Avoiding the Summons: Top 10 Legal Malpractice Pitfalls & Ethical Traps (Ethics CLE)

Renaissance Pittsburgh
Symphony Ballroom A, 2nd Floor
Friday, May 16, 2014
11:30 AM – 12:30 PM
AVOIDING THE SUMMONS

Top 10 Legal Malpractice Pitfalls & Ethical Quandaries

J. Logan Murphy  Melissa M. Lessell
We’re going to do our best to make sure this isn’t you in 35 minutes . . .
What is the most common basis for legal malpractice claims?

(a) Missing deadlines, blowing the statute of limitations, and procrastination

(b) Neglecting boilerplate transactional documents.

(c) Conflicts of interest.

(d) Inappropriate ‘relations’ with clients.
What is the most common basis for legal malpractice claims?

(a) Missing deadlines, blowing the statute of limitations, and procrastination

(b) Neglecting boilerplate transactional documents.

(c) Conflicts of interest.

(d) Inappropriate ‘relations’ with clients.
Pitfall 1
Neglecting the Boilerplate

Preparing and filing transactional documents was responsible for 28.5% of all legal malpractice claims from 2007 through 2011.

Secret 1:
We procrastinated on this presentation.
Pitfall 2

Deadlines and Procrastination

What percentage of claims resulted from procrastination, failure to calendar, or failure to determine a deadline?
Pitfall 2

Deadlines and Procrastination

What percentage of claims resulted from procrastination, failure to calendar, or failure to determine a deadline?

23%

Pitfall 2

Deadlines and Procrastination

Statutes of Limitations

Calendaring

Even if you refer the case or withdraw, you may be liable (Model Rule 1.16).
Pitfall 2
Deadlines and Procrastination

Model Rule 1.3

“A lawyer shall act with reasonable diligence and promptness in representing a client.”

Comment 3

“Perhaps no professional shortcoming is more widely resented than procrastination.”
I'll start tomorrow
IF YOU AREN’T PAYING ATTENTION:

We hope you take home this one point . . .
Suing a client for fees is the **SINGLE EASIEST WAY** to get sued for malpractice.
Pitfall 3
Suing a Client
The reaction of any malpractice counsel if their client wants to sue a former client for fees:
Pitfall 4
After the Relationship Goes Bad

Clients don’t sue lawyers they like.

Face-to-face visits.

Is it worth defending a malpractice claim?
Pitfall 5 will be introduced by our friend Lawyer Corgi

So, your owner made you fetch the ball, but they never actually threw it?

I'd say you have a strong case for fraud.
Don’t be this LAWYER CORGI:

I HAVE NO IDEA WHAT I'M DOING
Instead, practice like this LAWYER CORGI:

THAT'S NOT MY AREA OF EXPERTISE

BUT I CAN RUFF-ER YOU
You don’t want to end up like Lucy
Elsa is a talented, experienced, and well-known civil trial attorney. She is hired by Olaf after he is arrested for melting without consent, a relatively common third-degree felony in Arendelle. (There’s lots of snow.) Olaf could have hired Anna, a junior criminal defense attorney who frequently defends MWCs, but chose not to.

Elsa takes the case to trial and prevails on a jury verdict of acquittal. She charges Olaf 30 blocks of ice, about three times what Anna would have charged, a significant portion of which was for researching criminal procedure and basic MWC law.

With the recent thaw, Olaf can’t pay, so Elsa sues. Olaf claims the fee is unreasonable under Model Rule 1.5. What result?
Pitfall 5
Dabbling

(c) The fee is not reasonable, so Elsa is not entitled to the entire amount.

Pitfall 5
Dabbling

Model Rule 1.1

Model Rule 1.5
Pitfall 6
Engagement Letters & Retainer Agreements

Must be in writing and signed by you and the client!

Important Details:
• A definition of who the client is
• Statement regarding conflicts
• Scope of Engagement
• Fee arrangement
• Arbitration Clause?
• No Guarantee of Outcome
Pitfall 7
Working When You Aren’t Getting Paid

• Can you continue to represent a client that isn't paying?

• What are your options if you have an nonpaying client?

• Best Practices - how do you prevent this from happening?
Pitfall 8
Taking the Wrong Types of Clients

Client Screening is Essential!

