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Avoiding Big Mistakes

The frequency of legal malpractice claims asserted against lawyers insured by Minnesota Lawyers Mutual (MLM) has increased substantially over the past two years. The frequency is now at approximately 8%. In other words, MLM is seeing claims asserted against eight out of every 100 insured lawyers. While certain areas of practice are more prone to malpractice claims than others, for instance claims arising out of plaintiff personal injury practice account for 30% of the claims asserted against MLM insureds, and defense work accounts for less than four percent, no area of practice is immune from the threat of claims.

Regardless of the area of practice, the types of errors leading to malpractice claims are consistent. Those who bring claims against lawyers allege that the lawyer:

1. Failed to provide the client with sufficient information about the case
2. Failed to follow the client's instruction
3. Represented parties with conflicting interests
4. Procrastinated in handling the case for the client
5. Did not know or properly apply the law.

Examining the types of errors that lead to malpractice claims and attempting to understand why these errors are made is the first step in establishing a program to manage the professional liability risk in the law firm. While such a program will not guarantee a claim-free career, it can significantly reduce the malpractice risk.

The legal environment lawyers practice in today is becoming more complex and specialized. It is more and more difficult to practice as a generalist. Client expectations

are extremely high. If those expectations are not met, a claim against the lawyer often follows. The basis for lawyer liability is expanding. For example, the privity requirement has been eroded in many jurisdictions. Lawyers must adapt to these changes in order to avoid claims.

One method of accomplishing this task is to incorporate the Rules of Professional Conduct into a risk management and quality assurance program for the law office. Such a program will work for any law firm, regardless of its size.

While not all ethical violations lead to malpractice claims, the majority of malpractice claims, it could be argued, include a taste of an ethical violation. Thus, it stands to reason that using the Rules of Professional Conduct as a foundation for a law firm risk management program makes perfect sense.

The claim experience of MLM leads to the conclusion that malpractice and ethical problems are closely related, even though legal malpractice law developed as an aspect of the common law of tort, and professional disciplinary law as a constitutionally

based regulatory function of the Supreme Court. These areas of law also address different interests. When a lawyer is sued for malpractice, the plaintiff is looking to be compensated. Even if the lawyer is found to have committed malpractice, which damaged the plaintiff, that finding will have no impact on the lawyer's ability to practice. The lawyer's license will not be affected. If, however, that same person were to file an ethical complaint against the lawyer, they would not be entitled to be compensated, but the lawyer could face discipline and possibly lose the license that enables him or her to practice law. Legal malpractice law works toward compensating the victim, while professional discipline regulations are focused on the protection of the public.

Because of the differences cited above, a number of courts refuse to grant tort relief based solely on an ethical violation. The preamble to the ABA Model Rules of Professional Responsibility states:

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary

agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

The central question, however, in a legal malpractice action is whether or not the lawyer's conduct failed to meet the professional standard of care. It doesn't take much of a leap to conclude that a violation of an ethical rule might be evidence of such a failure.

The five types of errors leading to malpractice claims cited above each relate directly to ethical responsibilities lawyers have to clients. The remainder of this article will focus on practical means that can be employed to avoid one of these types of errors and the malpractice claims and ethical complaints associated with them.

As noted above, a commonly alleged error giving rise to malpractice claims is that the lawyer engaged in a conflict of interest. Karen Bell, in a booklet entitled "Managing Conflict of Interest Situations", published by

the Lawyers' Professional Liability Indemnity Company, Toronto, Ontario, defines conflict of interest as follows:

A conflict of interest is a compromising influence that is likely to negatively affect the advice which a lawyer would otherwise give to a particular client.

A conflict of interest situation is a set of circumstances that is likely to affect adversely:

- The lawyer's **judgment** concerning a client or prospective client, or
- The lawyer's **loyalty** in respect of a client or prospective client, or
- The lawyer's **safeguarding** of interests of a client or prospective client.

Ms. Bell goes on to state that conflicts are very troubling because of the fact that loyalty and independence of judgment are essential to the effective representation of a client, and that a conflict might make it impossible to exercise the essentials of loyalty and judgment.

ABA Model Rules of Professional Responsibility address the issue of conflicts of interest in Rules 1.7 – 1.10. The Rules, and especially the comments to the Rules, provide detailed direction that is invaluable, and that if followed, will assist in avoiding the majority of the malpractice and ethical traps presented by conflict situations.

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The central question, however, in a legal malpractice action is whether or not the lawyer's conduct failed to meet the professional standard of care.

While the Rules do not in all cases prohibit representing clients with conflicting interests, doing so, from a malpractice standpoint, is extremely dangerous. This is especially true if one of the represented parties does not believe their expectations were met. And in a malpractice context, a conflict of interest claim just plain makes things look bad. Even with what appeared to be an informed consent documented, and in writing, (as required by the Rules), if the deal goes bad, chances are a claim will be asserted against the lawyer by the party who believes they did not get all they deserved. While this type of claim can be defended successfully, they are still not without a cost to the defendant/lawyer. If a professional liability policy provides coverage for the claim, there may be a substantial deductible at risk for the lawyer. In addition, there will be significant amounts of unbillable time spent with the claim person and defense counsel.

The most effective way to avoid conflict of interest claims and ethical problems based on a conflict of interest is to decline any representation where a conflict exists. While this is an effective technique, it is not always a practical alternative. Instituting some relatively simple procedures will assist in managing these risks.

First, and most importantly, all actual and potential conflicts, to the extent possible, should be identified before representation is commenced. That will entail collecting certain information about all prospective clients and cases. This information, ideally, should be collected by telephone prior to the initial client consultation, and should include the prospective client's name, home and business addresses, and all of the prospective clients telephone numbers. It is also important to secure the prospective client's employment and business affiliations,

and other involved and interested parties to the matter, whether friendly or adverse. If the information is not secured prior to the initial meeting with the client, it should be gathered at the time of the initial meeting by means of a client intake form, **Exhibit A**.

Once gathered, the information must be entered into the system. One staff person should have the responsibility of maintaining the conflict system, and the system should be centralized. Conflicts checks must also cover current and former clients with new matters.

In order for a conflict system to be effective, all attorneys and support staff must be thoroughly trained in the system, must buy into the use of the system and must actually use the system.

If a conflict is identified, and if taking on the representation is being considered, an analysis must be done in order to determine if the conflict is waivable. This analysis must be done by a close examination of the applicable ethical rules. If it is determined that the conflict is waivable, then before proceeding with the representation the client must give an informed consent. That consent is required to be given in writing under the ethical rules in most jurisdictions. A sample engagement letter with a conflict of interest disclosure is shown in **Exhibit B**.

If the conflict is determined to be non-waivable, or for that matter, if the case is declined for any reason, including a gut level feeling of being uncomfortable with either the case or the client, there are important steps that must be taken. Do not obtain any confidential information in the process of screening the client and the case. If confidential information is received, obligations to the (non) - client could accrue, even if the case is declined.

If a case is declined it is crucial to document very clearly the declination. A non-retainer letter must be sent immediately to:

1. Document that the case is being declined, and that there has been no attorney/client relationship formed,
2. Advise the party that certain time limits could apply to bar the case and that they should seek other counsel immediately if they intend to pursue the matter, and
3. Confirm that you have received no confidential information. The letter should contain no opinion as to the merits of the case. It is recommended the letter be sent Certified, Return Receipt Requested. **See Exhibit C.**

Following the above suggestions will provide guidance to the party if they choose to pursue the matter, and a defense if it is alleged that an attorney/client relationship was established.

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