MALPRACTICE TRENDS

In recent years, legal malpractice insurers nationwide have seen increases in the frequency of claims. At MLM, over half of all reported claims are closed without any payment, which usually means the claims lack merit. While this is good news, the threat of a malpractice claim should be of grave concern to every practicing attorney because even claims that lack merit can be expensive to defend, and even one viable claim can have devastating financial effects on an uninsured lawyer.

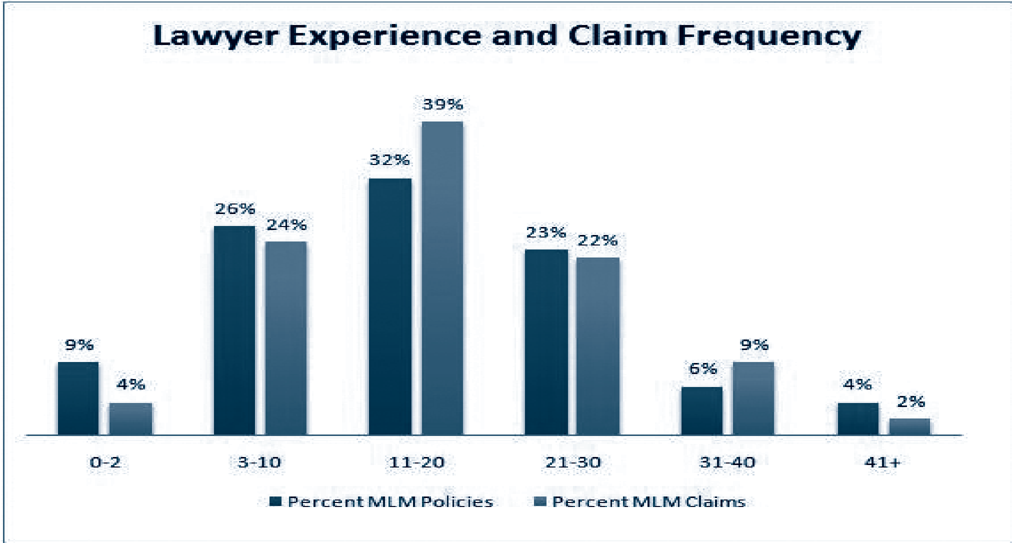
There are three reasons why a lawyer should not practice without insurance:

1. **To avoid the financial drain of defending claims.** Today some attorneys are 'going bare' (i.e., practicing without any professional liability insurance) despite an overall increase in claim frequency. The cost of defending a single claim, whether meritorious or not, can have a devastating financial impact upon a non-insured lawyer. A lawyer who is not insured can lose his non-exempt personal assets as the result of just a single claim. For example, so can an under insured lawyer.
2. **For the protection of the public.** As a matter of public policy – and personal professionalism – lawyers should not leave their clients unprotected in situations where an attorney's negligence may have damaged the client.
3. **To protect the lawyer's personal assets in the event of settlement or judgment.** Malpractice claims can be difficult to foresee, and can be costly whether malpractice can be proven or not. One claim can wipe out years of work in building a successful practice, as well as the personal assets of the attorney. You may never have to use a professional liability policy, but it is extremely risky not to have one.

CLAIM STATISTICS

The American Bar Association's Standing Committee on Lawyers Professional Liability publishes a quadrennial study highlighting the claims data it gathers every four years from professional liability insurers. The most recent claims trend data released as part of the ABA's malpractice study for 2004 to 2007 was released for publication in 2008. The ABA survey includes data from approximately 40,000 claims provided by eighteen commercial malpractice carriers in the United States and Canada. The following are a few key findings from the 2008 ABA Malpractice Study:

- Projections from the ABA indicate that new lawyers can expect to face three malpractice claims over the course of their practices. At MLM, nearly 40% of all reported claims involve administrative or procedural errors, which could be all but eliminated with proper use of calendaring and file management systems.
- Statistics show that it is not brand new lawyers who bear the brunt of malpractice claims, but rather seasoned attorneys with 11-20 years of experience. This is a function of various factors, including the usual lag time (sometimes several years) between when professional services are provided and a claim is reported, and the fact that seasoned lawyers tend to take on more complex cases, which can be accompanied by greater professional risks.



