

Preventing Legal Malpractice and Grievance Claims: Potential Pitfalls and How to Avoid Them

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Overview

1. What is legal malpractice and how does it differ from a grievance?
2. How likely is a legal malpractice claim?
3. Preventative maintenance.
4. Screening the potential client.
5. You've agreed to take on the representation – now what?
6. The end of the engagement.

1. What is legal malpractice?

- A relationship of attorney and client must exist before any claim for legal malpractice may lie.
- “Legal malpractice” typically refers to an attorney’s breach of two related, but distinct duties: (1) a duty of reasonable care, and (2) a fiduciary duty.
- A breach of the first duty gives rise to a claim of professional negligence. A breach of the second duty gives rise to a claim of breach of fiduciary duty.
- A breach of fiduciary duty can also give rise to a grievance.

2. How likely is a legal malpractice claim?

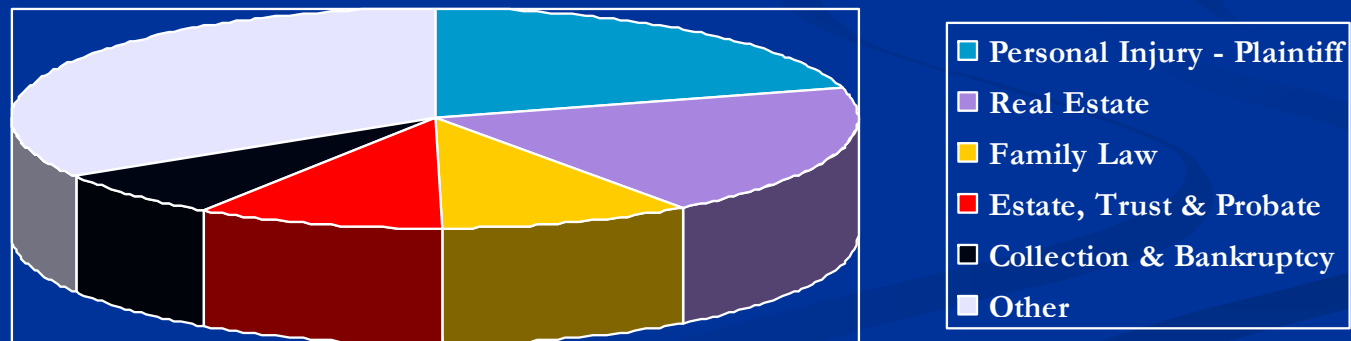
- The average lawyer will have three legal malpractice claims made against him or her during the course of a career.

Source: Mallen and Smith, Legal Malpractice.

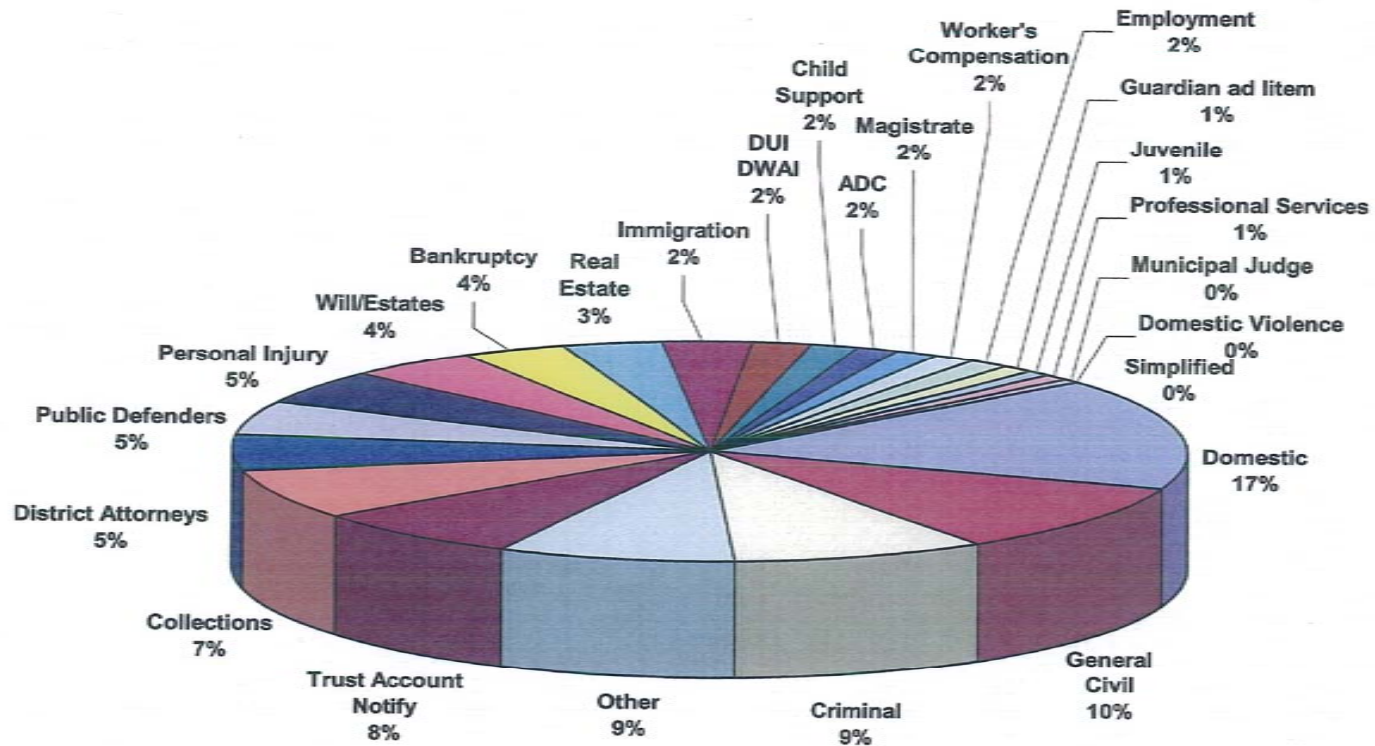
➤ The following areas of law have the highest percentage of claims:

