

Recent ABA Study Suggests Emerging New Trends in Legal Malpractice



By Todd C. Scott
VP of Risk Management

A new survey by the American Bar Association Standing Committee on Lawyers' Professional Liability suggests a changing landscape may have emerged in the world of legal malpractice. Most significantly, for the first time since 1985, when the committee first began conducting its four-year study on malpractice claims asserted against lawyers, personal injury attorneys no longer hold the title for the practice area with the highest risk of malpractice. Instead, real estate matters are now the most frequent subject of malpractice claims against lawyers.

Real Estate, Personal Injury - Plaintiff and Family Law are the top three areas in the "Profile of Legal Malpractice Claims: 2008-2011," released last month. In all five previous versions of the survey dating to 1985, personal injury-plaintiff matters were No. 1 in generating lawyer malpractice claims.

The study, sponsored by the ABA committee, has been conducted every three to four years since 1985 and has served as a snapshot in the legal industry of malpractice claims over the study period. Eleven member insurers of the National Association of Bar-Related Insurance Companies from the United States, including Minnesota Lawyers Mutual Insurance Company, and nine from Canada contributed data to the study, along with eight commercial insurance companies. Insurers provided data on 53,000 claims for the 2011 study, the most ever.

Among the noteworthy trends revealed in the malpractice study:

- 20.3% of reported malpractice claims during the study period involved matters in both residential and commercial real estate transactions;
- Claims against lawyers in Personal Injury - Plaintiff's practice accounted for 15.6% of the total claim matters – down from 21.6% of all claims in the previous study;

- Claims involving administrative errors and matters involving client relations rose noticeably, accounting for over 40% of all claims asserted against lawyers.
- The most frequently cited error against lawyers continues to be "failure to know/properly apply the law," amounting to 13.6% of all claims reported in the study.
- Attorney errors labeled "procrastination in performance" (9.7%) and "lost file, document, evidence" (7.1%) – which was almost non-existent in previous studies – rose the most between study periods, creating new concerns for lawyers.

The authors of the study are quick to point out that, although the study provides a tremendous benefit for law firm risk managers, attorneys practicing in the field, and legal malpractice insurers by providing an expansive high-level view of the evolution of legal malpractice claims, readers should use caution and avoid reading too much into the data. Many factors can skew the data including the variation from state to state of the laws governing legal malpractice claims, and the fact that the data does not cover the entirety of the lawyer population. Most significantly, the data presented in the study does not adjust claim numbers to reflect how much of the practice of law is devoted to particular subject matters. For example, there is no way to determine whether the decline in the number of malpractice claims asserted against attorneys conducting Personal Injury – Plaintiff work was the result of a change in the number of lawyers practicing in this field.

Malpractice Claims by Area of Law

The chart in Figure 1 presents the percentage of claims reported in the top areas of law. As stated previously, the significant change from previous studies is the drop for Personal Injury – Plaintiff

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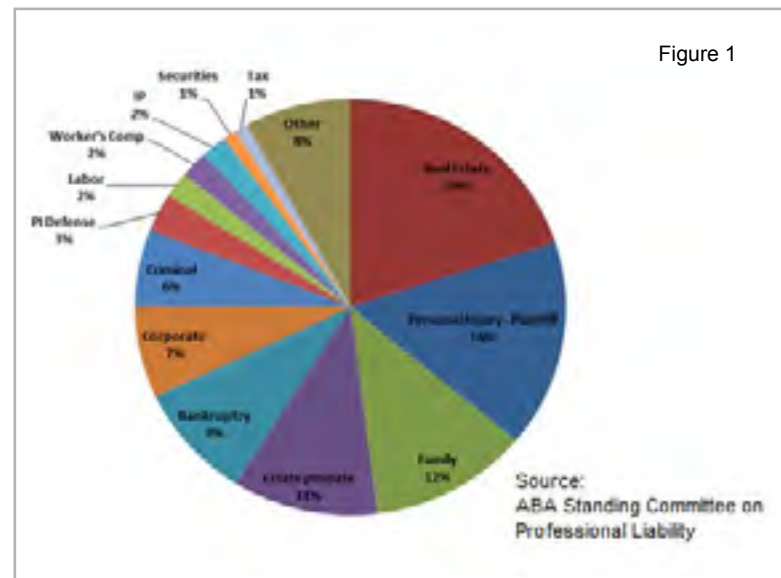
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to second place behind Real Estate. Interestingly, as the study points out, “This is not due to a significant increase in Real Estate... rather, it is the relatively large decrease in Personal Injury – Plaintiff claims of 5.97%.”

