



Emerging Issues in Legal Liability

ISBA Mutual Mirza Risk Management
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Lawyers' Professional Liability

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What are We Talking About?

What we are observing in claims, not only in legal professional malpractice, but how those malpractice issues relate to additional areas of risk management generally, including cyber liability.

What Types of Claims Do We See?

What are Examples of Claims
Related to Substantive Errors?

- ▶ Failure to Know or Apply the Law Correctly
- ▶ Inadequate Discovery or Investigation

What are Examples of Claims
Related to Client Relations?

- ▶ Failure to Follow Instructions
- ▶ Failure to Provide Sufficient Information / Obtain Consent



Substantive Errors

Failure to Know Or Apply the Law Correctly

Definition: This category applies when a lawyer is unaware of the legal principles involved, or when a lawyer does the research but fails to ascertain the appropriate principles. It applies in instances of erroneous reasoning from known principles.

Failure to Know Or Apply the Law Correctly

Practice Tips

- ▶ Know your area of expertise – DON'T DABBLE
- ▶ Continually study the law by taking advantage of relevant CLE
- ▶ Check the credentials of new lawyers, lateral hires, backup lawyers, and referral sources
- ▶ Supervise and properly train associates, paralegals, and staff
- ▶ Require the approval of two attorneys for opinion letters.
- ▶ Use checklists and forms.

Source: The Fundamentals of Loss Prevention for Lawyers, ISBA Mutual

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6

Failure to Know Or Apply the Law Correctly

Tips to Avoid Missing Statutes

- ▶ Make your initial calculation of the statute of limitations date(s) immediately
- ▶ Do not assume you already know the applicable statute of limitations
- ▶ Be on the alert for unusual circumstances that might impact your statute of limitations analysis.
- ▶ When working in an unfamiliar venue, always call local counsel to verify foreign statutes of limitations
- ▶ Do not rely solely on information provided by any one source, particularly clients
- ▶ Check the Illinois State Bar Association's current Guide to Illinois Statutes of Limitations and Repose and other resources

Source: The Fundamentals of Loss Prevention for Lawyers, ISBA Mutual

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7

Inadequate Discovery/Investigation

Definition: This category includes cases where the claimant alleges that certain facts which should have been discovered by the lawyer in a careful investigation or in the use of discovery procedures were not discovered or ascertained.

Inadequate Discovery/Investigation

Practice Tips

- ▶ Ask questions... and then ask more
- ▶ Pay attention to details
- ▶ Take thorough notes
- ▶ Verify all levels of ownership: Government, Corporations, Private Companies.
- ▶ Methods of discovery:
 - ▶ Client Interviews
 - ▶ Non-party Interviews
 - ▶ E-Discovery
 - ▶ Interrogatories
 - ▶ Deposition

Source: The Fundamentals of Loss Prevention for Lawyers, ISBA Mutual

Failure to Follow Instructions

Definition: Attorneys are supposed to follow the instructions of their clients and a failure to follow instructions claim can be made whether or not the failure was intentional or unintentional.

Failure to Obtain Consent/Inform Client

Definition: This category involves cases where a client asserts that, if the client had been fully informed by the lawyer of various alternatives or the risks involved, a different course of action would have been selected. It would also apply when the lawyer should have communicated with the client and obtained consent to proceed but did not.



Client Relations

Client Relation Claims

Practice Tips

- ▶ Prepare an engagement letter and have it signed by client
- ▶ Increase your documentation
- ▶ Send letters to unrepresented parties
- ▶ Retain a record of your research
- ▶ Retain copies of all drafts of agreements and contracts
- ▶ Send a disengagement letter when you are withdrawing from representation. Contact your insurance carrier's risk management support for examples
- ▶ Communicate in writing
- ▶ Get written confirmation from client. Get it signed
- ▶ Document. Document. Document.

