

## **THIRTEEN TIPS TO AVOID ETHICAL AND MALPRACTICE CLAIMS**

1. Don't be afraid to turn down a client. Whether you are a solo practitioner in a small town or a big firm partner in the city, the pressure to land new clients is a fact of life. Ironically, however, the most important client to your practice may be the one you turn away. Frequently, lawyers sued for legal malpractice will say they knew at the outset they should not have taken on the client who sued them. Beware of clients who fired their previous counsel or who have been turned down by other lawyers. Think twice about a client who has more litigation experience than you do, or the one who has nothing good to say about lawyers or the legal system. But most importantly, run from the clients who just don't feel right. Chances are you have good instincts. Learn to trust them.
2. Don't forget the small cases. There is a case that has been sitting on the corner of your desk, the end of your credenza, or the bottom of your pile, and you just can not bring yourself to pick it up. You tell yourself you will work on it tomorrow, or the next day, or next week, because today you must devote to your big cases and your big clients. This is the attitude that will get you sued. Only rarely are lawyers sued by their most important clients or on the cases where they spend a great deal of time. Almost always it is the small case or the difficult client lawyers will neglect. The truth is, there are no small, insignificant cases or transactions on your docket.
3. Use effective retention agreements. A central but often overlooked issue in legal malpractice cases is the existence and scope of the attorney-client relationship. Lawyers frequently get sued by people they never thought they represented, or by clients they know they represent but on matters they did not think they were engaged to handle. Preparing specific engagement letters can help prevent these suits, or at least they can provide strong defenses if you are sued. The engagement letter need say nothing more than this: "Thank you for retaining me to represent you in the lawsuit entitled Smith v. Jones, now pending in the Third Judicial District Court, case no. 01-00345. Although I would be happy to represent you in other matters should the need arise, this current representation will be limited to the Smith v. Jones case." Moreover, many lawyers represent clients on multiple matters. Although it may seem like a hassle at the time, preparing separate engagement letters for each new matter, and avoiding general representations such as "corporate advice" or "general business matters," could be your salvation in a legal malpractice case.
4. Manage your client's expectations. Many clients' exposure to the legal system is limited to what they see on television, which usually gives them unrealistic expectations about what you and the legal system can do for them, how long it will take to do it, and how much it will cost. Clients almost always believe their position is the correct one, and they expect to be vindicated in the courtroom or across the transaction table. Rarely do they view their legal predicament with objectivity, so they need their lawyer to explain concepts like the adversarial system, the neutral fact finder, varying interpretations of the law, competing policy concerns, inherent delays of litigation, controllable and uncontrollable expenses, and unpredictable outcomes. Without managing clients'

expectations at the outset of the engagement – and periodically throughout – they will believe from watching “Perry Mason,” “L.A. Law,” “The Practice,” and the O.J. Simpson trial that the best lawyer always wins. And if you don’t, you may get sued.

5. Return your phone calls. When you first graduated from law school and took your first job, the first thing your first supervisor told you was to return your phone calls daily. Lawyers who get sued for legal malpractice almost invariably violate this rule. There is nothing clients resent more than being ignored by the lawyer they are paying to look out for their interests. Combined with unfulfilled expectations, unreturned phone calls make clients angry with their lawyer. A lawsuit is a predictable result.
6. Don’t sit on your mistakes. Most lawyers pride themselves on fixing the mistakes of their clients, not making mistakes themselves. So when they do make mistakes – and all of us do – they naturally are embarrassed and instinctively want to prevent anyone else from knowing. But the biggest mistake of all usually is trying to hide your mistakes. Lawyer mistakes do not go away, they fester and grow. There is no need to make a public announcement, but talk to a partner or a trusted colleague for some objective advice. And most importantly, tell your client. Frequently, there is a solution to the problem, and if there is not, the last thing you want is a failure to disclose to add to a negligence claim.
7. Think twice before suing to collect unpaid fees. Being a lawyer carries an implied threat of suing anyone who crosses you. So you might get some mileage out of mentioning your occupation to an insurance representative trying to deny your coverage request, or to an auto mechanic trying to overcharge you. But throwing your legal weight around by suing clients when they fail to pay will land you in a legal malpractice suit ten out of ten times. There are times when suing your clients might be justified, just be aware of the certainty of a counterclaim and be confident you can prevail.
8. Be diligent in billing and collecting fees. The corollary to the rule against suing clients for fees is to keep your billings and collections under control so you are not tempted to sue. If you do not bill for three or four months at a time, your receivables may grow to the point where you cannot afford to walk away. The same may be true if you bill regularly, but do not collect. You do not have to work for free, and even your deadbeat clients will not expect you to. But they will take advantage of you for not billing and collecting regularly, leaving you in the awkward position of having to continue working pro bono or seeking to withdraw for non-payment, which almost assures you will not get paid without suing.
9. Write it in your calendar, and then write it in another calendar. The number one cause of legal malpractice, by an overwhelming margin, is missed deadlines. Most lawyers have a false sense that something so easy as meeting a deadline is not so hard. But the reality is that deadlines change, compete with other deadlines, and are just plain forgotten. So make a habit of writing all of your deadlines in your calendar, and then have a secretary or docket clerk make a backup calendar. And most importantly, remember to review your calendars daily.

10. Look for conflicts, not away from them. Few things look worse in a legal malpractice case than conflicts of interest. Conflicts frequently arise in non-litigation contexts, such as when the estate planning lawyer represents a trustor, trustee, and beneficiaries at the same time; when the real estate lawyer represents multiple members of a development joint venture; or when the corporate lawyer represents the buyer and the seller in a small transaction. For litigators, common conflicts traps include taking different positions on the same legal issue or representing the adversary of a former client in a factually related matter. Most potential or actual conflicts can be foreseen and resolved at the outset of a matter with an inquiry or a conflict waiver letter, which in the long run is a lot less trouble than taking a chance and getting sued.
11. All work and no play makes Jack a dull boy. Whether a lawyer's mistake takes the form of a missed deadline, an overlooked conflict, or sloppy billing practices, a common cause of the mistake is stress. Paradoxically, it takes a clear mind and a certain degree of calmness to practice law, while the practice of law tends to muddle the mind and agitate your disposition. To keep things in balance, everyone needs an outlet. So take a vacation, go for a run, or read a good book. You may lose a few billable hours but you likely will make fewer mistakes and enjoy lawyering more.
12. Be a lawyer or a businessperson, but not both. It takes only a short time in the practice of law to realize that many of your clients make more and work less than you do. The lure of being in the deal, taking equity, or running a business is there for many of us. While some people manage to be both lawyers and businessmen or women, they do so at a risk. Mixing law and business invariably will put you in the line of fire for allegations of conflicts of interest or self-dealing should the business do badly. As the lawyer in the mix, you are likely to be the first one sued and most aggressively pursued.
13. It really could happen to you. According to the American Bar Association, one of the top ten legal malpractice traps is the unwillingness to believe it could happen to you. The truth is, a lot of bad lawyers get sued for legal malpractice. But so do really good lawyers, new lawyers, old lawyers, big firm lawyers, and solo practitioners. There is no prototype legal malpractice defendant. We all are at risk. So be careful and buy insurance. You will be glad you did.

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