Shape & Build Your Practice

Minimizing ethics and malpractice problems

By Charles E. Lundberg

There are two basic principles for shaping a law practice to effectively deal with legal malpractice and legal ethics issues: First, practice in such a way that no legal malpractice or legal ethics problems could ever arise. Second, have a carefully thought-out plan and procedure for dealing with potential malpractice and ethics issues when they do arise — because they will.

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The first part of this article focuses on how not to commit legal malpractice or ethics violations. The second part addresses what to do when a potential malpractice/ethics problem arises.

Practice makes perfect

Practice in the areas you know.

The quickest path to malpractice is to take on a legal matter that you are not competent to handle. Graduating from law school does not make you a competent lawyer in every area of law. Be scrupulously honest with yourself about what types of cases you can proficiently handle, and then stick to those areas of the law.

The first legal malpractice case I defended, over 20 years ago now, involved a very accomplished trial lawyer — a lawyer whose name would be included in any list of the top trial lawyers in this state — who for some reason had decided to "help out" a client with a commercial transaction, the transfer of a small business. He figured it would be okay to use a standard Minnesota real estate contract-for-deed form to paper an installment sale of corporate assets. That was a mistake — an expensive mistake.

It is possible to become proficient in new areas of law, of course, but it takes careful study and perhaps association or consultation with someone who is an expert in that field. It doesn't happen overnight. If you are not already proficient in an area and do not intend to invest the time and effort to become so, then don't take the case.

Maintainance issues

Maintain good client relations, don't create great expectations and remember it is the client's matter and not yours.

Happy clients do not sue their lawyers or file ethics complaints. Only unhappy ones do. Maintaining good client relationships must be a constant, everyday focus.

Avoid creating great expectations. The law is a crapshoot. You don't know what a judge or jury might do with your client's case. Why in the world would you go out on a limb making rash and rosy predictions about what will happen? If anything, err on the opposite side; emphasize to your clients all of the ways the matter could go bad, so they'll be pleasantly surprised when you win.

Above all, remember that it's not your case, it's the client's case. This is not just a matter of allowing the client to make the important decisions on the case, such as whether to settle. It's much deeper than that. A lawyer who doesn't constantly keep this perspective not only loses critical objectivity but also runs the risk of overstepping the proper role of "counsel" in this delicate fiduciary relationship. Cultivate a mindset that this is, in fact, the client's matter in every respect — you are just there to give advice and counsel on legal details.

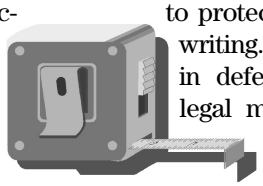
The power of communication

Communicate, communicate and communicate — in writing.

A lack of timely communication is one of the most prevalent problems giving rise to legal malpractice claims. It is clearly the cause of most ethics complaints.

Information about the client's matter should be communicated frequently and regularly. And it should almost always be in writing. Whenever you have oral communications with the client, dictate a short memorandum or confirming letter. Make this a habit of your daily routine. Put *everything* in writing.

Mark this well: An angry client is not going to remember things the same way that you do. And in the face of a credibility contest between you and your client, a jury or other fact finder is not going to give you the benefit of the doubt in most cases. The only way to protect yourself is to put it in writing. Nothing is more helpful in defending a nonmeritorious legal malpractice claim than a written record that proves the lawyer's side of the story. The same goes for dealing with ethics complaints.



Remember, the most painful kind of legal malpractice case is the "if only" case, where the lawyer-client laments, "If only I had confirmed that conversation in writing." It happens all the time.

Conflicts check

Watch for and properly deal with potential conflicts of interest.

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Conflict problems usually sneak up on you. To be sure, some of the obvious situations — representing both the husband and the wife in a divorce, representing both sides of a real estate transaction — don't seem to happen much any more. Problems frequently arise, however, in a situation where more than one person is involved on one side of a transaction — multiple shareholders or principals in a business, coparties in litigation, etc. Be very clear about who you do and do not represent. Always put it in writing.

Review the conflict rules (Minn. R. Prof. Cond. 1.7-1.10) every six to 12 months and analyze each of your cases in terms of "where could a possible conflict arise here?"

Don't forget how your own interests might conflict with your client's interests. Don't let your economic interest in a fee cloud your judgment about the client's matter.

The most dangerous kind of conflict situation arises where there is no particular problem at the outset, but a conflict slowly develops as the matter progresses, so that after time has passed you have a full-blown conflict that no one ever anticipated.

Recognizing potential conflicts, however, is only half of the problem. One also has to carefully deal with conflicts once they come to light. That requires a careful disclosure and consent procedure.

The best way to solve a potential conflict problem is to involve another lawyer. There are very few conflicts that can't be resolved by the judicious use of independent counsel.

Fee sensitivity

Be sensitive to your legal fees.