Claims by Practice Area - 2012

The practice areas that actually increased the most in claim frequency between studies were Collection and Bankruptcy (9.2%), Corporate/Business Organization (6.8%), and Family Law (12.1%) – each increasing by an average of 1.85%. Minnesota Lawyers Mutual also likes to remind attorneys that the claims data represented here reflects the frequency of malpractice claims – referring to the actual number of claims reported in each practice area. If the chart were to present information showing practice areas with high severity rates (the claims that are the most expensive to resolve) some of the practice areas such as Intellectual Property and Securities that have much less frequent claim activity are among the costliest to resolve, posing great risk for practitioners.



Number of Claims by Alleged Attorney Error

Historically, the creators of the study have organized the errors reported against lawyers into four groups: Substantive, Administrative, Client Relations, and Intentional Wrongs. [See Figure 2.]

Nearly half of the errors alleged against attorneys are Substantive Errors (45%) and the category is relatively unchanged from previous studies. Client Relations and Administrative Errors both saw increases since the previous study, totaling 4.8%.

Substantive Errors	45.07	Client Relations	14.61
Failure to know law	13.57	Failure to obtain consent	7.02
Planning error	7.82	Failure to follow client instruction	5.71
Inadequate discovery	7.39	Improper withdrawal	1.87
Failure to know deadline	6.91		
Conflict of Interest	4.28	Administrative Errors	30.13
Error in record search	3.03	Failure to file document	3.17
Failure to understand tax	1.37	Failure to calendar	4.34
		Procrastination	9.68
		Failure to react to calendar	2.34
		Clerical error	3.54
		Lost file, document, evidence	7.05
Intentional Wrongs	10.19		
Fraud	4.53		
Abuse of process	3.43		
Violation of Civil Rights	1.27		
Libel or Slander	0.96		

Figure 2

Most Common Alleged Errors - 2012

Of the top five most frequent errors leading to malpractice claims cited in the study, two of the errors are new to the chart. [See Figure 3.] “Procrastination” increased from 4.2% to 9.7% and “Lost File, Document, Evidence” increased significantly from .6% to 7%. It is difficult to speculate as to the cause for the increase in errors involving procrastination and lost files; however, the error types are both categorized as administrative errors, causing lawyers to consider the effect of changes to law office administrative systems between 2008 and 2012, the two most recent study periods.

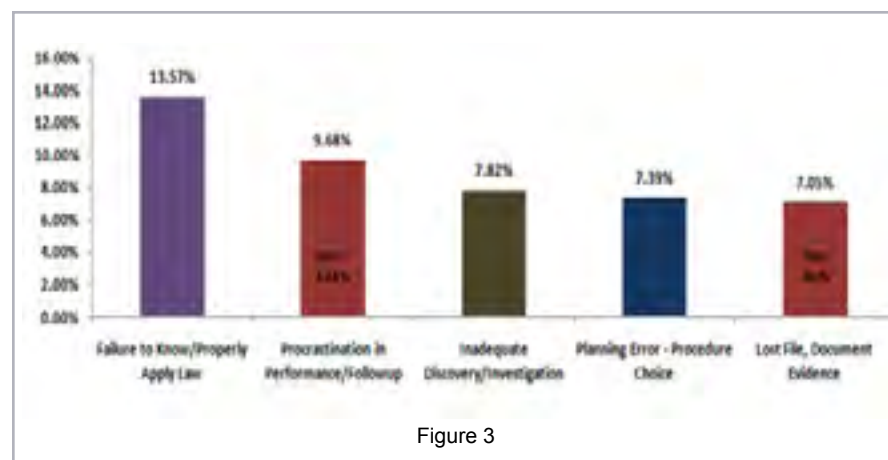


Figure 3

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Errors in the category “Intentional Wrongs” have always been among the most disturbing for those who track malpractice claims against lawyers. They represent errors where the lawyer knew the difference between right and wrong, yet the lawyer chose to do wrong. Often the errors listed in this category – such as fraud claims – are excluded from coverage since insuring these claims would run contrary to public policy and represent a moral hazard. One of the bright spots in the latest study is that errors in the category of Intentional Wrongs represent only 10% of all errors reported – a decline of 3.3% from the previous study. It is important that lawyers continue to properly safeguard their client funds to see a further decline in claims involving intentional wrongs by an attorney or an employee of the firm.

