



Preventing the Top 10 Malpractice and Ethics Mistakes

What You Should Know

1. MISSED DEADLINES:
1. No matter how strong your case or persuasive your argument, it won't do you any good if you miss the deadline to make it. Missed deadlines remain one of the most common malpractice mistakes, both because attorneys fail to accurately calendar or because they fail to react to their calendar. A computerized calendaring system with "ticklers" that are sent to every attorney and staff member working on a case is a great first step, but any system is only as good as the information put into it and the people using it. Do not rely on support staff to know the rules that apply to scheduling deadlines. Be certain staff is adequately trained and supervised concerning calendaring, especially on atypical cases. When a case comes in, be aware of any rules that apply to calendaring deadlines, especially statutes of limitations that can be fatal to a case. It is good practice, for example, to file a case proactively so that discovery responses that may identify additional defendants are returned before the statute runs, and those defendants can be added. Establish protocol to enter scheduling orders into the calendaring system, and prevent confusion by removing dates that have been replaced by new orders.

2. CONFLICT OF INTEREST:
2. While a conflict of interest isn't a basis for a malpractice claim in and of itself, even the appearance of a conflict can lead to ethics complaints or exacerbate malpractice claims. A comprehensive conflict checking system will allow you to identify potential issues and address them head on. Most lawyers know to check for conflicts between or among former and current clients and adverse parties, but it is good practice to also check for conflicts with fact and

expert witnesses, staff, and other interested parties who may not be actual litigants. It is also good practice to run conflicts checks each time a new litigant is added, or discovery reveals new potential conflicts. Once a potential conflict is identified, have a procedure for disclosing, discussing, resolving, and waiving (if possible) conflicts. Communication is key – address potential or actual conflicts directly so no one is blindsided later on. For particularly complex situations, consult your Bar ethics committee or Board.

3. SUING THE CLIENT:
3. Law firms should be particularly careful about suing clients for unpaid legal fees. This often provokes a Bar complaint or malpractice counterclaim, particularly where there is room for the client to complain about a bad result. The best practice is to ensure that issues relating to legal fees are addressed up front and throughout the representation so that a client's account never becomes delinquent. Be clear with your clients about their objectives and how much it will likely cost to obtain them. Discuss how a client intends to pay your fees, a sizeable cash retainer, credit, a gift from a relative, a payment plan. Be sure to regularly send itemized bills (generally every month), and regularly demand payment. If a client is struggling to pay as agreed, discuss this with the client and determine whether there is a problem the firm needs to address, such as dissatisfaction with service, confusion over charges, or a need for a revised payment plan. Staying on top of billing issues is the best way to

avoid the difficult business decision of whether to sue for unpaid legal fees.

4. ENGAGEMENT AGREEMENTS:
4. It is good practice to use detailed engagement agreements, even with well-established clients. An engagement agreement is an excellent opportunity to clearly discuss with your client the scope of the representation, both what you are agreeing to do for the client and what you are not. The more comprehensive the agreement, the better. Obtain agreement in writing as to how fees will be collected, how often and by what method you will communicate with your client, and how any disagreements will be resolved. Engagement agreements are not a mere formality, they are an excellent tool to avoid malpractice and ethics complaints.

5. DABBLING:
5. While it is tempting to take any and all business that comes through your door, this can be a recipe for malpractice disaster. Be certain that you have the necessary expertise, time and resources to handle each representation, or can associate with a lawyer who can help guide you. If you feel out of your element, it makes sense to refer clients to attorneys more suited to the representation. It is far better to miss out on some possible legal fees than to find yourself in over your head on a matter you were not prepared to handle, possibly facing malpractice allegations or even discipline from the Bar. If you would like to expand your areas of practice, be sure you have the time and resources to devote to getting up to speed.

6. NEGLECT:
It is human nature to focus on things we enjoy and ignore things that present challenges. As lawyers, we cannot afford to indulge this desire. It is far better to present your client with “bad news” – whether an unfavorable ruling or an inadvertent mistake – while there is still time to take action to repair or improve the situation. Good client relationships develop when the client feels informed and included in the legal process. Discuss with your clients how they prefer to communicate: phone calls, emails, and letters. Be available to your clients, and always see that their communications are returned with 24 hours, even if it is just a quick call from your assistant letting the client know you received the message and will address the situation shortly. Take the time to document communication. It is good practice to send a follow-up email detailing phone or in-person conversations so that there is no confusion about what was discussed (or if there is confusion, it can be addressed). The file should indicate the work you have done, your analysis, all discussions you have with your client, and all decisions made and decided against and why.

7. BUSINESS INTEREST:
Exercise caution when making a decision to become involved in a business venture with your client, especially when providing legal services in connection with that business. It can be tempting to take a business interest in lieu of fees, but it may lead to conflicts and allegations of overreaching or improperly motivated legal advice. If there are any problems

with the business interest, all of your conduct as a lawyer will be scrutinized. The same is true when handling legal matters for a client when you are also a member of the client’s board of directors, officer, or shareholder. Importantly, there is often no coverage under legal malpractice policies for non-legal services, or for legal services in connection with a business interest of the lawyer.

8. TRUST ACCOUNT:
For many lawyers, the “business” side of law seems both daunting and baffling. Failure to properly maintain your trust account can lead to malpractice and ethics complaints and even loss of license. Be sure to understand the ethical rules governing trust accounts, and have solid accounting procedures in place. While delegation to those more skilled with numbers is okay, be sure that you, as the attorney, review and approve monthly trust account reconciliations. Have procedures in place to prevent mishandling of funds, such as limiting check signing authority, separating delegation of receipts and reconciliation, and requiring two signatures for checks over a certain amount. Regular audits by a CPA familiar with lawyer trust accounts can help you spot potential problems in your system that could make you susceptible to fraud or abuse of funds.

9. MISREPRESENTATION:
As lawyers, we endeavor to zealously advocate for our clients, which often includes spinning facts in ways that benefit our position. There is a difference between a creative argument, however, and

outright misrepresentation. While the intent is likely to help or protect your client, misrepresentation causes a loss of credibility with opposing counsel and parties, the judge, and even your client. Depending on the severity of the misrepresentation, it could cost you your law license. Be absolutely certain that you are above reproach in representations made to your clients, opposing counsel and parties, the court, investigators, creditors, government agencies, and all others.

10. SCREENING CLIENTS:
Attorneys reporting claims routinely comment that they knew they should never have agreed to the problematic representation. If you get an “off vibe” from a potential client or situation, listen to your instinct and decline the representation. Be especially cautious if the potential client has unreasonable expectations, has had another lawyer (or several) before coming to you, wants to micromanage the representation, seems to have a personal vendetta rather than a legal issue, or is rude or offensive to you or your staff. Sometimes concerns can be identified, addressed, and alleviated. Oftentimes, however, it is best to simply decline the representation rather than take on a client or legal issue that is not a good fit with your practice.

Many attorneys get in trouble by not understanding and reviewing all the rules that apply.