This could be the subject of a treatise. Always use a detailed, written retainer agreement. All legal fees must be reasonable. Rest assured that your view of "reasonable" is rarely going to be the same as your client's. It's a good idea to cut your fee occasionally, where that seems justified, based on a cost-benefit analysis from the client's perspective.

Bill frequently. Never let unbilled time pile up. This is one area where surprises are not good. Unpaid bills are also a frequent source of problems. The best lawyers don't allow this to happen because they work off evergreen retainers so there is never an unpaid fee. Rule 1.5 of the Minnesota Rules of Professional Conduct provides excellent guidance for properly handling fee issues.

Above all, don't sue your clients for legal fees. Or if you do, carefully evaluate your malpractice risk, because nothing can bring on a legal malpractice claim quicker than a suit for legal fees. (Ever heard of a "compulsory counterclaim?" Once you sue the client for fees, he or she *must* counterclaim for legal malpractice, or else any potential claim will be barred.)

Many legal malpractice claims never would have been asserted, but for the lawyer's rash decision to sue the client for fees. Don't do it. (The only exception to this rule would be the rare case where you have clearly won or accomplished everything the client could possibly have achieved, so there is no way the client could claim he or she should have gotten more or done better — but still doesn't pay your fee. Then and only then should a fee suit be considered.)

Docket control

Develop and maintain a good docket control system and a systematic "dog file" review.

An enormous percentage of all legal malpractice claims — 20 to 30 percent —involve a missed statute of limitations or similar deadline. Whether you use a simple double-entry handwritten tickler system or a complex computer-based system, the important thing is to keep track of and deal with all deadlines in a timely fashion.

"Dog" files are those that you don't want to work on. They sit hidden in the corner of your filing cabinet; you would rather work on anything else. Take control of your "dog" files. Do what needs to be done on them, or assign them to someone else. They are malpractice claims waiting to happen.

The smell test

Choose your clients carefully.

This is the hardest rule to follow. You want to take on this new client and accept the new fee, but there is just something about the person that bothers you. It's a "smell test" issue. Watch for those reactions. They are important. Has the client sued before? Are you the third or fourth lawyer on this matter?

There can be an enormous tension between the lawyer's perceived economic advantage in taking on a new client and the heightened legal malpractice risk that new client represents. Trust your smell test.

I'll turn now to what to do when a potential malpractice/ethics problem arises.

Insure yourself

Carry legal malpractice insurance, and use your insurer wisely.

You really must carry malpractice insurance. Not only to pay the occasional claim, but more impor-

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tantly, to pay the considerable defense costs that you will face even when a nonmeritorious claim is asserted.

Use your malpractice carrier wisely. Most of them offer practical assistance in areas of claim repair, defensive lawyering, etc. Find out what services your insurer offers and use them.

Be quick

Act immediately; these things don't get better if left alone.

The subject of reporting potential claims is addressed at length in a recent article I wrote for the Minnesota State Bar Association. (See "Self-Reporting Malpractice or Ethics Problems," in the September 2003 issue of *Bench & Bar* or read it online at http://www2.mnbar.org/benchandbar/2003/sep03/malpractice.htm)

Suffice it to say that anytime you become aware of a situation that could give rise to a potential claim, you should report it to your malpractice carrier immediately, not only to comply with the mandatory reporting requirements under your policy, but also to seek out whatever claim repair/defense suggestions the carrier may be able to provide.

Repairing the damage

Consider using claim repair.

Claim repair can be a godsend. The concept is quite simple; upon your report of a potential claim, the insurer retains an expert lawyer in that particular area of law to analyze the potential problem and assist you in whatever practical steps can be taken to "fix" the situation now, before it becomes a claim. (Common claim repair efforts include bringing an action to reform a scrivener's error in a deed, a motion to vacate a default judgment or an appeal from an adverse ruling.)

Claim repair doesn't always work, of course, but it does work more often than not. And it depends entirely on an early report of a potential "situation."

Get help

Don't try to handle the problem yourself; bounce the issue off colleagues and consider using outside ethics counsel.

Always remember that when you have a potential malpractice or ethics problem, you are by definition "conflicted." Independent judgment is required to assess the situation and decide how to proceed.

Never try to handle this kind of situation yourself. At a minimum, get some advice from a partner or colleague so you have two sets of eyes looking at the problem rather than just yours.

Where the answer is not immediately clear, consider retaining outside counsel to advise you. Lawyers who try to solve these kinds of problems themselves have the proverbial fool for a client.

Services

Use the Minnesota Office of Lawyers Professional Responsibility (OLPR) telephone advisory service.

The OLPR's free ethics advisory service is worth its weight in gold. The phone number is (651) 296-3952. You can call them to get expert advice and assistance in handling any prospective ethics problem that you may face in your practice.

This service, which has grown significantly over the past few years, is an invaluable resource for getting some sound suggestions on how to deal with an ethics problem.

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