Watch out for these types of clients

If you have to take on a crazy client, what should you do to protect yourself?

A HOT MESS! PERIOD.
Pitfall 9
No Legal Malpractice Insurance

Do I need it?

What isn’t covered?

Is it mandatory like car insurance?

Does it cover the scope of your practice?

Key Provisions to Look For

Disciplinary Proceedings

Basics
Pitfall 9
No Legal Malpractice Insurance

Don’t get blindsided.
Pitfall 10
Conflicts of Interest

A typical reaction when we bring up conflicts of interest:
Pitfall 10
Conflicts of Interest

Or this:

Oh my god, I hate my life.
Pitfall 10
Conflicts of Interest – Part 1

Attorney Pauper is broke! He has insurmountable student loan debt and has been on a dry-spell in terms of getting new cases. Luckily, he just settled a large personal injury matter for one of his clients, Mr. McDuck. The settlement is $300,000. However, even after receiving his 1/3rd fee, he is still in dire financial straits. Nine months after the settlement, Pauper approaches McDuck, requesting a $50,000 loan at 7.99% interest. Mr. McDuck, who owns several successful small businesses, agrees to the loan. In fact, he lends him the money from his share of the settlement proceeds. The terms of the loan are reduced to writing in language that Mr. McDuck, a sophisticated businessman, clearly understands. Mr. McDuck wires Pauper $50,000. Is there a conflict?

(a) No, because the representation has ended
(b) Yes, because McDuck was not told to consult a lawyer before signing the loan documents
(c) Yes, because you should never borrow money from your clients
(d) No, because McDuck was a sophisticated businessman
Pitfall 10
Conflicts of Interest – Part 2

Chris hires Attorney Quick to handle his divorce from Kim. Quick negotiates a community property settlement, which includes a large farm. Chris and Quick discover that an oil company is seeking to purchase a portion of the land and has made Kim an offer. Despite his best efforts, Quick cannot discover the value of the offer.

Because Chris is strapped for cash, Quick continues with the negotiations and Chris eventually receives $500,000 in exchange for relinquishing his interest in the farm.

Several months after the settlement, Kim, who was impressed with Quick’s skills, contacted Quick to represent her in connection with the sale of the land to the oil company. Quick agrees. Quick then discovers that the oil company’s valuation of the farm could have increased Chris’s allocation in the settlement.

Is there a conflict?

(a) No, this is not a conflict as long as it is properly waived by both clients
(b) No, because Quick is not currently representing Chris
(c) Yes, it is a conflict and is not waivable
(d) Yes, it is a conflict because the subject matter of Kim’s matter is the same as Chris’s.
Ms. Radley hired Attorney Finch to represent her in a personal injury matter. Finch calendared the wrong statute of limitations, and the suit was not timely filed. Upon realizing his error, Finch immediately met with Ms. Radley and disclosed his error. He told Ms. Radley that he wanted to “make her whole” and offered her $10,000—Finch’s assessment of the value of her case. Ms. Radley accepted. No settlement agreement was signed. Attorney Finch notified his malpractice carrier of the potential claim. Is there a conflict?

(a) No, there is not a conflict because Finch told his malpractice carrier and gave Radley a fair value payment for his mistake

(b) Yes, because he settled his claim without involving his malpractice carrier

(c) Yes, because he is trying to cover up his mistake and thus, violating his duty of loyalty to the client

(d) Yes, because this is, at its essence, a business transaction with the client and the requirements of Rule 1.8 apply.
Thank you for your attention!

E-mail us if you have any questions!

jloganmurphy@gmail.com
mlessell@dkslaw.com
AVOIDING THE SUMMONS:
TOP 10 LEGAL MALPRACTICE PITFALLS & ETHICAL QUANDARIES

MELISSA LESSELL & J. LOGAN MURPHY

INTRODUCTION

Legal malpractice claims are on the rise. Even though an astounding number of claims are resolved without payment or prolonged litigation, the simple fact of a claim can be a persistent thorn in the heel of the most experienced and unflappable lawyer. When newly solo and young lawyers are hit with a claim, the results are even more unpleasant, since it’s likely the first time the lawyer has been thrown into the Coliseum of legal malpractice.

