that he did not finish projects have a duty to tell the other client that hired the builder? Can the attorney make a demand on the lender to fund the loan knowing that the client is going to use the money to pay the builder? If so, and the builder doesn’t complete the project and goes out of business, is the attorney liable to the other client? The important point is to be aware that when two clients do business with each other, the attorney must be aware of potential conflicts.

Scope of representation: The client comes to the attorney for one problem. The attorney agrees to help, but does not plan on dealing with other problems. What duties arise to address the client’s other problems?

This is an area that can arise in a number of areas, including litigation, probate, and business law. An example is the workers’ compensation attorney. She is hired to handle the workers’ compensation claim, but she still may have a duty to advise the client that he has a potential claim against a contractor (not his employer) that may have caused his work related injury. Or she is hired to prepare a simple will but she has sufficient information to know that her client may be able to avoid certain tax issues through a more comprehensive estate plan. If she works in a particular area, it may be necessary to recognize these peripheral issues and at least advise the client to seek further help.

Another problem may be that the client is aware of other legal issues but just assumes he is dealing with those issues too. This is where the retention letter, like the rejection letter discussed above, becomes important. Once a lawyer screens the client and legal issues, the attorney must put the scope of the representation in writing.

The test for determining whether an attorney-client relationship exists (and usually also its scope) is a “reasonable belief” standard from the viewpoint of the client. Thus, once the client claims to have a subjective belief, it will become a jury question in most cases about the reasonableness of that belief. If the scope of the retention is in writing, summary judgment is possible in many jurisdictions.

**How To Ruin Your Malpractice Insurer’s Day
or
High Risk Behavior That Will Likely Bring A Malpractice Claim:**

Ben Stein has a series of books called “How to Ruin Your [Blank].” The “Blank” could be your “Life,” your “Love Life,” or your “Financial Life.” Reasoning that “failure is a virtual road map to success in reverse,” he advises such nuggets of anti-wisdom that you make yourself useless, be a slob and act like the world owes you. By doing the following, you too can count on an eventual legal malpractice claim to be served by the local sheriff.

Take any client that walks in the door: This is an economic downturn. Lawyers cannot be expected to screen clients or ask background questions. There are bills to be paid. Although you would normally not accept a case from a client who already fired four lawyers and sued two of them, certainly you can make this person happier than those prior losers. Your client’s litigious nature will never be directed at you – you are outstanding.

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Obviously, taking a client that your gut tells you to avoid should not be done lightly. Client screening is important to ensure that you have someone with whom you can work effectively. Some malpractice claims can be identified when they walk in the door.

Take any type of legal problem that walks in the door: The client is an elderly, wealthy nun with an estate planning issue. You have never done estate planning and cannot even identify the tax issues that a wealthy, spouseless client might have. One thing is certain, though – the client seems nice. What could go wrong?

Your neighbor has been hit by a tractor-trailer and is severally injured. The doctor may have committed malpractice during the surgery to repair some of the damages. Your neighbors want your help. You have done nothing but close residential real estate loans in your three years of law practice and have never spoken to a judge during court. This is the perfect opportunity to score a major case and retire.

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Dabbling in areas in which you are not familiar is a great way to increase the risk of a claim. Branching out requires either a mentor or partner that already knows the area or a dedication to learning the new area of the law. If you are a focused attorney branching out into many new areas due to tough economic times, you may not be able to adequately learn all of the new law you are practicing. This makes your practice much riskier for malpractice.

Never document it – an oral conversation is sufficient: When deals and cases fail, you never worry. You are certain that the client’s memory will recall that you limited the representation to certain issues, that you never promised that the case was a winner and that you never agreed to also be the client’s business advisor. Besides, you are the lawyer. No jury is going to believe a client’s sour grapes over your recollection of what was agreed to when the representation began.

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A client’s memory can be short, clouded or self-serving. When creating the relationship, documenting the engagement and the scope of the work expected creates clear guidelines and protects you from claims later. When terminating or not taking the representation, documentation helps clarify the client’s expectations and protects you from a clouded memory later. When engaging in any transaction that causes you any concern, such as a risky settlement, documentation can identify the factors that were considered and avoid swearing contests in the future.

Sue your clients for your fees: You tried really hard but lost that case. Now the ungrateful client won’t pay the bill. Undoubtedly you should sue your client to get paid. He would never think of counterclaiming for legal malpractice and claim that you lost the case because of your negligence. That would just be rude.

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The best practice is to get paid up front when possible. Otherwise, keep your client current. When a client gets behind, demand payment or get out before the situation becomes worse. There is no quicker way to get a malpractice claim than to sue a client for attorneys’ fees.

Don’t Call Your Client Back: As a lawyer, you are quite busy. You can’t be expected to call every client back just because he left a message, stopped by the office twice, and mailed you a letter with a lot of questions about the representation. The client knows you are busy and that other clients are important too. Plus, you have tickets to the game tonight. You will eventually tell the client that the court dismissed the case. It just isn’t important right now.

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Interviews of legal malpractice claimants and clients who filed bar complaints show that the greatest common complaint is that the attorney would not communicate with the client. Communication serves several important roles. The failure to communicate with a client causes the client to become angry and suspicious of the attorney. From a practical standpoint, communication also helps define the scope of representation and achieve the other malpractice avoidance goals mentioned in this article.

Most importantly, communication creates a relationship with the client. Even when things go wrong, prompt, regular communication throughout the representation can be the greatest tool against a legal malpractice claim. Proper communication will accomplish the following: set reasonable expectations for the representation, keep the client informed about the status, avoid surprises over the bills, and adjust expectations as necessary. At the very least, return all phone calls and answer all correspondence.

The legal profession has many of the same risks for litigation as any other business. Avoiding the risky behavior and following the guidelines mentioned above will not guarantee that you avoid a malpractice claim. It will, however, greatly reduce the risk that you face a claim. In the event you do face a claim, by following these rules you stand a better chance of successfully defending such claims.