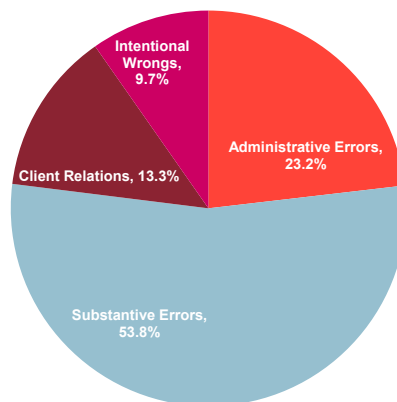
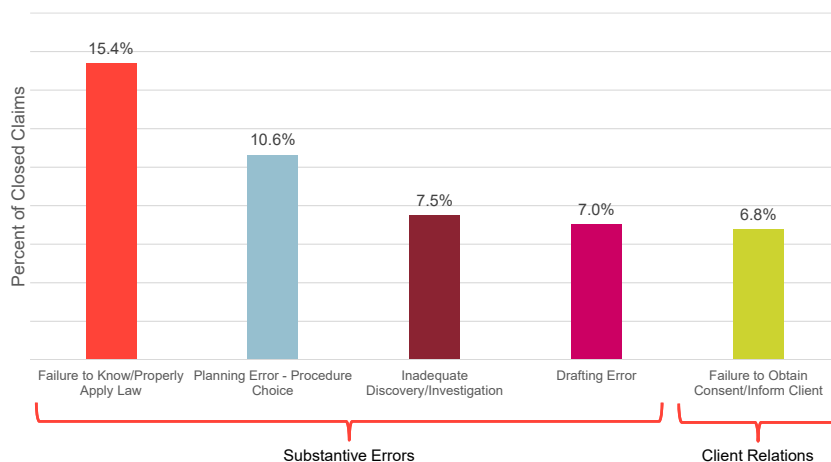


The Top 5 Malpractice Claims and How to Avoid Them

General Type of Alleged Error in 2015 Study



Most Common Alleged Errors



ISBA Mutual Lawyers' Malpractice Insurance

Source: ABA Profile of Legal Malpractice Claims 2012-2015

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Failure to Know/Properly Apply the Law

Real Life Claim: Lawyer represented one client who slipped and fell at the Rosemont Horizon during a concert and a different client who tripped in a University of Illinois parking lot. Both cases were handled in the same fashion but did not have the same outcome. The first client received a favorable outcome but the second client did not and the attorney was sued.

WHY?

The lawyer did not realize that a one-year statute of limitations deadline applies to facilities owned by governmental entities and therefore missed the filing deadline.



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Discussion

- ▶ What is the preventable error?
- ▶ What would have been the right course of action?



Failure to Know/Properly Apply the Law Tips to Avoid It

- ▶ Know your area of expertise.
- ▶ Continually study the law by taking advantage of relevant CLE.
- ▶ Check the credentials of new lawyers, lateral hires, backup lawyers, and referral sources you work with.
- ▶ Supervise and properly train associates.
- ▶ Require the approval of two attorneys for opinion letters.
- ▶ Use checklists and forms.



Failure to Know/Properly Apply the Law Tips for Avoiding Missed Statutes

- Make your initial calculation of the statute of limitations date immediately.
- Don't assume you already know the correct 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.
- Don't rely solely on information provided by any one source, particularly clients.
- Check ISBA's current *Guide to Illinois Statutes of Limitations and Repose*.



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

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Planning Error – Procedure Choice

Real Life Claim: Lawyer defended a bus driver on a DUI. The strategy used was pleading to a lesser offense, specifically reckless driving. The strategy worked and the driver did not lose his commercial license. However, the client pursued a claim against the lawyer

WHY?:

- The bus driver worked for a school district which forbid operators from having a record of reckless driving. Based on the school policy, the client was fired and his guilty plea was used to justify the termination.
- The lawyer was able to change the plea to the lesser charge of inappropriate lane change. Despite this change, the driver was still unable to get his job back.



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Discussion

- ▶ What is the preventable error?
- ▶ What would have been the right course of action?



Planning Error – Procedure Choice Tips to Avoid it

- ▶ Always do thorough investigation of client's particular situation. (In this example, why did the client need a commercial drivers license?)
- ▶ Discuss the negative consequences of all options so your client can make an informed decision.
- ▶ Don't limit your attention to the client's definition of the scope of the legal matter at hand.
- ▶ Your duty is to put the needs of your clients first. Keep the big picture in mind.
- ▶ Document. Document. Document.