Fortunately, most of the mistakes and omissions made by young and newly solo attorneys can be easily avoided. Rare is the claim premised on archaic or impenetrable legal doctrine. Instead, most claims arise from the mundane day-to-day of a legal practice: Procrastination. Scheduling errors. Form contracts. Unhappy clients. The bad thing is that just about everyone reaps these bad habits from the seeds of lazy routine at one time or another. The good thing, however, is that young lawyers can easily be trained to recognize the tell-tales of oncoming malpractice or, more importantly, learn strategies to stunt its materialization in the first place.

With that in mind, we present the top 10 legal malpractice pitfalls and ethical quandaries. This is a top 10 grounded in both empirical and anecdotal data. Many of the categories are drawn from the statistical data collected by the American Bar Association’s Standing Committee on Lawyers’ Professional Liability for its Profile of Legal Malpractice Claims 2008-2011. This list is empirical in that sense. Other categories are strategically placed on the top 10 because they touch on basic facets of law practice management about which young lawyers consistently proclaim ignorance. In that sense, the list is anecdotal. Overall, we strove to collect a group of topics that would make young lawyers aware of the most common legal malpractice claims and ethical violations, while providing them mitigating knowledge to build a strong, secure, and ethical practice.

After all, as young lawyers who make a living defending other lawyers, we know the strife of a malpractice claim—a feeling we prefer that other lawyers never experience.

PITFALL 1: FORM TRANSACTIONAL DOCUMENTS

Lawyers who do not practice in professional liability are constantly shocked that form contracts and boilerplate documents were the single greatest source of legal malpractice claims from 2008 through 2011. A whopping 28.5% of all claims
resulted from the negligent preparation of transactional documents, a significant jump for the category. Part of the increase is likely due to the recession and general collapse of the real estate market, but make no mistake: preparation of transactional documents carries more potential for danger than any other activity.

Unlike other categories on this list, there is no panacea for preventing document-based malpractice. There are, however, some simple tips that young lawyers can adopt to avoid finding themselves on the wrong side of a summons. First, don’t use form documents. If you must use form documents, make sure they are generated with blanks instead of generic entity or party names. This will mitigate the possibility that the lawyer includes the wrong entity name in the document. Second, get the client’s approval of the document before filing it or signing it. Make sure the approval is not merely a formality—provide the client the document with plenty of time for a review and emphasize that the document must be satisfactorily reviewed before any further action can be taken. Finally, know exactly who your client is. We will get into this in depth later, but the entities identified in a document can be precise only if you can draw the correct lines among the parties involved.

**PITFALL 2: PROCRASTINATION, CALENDARING, AND DEADLINES**

If transactional documents are the most frequent substantive source of legal malpractice, the most common administrative errors are related to the thing William Penn called “what we want most, but what we use worst”: Time. Somewhere around 23% of malpractice claims are the result of procrastination, poor calendaring, blowing deadlines, or missing the all-important statute of limitations. Missing the statute of limitations is the error young lawyers most frequently associated with legal malpractice, and for good reason. The mistake is so obviously negligent that some courts have taken to calling expired statutes of limitations “malpractice *per se*.” And malpractice arising from expired statutes of limitations cannot be avoided by simply withdrawing or referring the case.

Never fear. Even lawyers who miss the statute of limitations have affirmative defenses. The most prevalent of these is lack of causation. In other words, the plaintiff must prove that she would have prevailed on the merits of her claim if it had been filed on time. This is a peculiarity of legal malpractice law. And the causation requirement means that a legal malpractice plaintiff often is required to prove a “case-within-a-case” at trial. The “case-within-a-case” concept is limited,

---

2 Indeed, the opposite is true, as well. If an attorney accepts a referral and allows the statute of limitations to run, even if the time in which a complaint could be filed was brief, the attorney could still be liable for malpractice. *Lenches-Marrero v. Law Firm of Averna & Gardner*, 326 N.J. Super. 382 (N.J. Sup. Ct. App. Div. 1999).
3 See *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP*, 676 F.3d 1354, 1360 (Fed. Cir. 2012) (proving proximate causation in legal malpractice cases requires a “case within a case” determination); *First Union Nat'l Bank v. Benham*, 423 F.3d 855, 860 (8th Cir. 2005) (“This requires SE Timber to prove a case within a case, or in
for the most part, to litigation-based malpractice, however. Plaintiffs sometimes need not prove a case within a case if damages can be otherwise ascertained from evidence in transactional-based malpractice.