For further information on the study by the ABA Standing Committee on Lawyers’ Professional Liability, or to order a complete copy of the publication, “Profile of Legal Malpractice Claims 2008 – 2011,” go to abastore/ or call 800-285-2221.

THE ABA ADDRESSES TECHNOLOGY, OUTSOURCING, AND LAWYER MOBILITY IN RECENT AMENDMENTS

By Alice Sherren, MLM Claim Attorney

This August, the Commission on Ethics 20/20 offered guidance on trending issues by amending several Model Rules and their Comments. As always, the ABA Model Rules and Comments are only suggestions and each state will determine which, if any, of the amendments will be included in their own codes.

The amendments center around four main ideas:

- Confidentiality When Using Technology (Model Rules 1.0, 1.6 and 4.4, Comments to Model Rules 1.1 and 1.4)
- Using Technology for Marketing (Model Rules 1.18 and 7.3, Comments to Model Rules 7.1, 7.2 and 5.5)
- Outsourcing (Comments to Model Rules 1.1, 5.3 and 5.5)
- Detection of Conflicts of Interest When Lawyers Change Firms (Model Rule 1.17)

You can see the actual amendments in the [August 2012 Amendments to ABA Model Rules of Professional Conduct](#). The [ABA Commission on Ethics 20/20 August 2012 Proposals](#) provides a brief summary of the amendments.

MLM encourages its insureds to familiarize themselves with the changes and review their technology use and policies about outsourcing and conflict checking to ensure compliance with ethics rules.

Additional Resources

- In the article “[New ABA Model Rules May Require Changes in Your Law Firm’s Internet Marketing and Social Media Use](#),” veteran internet marketing attorney Michael J. Evans provides insight into how the technology related amendments could affect lawyers. Many agree that the amendments clarify some issues while raising even more questions that will likely be addressed in the coming years as this ethical area develops.
- “[ABA Adopts Model Rules Comments Concerning Outsourcing](#)” explains that the amendments relating to outsourcing essentially codify the points made in ABA Formal Op. 08-451. See also [Formal Opinion 08-451 Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services](#).



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MLM Roadmap Planning for Success

MLM BLOGS A Collection of Conversations

FAILURE TO KNOW THE LAW



The American Bar Association recently released its Profile of Legal Malpractice Claims from years 2008-2011¹. Once again, one of the most

frequent errors leading to a legal malpractice claim is the failure to know or properly apply the law. The ABA estimates that 13.5% of malpractice claims arise from these types of mistakes. How can a lawyer fail to know the law?

Unfamiliar Jurisdiction

One way for attorneys to make mistakes based on misunderstanding or unfamiliarity with the law is by working in an unfamiliar jurisdiction. This may play out when, for example, an attorney in one state takes a case in a neighboring state and is admitted pro hac vice. Differing sets of rules apply in each state with respect to substantive areas of the law, as well as rules and time limits.

Practicing in an unfamiliar court may also cause a failure to know the law. If an attorney is inexperienced in state or federal court, or fails to know a local court's rule, this can lead to malpractice due to failure to be aware of the law.

Handling a legal matter in a court or jurisdiction an attorney is unfamiliar with can lead to using improper legal arguments, missed deadlines and other mistakes that can be fatal to a client's claim or defense.

Dabbling

Attorneys are practicing in a challenging economic environment, which may cause them to want to branch out of their typical practice areas in order to sustain business. In order to do this, attorneys must familiarize themselves with the specific practice area and its requirements. This may mean CLE attendance, finding a mentor, or other methods of actively becoming versed in a new practice area. Attorneys who dabble in unfamiliar practice areas without proper preparation open themselves up to the potential for malpractice claims and ethical violations. It may be tempting to take a case in an unfamiliar area of law, especially if it seems particularly simple or if there is a chance for a large payoff. It is important to remember the old adage, however – if something seems too good to be true, it probably is.

Failure to Do Adequate Research to Stay Updated

Within any practice area it is imperative that attorneys stay up to date on changes in the law. A statutory change or new case law can be a game changer in any area of the law. If attorneys do not avail themselves of this knowledge, they can be left out in the cold – along with their client. For this reason, it is important to approach every case with a fresh eye toward the law and determine whether there have been changes that are either harmful or beneficial to clients.