- Personal Injury – Plaintiff: 21.6%
- Real Estate: 20.1%
- Family Law: 10.3%
- Estate, Trust & Probate: 9.7%
- Collection & Bankruptcy: 7.3%

Source: ABA Standing Committee on Lawyers' Professional Liability, Profile of Legal Malpractice Claims (2004-2007)



**COLORADO SUPREME COURT
ATTORNEY REGULATION COUNSEL
CENTRAL INTAKE - TYPES OF INQUIRIES
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➤ Trends observed over past 20 years:

- Plaintiff's personal injury lawyers have consistently had the most claims, followed by real estate lawyers.
- Gap is closing—number of real estate-related claims has jumped nearly by half just in last three years.
- Small firms have the most claims by far. Claims against large firms have decreased.
- Number of severe claims has increased—large firms are primary targets for these claims.

Source: ABA Standing Committee on Lawyers' Professional Liability

➤ In Colorado, the following areas of law had the highest percentage of claims:

- Civil Litigation: 20%
- Personal Injury – Plaintiff: 16%
- Family Law: 14%
- Real Estate: 11%
- Estate, Trust & Probate: 5%

Source: Colorado Bar Association presentation by CNA Financial Corporation

- Lawyers are increasingly being sued by non-clients. Colorado courts have recognized some exceptions to the general rule that an attorney has no liability to a non-client:
 - Attorney acted fraudulently or maliciously.
 - Attorney provided an opinion letter for the benefit of third parties and the opinion letter contained factual misrepresentations.
 - Statements made during an initial consultation for legal services. *Steele v. Allen*, 2009 WL 399992 (Colo. App. Feb. 19, 2009). Cf. Rule 1.18.

- An attorney may also be held liable for aiding and abetting a client's tortious conduct.



“We also find the defendant’s lawyer guilty by association.”

For example, in *Anstine v. Alexander*, the Colorado Court of Appeals held that an attorney can be liable to a non-client for aiding and abetting a client's breach of fiduciary duty. The Colorado Supreme Court reversed on other grounds. It expressly noted, however, that it was not reaching the issue of whether an attorney can be held liable under such an aiding and abetting theory.

3. Preventative Maintenance

- Purchase malpractice insurance.
 - Know your limits of liability.
 - Know what is excluded.
 - Be accurate on your application.
 - Disclose all potential claims.
 - Prior knowledge exclusion may exclude coverage where, at the time of the insurance application, the lawyer knew of or reasonably should have foreseen the claim, but did not disclose it to the insurer.

- Know the rules governing your conduct.