The better approach than knowing an effective defense is available, however, is to establish a comprehensive calendaring system so that a claim never arises in the first place. In his article on this very topic, Joseph Scott recommends multiple technology-based calendaring solutions, including establishing and documenting calendar practices so that a solution that best fits the workflow can be chosen; integrating the calendar into desktop solutions, such as Outlook, GroupWise, and Lotus Notes; creating one centralized calendar with no peripherals; or even purchasing a software-as-a-service computerized date calculation program. Automating deadline calculation can be a tremendous productivity enhancer, not to mention assuaging fears over missed deadlines.4

Of course, the most practical solution to time-based malpractice is the one lawyers have the most trouble with: Don’t procrastinate.

**PITFALL 3: SUING A CLIENT**

Suing a client is never a good idea. It almost always results in a counterclaim for legal malpractice, which then has to be defended, and can sometimes lead to an ethics complaint, which will often be deferred until the civil case concludes, dragging out the controversy even more. The only situation in which a suit for fees should be contemplated is when the fee is substantial and the result for the client was uniformly positive.5 Even then, a lawsuit should be pursued only if the engagement letter is sound, you have no other options, and you are prepared to face a legal malpractice claim and ethics complaint.

Luckily, the need for suing a client can be obviated by avoiding many of the pitfalls below. For example, be sure to discuss fees and have a clear mutual understanding regarding the fee arrangement and payment with your client before undertaking representation. Determine whether the client can actually afford the payment to which she agrees. Finally, put the fee arrangement in the engagement letter and require the client to sign the agreement. Some other tips to avoid suing

---


your client include billing early and often to test payment ability and engaging in frequent, frank conversations about case management, billing, and payment.

Suing a client is one of the most attractive pitfalls for young lawyers, who see the legal soundness of their contractual claim and assume it will be a slam dunk. Not so. The legal malpractice claim—which will inevitably be asserted—is notoriously difficult to dispose of on summary judgment. And now, the slam-dunk case for fees has become a protracted, thorny malpractice claim lasting 18 months.

Suing for the $10,000 in fees you earned may not be as worthwhile as you think.

**PITFALL 4: REPRESENTING A CLIENT AFTER THE RELATIONSHIP HAS SOURED**

A close runner-up to suing a client for easiest way to get sued for malpractice is continuing to represent a client after the relationship between the attorney and client has soured. As counsel for attorneys sued for malpractice, this is one of the most common precursors to litigation we see. Anecdotally, we estimate that somewhere north of 50% of all legal malpractice claims arise out of an attorney-client relationship that was headed south long before the attorney withdrew.

Clients don’t sue lawyers they like. On the flip side, clients often sue lawyers they never see or with whom they only communicate through e-mail. There is an easy solution to this: Visit with your client face-to-face whenever possible, and have frank telephone conversations when problems arise.

Finally, this pitfall is especially prevalent when the lawyer is faced with an obstinate client who, despite himself, is regularly paying the bills. It’s really tough to withdraw from representing a cash cow, but sometimes it needs to be done. If you are regularly getting into tiffs with a client, you need to ask yourself a question: Are the fees I am going to accumulate throughout this case worth a legal malpractice claim? Probably not.

**PITFALL 5: DABBING**

Dabbling is dangerous. If you don’t know for certain that you have the expertise to handle a case, don’t try. There is no such thing as a simple will or a cut-and-dry cause of action. Legal malpractice insurers of all stripes frequently advise their lawyers not to dabble, and they see dabbling is a fast-track to suit.6

---

Not only does dabbling expose the dabbler to civil liability, it usually contravenes the lawyer’s ethical obligations. Model Rule of Professional Conduct 1.1 requires lawyers to “provide competent representation to a client,” which entails “the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation.” While comment 2 to Rule 1.1 emphasizes that the new lawyer can be just as competent as to the experienced lawyer through careful study and association with other lawyers, comment 2 does not immunize a lawyer from civil liability just because she studied hard.

Dabbling also implicates Model Rule 1.5 addressing fees. In prohibiting lawyers from charging “an unreasonable fee,” the rule necessarily requires a fee equivalent to what a competent attorney in the field would charge. As Angie Hoppe, a claims attorney with Minnesota Mutual Lawyers Insurance Company, put it: “[I]t is not acceptable to bill a client for the attorney’s learning curve in a new area of law.”

