

IN BRIEF

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Malpractice Prevention Education for Oregon Lawyers

A Common Sense Approach to Avoiding Malpractice Claims

The practice of law is a profession. As professionals, our stock-in-trade is making decisions and giving advice. For a variety of reasons, we may make decisions or give advice that is incomplete or incorrect, especially when viewed with hindsight.

Although no single factor will prevent mistakes, a number of guidelines can enhance your performance as a professional and also help you handle the consequences of most any mistake. Making mistakes goes with the territory of being a lawyer. Often, your handling of those mistakes determines the severity of the consequences.

The purpose of this article is to share a workable approach to avoid or minimize malpractice claims. This approach is the product of my 25 years' experience representing plaintiffs in legal malpractice cases and advice conveyed to me by the Professional Liability Fund.

The client relationship can be divided into two stages – before you are hired and after you are hired. The guidelines for avoiding or minimizing malpractice are different for each stage.

Before you agree to represent a client, the focus is on whether you, the case, and

the client are a good match for each other and if you are creating a clear relationship that will endure. At this stage, there are five guidelines:

1. Look before you leap. Carefully and thoroughly evaluate a matter before you agree to accept the representation. If in doubt, don't take the case. Usually, the most important time you spend is the time you invest to evaluate the client and the matter. Case selection is a crucial key to a successful practice, and careful evaluation is an indispensable component. Your professional intuition and experience will be your best guide in case selection. Saying "no" is as important as saying "yes." Check out both the client and the matter before you say "yes."

2. Know your limits and resources. Handle matters within your experience and expertise, or get appropriate help. It can be dangerous to venture into a new area of law without help from someone who is knowledgeable in that particular area. Professional growth should not come at the expense of a client. The key to professional growth and success is often being willing to ask for help from a colleague who has more experience than you in the relevant area of law. If you don't know a lawyer who can help you, check with the Oregon State Bar Lawyer to Lawyer program at (503) 620-0222, ext. 408, or call an active member of the applicable OSB section.

3. Connect with your client. It is important to understand your potential client before you agree to representation. If you

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DISCLAIMER

IN BRIEF includes claim prevention information that helps you to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate research.

A Common Sense Approach

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do not feel comfortable with the person, you should not represent him or her. Your gut reaction is usually a good indicator of how other people will react to the person and the case. It is difficult to convince someone to accept your client's version of the facts if you don't believe your client or if you don't share your client's perspective on the case. In turn, clients who feel their lawyer is connecting with them and is "on their side" will be far less likely to make a malpractice claim.

4. Manage client expectations. Managing expectations is essential but often difficult. In your efforts to get the business, be careful not to promise too much, too soon, with too little information. This creates unrealistic expectations that you will then be stuck with. Resist giving a quick opinion. Concentrate on the process of developing and evaluating the case, not on specific results. Provide a general overview of estimated costs and fees. Make sure the client understands that circumstances often change, and that changed circumstances require a case reevaluation.

5. Document your representation – or lack thereof. If you have gained confidential information from a potential client but you are not going to represent him or her, send a nonengagement letter documenting that you are not representing the person. If you are going to represent the person, document the scope of engagement with an engagement letter. Explain what your representation includes and, if important, what it excludes. If you represent the client, send the client a disengagement letter when your representation is finished – whether that is in the middle of a case because you withdrew or at the conclusion of the legal matter.

After you agree to representation, the focus shifts to communication during representation and managing the case you are handling. In this stage, there are six guidelines to help avoid or minimize malpractice:

1. Be clear and direct. Create an atmosphere in which you can speak frankly with your client. Anticipate and address problems so no one is surprised. If possible, give the client options along with your recommendation, but only after the due diligence of adequate factual investigation and legal research. If you and the client repeatedly disagree on significant issues, you should consider ending the representation, as long as you can do so without prejudice

to the client. Don't ignore problems either in your working relationship or with the matter you are handling. Deal with issues sooner rather than later.

The client has the right and the responsibility to make the big decisions. The lawyer has the right and the responsibility to determine strategy and tactics. The client should set the goal for the representation; the lawyer should determine how to achieve it.

2. Document your advice. Document all advice and every decision, using letters to the client or notes in the file. Letters to the client are best for critical decisions, particularly those involving case evaluation and settlement. Notes are helpful for recording the circumstances of the advice or decisions. Documentation helps the client make a better, informed decision and signals to the client that what is going on in the case is important. It also helps with the defense of your representation.

3. Docket everything. Many malpractice claims are filed because of missed deadlines. This type of malpractice is entirely preventable, especially with use of an effective computer system. Calendar case dates, deadlines, and file reviews, using multiple, staggered follow-up reminders for each. If you have staff, arrange for someone in addition to you to check the docket. Using systems that bring deadlines to your attention in multiple ways decreases your chances of missing one. You cannot look at a file too often, only too little.

Utilize the free and confidential help of the PLF's practice management advisors by calling 503-639-6911 or 800-452-1639.

4. Provide customer service. The client is a customer. The lawyer is a service provider. Follow the "golden rule": treat a client as you would like to be treated. In general, the more time you spend with the client, the better your relationship will be. Certain key practices will enhance that relationship: return phone calls as soon as possible, keep clients informed about developments with copies of work, and don't keep clients waiting. The cumulative effect of such treatment always pays dividends.

5. Don't sue your clients for fees. Suing a client for unpaid fees causes that client to look for a reason not to pay. Use the OSB fee arbitration service or a similar alternative to suing for fees, or avoid the problem altogether by getting your money up front.

6. Disclose mistakes. The ethics rules require that you disclose material mistakes to the client. If you think you may have made a mistake or someone is accusing you of having made one, call the PLF for advice on how to proceed and how to inform your client. Ignoring a problem doesn't make it get better or go away. Cover-up efforts exacerbate the problem, get you into ethics trouble, and anger the client. This conduct makes it more likely that the client will file a malpractice claim or an ethics complaint.

We all make mistakes. Often, it is the way we handle those mistakes that determines how the client will respond.

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