



Avoiding legal malpractice: Pitfalls of problem clients

The plaintiff's attorney is the most likely to commit legal malpractice. Proper evaluation of the case and client can help avoid this pitfall.

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Beginning in law school, eager students are warned about the pitfalls of legal malpractice. New associates worry that their lack of experience can lead to that fatal mistake and the end of a promising career. But guess what? Fresh from law school attorneys are not the ones most likely to commit the egregious errors that result in a client filing a complaint with the bar association or filing suit for malpractice. Still "wet-behind-the-ears," newbie lawyers go to great lengths not to make mistakes. They still hit the books when they feel uncertain. They ask questions of mentors. They are still smart enough to know they don't know everything.

In reality, it is the more seasoned attorney that is the most likely to commit legal malpractice. And, among all attorneys, it is the plaintiff's attorney who, statistically, commits legal malpractice more often than attorneys in other fields. For the attorney who is still willing to learn, there are steps to take that can prevent him or her from receiving that dreaded notice that begins with "a client of yours has filed a complaint . . ."

The cause of action for legal malpractice is traditionally one of professional negligence asserting that the attorney has failed to use the skill, care and diligence commonly possessed by members of the legal profession. That lack of skill must result in injury to the

plaintiff that is actual, not speculative. In other words, if the attorney's incompetence resulted in the client losing the case, the attorney can be liable for monetary damages that may include punitive damages in rare cases.

Malpractice complaints in California

In California, a client may file a complaint with the State Bar and sue for legal malpractice. A client has an absolute right to file a complaint with the State Bar and that complaint will be evaluated by the Intake Unit. Almost all of the annual dues paid by attorneys go to fund the regulatory and discipline functions of the bar. In the most recent statistics, the Intake Unit received 73,259 calls in 2007 and 73,288 complaint forms were downloaded. An attorney can lose the right to practice for a period of time or be forced to submit a resignation, depending on the nature of the complaint and what the investigation reveals. This can be far more damaging than the average malpractice suit, which might result only in monetary damages. The double whammy, of course, is when the malpractice suit results in further disciplinary actions by the State Bar.

While State Bar complaints may involve Code of Ethics violations, many of these violations can translate into viable causes of action in a malpractice lawsuit. Some of these include misrepresentations

to clients, representation of interests adverse to the client's interests, unconscionable fees, failure to perform and failure to communicate with the client.

Evaluate, evaluate, evaluate

First of all, you must develop the skill to evaluate a case. This generally takes more time than the half-hour some attorneys set aside to meet with a new client. You need to determine if the case has merit, and even if it does, if the likely recovery makes the case economically viable. Are there statute of limitation problems? What will it cost you to do the work? Will you need expert witnesses?

Analyzing a case takes time. You may need to confer with someone more experienced to determine whether the case has merits. Taking shortcuts here will only lead to problems down the road.

Next, you have to evaluate the client. While the case may have merit and the recovery might be substantial, you have to be able to work with the client for some time. You have to be willing to walk away from a case when a client signals to you that they may present the following problems:

- *The client has unrealistic expectations.* If you cannot manage the client's expectations at the start of the case, then you are just asking for trouble thinking it will get better with time.
- *The client is "needy" and requires more than handholding at times.* This can often



translate into emotional demands on your time that you may not be able or willing to meet.

- *The client's primary goal is seeking revenge.* This is a client who, no matter what result you achieve, will never be satisfied. Read: a client who will file a complaint with the State Bar or file a malpractice lawsuit.

- *The client has fired other attorneys and ends up in your office.* You need to ask yourself why your experience with this client will be any different.

- *The client has previously sued other attorneys for malpractice or has filed complaints with the State Bar.* It is interesting to note that 36 percent of the clients who filed complaints with the State Bar filed subsequent complaints against other attorneys.

You may pride yourself on your ability to manage clients and maintain appropriate boundaries, but too few attorneys actually understand the difference between maintaining appropriate boundaries and showing appropriate empathy in the face of the client's real emotional pain. While this is the subject that deserves more discussion, for purposes of evaluating a client, be aware of the red flags – at the very least. Use an abundance of caution with clients who signal these tendencies.

Pitfalls

Finally, you must be able to honestly evaluate your ability to handle the potential case. Phil Feldman, a board-certified specialist in legal malpractice and an expert witness in malpractice cases for the past 23 years, cites the following "pitfalls" for attorneys that often lead to malpractice claims:

- Representing friends, lovers or the boss's family;
- Unwillingness to hurt a client's feelings by maintaining legal objectivity over internal empathy;
- Unwillingness to challenge a supervisor's view of the law, the case or the client;

STATE BAR ALLEGATION CATEGORIES BY PERCENT FOR 2007

Duties to Client	15%
Fees	13%
Handling of Funds	12%
Interference with Justice	10%
Performance	35%
Personal Behavior	10%

- Undertaking any case with minimal damages;
- Assuming the client has told you all the relevant facts accurately;
- Waiting until trial to hire expert witnesses;
- Avoiding settlement talks in favor of going to trial;
- Failing to recommend accepting a fair settlement before going to trial;
- Failing to evaluate your lack of expertise and failing to timely associate or consult with more knowledgeable colleagues; and
- Failing to refer a case out when you lack the expertise and experience to handle the matter effectively.

Plaintiffs' lawyers consistently rank at the top of the list of lawyers who are sued for malpractice. Feldman says there is good reason for this. Each case, from fender-benders to products liability to medical malpractice, requires a special subset of skills and knowledge. Just because you have mastered the fender-bender doesn't mean you are ready to jump into products liability. Does this mean you are forever relegated to handling a narrow range of cases? "No," says Feldman. "But," he cautions, "You must be willing to hit the books, stretch yourself and seek competent advice when you need to."

Some daily do's

There are things that you can do every day that will help insure that you avoid the pitfalls of legal malpractice and clients who feel the need to lodge complaints with the State Bar.

- **Do** return phone calls every day. If you cannot return the call, have a member of your staff return the call, explaining to the client when you will be able to speak with him or her.

- **Do** keep accurate track of your time on a case. Include necessary details such as the nature of the phone call or the research that you performed. This information will enable the client to be adequately informed about the work you are doing for them.

- **Do** document your file. Keep an accurate log of all phone calls and summarize them, particularly calls to and from the client. Keep copies of all letters and other communications. Writing notes on the inside of the file cover is not going to impress the judge or jury.

- **Do** turn down cases you feel you cannot adequately handle and document your referral with letters to the referring attorney and potential client.

- **Do** trust your gut. Even if you cannot articulate the reason, stay away from potential clients and cases that make you uneasy.

- Finally, if you make a mistake in handling a case, **do** own up to it right away. The client may not be happy about it, but if the client understands what happened and what you have done to address the matter, you are less likely to face the possibility of a lawsuit.

Some don'ts to note

- **Don't** give advice in a social setting.
- **Don't** take on work beyond your expertise.
- **Don't** take on cases that overload you.
- **Don't** ignore client phone calls.
- **Don't** take on the "emergency case" before you have adequate time to investigate the facts.



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• **Don't** agree to represent a client who makes you uncomfortable. Even if you can't articulate the reasons, the feeling probably won't go away and you will be left with a case you don't want to work on and a client you don't want to represent.

Conclusion

Like it or not, law is a business as well as a profession. You have to man-

age both aspects well. And you need to make a commitment to not get complacent – to keep learning – to stretch yourself. In that way you won't fall victim to your own complacency and you will find that the act of continually sharpening your pencil keeps you out of the pitfalls of malpractice and gives you greater satisfaction in the quality of the work you do.

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