**PITFALL 6: FAILING TO HAVE AN ENGAGEMENT LETTER OR RETAINER AGREEMENT**

Nearly 16% of all legal malpractice claims stem from poor or inadequate client communication. It is important to have a mutual understanding at the outset as to what the parameters of your representation will be. There should be a clear understanding of the goals of the representation, when the representation will begin and end, the responsibilities of both the client and the attorney, and the scope of the representation. The engagement letter should be in writing, dated, and signed by both the attorney and the client. In fact, some jurisdictions require an engagement letter and specify what the letter must contain. But this is more than a legal requirement—a clear, comprehensive, and accurate engagement letter is

---

7 See, e.g., Horne v. Peckham, 97 Cal. App. 3d 404 (Cal. App. 3d Dist. 1979), disapproved of on basis of time of accrual of legal malpractice claim, ITT Small Business Fin. Corp. v. Niles, 9 Cal. 4th 245 (Cal. 1994); Ctr. Found. v. Chicago Ins. Co., 227 Cal App. 3d 547, 557 n.7 (Cal. App. 2d Dist. 1991) (“[A] lawyer may be disciplined for representing a client in a field in which the attorney has no experience and without associating or consulting a sufficiently experienced attorney . . . and may be sued for malpractice for venturing into an unfamiliar area without the assistance of a specialist.”).  
8 Cf. Matter of Fordham, 668 N.E.2d 816 (Mass. 1996) (finding as unjustified a large fee charged by a “very experienced senior trial attorney with impressive credentials” in a DUI case, where the attorney had never tried a DUI case)  
9 The Dangers of Dabbling, supra, at 6.  
11 Often times, an engagement letter will not specify through what phases the representation will continue through. For example, in a litigation setting, will the same attorney handle any appeals? Will appeals be handled at the same hourly rate? Will you handle judgment enforcement? Alternatively, assume you provide tax advice to a client. If that client follows the advice and as a result, the collector of revenue institutions some sort of collection proceeding, will you represent them in that phase of the tax dispute?  
12 See, e.g., Wisconsin Supreme Court Rule 20:1.5(b) “Fees,” which requires a written engagement letter to be signed by the client before the representation begins, or within a reasonable time thereafter, stating the scope of representation and the fees associated with the same.
frequently cited as the most important best practice in risk management for lawyers.

Above and beyond the general elements discussed above, a proper engagement letter should also define who the client is; contain a statement regarding conflicts; set forth the scope of the representation; contain information pertaining to the fee arrangement and terms of payment (including, if possible, the anticipated schedule of legal fees and expenses); state how the matter will be staffed; and state how the attorneys and clients will communicate. Other options for the letter, depending on the circumstances of the engagement, include a statement that the lawyer does not guarantee any particular outcome and an arbitration clause.\(^\text{13}\) Including any of these various provisions will only strengthen the letter.

Anecdotally, malpractice suits are often filed by plaintiffs under the mistaken impression that they retained a particular attorney to pursue their case or claim, even though, in reality, the lawyer either declined the representation entirely or has withdrawn during the pendency of the representation. In the interest of avoiding such a situation, “non-engagement” and “disengagement” letters sent to rejected potential or former clients are just as critical as letters initiating the representation. Non-engagement letters can be used in a variety of situations where the lawyer never formally accepts representation of the client. As a matter of best practices, it is important to state any upcoming deadlines or statutes of limitations in the non-engagement letter along with a statement suggesting that the rejected potential client consult new counsel immediately should they wish to pursue their claim. Disengagement letters are used to terminate the representation. These letters should clearly provide that no further work will be done on behalf of the client and that the representation is terminated. They should also tell the client how their file materials will be kept and for how long.

**PITFALL 7: TAKING THE WRONG TYPE OF CLIENT**

Sometimes the best way to avoid problems on the back-end is to have an aggressive screening process on the front-end. Just like your standards for friends and romantic encounters, you should implement standards on the types of clients you will take. Do not be afraid to turn down a client.

