

## WHO HAS THE MOST MALPRACTICE? HINT: IT'S NOT THE NEW LAWYERS

By Todd C. Scott, VP of Risk Management

One malpractice statistic that is often puzzling to both new and experienced lawyers is the comparison of the number of reported malpractice claims to the years of experience among the lawyers reporting them. When comparing the frequency rate of malpractice claims to lawyer experience, Minnesota Lawyer's Mutual (MLM) data shows that the greatest proportion of malpractice claims are reported by lawyers who have practiced law for more than a decade.

The chart in Figure 1 shows that lawyers who have been in the practice of law two years or less make up nearly 9% of policyholders, but report just 4% of the malpractice claims. Compare that to the lawyers who've worked 11 to 20 years. The more experienced group represents 32% of the policyholders, and yet they reported 39% of the total claims. To put it more plainly, while lawyers practicing two years or less have reported claims

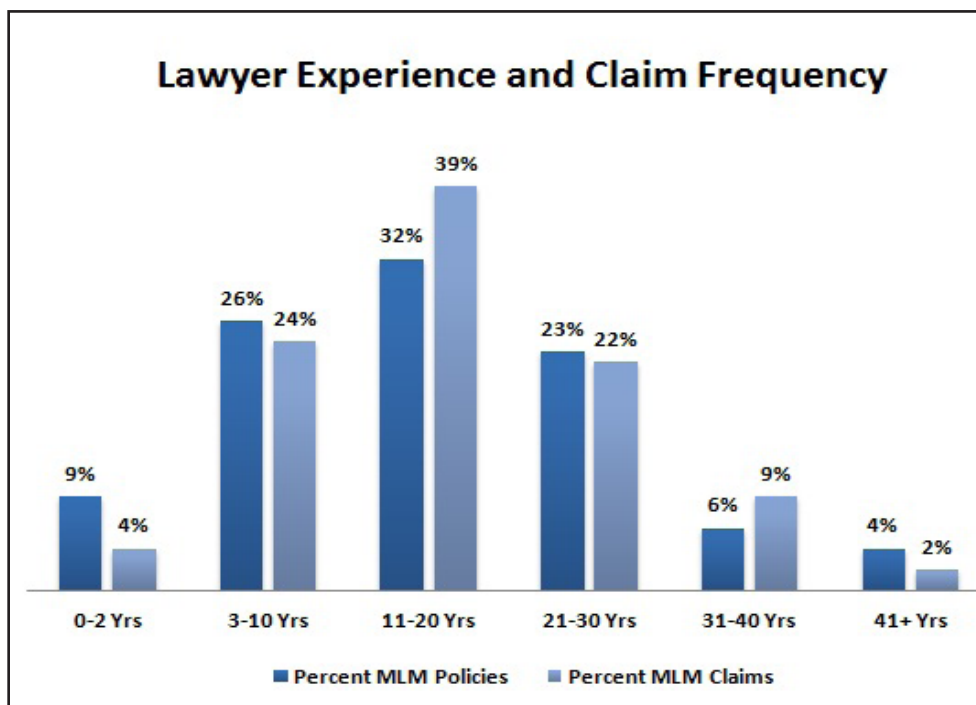
at the rate of 44%, the lawyers practicing 11 to 20 years report claims at the rate of 122% – about 12 claims for every 10 policyholders.

The data in the chart lends itself to a lot of questions as to why the more experienced lawyers are reporting a much higher rate of claims. Are the more seasoned attorneys cutting more corners and taking more risks, while neglecting their client matters? Are they growing more bored and burned out with their work, thus they're more likely to put off tending to important client matters? Are the new lawyers just that much more diligent when overseeing their daily workload?

The truth is, more experienced lawyers report a much higher rate of malpractice claims because of their increased exposure to difficult and troubling legal matters.

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Figure 1



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Despite the tremendous wealth of knowledge lawyers gain in the first 10 years of law practice, their exposure to potential malpractice matters grows rapidly because of the sheer number of cases they have worked on. Consider this:

- More experienced lawyers tend to handle more legal matters than new lawyers, and the matters they handle tend to be much more complex, increasing the likelihood that a mistake may be made.
- Experienced lawyers tend to oversee legal matters that other, newer lawyers are working on. Thus, if the newer lawyer makes a mistake, the experienced lawyer is likely to be named on the complaint.
- Most significantly, the more experienced lawyers have more of a “tail,” meaning they have more matters in their past that can come back to haunt them. While new lawyers tend to only have claims from current matters, the more experienced lawyers have claim exposure relating to current matters, as well as exposure from legal matters concluded in the past.