There are many and varied ways lawyers can fail to know or properly apply the law. The key to preventing these types of mistakes is for attorneys to make sure they are familiar with the rules where they are practicing and the area of law they are practicing in. They also must be aware of any changes to the law, even if they have been in the same practice area and jurisdiction for years. Also remember that preventing malpractice claims and ethical violations simply means focusing on providing the best service and protection to clients, so for lawyers it's a win-win.

¹ The ABA Standing Committee on Lawyers' Professional Liability releases a new Profile of Legal Malpractice Claims every three years. The data contained is collected from insurance companies specializing in professional liability. That said, there is not a standard way in which data is collected throughout the companies, so while the profile is certainly informative and useful, it must also be understood that it is not meant to be exhaustive.



Angie Hoppe
Roadmap Editor

Angie Hoppe, MLM claim attorney, is actively involved in helping attorneys start a practice as the MLM Roadmap's editor, and by leading the ongoing development of MyLawyersModules.com, an online environment to assist attorneys start and run a safe and successful practice.

Submit your question on starting a practice and Angie will do her best to divulge practice pointers that are both useful and practical.

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Good Question Better Discussion

MLM BLOGS A Collection of Conversations

PROCRASTINATION: TYPICAL CAUSES AND WHAT TO DO



You get a letter from the insurance carrier in a personal injury case. Hmmmm, that's odd. You don't remember making a demand. In fact, you're not really sure what this case was about. You know the client emailed

you a few weeks ago, but her emails are always so rambling and incoherent, and you didn't even read it. You had other things to do and figured you would get to it eventually, maybe next week. The case isn't worth much anyway. Then your heart sinks as you realize the insurance company is letting you know it is closing its file and no offer will ever be forthcoming – you have missed the statute of limitations to file suit on behalf of your client.

It's human nature to procrastinate tasks that do not excite us, that we feel will not pay off for us, or that vaguely scare us. For some, certain tasks are avoided because of mental health or chemical dependency issues. For others, personal issues such as death of a loved one or divorce make focusing on anything else difficult.

If the avoided tasks are doing dishes or mowing the lawn, the worst that can happen might be fruit flies in our kitchens or irritated neighbors because of the jungle in our front yards. But if we as lawyers procrastinate the work we have agreed to do, our clients and practices can be seriously affected, and we are at risk for malpractice claims or even disbarment. Being aware of typical causes of procrastination in lawyering can help us recognize when we are at risk for malpractice and take steps to avoid it.

- **I DON'T LIKE MY CLIENT:** When he first walked into your office, your client seemed "assertive." But in recent weeks and months his constant demands on your time and unreasonable expectations make you dread even answering his emails anymore. He refuses to take your advice, and then blames you when things don't go as he wanted. It's becoming clear he has not presented you with all of the facts you need. He expects you to clean up problems he created but doesn't trust you to do it within the confines of the law. What's the point of even trying to please someone like that? You'd rather work for clients who appreciate you.
- **WHAT YOU SHOULD DO:** While it is understandable that you would want to just ignore this situation, if you have agreed to represent the client you cannot simply leave him hanging. Failure to communicate is a major precursor to malpractice claims, even when there is no actual malpractice. And obviously, failure to meet court or other deadlines

can cause your client actual damages. Depending on the stage of representation, it may make sense to withdraw and refer the client to another attorney. Most importantly, learn from the experience and take steps to manage future clients and their expectations. Not every potential client is a good fit for a particular lawyer. Be sure you are clear with potential clients about what you can and cannot do for them, and what you need from them in order to best represent them. If you get a sense that the client or his expectations will be difficult to manage, often the best decision is to decline the representation.

