

## Ten Tips to Assist in Avoiding a Malpractice Claim

There is little doubt that the legal profession can be a risky one. According to the American Bar Association, the likelihood of a private practice attorney being sued for malpractice in a given year runs between 4 and 17 percent.<sup>1</sup> Moreover, attorneys can expect, on average, at least three malpractice claims over the course of their careers.<sup>2</sup> Law firms that have robust risk management practices may not only reduce their risk of a professional liability claim, but also may have a distinct competitive advantage over those firms that do not have them. Below is a list of the top ten risk management tips to assist lawyers in avoiding legal malpractice claims.

### 1. Use Engagement Agreements

An engagement agreement is arguably the most important risk management tool for law firms. A solid engagement agreement confirms the terms of the agreed-upon representation, helps to avoid potential misunderstandings with the client and can protect the lawyer in the event of a dispute.

Obtaining the client's written agreement to the key terms of the representation from the outset of the engagement can avoid confusion and reduce the risk of malpractice claims. At a minimum, the agreement should contain provisions regarding the identity of the client, the scope of the representation, fees and billing, expenses, and the firm's policy on file retention and destruction.

An engagement agreement can help to prevent disagreements with the client. It is not unusual for clients to have a different recollection of conversations they had with the lawyer years earlier or to forget what the lawyer said altogether. For instance, a client may mistakenly recall that the lawyer agreed to handle both his personal injury action, as well as his workers' compensation matter, when the lawyer only agreed to handle the personal injury action.

Finally, an engagement agreement may help protect the lawyer in a legal dispute by clearly documenting the agreed terms of the engagement. For example, an engagement letter could support a defense where a lawyer representing a limited liability company ("LLC") is later sued by one of the LLC's principals, alleging that the attorney failed to protect his personal interests. See CNA's Lawyers' Toolkit 3.0, available at [CNA.com/lawyersriskcontrol](https://www.cna.com/lawyersriskcontrol) for sample engagement agreements.

### 2. Screening Clients is Essential

Good client and matter intake procedures are essential to avoiding legal malpractice claims. Unlike most other professions, lawyers have ethical duties that could prevent them from terminating a representation. Therefore, lawyers should give serious consideration to whether to take on a particular client or matter at the outset.

This screening process should not end with a clean conflicts check. Rather, lawyers should assess a potential client's character and demeanor, ruling out clients who appear overly litigious, dishonest or who have unrealistic expectations for the representation. Clients with poor finances also should raise a red flag for the lawyer, as they may prove unable or unwilling to pay the legal fees, which could lead to risky fee collection suits by the law firm. Lawyers should also consider whether a particular matter is appropriate for the lawyer or firm – lawyers have an ethical duty to reject representations that they are not competent to perform or in which they have a business or legal conflict of interest.

For further information, see CNA's Professional Counsel article, "Client Intake Procedures: Avoiding Problematic Clients," available at [CNA.com/lawyersriskcontrol](https://www.cna.com/lawyersriskcontrol).

<sup>1</sup> American Bar Association, Lawyer's Desk Guide to Legal Malpractice, 1999.

<sup>2</sup> Lexis-Nexis, Safeguarding Your Law Firm from Liability: Eight Tactics to Minimize Malpractice Risk, 2013.

### 3. Avoid Suing Clients

Suits for unpaid fees against clients are extremely risky because they can frequently lead to counterclaims for legal malpractice. It has been estimated that 42 to 47 percent of fee collection suits result in a legal malpractice counterclaim.<sup>3</sup> Defending against such counterclaims can be both time consuming and expensive for law firms. If a firm finds itself routinely filing lawsuits to collect fees from clients, this can be a symptom of a larger problem: ineffective client intake and management.

One of the best methods to avoid a fee collection suit is to take steps to prevent large fee balances from accruing in the first place, such as:

- Discussing payment and billing practices at the outset of the representation to properly set the client's expectations;
- Describing the work performed in sufficient detail in the firm's invoices; and
- Reviewing bills for any inaccuracies and correcting those before the bills are mailed.

If unpaid fees accrue, the firm should not ignore this, but should instead initiate an immediate discussion with the client. The firm should advise the client that it will seek an immediate withdrawal from the representation if the bill is not paid by a date certain – and then should follow through with that plan.