It is the final point that may be contributing the most to the wide disparity in the malpractice claim rate for new lawyers and the lawyers with 10 or more years of experience. For lawyers in states such as Minnesota where the time to bring a negligence claim against an attorney is six years, even the best and most experienced lawyers face troubling rates of exposure to potential malpractice claims.

New lawyers looking at this data should keep in mind that their relatively low exposure for malpractice is primarily attributed to the small amount of client matters they have handled in their first few years as an attorney. The risk for a malpractice claim rises significantly after a few years in practice, so it is important for new lawyers to adopt good work habits early on to keep their law practice claim free. ■

## MALPRACTICE PITFALLS FOR NEW LAWYERS AND HOW TO AVOID THEM

By Todd C. Scott, VP of Risk Management

New lawyers are often surprised to hear that the most troublesome malpractice claims can be easily avoided by incorporating good, simple, everyday work habits into their daily workflow. It should be no surprise that lawyers who provide good client service are the most successful in preventing a breakdown that eventually leads to a malpractice claim.

Providing good client services should be easy. Clients seeking legal services, like any other consumers, simply want to be treated fairly and be fully informed when working with their

lawyer. But legal clients can be highly stressed, so it is important lawyers make great efforts to communicate with clients in a way so that they understand what is going on and feel like they are being heard.

*“The first call of the day should be the one you look forward to the least.”*

If you are new to the practice of law you have a tremendous opportunity to start off your career trouble-free by incorporating simple everyday work habits that will help you to provide good client service and will go a long way to lessening the risk of malpractice claims. Whether you’re a new attorney starting your own law practice, or you’ve had the good fortune to join an experienced group of attorneys who are willing mentors, this advice is for you:

**You select your clients. They don’t select you.** One tragic mistake that new lawyers often make is agreeing to perform legal work on behalf of a client who turns out to be difficult and hard to control. It is a great thing when potential clients seek you out and inform you that they would like to hire you to handle their legal matter; however, the crucial time for getting to know the individual seeking legal services is before the engagement agreement is in place. Ask potential clients about goals and objectives they already for their case, and what they think it will take in order for the lawyer to be successful. Their responses may surprise you. If your gut tells you the individual’s expectations may be unreasonable, or perhaps he or she is looking for a different type of lawyer, it is better to decline the representation at the outset. Even if you do not have a lot of clients, you still have to be selective in those you represent. It is a much more difficult thing to withdraw from representing an individual once the attorney-client relationship has been established.

**Choose your practice area and stick to it.** As a new lawyer, it is permissible to take on legal matters in unfamiliar areas of practice. After all, if taking on new, unfamiliar areas of law was strictly prohibited, no lawyer would ever get his or her legal career off the ground. However, it is important to be keenly aware of “knowing what you don’t know,” and seeking the help of seasoned lawyers to guide your learning. One mistake new lawyers often make is taking on matters in areas of law that are much different than the type of matters they are accustomed to handling in their first few years of practice. Practicing law this way is called “dabbling” and it exposes the attorney and the other attorneys in the firm to a much higher risk of malpractice claims if the lawyer in charge is learning how to handle the new matter on the fly. Therefore, always seek the help of a willing and more experienced lawyer to make sure the matter stays on track.

**Friends and family will get you every time.** It may be hard to believe, but there is an unusual number of attorney malpractice cases that started when a lawyer (sometimes reluctantly) agreed to handle a legal matter on... (continued on page 3)

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behalf of a friend or family member. Why does this occur? One reason is that, although lawyers may take great pains to create certain workflows and practice habits when handling their important client matters, all those work systems for keeping the lawyer focused and on track go out the door when the lawyer agrees to handle a matter for a friend or family member. This is especially true when the lawyer is working out of his or her comfort zone and agrees to handle a legal matter in an unfamiliar practice area. The better thing to do when someone close to you asks for legal advice is to be honest and explain that you don't know much about the area of concern but you would be happy to recommend a lawyer who specializes in that practice area.