\(^{13}\) If you chose to put an arbitration clause in your engagement letter, be sure to check if your jurisdiction has any additional requirements that you must follow to allow for the arbitration clause to be enforceable in a subsequent legal malpractice case. In Louisiana, an arbitration clause in a retainer agreement is enforceable assuming that the clause provides informed consent to the former client about the specific effects of binding, legal arbitration. *Hodges v. Reasonover*, 103 So. 3d 1069 (La. 2012). The *Hodges* Court specified seven components of binding arbitration that the client must be informed about, based on applicability: 1) waiver of the right to jury trial; 2) waiver of the right to appeal; 3) waiver of the right to broad discovery under the Louisiana Code of Civil Procedure and/or the Federal Rules of Civil Procedure; 4) the fact that arbitration may involve substantial upfront costs; 5) the nature of the claims covered by the arbitration clause, such as fee disputes and legal malpractice actions; 6) the fact that the arbitration clause does not prevent the client from filing a disciplinary complaint; and 7) that Client can speak with independent counsel before signing the retainer. *Id.* at 1077.
Although you will develop your own client screening policies as you develop your practice, here is a brief list of the types of clients you should think twice about before accepting the representation of:

1. Clients who have retained, fired, or been fired by multiple lawyers for the same matter: This is can be a sign that the client has not been paying his former attorneys, that the client has unrealistic expectations, that the case lacks merit, or that the client is exceedingly difficult to work with. Don't trick yourself into believing that you'll be the lawyer who will succeed in changing the client.

2. Clients who are looking to you to save their case after another lawyer has messed it up: If you decide to represent this client, be aware that you are obligated to inform them about the mistake that their prior attorney made. Furthermore, should the case not resolve in a manner successful to your client, you could be comparatively at fault in any future legal malpractice case. Even if you do nothing wrong, you may inevitably be dragged into the malpractice proceedings between the client and former counsel.

3. Clients that lie, manipulate or misconstrue the facts, or cannot follow simple instructions: If you find yourself in this situation, make sure you document everything in writing (which you should be doing, anyway).

4. Clients that are overly concerned about your fee or cannot afford you.

5. Clients that bring the case right before the statute of limitations has run, or need everything in a rush: These clients do not give you enough time to properly research and draft necessary pleadings. If you are rushed, you are more likely to make mistakes, which in turn could lead to malpractice claims or disciplinary complaints.

6. Clients with unrealistic expectations or those that cannot face the reality of their case: You will never been able to please these clients. Promising the moon when a case will crater will only lead to a claim by the client who believed and expected everything you promised.

7. Clients that exhibit personality traits that you abhor or clients that are mean or rude to your staff: If you struggle to work with your client from the outset, in all likelihood, your relationship will quickly sour when the case gets tough.

8. Trust your gut: If it feels weird, don’t take it.14

---

14 Opinions differ as to what other categories of clients you should watch out for. The above list is an amalgamation of common types of unsavory clients, with a particular eye toward clients who often end up bringing malpractice
PITFALL 8: WORKING FOR FREE, OR CONTINUING TO WORK WHEN YOU AREN’T BEING PAID

As discussed above, fee disputes often morph into legal malpractice claims. Unless you are intentionally undertaking a case pro bono, you should not continue to work for a client if the client stops paying you. If a client is not compensating you for your services, it is likely that it will impact your ability, or at least your desire, to act diligently and promptly on behalf of your client.15

Similarly, you should not agree to represent someone for free, even family and friends. Because lawyers often view cases taken for family and friends as favors, the cases often do not get the time and attention they need. Additionally, cases for family and friends are often not handled as a dispassionate, arm’s length business arrangement. The result is the lack of an engagement letter, lack of communication, and unrealistic expectations.

The best defense to non-paying clients is a good offense. Minimize the likelihood of having this problem by getting a retainer up front for what you believe to be the initial costs associated with your representation. Be sure to bill the client regularly, and no less frequently than monthly. And be upfront with your clients about how much you think something is going to cost—if costs increase, talk to the client to avoid sticker shock. As with just about every pitfall on this list, communication is key.

That being said, if you find yourself in a situation in which the client is not paying you, you may withdraw.16 If you do, make sure you are in compliance with Model Rule of Professional Conduct 1.16.