➤ Colorado Rules of Professional Conduct

- Adopted by the Colorado Supreme Court.
- Adopted by the U.S. District Court for the District of Colorado (with some exceptions). D.C. Colo. L.R. 83.4.
- The full text of the Rules, in searchable form, is available in the Opinions/Rules/Statutes section of the CBA website at: www.cobar.org.
- New Preamble states that: “[S]ince the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”

4. Screening the Potential Client

- Establish criteria by which clients, cases and transactions will be evaluated and accepted. One way to avoid legal malpractice claims is to identify potential clients who are likely to become problem clients down the road.
 - Client has already gone through one or more lawyers on the same matter.
 - Client expresses unrealistic expectations.
 - Client is unwilling to agree to your fee.
 - Client has a personal vendetta.
 - Client wants a hired gun.

- Do you have the expertise?



- Be wary of practicing in a new area.
 - *See Colorado Rule of Professional Conduct 1.1, which states that “A lawyer shall provided competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”*
 - The comments to Rule 1.1 state that “A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. . . . The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.”
- Even if you have the expertise, do you have the time necessary to devote to the matter?

➤ Advertising – Beyond Billboards and Television

- A lawyer's services or fees can be advertised through "any public media." Rule 7.2. This includes legal directories, websites, and other marketing materials.
- Advertisements cannot contain false or misleading communications about a lawyer's services. A communication is false or misleading if it: (1) "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading"; (2) is "likely to create an unjustified expectation about results the lawyer can achieve"; or (3) compares a lawyer's services with other lawyer's services "unless the comparison can be factually substantiated." Rule 7.1.
- A lawyer may be held liable under the Colorado Consumer Protection Act for deceptive trade practices. *Crowe v. Tull*, 126 P.3d 196, 205 (Colo. 2006). However, "mere advertising by an attorney lacking the intent to defraud will not convert a malpractice claim into a CCPA claim." *Id.* at 204.
- Be aware of representations made on websites and social media.

- Don't hesitate to turn down a potential client.
- Send non-engagement letter.
 - Advise the recipient that you have decided not to accept the representation.
 - Advise the recipient that statutes of limitations may be applicable to his or her claims.
 - Advise the recipient that he or she should seek other counsel.

**5. You've agreed to take on the representation
– now what?**

➤ Perform conflicts check.

- Establish a system for clearing conflicts.
- Rules 1.7 and 1.9 - set out the general rules concerning conflicts of interest.
- Rule 1.8 - discusses transactions prohibited between client and lawyer.
- Rules 1.10, 1.11, 1.12 and 1.13 indirectly discuss conflict of interest issues pertaining to lawyers who change law firms, leave government service, or represent organizations.
- Check the opposing lawyer's name and all entity names as part of the conflicts check.
- Update the conflicts check if changes occur in the case, e.g., new parties are added to a lawsuit or non-parties at fault are designated.

➤ Send engagement letter.

- Rule 1.5(b) states that “When the lawyer has not regularly represented the client, the basis or rate of the fees and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.” The rule also treats a material change to the basis or rate of the lawyer’s fees or expenses any time after the initial fee arrangement as a business transaction with a client, which requires the lawyer to comply with Rule 1.8(a).

- Clearly identify your client.
 - 21% of all claims against attorneys are asserted by persons other than their former clients.

Source: ABA Standing Committee on Lawyers' Professional Liability 1986
Profile of Legal Malpractice Claims.

- Multiple clients?
 - Send a joint representation letter outlining the potential conflicts and requesting the clients' consent in writing to the joint representation.
- Do you represent an entity, or its constituents?
 - Attorney retained by organization represents the entity, and does not automatically represent the constituents of the organization. Colorado Bar Association's Ethics Opinion 120.
 - Attorney may violate ethical rules by asserting that he or she represents the constituents of the organization unless the lawyer reasonably believes he or she has in fact been engaged by the constituents.

- State accurately and specifically the work that will be done.
 - *See* Rule 1.2(c), which provides that “A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable and the client gives informed consent.”
- State any known matters that you will not be handling, and advise the client to immediately seek other counsel to represent them in those matters.

- Tell the client what his or her duties are, e.g., to cooperate and timely pay your bills, and that you will withdraw if the client does not fulfill his or her responsibilities.
- *See* Rule 1.16 regarding withdrawal.
- Make clear to experts, court reporters and other professionals you hire who is responsible for the costs.
- Obtain the client's signature indicating his or her consent, even if the Rules of Professional Conduct do not require a signature.
- Note that you are prohibited from asking the client to agree prospectively to limit your liability for malpractice unless permitted by law and the client is independently represented in making the agreement.
- Rule 1.8(h); *See also People v. Ginsberg*, 967 P.2d 151 (Colo. 1998) (90-day suspension was appropriate sanction for attorney who violated Rule 1.8(h)).