**Organize your desk and your day.** It is important to be organized and develop good work habits from the very first day of your law career. Nearly a third of all malpractice cases involve matters where the lawyer knew what they were doing, but things slipped through the cracks. By not having a good calendar/docket control system, you are almost guaranteed to miss a statutory deadline. The best software for staying on task is case management software that features many calendaring and deadline reminders. By incorporating a good case management system into your practice, not only will you develop good work habits for overseeing all of your client matters, but the result will be a thorough law firm database containing all your client information that can be maintained well into the future.

**Clients 'misremember' things, so document your file.** Even for the most seasoned lawyers, the outcomes of legal matters don't always turn out according to the clients' expectations, therefore it is important to make sure client files are always well-documented. It may be no surprise that clients sometimes forget important matters involving their case, even though you may have taken great care to explain the options to the client thoroughly. When informing a client of important matters, or whenever you make recommendations on a course of action, always follow up with a letter or memo to the client and keep a copy of the document in the file. It may become very important later if a client does not remember your conversation and has regret that he or she chose to settle a matter.

**Use every opportunity to communicate.** A wise judge once said, "Make sure the first call you make in the day is the one you look forward to the least." Difficult matters are often more troubling when they have to be communicated to a client, but don't fall into the trap of putting off the difficult conversation in hopes that the matter will resolve itself. Malpractice is not like a fine wine that gets better with age. Communicate regularly and often with clients about every stage of their matter, and at every opportunity you get. A significant number of malpractice claims result in a simple breakdown in communication with the client. Clients may not always enjoy hearing what it is that you have to tell them, but their ire becomes much more intense when they believe their lawyer has not been forthcoming about the most important circumstances of their legal matter.

**Whenever it's possible, avoid fee disputes.** If you find yourself in the difficult situation of trying to recover an earned fee from a client who is unwilling to pay, it is strongly recommended that you do not file a lawsuit against the client for the amount of the unpaid bill. Fee disputes that are brought to court often result in a counterclaim by the client against the attorney, where the client alleges that the reason they didn't pay the bill is because the lawyer's legal services were negligent. You may know that the allegations of malpractice are baseless, and that the client is simply trying to gain leverage to negotiate a lesser fee, but the counterclaim is one that needs to be reported to your malpractice carrier, and the cost of your time and money defending the baseless claim need to be taken into account. The better way of handling a fee dispute is to have a direct discussion with the client and ask if there is a reason that he or she has not paid the bill. Be willing to negotiate the fee and make payment arrangements, as the cost of chasing an unpaid fee in court can be much greater. ■

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## Malpractice & Ethics Claim Avoidance in Practice Areas

### FIVE TIPS FOR DEALING WITH DIFFICULT OPPOSING COUNSEL

By Angie Hoppe – Claim Attorney

New and experienced attorneys alike are, or will quickly become, familiar with dealing with challenging opposing counsel. This can include lawyers who bully, yell, become explosively angry, condescend and use various other antics to attempt to distract from the issue at hand and intimidate their opposition. When faced with these tactics, remembering some simple rules can help you keep your cool and best serve your client.

#### 1. Silence is Golden

An attorney much more experienced than myself once told me that less experienced attorneys often feel the need to “fill the silence” and thus it was a good tactic to simply sit quietly and allow opposing counsel to continue talking. When new attorneys (or experienced attorneys) feel the need to fill every awkward silence, they may end up revealing facts or strategies that were not intended to be shared. When appropriate, it’s best to simply become comfortable with the uncomfortable silence.

#### 2. Do Not Fight Fire with Fire

Being screamed at and bullied by opposing counsel can be very frustrating and have you wanting to pull out your best snappy comebacks and digs. However, when those instincts do arise, ask yourself what benefit would come from reacting in such a way. In litigation, as in life, it is best to stay above the fray and above reproach. It is better to simply stand firm and calm in your positions than to engage in reactive behavior. This leads to the next tip.

#### 3. Remember Your Client

In order to best serve your client, you must remember at all times that you are acting for the benefit of your client. An attorney’s job is not to always be right or to prove he or she is the smartest person in the room; rather, an attorney’s job is to zealously advocate for clients. It can be difficult to disentangle the emotions incited by frustrating opposing counsel from the goal of a successful outcome for your cli-

ent, but what might feel best to say to a rude attorney is not always what will best serve your client.