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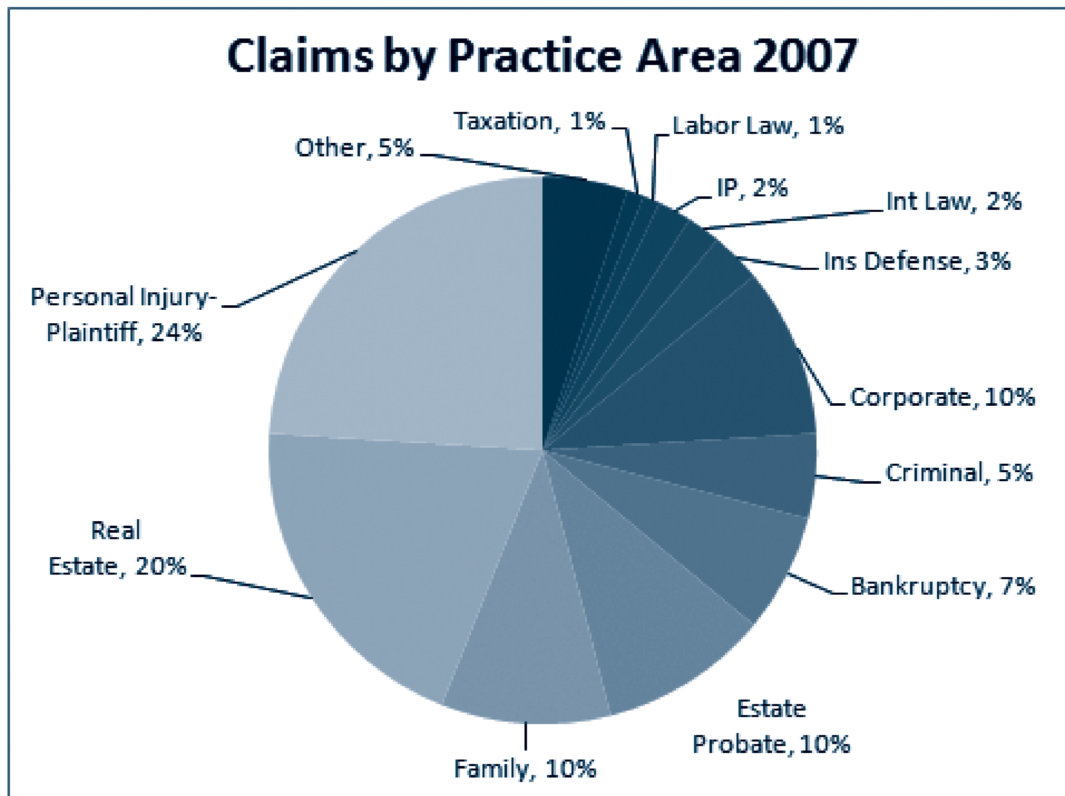
ABA statistics also show that some practice areas tend to have more reported claims than others. From a malpractice standpoint, the traditionally “riskier” practice areas include plaintiffs personal injury, real estate, and family law.



An obvious – but often overlooked – contributing factor to malpractice risk is chemical and mental health. In recent years, the bar has taken steps to address the prevalence of depression, alcoholism, and job dissatisfaction in the legal profession. Most states have organizations where attorneys can find confidential support for a variety of mental and chemical health issues. For new lawyers (as well as seasoned lawyers), being cognizant of their own needs and addressing any concerning issues are paramount to managing malpractice risk.

TIPS TO AVOID MALPRACTICE CLAIMS

According to the American Bar Association, one of the top ten legal malpractice traps is the unwillingness to believe it could happen to you. The truth is, a lot of bad lawyers get sued for legal malpractice. But so do really good lawyers, new lawyers, old lawyers, big firm lawyers, and solo practitioners. So be careful, buy insurance, and take steps to avoid claims.

1. Don't be afraid to turn down a client. The pressure to land new clients is a fact of life. However, the most important client to your practice may be the one you turn away. Frequently, lawyers sued for legal malpractice will say they knew at the outset they should not have taken on the client who sued them. Beware of clients who fired their previous counsel or who have been turned down by other lawyers. Think twice about a client who has more litigation experience than you do, or the one who has nothing good to say about lawyers or the legal system. But most importantly, run from the clients who just don't feel right. Chances are you have good instincts. Learn to trust them.

2. Don't forget the small cases. There is a case that has been sitting on the corner of your desk, the end of your credenza, or the bottom of your pile, and you just cannot bring yourself to pick it up. You tell yourself you will work on it tomorrow, or the next day, or next week, because today you must devote attention to your big cases and your big clients. This is the attitude that will get you sued. Only rarely are lawyers sued by their most important clients or on the cases where they spend a great deal of time. Almost always it is the small case or the difficult client lawyers will neglect. The truth is, there are no small, insignificant cases or transactions on your docket.