Source: The Fundamentals of Loss Prevention for Lawyers, ISBA Mutual

Elements of an Engagement Letter or Fee Agreement

- ▶ A clear identification of who the client is.
- ▶ A detailed description of the legal work to be performed.
- ▶ A description of any critical aspects of the matter for which the lawyer will not be responsible.
- ▶ A detailed description of the fee arrangement.
- ▶ In the case of solo lawyers, the identification of a backup lawyer designee.
- ▶ File retention and destruction procedures.
- ▶ Language that indicates that your firm will not be delivering wire transfer instructions.
 - ▶ For sample engagement letters and fee arrangements, contact your bar association & various online resources.

Disengagement

- ▶ Termination of Representation
- ▶ Removing yourself from a case/matter after having accepted it but before the matter has concluded
- ▶ Unpaid Fees
- ▶ File Closing Letter

Non-Engagement

- ▶ If the firm declines representation, always send a letter to the individual or entity that has been declined.
- ▶ The Non-Engagement letter should clearly state your decision not to represent the declined client
 - ▶ Never give an opinion as to the viability of a particular case or matter.
 - ▶ Do not specify the statute of limitations date in your letter.
- ▶ This can be accomplished quickly with a form letter you can obtain from your bar association & various online resources.

Client Relation Claims

Tips on What to Document

- ▶ Client's consent to all major decisions.
- ▶ Client's instructions to proceed in a manner against the client's best interests.
- ▶ Anything unusual.
- ▶ All demands/offers and the client's response.
- ▶ Telephone calls.
- ▶ Err on the side of everything.

Legal Malpractice Claims

Examples

- ▶ Inter-related Business Relationships
 - ▶ Lawyer Involved in Start-up as Attorney and Investor
 - ▶ Lawyer Accused of Stealing Intellectual Property
 - ▶ Lawyer's Defense: Business Had Other Counsel to Handle IP
 - ▶ Insured involved in multi-state litigation with over \$200k spent in defense.
 - ▶ Coverage?

Legal Malpractice Claims

Examples

- ▶ Friends as Clients
 - ▶ Lawyer Handles Real Estate Closing For Friend (Seller)
 - ▶ Friend's Deal is with Lawyer's Existing Client (Buyer)
 - ▶ Buyer Does Not Have Lawyer. Why?
 - ▶ Error: Insured Fails to Convey Two Parcels
 - ▶ Buyer Realizes House on Property was Sold in Tax Sale
 - ▶ Insured sued by Buyer for damages.
 - ▶ Conflict Waiver?

Legal Malpractice Claims

Examples

- ▶ Family as Clients
 - ▶ Lawyer's cousin would call him with legal questions;
 - ▶ Cousin bought property at sheriff's sale with lien on it;
 - ▶ Lawyer said he told cousin to pay off lien as soon as possible but no documentation
 - ▶ Eventually the property was sold to the judgment holder and cousin sued Lawyer.
 - ▶ Insured had never charged cousin or was paid any fees.

Legal Malpractice Claims

Examples

- ▶ Family vs. Family
 - ▶ Sister v. Brother (Lawyer): Allegation is that Brother Failed to Advise Sister to Get a Survey of Deceased Mother's Home
 - ▶ Sister Sole Owner after buying out Brother Lawyer
 - ▶ Flood damaged Home
 - ▶ Home Cannot Be Repaired or Rebuilt Because of Easement
 - ▶ Expert v. Expert: Was A Survey Required Prior to Being Bought Out?
 - ▶ Mediated Settlement

Lawyers' Professional Liability

- ▶ What is Lawyers' Professional Liability Insurance?
 - ▶ Malpractice, Negligence, Errors and Omissions Coverage.
- ▶ But why do you need it?
 - ▶ Mistakes happen and your CLIENT needs to be made whole
 - ▶ OR
 - ▶ No malpractice was committed, but you have to be DEFENDED!

Lawyers' Professional Liability

- ▶ How do I report a claim?
 - ▶ Reporting information is usually on the Declarations Page
 - ▶ May also be on the Policy Form
 - ▶ Follow the Reporting Requirements of your Policy
 - ▶ Date(s) of Wrongful Act; Alleged Damages; Claimant's Name; Date you became aware of a Claim
 - ▶ Attach a copy of the lawsuit, demand, e-mail, etc.
- ▶ Why is timeliness important?
 - ▶ Professional Liability Policies are Claims Made and Reported

Questions?

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Thank You