Inadequate Discovery/Investigation – Failure to Identify the Correct Defendants Example

Real Life Claim: Lawyer filed a products liability action against manufacturer on Client's behalf. Lawyer named Acme Tool Company as the defendant. The suit was eventually dismissed as a result.

RESULT:

- Acme filed a successful Motion to Dismiss based on the fact that it was not in existence at the time of the accident.
- Lawyer filed an amended complaint naming Joe Blow d/b/a Acme Tool Company just after the statute of limitations ran. Joe Blow d/b/a Acme Tool Company filed a Motion to Dismiss based upon the statute of limitations.
- Of particular note, the ***defendant argued that plaintiff's lawyer noticed he had sued the wrong party when Lawyer had taken Joe Blow's deposition six weeks before the statute of limitations expired.*** The case was dismissed



Discussion

- What is the preventable error?
- What would have been the right course of action?



Inadequate Discovery/Investigation Tips to Avoid it

- Conduct discovery and investigation early in representation.
- Pay attention to all of the details, not just answers to your questions.
- Know what you are looking for.
- Take thorough notes. Obtain and review the transcripts from depositions.
- Compare all documents.
- Verify all levels of ownership at all levels of government.
- Methods of discovery:
 - Thorough client interviews
 - E-Discovery
 - Interrogatories
 - Deposition



Drafting Error

Real Life Claim: Lawyer represented Buyer/investor in the purchase of multiple properties from one Seller. The problem arose when the House and Yard next to it were on two separate legal descriptions. The lawyer, in preparing the warranty deed, only documented the Yard in the purchase. The client purchased a yard instead of a house.

RESULT:

- The house was purchased on a tax sale.
- To resolve the claim, the insurance carrier has to buy out the tax purchaser or the buyer/investor



Discussion

- ▶ What could be the cause of the claim?
- ▶ What would have been the right course of action?



Drafting Error Tips to Avoid It

- ▶ Proofread. Proofread again. Put down the document. Proofread again.
- ▶ Read the document aloud to another person as they verify the document.
- ▶ Allow sufficient time to proofread.
- ▶ Have someone else proofread the document.
- ▶ Proofread again.



Failure to Obtain Consent/Inform Client Example

Real Life Claim: Lawyer represents the family of Smith, who was killed by a truck owned and operated by the Defendant. Shortly before trial, Defendant offers \$1,000,000 to Smith's family. Lawyer strongly encourages the Smiths to take the offer. Lawyer points out to the Smith family that their case has weaknesses from a liability standpoint. In particular, the defense alleges that Smith was walking in the road at the time of the accident. The Smiths are convinced they can obtain more at trial and instruct Lawyer to reject the offer and proceed to trial. The jury returns a not guilty verdict. Shocked and disappointed, Mrs. Smith cannot remember Lawyer's advice to settle.

RESULT:

Mrs. Smith sues the Lawyer for legal malpractice. The complaint alleges that Lawyer failed to convey the settlement offer to his clients, failed to adequately advise the Smith family of the risks of trial, and failed to vigorously pursue settlement negotiations. Lawyer has no documentation to buttress his version of the story.



Discussion

- ▶ What is the preventable error?
- ▶ What would have been the right course of action?



Failure to Obtain Consent/Inform Client – Dispute Over Scope

Real Life Claim: Client is injured at work while driving a forklift for Employer. Lawyer agrees to represent Client in her worker's compensation claim against Employer and has Client sign the standard Attorney Representation Agreement required by the Illinois Industrial Commission. Thereafter, Lawyer obtains a \$25,000 settlement on Client's behalf.

RESULT:

- After talking with a few friends at the gym, Client asks Lawyer about the possibility of bringing a product liability claim against Forklift Manufacturer. Lawyer discovers to his horror that the statute of limitations has expired. Client then sues Lawyer claiming that he should have filed the products liability complaint on Client's behalf.
- Case dismissed. Nevertheless, there were costs to defend the claim



Discussion

- What is the preventable error?
- What would have been the right course of action?



Failure to Obtain Consent/Inform Client How to Avoid It

- Prepare an engagement letter and have it signed by client.
- Increase your documentation for troublesome clients.
- 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.
- Communicate in writing.
- Get written confirmation from client. Get it signed.
- Document. Document. Document.



ISBA Mutual Lawyers' Malpractice Insurance

Source: *The Fundamentals of Loss Prevention for Lawyers*, ISBA Mutual
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Failure to Obtain Consent/Inform Client What to Document in Writing

- 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.



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