3. Use effective retention agreements. A central but often overlooked issue in legal malpractice cases is the existence and scope of the attorney-client relationship. Lawyers frequently get sued by people they never thought they represented, or by clients they know they represent but on matters they did not think they were engaged to handle. Preparing specific engagement letters can help prevent these suits, or at least they can provide strong defenses if you are sued. The engagement letter need say nothing more than this: "Thank you for retaining me to represent you in the lawsuit entitled Smith v. Jones, now pending in the Third Judicial District Court, case no. 01-00345. Although I would be happy to represent you in other matters should the need arise, this current representation will be limited to the Smith v. Jones case." Moreover, many lawyers represent clients on multiple matters. Although it may seem like a hassle at the time, preparing separate engagement letters for each new matter, and avoiding general representations such as "corporate advice" or "general business matters," could be your salvation in a legal malpractice case.

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Real Experiences

When the vehicle involved in the death of a young girl was crushed by the tow yard before it could be secured as evidence, the family sued their attorney for damages due to loss of action, claiming the lawyer's failure to act swiftly resulted in the loss of crucial evidence.

A firm was retained to represent defendants in a civil suit. The jury returned a judgment of almost $500,000. After exhausting all appeals, the defendants sued their lawyers for failure to represent them with "reasonable care, skill and diligence."

The law firm retained to represent the wife in a divorce action a decade ago negotiated an agreement for spousal support. Five years later, the husband retired and petitioned for modification of support. The wife "discovered" that prior representation was "negligent" and sued her attorney.

4. Manage your clients' expectations. Many clients' exposure to the legal system is limited to what they see on television, which usually gives them unrealistic expectations about what you and the legal system can do for them, how long it will take to do it, and how much it will cost. Clients almost always believe their position is the correct one, and they expect to be vindicated in the courtroom or across the transaction table. Rarely do they view their legal predicament with objectivity, so they need their lawyer to explain concepts like the adversarial system, the neutral fact finder, varying interpretations of the law, competing policy concerns, inherent delays of litigation, controllable and uncontrollable expenses, and unpredictable outcomes.

5. Return your phone calls. Lawyers who get sued for legal malpractice almost invariably violate this rule. There is nothing clients resent more than being ignored by the lawyer they are paying to look out for their interests. Combined with unfulfilled expectations, unreturned phone calls make clients angry with their lawyer. A lawsuit is a predictable result.

6. Don't sit on your mistakes. Most lawyers pride themselves on fixing the mistakes of their clients, not making mistakes themselves. So when they do make mistakes – and all of us do – they naturally are embarrassed and instinctively want to prevent anyone else from knowing. But the biggest mistake of all usually is trying to hide your mistakes. Lawyer mistakes do not go away, they fester and grow. There is no need to make a public announcement, but talk to a partner or a trusted colleague for some objective advice. And most importantly, tell your client. Frequently, there is a solution to the problem, and if there is not, the last thing you want is a failure to disclose to add to a negligence claim.

7. Think twice before suing to collect unpaid fees. Being a lawyer carries an implied threat of suing anyone who crosses you. So you might get some mileage out of mentioning your occupation to an insurance representative trying to deny your coverage request, or to an auto mechanic trying to overcharge you. But throwing your legal weight around by suing clients when they fail to pay will land you in a legal malpractice suit ten out of ten times. There are times when suing your clients might be justified, just be aware of the certainty of a counterclaim and be confident you can prevail.

8. Be diligent in billing and collecting fees. The corollary to the rule against suing clients for fees is to keep your billings and collections under control so you are not tempted to sue. If you do not bill for three or four months at a time, your receivables may grow to the point where you cannot afford to walk away. The same may be true if you bill regularly, but do not collect. You do not have to work for free, and even your deadbeat clients will not expect you to. But they will take advantage of you for not billing and collecting regularly, leaving you in the awkward position of having to continue working pro bono or seeking to withdraw for non-payment, which almost assures you will not get paid without suing.

9. Write it in your calendar, and then write it in another calendar. The number one cause of legal malpractice, by an overwhelming margin, is missed deadlines. Most lawyers have a false sense that something so easy as meeting a deadline is not so hard. But the reality is that deadlines change, compete with other deadlines, and are just plain forgotten. So make a habit of writing all of your deadlines in your calendar, and then have a secretary or docket clerk make a backup calendar. And most importantly, remember to review your calendars daily.

10. Look for conflicts, not away from them. Few things look worse in a legal malpractice case than conflicts of interest. Conflicts frequently arise in non-litigation contexts, such as when the estate planning lawyer represents a trustor, trustee, and beneficiaries at the same time; when the real estate lawyer represents multiple members of a development joint venture; or when the corporate lawyer represents the buyer and the seller in a small transaction. For litigators, common conflicts traps include taking different positions on the same legal issue or representing the adversary of a former client in a factually related matter. Most potential or actual conflicts can be foreseen and resolved at the outset of a matter with an inquiry or a conflict waiver letter, which in the long run is a lot less trouble than taking a chance and getting sued.