#### 4. The Magic Words

No, I am not speaking of “please” and “thank you,” although polite words certainly do possess magic. I am speaking of the words attorneys seem the most hesitant to employ – “I don’t know.” There is nothing wrong with telling someone you need to do more research or double check your facts before providing an answer. In fact, admitting you don’t have the answer at hand will make you look much more intelligent than fumbling through an incomplete or guessed at answer. It will also serve your client better to only speak when you are sure what you are saying is correct.

#### 5. You Can Only Control Your Own Behavior

In a perfect world, refusing to engage in the bad behavior exhibited by other attorneys would stop them from being bullies or “Rambo” lawyers. While at times leading by example will change the bad behavior presented by opposing counsel, often times it will not. A good resource for the baseline of behavior required by attorneys is your state’s rules of professional conduct.

Unfortunately, every attorney will at some point encounter opposing counsel who engages in negative behavior and tactics. Having considered ahead of time the way you want to behave in response will help best serve your clients and also help you stay as a positive example of professionalism in the legal community. ▪

### DUAL HATS: LAWYER AND BUSINESSPERSON

By Alice Sherren – Claim Attorney

Law school teaches lawyers-in-training a great many things... but generally speaking, how to manage the business side of a law practice is not among them. New lawyers might think that they need to focus on developing their clientele and expertise in legal work, and this is true. But if they fail to develop a clear and manageable business plan, all could be for naught.

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A law practice is not just practicing law – it is also running a business. Most large and established firms have carefully constructed “business management” teams that include administrators, accountants, financial officers and other staff well versed in how to run a business. Vital tasks such as billing clients, collecting fees, writing checks to vendors and staff, and managing other overhead are handled by the “business management” team. This allows the lawyers in the firm to focus on providing legal services to existing clients and marketing to potential clients.

Smaller firms and solo practitioners often do not have the luxury of a “business management” team. The idea of lawyering and marketing while also keeping their business afloat can be daunting for solo practitioners or small partnerships. The following are some pointers for how to keep your sanity while wearing the dual hats of both “lawyer” and “businessperson.”

- **Determine goals:** The first step in developing a workable business plan is to determine your goals. Do you want to focus your practice on one area of law, or would you prefer to cast a wider net? Do you have partners or associates? Paralegals and support staff? Do you want to grow to increase the size of your firm? Is your office space adequate should you decide to expand?
- **Identify overhead:** Once you have clearly defined goals, be sure you have thought out what costs you will incur to achieve them. How much money will you need to lease your office space, to pay for electricity and water, for office supplies (including little things like coffee, tissues, business cards, pens), for technology (hardware, software, phone lines, Internet)? How will you manage cash flow so that you can consistently pay employees (and yourself) without going into the red? Do you need to set aside funds to put toward marketing, whether an ad in the paper or money for marketing lunches? What about the costs of continuing legal education? If you are in an urban area without free parking, will you be validating parking for your clients? What is the condition of your office furniture? Will you need a cleaning staff?
- **Predict cash flow:** It can be difficult to predict cash flow, especially if you often work on contingency. But it is very important to set a realistic budget, which means being thorough in identifying fixed costs and diligent in seeking out where costs can be reduced or eliminated. Lawyers also must be realistic when taking on new clients and ask the hard questions about ability to pay legal fees.
- **Balance billable legal work with marketing and managing the business:** It can be tempting to focus our efforts as lawyers on the thing we were trained to do: provide excellent legal services. However, a singular focus like that can lead to the failure of a law firm. One thing new lawyers sometime overlook is that billing time is important, but “billed hours” do not help their bottom line unless they can actually collect the fees owed from clients. This means that solo practitioners and small firms must be especially conscious of their clients’ ability to pay before entering an attorney/client relationship, and must regularly bill and ensure bills are paid before large arrearages build up. For those who work on contingency, it means knowing when to decline cases that are not likely to result in a profit once expenses are subtracted. It is also important to be forward thinking and develop a marketing plan so that workflow is consistent. This means taking time away from actually doing legal work, but it is essential to the maintenance of a healthy business.
- **Know your limits:** Lawyers are sometimes stereotyped as “workaholics” who lack balance in their lives. Don’t let this be you. Be sure to schedule your time and run your practice so that you can have a life outside the office. You will be happier and healthier if you make time for family, friends and your avocations, and will likely be a better lawyer as well. If you need help, talk to other lawyers for mentoring on legal questions, and seek out services offered through your local bar if you are struggling with mental health or addiction issues. ■

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