PITFALL 9: NOT HAVING LEGAL MALPRACTICE INSURANCE

Legal malpractice cases are on the rise. It is estimated that lawyers who are starting their careers now will face an average of three malpractice claims during their time in practice.17 This is not to say that any of those claims will be meritorious, but you will have to defend them nonetheless. Without malpractice

---

15 Unfortunately, Model Rule of Professional Conduct 1.3 does not have any exceptions for when your client is not timely paying your bill! Rather, a lawyer must continue to timely and diligently act on behalf of their client unless the relationship has been properly terminated. See M.R. 1.3, Comment 4 (“[u]nless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client”).

16 See, Rule 1.16 (5) and (6).

insurance, you will have to pay defenses costs out of pocket and your personal assets may be at risk in the event of an adverse judgment or agreement to a substantial settlement. Simply put, not having legal malpractice insurance is a risk you do not want to take.

Although legal malpractice insurance is mandatory in only one state, the growing trend is to require attorneys to disclose whether they have a sufficient amount of coverage. The ABA passed a model rule on disclosing legal malpractice coverage in 2004, and 28 states have some form of disclosure requirement.

Although legal malpractice policies vary from carrier to carrier, most of them are “claims-made” policies. “Claims-made” policies provide coverage only if the claim is made during the policy period. Additionally, legal malpractice policies often have “eroding” limits, meaning that the defense costs incurred in defending the claim reduce the limit on the amount of coverage per claim. When shopping for coverage, you want to make sure that it covers the full scope of your practice, including any additional work performed by you ancillary to your practice, such as such a notarial liability, trustee/executor liability, title insurance, mediator, etc. Also, check to make sure it covers you if you get sued by an adversary for such things as slander, libel, invasion of privacy or malicious prosecution. Many policies also provide at least some coverage for disciplinary proceedings. Some policies have “consent to settle” and “choice of counsel” provisions.

---

18 Oregon requires lawyers to have legal malpractice insurance.
20 Jeffery Watters, What They Don’t Know Can Hurt Them: Why Clients Should Know if Their Attorney Does Not Carry Malpractice Insurance, Baylor Law Review, 62 BLRLR 245 (Winter 2010). These requirements vary state to state. For example, the Virginia State Bar requires its attorneys to disclose to it whether they are insured, but not require disclosure to the client. Id. Compare, South Dakota Rule of Professional Conduct 1.4(c) (requiring that South Dakota attorneys disclose on their letterhead if they do not have legal malpractice insurance, or if their limits are less than $100,000 per claim; California Rule of Professional Conduct 3-410, “Disclosure of Professional Liability Insurance” (requiring California attorneys to provide written notice to their clients should they not have legal malpractice insurance).
21 St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 535 n.3 (“An ‘occurrence’ policy protects the policyholder from liability for any act done while the policy is in effect, whereas a ‘claims made’ policy protects the holder only against claims made during the life of the policy.”); DiLuglio v. New England Ins. Co., 959 F.2d 355, 358 (1st Cir. 1992) (“A typical ‘claims-made’ or ‘discovery’ policy . . . covers acts and omissions occurring either before or during the policy term, provided the claim is discovery and reported to the insurer during the same policy term.”) (emphasis removed).
22 See Barbara Wolff Engler, Eroding Limits Policies Create Coverage Issues, 2 NO. 4 LEGAL MALPRACTICE REP. 12 (1991) (An eroding limits policy subtracts “any attorneys’ fees or costs incurred in defending a claim . . . from the policy limits, thereby reducing the amount available to settle claims or pay judgments.”).
23 Generally you can determine what is covered by reading the definition for “legal services,” or “professional services.”
24 Handling disciplinary complaints is a very specialized practice area. Many times, the initial response to a disciplinary complaint will determine whether the Board will launch an investigation into you. A doctor wouldn’t be allowed to operate on themselves, so why do you think you can respond to your own disciplinary complaint? Some policies also offer to appoint an attorney if you have to respond to a subpoena, or are going to be deposed but aren’t a party to the action.
Like any type of insurance, you can pay to have more or less coverage. Determining your limits requires an examination of what type of exposure you could have, what type of cases you may handle, your personal comfort level with risk and an evaluation of your personal assets.