Moreover, before pursuing a fee collection suit, the firm should take risk management steps to reduce the potential for a legal malpractice counterclaim. First, law firms should always review the case file to assess whether the client would have any meritorious basis to pursue a legal malpractice counterclaim against the firm. Law firms should also consider whether the amount of fees owed to them is greater than their likely expenditures (in terms of time and money) if the client files a legal malpractice counterclaim. Finally, if possible, it may be prudent for firms to wait to file a fee claim until after the statute of limitations has run on any potential legal malpractice claim the client may have.

For further information, see CNA PROfessional Counsel article, "Taking Stock of a Potential Fee Collection Suit," available at [CNA.com/lawyersriskcontrol](https://www.cna.com/lawyersriskcontrol).

<sup>3</sup> Weiss, Debra Cassens, "NY Law Firms Aggressively Pursue Fees; Up to Seven Suits Filed Weekly in Manhattan," ABA Journal, 23 Oct. 2012. Web. 20 Feb. 2014.

### 4. Avoid Conflicts of Interest

A conflict of interest is a compromising influence that is likely to negatively impact a lawyer's ability to represent a client. Conflicts of interest are a frequent, if not the most frequent, cause of legal malpractice claims and disciplinary actions against lawyers.<sup>4</sup>

Lawyers can avoid conflicts of interest in their practice by being conversant about their jurisdictions' ethical rules and implementing risk management controls to recognize and address conflicts of interest as they arise. Conflicts checks should be performed multiple times throughout a representation, including before the lawyer accepts the representation and whenever a new party enters the litigation or there is a significant development in the representation.

If a conflict of interest arises, the lawyer may be able continue the representation after advising the client of the conflict and obtaining his or her written informed consent to waive the conflict and continue the representation. However, if the conflict is not the type that may be waived, or the client will not give informed consent, the lawyer must immediately withdraw from the representation.

For further information, see CNA's PROfessional Counsel article, "The Conflicts Conundrum: Avoiding and Managing Conflicts of Interest" available at [CNA.com/lawyersriskcontrol](https://www.cna.com/lawyersriskcontrol).

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<sup>4</sup> "Law Firms Face Large Malpractice Claims, Some in Excess of \$50M," *Claims Journal*, July 13, 2015.

## 5. Don't Dabble

Many lawyers, particularly those new to the profession, may feel pressured to take cases outside their focal areas of practice for financial reasons. However, taking a case outside an area of expertise can significantly increase a lawyer's risk of a malpractice claim, not to mention subjecting a lawyer to a potential ethics violation. CNA's claims data reveals that lawyers who dabble in multiple practice areas may have a significantly higher risk of legal malpractice claims than those that specialize in one particular practice area.

When lawyers initially take on representations in unfamiliar practice areas, they may not realize how much they do not know. It is usually only after lawyers have worked in a particular practice area for a while that they begin to realize the complexities of that area of law; however, by that point, it may be too late for them to withdraw from a representation.

Rather than independently handling a matter in an area in which the lawyer does not have significant experience, a better course would be to refer the case to someone who is an expert in the field or to associate with co-counsel who is already competent in that practice area.

## 6. Handle Mistakes Properly

Like all humans, lawyers occasionally make mistakes. While errors can't always be avoided in practice, lawyers can choose their actions following an error. How a lawyer handles an error can impact the likelihood and outcome of a future legal malpractice claim.

After discovering an error, a lawyer should first determine whether it is necessary to notify the client. In some circumstances, it may not be necessary to notify the client if the mistake was inconsequential or if the error can be corrected within a reasonable amount of time. However, significant or material errors must be disclosed to the client as soon as practicable so that the client may make informed decisions concerning the representation.

An error by a lawyer can create a conflict of interest with the client. Concealing or covering up a mistake to avoid liability could result in an ethical grievance and additional claims for enhanced damages in a resulting malpractice suit. For example, a lawyer who has made a mistake may attempt to quickly settle a client's lawsuit before the client discovers the error. Such conduct would violate the lawyer's ethical duty to communicate material facts to the client and may result in a claim for fraudulent concealment of material facts violating the lawyer's fiduciary duty to the client.

The best way to handle an error is to notify the client in person and follow up the conversation with a written summary of the discussion. This memorializes the timing and substance of the conversation. In many jurisdictions, lawyers have an ethical obligation to promptly notify the client about the error, as well as a duty to tell their client that the client may have a possible malpractice claim. However, before admitting an error, the lawyer may want to consult with his or her legal malpractice carrier because making an admission of liability may potentially violate the terms of the coverage. For further information, see CNA's PROfessional Counsel article, "To Err is Human: Managing the Disclosure of Mistakes to Clients" available at [CNA.com/lawyersriskcontrol](https://www.cna.com/lawyersriskcontrol).