- Understand the client's goals – e.g., quick resolution?
Principle?

- Educate the client.
 - Explain the process and what to expect.

 - Discuss the anticipated fees and expenses.

- Create a paper trail (whether hard copy or electronic).
 - Take detailed notes.
 - Document important discussions had with client.
 - Document decisions made by a client.
 - Settlement demands and settlement offers.
 - Decisions to not pursue matters.
 - Include detail on your billing records.

➤ Identify problems.

- Is the client a “slow pay” or “no pay”? This may be a sign that the client is unhappy with your work.
- A proactive approach can keep the problem from getting worse.

- Don't promise results.
- If you aren't sure of an answer, inform the client of that fact.
- Perform adequate legal research and know the substantive law.



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- Avoid romantic or inappropriately personal relationships with client.
 - E.g., sexual relationships; substantial gifts.

- Avoid business relationships with client.
 - E.g., acting as director or officer of for-profit client company; investing in client securities; becoming involved in business deal with client.
 - Conflict of interest issues.
 - Typically excluded from coverage under lawyer's professional liability policy, and directors' and officers' insurance may be inadequate or nonexistent.
 - Law firm may be vicariously liable for the lawyer's business activities.
 - Law may impose a higher standard of care on a director or officer who also acts as the company's lawyer.

- Establish a calendaring or docketing system.
 - Have all correspondence and pleadings checked for deadlines and calendared immediately.
 - Double-check the dates calendared for accuracy.
 - Calendar reminders leading up to the due date.
 - Build redundancy into your system.

6. The End of the Engagement

- If the matter is still pending, apprise the client of any imminent deadlines of which new counsel should be aware, and of the need to immediately obtain new counsel.

- Be wary of suing clients for fees.
 - In over 40% of fees lawsuits, the client brings a counterclaim for legal malpractice.
 - These claims can make it more difficult to obtain legal malpractice insurance.

➤ Problems?

- Tell the firm's loss prevention attorney.
- Also may need to tell the client.
 - Lawyer has duty to inform client of adverse developments—including those resulting from the lawyer's own error—if the error is material, i.e., likely will result in prejudice to the client. Ethics Opinion 113.
 - Lawyer also may need to advise client to consult with independent counsel regarding the error, and may be precluded from continuing to represent the client. *Id.*
 - “[L]awyer need not and should not inform the client of the existence or merit of a legal malpractice claim against the lawyer, or of the desirability of terminating the lawyer’s representation.” *Id.*

- Promptly report actual or potential claims to your insurer.
- “Claim” usually defined within the policy—typically, as a demand for money or services.
- Where the insurance policy does not define the term, “claim” will be construed as a demand for some asserted right; a mere request for information, in contrast, does not constitute a claim. *Nat’l. Casualty Co. v. Great Southwest Fire Ins. Co.*, 833 P.2d 741, 744 (Colo. 1992).
- Know and comply with your insurance policy’s notice requirements.
- Do not attempt to settle the matter yourself.

Top 10 Ways to Avoid a Malpractice Claim

1. Put your agreement with client in writing – preferably, before entering an appearance or doing any work. Even better, have the client sign the fee agreement.
2. Return all of the client's calls and correspondence – promptly.
3. Copy the client on all documents you receive, and all documents you generate – again, promptly. Send the client periodic status reports, and advise the client of all important events and decisions.
4. Know your limitations, both in terms of competence and time.
5. Avoid entering into business dealings with a client.

Top 10 Ways to Avoid a Malpractice Claim

6. Never get romantically involved with a client.
7. Look out for conflicts of interests.
8. Have a good calendaring system.
9. Once the matter is concluded, send a letter to the client confirming that you no longer represent the client.
10. Don't sue the client (unless you really, really need to).

Top 10 Ways to Avoid A Grievance

1. Communicate, communicate, communicate.
2. Once you accept the case, do the work.
3. Put unearned fees and flat fees into the trust account and avoid commingling.
4. Bill regularly.
5. Avoid conflicts of interest.

Top 10 Ways to Avoid A Grievance

6. Return client files.
7. Don't engage in unprofessional conduct.
8. Never lie to the court, opposing counsel or the client.
9. Don't practice Colorado law if you are not admitted here. Let clients, opposing counsel and the world know you are not yet a Colorado lawyer.
10. Be aware of representations made on websites and in social media.