It is also important to note what would not be covered by your professional liability policy. Generally speaking, intentional acts and fraud are not covered. If your state allows for the recovery of punitive damages in actions against attorneys, those are often not covered. Additionally, if you serve as an officer or a director of a business, even if you do so as a lawyer, those services may not be covered.25

The ABA and many state bars offer resources and aides to help you select the right type of professional liability policy to meet your needs. If you are unsure about what type of policy is right for you, take some time to review the insurance resources located on the website of the ABA Standing Committee on Lawyers’ Professional Liability.26 Certain carriers, such as Minnesota Lawyers Mutual, even offer specific plans targeting to providing new, solo attorneys with coverage at an affordable rate. Simply put, there is no good reason not to have legal malpractice insurance.

**PITFALL 10: NOT SPOTTING THE CONFLICT**

Conflicts can be tricky. Undoubtedly, when difficult situations present themselves to you in real life, they are not as straightforward as you’d like them to be. For example, is there a conflict of interest in approaching a former client for a loan? What about participating in an investment opportunity when your client is also a co-investor, but not the party that requested your investment? Can you handle a case for a party who was previously adverse to a former client? While it is fairly easy to determine which rule of professional conduct should be analyzed, the answer is not always clear or consistent.

The presentation accompanying this paper will pose hypothetical ethical quandaries, based in part on Model Rules of Professional Conduct 1.7 (“Conflict of Interest Current Clients”), 1.8 (“Conflict of Interest: Current Clients: Specific Rules”), and 1.9 (“Duties to Former Clients”). These rules do not, except in very specific circumstances, prohibit you from representing a party that is not directly adverse to a current client. Rather, this of the rules as describing the “hoops” to jump through to make sure the current client is adequately informed and their interests protected.

Rule 1.8(a) deals with situations in which a lawyer participates in a business transaction with a current client. Rule 1.8(a) states as follows:

---

25 Make sure you are listed as an insured on that business’s Directors and Officers errors and omissions policy.
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Thus, you are allowed to participate in a fair transaction, provided that your client gives fully informed, written consent after being given the opportunity to consult with another attorney. The scope of Rule 1.8(a) is not simply addressed to business transactions outside of your law practice. The comments to Rule 1.8(a) specify that it also applies to “lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice.”

We started off this pitfall by saying that conflicts are tricky, and that holds true. But the solution doesn't have to be. Even though the academic resolution of a particular set of circumstances may be difficult to reach, the solution of informed consent is always available. By that, we mean that whenever you are presented with an uncomfortable situation in which you are concerned that a conflict may be implicated, you should play it safe with informed consent. Discuss the situation with the client, give the client time to consult with another lawyer if they so desire, and ultimately obtain the client’s informed consent, in writing. That will solve almost every ethical quandary and prevent surprises from cropping up.

**CONCLUSION**

These are just a smattering of the pitfalls and ethical quandaries faced by young and newly solo lawyers. We hope the solutions presented help you avoid the traps others may fall into. Stay vigilant and utilize the plethora of resources provided by bar associations, private companies, and malpractice attorneys. There's no need to face a difficult situation alone when so much help abounds.
AVOIDING THE SUMMONS:
TOP 10 LEGAL MALPRACTICE PITFALLS & ETHICAL QUANDARIES

MELISSA LESSELL & J. LOGAN MURPHY

MELISSA M. LESSELL

Melissa is a partner in Deutsch, Kerrigan & Stiles, LLP’s Commercial Litigation and Professional Liability Department. She is based in the firm’s New Orleans office. Her practice includes complex commercial litigation and insurance coverage with an emphasis on professional liability defense. She represents lawyers, accountants, insurance agents, financial institutions and other professionals in both litigation and disciplinary proceedings. Melissa also has experience in multi-district litigation and complex class actions. Melissa earned a J.D. *cum laude* from Tulane University Law School in 2009, and a B.A. from the University of California, San Diego in 2005.

J. LOGAN MURPHY

Logan is the Young Lawyers Division Liaison to the ABA Standing Committee on Lawyers’ Professional Liability, the ABA’s clearing center for legal malpractice claim statistics, insurance for lawyers, and malpractice prevention information. Logan is currently a judicial law clerk at the United States District Court for the Middle District of Florida. Before his clerkship, he practiced at Hill Ward Henderson in Tampa, Florida, where he focused on legal malpractice defense, commercial litigation, and appeals. Logan holds a J.D., Order of the Coif, from Vanderbilt University Law School, and a B.S. in Finance from the University of Florida.