## 7. Communication Is Key

Good client communication is essential to the practice of law and is a key ingredient for a healthy lawyer-client relationship. In addition, inadequate communication with a client may increase the likelihood of a future legal malpractice claim.

Good client communication means continuous, substantive communication throughout the attorney-client relationship, including:

- Gathering a solid understanding of the client's goals and managing the client's expectations for the representation;
- Engaging the client in discussions about case strategy and obtaining the client's approval before pursuing a particular strategy;
- Keeping the client apprised of notable developments in the representation;
- Providing the client with copies of all substantive letters and pleadings; and
- Providing consistent written interim reports as well as a final report documenting the tasks performed and the ultimate outcome of the matter.

In order to effectively manage a client's expectations, the lawyer must be completely honest as to the strengths and weaknesses of a client's case. Direct and honest communication throughout the representation can better prepare the client to handle bad news.

## 8. Avoid Administrative Errors

Administrative errors represent approximately 30 percent of all legal malpractice claims, based on the American Bar Association's Profile of Legal Malpractice Claims.<sup>5</sup> Two of the most frequent types of administrative errors include the failure to calendar or react to due dates properly and the failure to file or record a document.<sup>6</sup>

Appropriate law firm management can minimize administrative errors by first ensuring that all employees have the necessary experience and training. Specific training areas should include calendaring systems, as well as filing requirements and procedures for different filing authorities.

Finally, firm management must also meet its ethical obligation to ensure that the firm's administrative staff complies with the ABA Model Rules of Professional Conduct, such as the rules relating to client confidentiality (Model Rule 1.6), communication (Model Rule 1.4) and conflicts of interest (Model Rules 1.7 and 1.9). The firm may need to implement appropriate policies and procedures to ensure that the firm's staff meets these ethical standards.

## 9. Document the File

The client file can help protect the lawyer by preserving a complete and accurate record of the representation. Unfortunately, many lawyers may fail to take full advantage of this simple risk management tool.

Contemporaneous written documentation in a file can provide critical support to a lawyer's defenses in a legal malpractice case. Without written contemporaneous documentation in the file, it may be difficult to defend a legal malpractice claim. Lawyers should ensure that their files reflect what transpired in the representation. If the lawyer works on a particular file, the file should reflect what he or she did.

Specifically, the lawyer should document any advice to the client in the file, *especially* if the client ultimately rejected such advice. In addition, the lawyer should always document situations where the law is unclear and the lawyer uses his or her professional judgment to decide a specific course of action. Many jurisdictions recognize a "judgmental immunity" defense, which provides that it is not a breach of the lawyer's duty of care if the lawyer exercised a reasonable degree of care and skill with respect to an unsettled area of law.

## 10. Avoid Business Transactions with Clients Outside Legal Representation

Business transactions with clients can sometimes lead to conflicts of interests for lawyers and are best avoided. Some examples of business transactions with a client include investing in a client's business, loaning money to a client, or becoming involved in a business deal with a client. Transacting business with clients can create opportunities for unfair advantage. These situations could easily lead to bar disciplinary actions and legal malpractice claims.

Under ABA Model Rule 1.8, business transactions with clients are permissible only if certain conditions are met. First, the transaction must be "fair and reasonable" to the client and must be fully disclosed to the client in writing in a manner that is reasonably understandable. Second, the lawyer must give the client the opportunity to seek the advice of independent counsel in the transaction. Third, the client must consent to the transaction in writing.

However, even if the lawyer satisfies the above conditions, a client may still pursue a disciplinary action or legal malpractice claim. A bar grievance committee or court may then scrutinize whether the above conditions have been met. Lawyers can face severe punishment as a result of an improper business relationship with a client, up to and including disbarment. Furthermore, the lawyer's law firm may be held vicariously liable for the lawyer's business activities. It is also important to note that legal malpractice insurance policies may exclude coverage for claims arising out of business transactions with clients. The bottom line is that lawyers who enter into business transactions with clients do so at their own risk. All facts in the transaction will likely be construed against the lawyer and in favor of the clients.

It may be impossible for lawyers to eliminate *all* of their professional liability risks – particularly if they wish to maintain a thriving law practice. However, by implementing the above risk management recommendations, lawyers may be able to significantly reduce their likelihood of a future legal malpractice claim, while simultaneously strengthening their client relationships.

<sup>5</sup> American Bar Association, "Profile of Legal Malpractice Claims, 2008 – 2011", 2012.  
<sup>6</sup> CNA Claims Data, 2002 – 2013.

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