- **I DON'T KNOW THE LAW:** Your sister-in-law referred her neighbor to you. The neighbor has plenty of money to pay your fees, and wants your help to patent her new invention. This could be a major source of income for you, especially if the invention takes off. You are already envisioning the new boat you will buy with the extra funds. So what if the last time you thought about patent law was during your third year in law school – you can get up to speed... right? Except there is just so much to learn, and soon you feel overwhelmed. It seems every day there is some new roadblock you didn't even realize would be an issue. You start to feel anxious that you are missing something, and you recognize you probably are. You don't want to let your sister-in-law or your client down, and you don't want to admit you are in over your head. It's easiest to just pretend it isn't happening.
- **WHAT YOU SHOULD DO:** Don't panic. Advise your malpractice carrier about the situation and follow its suggestions on how to proceed. In all likelihood, an experienced patent lawyer should either take over the case or act as co-counsel to protect the client. Then be honest with your client that the issues presented require more expertise than you currently possess, and that it is up to her whether she continues with you as co-counsel or finds new counsel. This will be a difficult conversation to have, but it will be far less damaging than the one you would need to have after a tactical mistake, misunderstanding of the law, or missed deadline causes unfixable damage to your client. Going forward, be honest with yourself and with potential clients about your level of expertise. It would be impossible for any lawyer to be capable of being up to speed on every aspect of every type of legal issue. It is generally best to refer clients to lawyers with experience in the type of situation presented, or to act as co-counsel with a lawyer who has such experience, than it is to take on something unknown and simply hope for the best.

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- **MY CLIENT ISN'T PAYING:** A client comes to you in distress – he's been accused of molesting a young girl and needs you to prove his innocence. His story seems legitimate, and you genuinely want to help him so you agree to get to work without a retainer. Within a few months, the legal fees are approaching \$15,000 and the bills you have sent him are ignored. The case is nowhere near trial, and there is a lot of work yet to be done. Expenses are also piling up, and are coming out of your own pocket. You ask the client when and how you will be paid, and he explains he doesn't have the money, but this is his reputation and life on the line...would you please help him out? He will pay you eventually! You know deadlines are approaching, but you simply cannot afford to waste time doing work you suspect you will never be paid for. So you put the file on the far corner of your desk and avoid the client's calls and emails.
- **WHAT YOU SHOULD DO:** While it seems like you cannot afford to continue representing the client, you also cannot afford to simply stop representing him either. Procrastination could lead to severe consequences for your client and for you. While nonpayment of fees can be a reason to withdraw from representation, until you actually withdraw you have a duty to meet the standard of care, even if you have not been paid a penny. The chances of recovering fees at this point are small. Depending on the stage of the case, you should petition the court for leave to withdraw. If the court does not allow this, you may have to chalk this up to a lesson learned. Going forward, always talk to potential clients about their ability to pay and get an appropriate retainer. Be sure to follow up on unpaid bills immediately so that problems with nonpayment can be addressed before you are out significant fees and expenses.
- **I'VE TAKEN ON TOO MUCH:** At first it was exciting – a well-placed ad brings dozens of new clients to your office and business is booming! Except soon you realize that there is simply not enough time for you to give each new case the attention it needs. You find yourself working 12 hour days consistently (including weekends), and you feel out of control. Soon you hit your breaking point – you can't seem to focus on anything because you are worried about everything. You start to panic and the only possible thing to do is to give up and do nothing.
- **WHAT YOU SHOULD DO:** Don't give up. Breathe. Ask for help. If you are a solo, this may mean hiring an associate or paralegal to help organize files and handle some of the work. If you are in a firm, this may mean going to the managing partner and asking that some cases be reassigned. The absolute worst thing you could do is to do nothing. And going forward, recognize your limits. It is better to get a referral fee than it is to take on too much and be hit simply with a malpractice claim.
- **I'M HAVING PERSONAL ISSUES:** Life has handed you lemons lately: Your youngest child left for college, your father died last month, leaving you to administer his estate, and you suspect your wife is having an affair. It's just hard to focus on work at a time like this.
- **WHAT YOU SHOULD DO:** First, take care of yourself. This means using the mental and chemical health resources available to you through your law firm or bar association. For members of the Minnesota State Bar Association, this would be Lawyers Concerned for Lawyers (www.mnlcl.org or 1.866.525.6466). Second, take care of your practice. This often means asking for help, either from a partner or associate or from the Bar or your malpractice carrier. If you are not personally able to handle your practice, do not let your clients suffer. Let someone know so steps can be taken to protect your clients and the practice you worked hard to build.



Alice Sherren
Good Question
Editor

Alice Sherren, MLM claim attorney, addresses common (and not so common) questions MLM receives from insureds through its Risk Management HelpLine and invites insureds to weigh in via the comments section.

Join the "Good Question, Better Discussion" Conversation at Blogs.mlmins.com/goodquestion/.

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