



Malpractice Risk Factors and How to Avoid Them

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After reviewing PLF claims data for the past five years, I want to highlight some of the major factors that lead to malpractice claims filed against our covered parties. Those factors are represented in the chart below.



The malpractice risks resulting from many of these factors (e.g., failure to follow through, inadequate preparation, failure to meet deadlines, and poor client relations) can be avoided by focusing on one major risk factor: inadequate office systems.

This and a later article will explore ways to improve your office systems as a risk management tool.

Reduce Malpractice Risks by Improving Your Office Systems

Having the necessary law office systems helps ensure that your law practice runs smoothly. The systems set out procedures and processes to handle daily firm operations such as screening and engaging clients, checking for conflicts, entering deadlines, managing

the file, and disengaging clients. With these in place, lawyers will not have to scramble to come up with a way to do things or reinvent the wheel for each new client or matter. Most importantly, lawyers can reduce their malpractice risk by having reliable systems in which to practice law. Necessary office systems consist of the following components:

- Client screening and case assessment
- Calendaring
- File management
- Client management
- Conflict checking
- Time tracking and billing

These systems need not be thoroughly planned out or perfected before you open your law practice. But consider how you will set up and manage each component. As you practice, you figure out what works and what does not, and continue to refine and improve your systems.

This article will discuss the first three components on this list: client screening and case assessment; calendaring; and file management. The last three components will be discussed in a later article.

CLIENT SCREENING AND CASE ASSESSMENT

Proper client screening is one of the most effective ways to reduce the risk of malpractice claims. The purpose of screening is to filter out high-risk clients, who are more likely to bring an unmerited malpractice claim against lawyers or otherwise make your practice unenjoyable. Client screening will help you identify unwanted clients from desirable ones.

You can screen clients with the help of a checklist. (Read my blog post about why lawyers should use a checklist at <https://www.osbplf.org/inpractice>.) The checklist should consist of questions to evaluate the client's attitude toward the case, the client's experience and relationship with previous lawyers, the client's ability to pay, and other areas that may raise a red flag. Below are some red flags and what they could mean:

- **Client had multiple prior lawyers for the same matter** – This may indicate a problem client, a non-paying client, or a case with serious flaws

(lacks merit, no evidence, no witness, etc.).

- **Client is motivated by revenge, a feeling of victimization, or other extreme emotions** – This may indicate the client has her or his own agenda and may be difficult to work with.
- **Client waited until the last minute to look for a lawyer** – This may be a signal that the client is unprepared, not proactive, and may not cooperate or respond to your requests for information, thus preventing you from performing competently.
- **Client has unrealistic expectations that cannot be changed** – This may indicate the client will be difficult or impossible to please, second-guess your legal advice, impose unreasonable demands on you, and will not be satisfied with the result, no matter how good.
- **Client expresses difficulty or inability to pay fees** – This may be a sign that the client will not pay on time or at all, will likely dispute the bills, will expect you to advance costs, and will blame you if anything goes badly.

Screen every prospective client. If a red flag is raised during the consultation or interview, put extra effort into evaluating the client by asking follow-up questions. If many alarm bells are going off, you will be better off declining the client. Send that person a nonengagement letter. Sample nonengagement letters are available at our website at www.osbplf.org > *Practice Management* > *Forms*.

Besides screening clients, it's also important to assess the case to ensure you can provide competent representation. Decline cases that fall outside your practice area. Dabbling is dangerous. Reject cases if you do not have and cannot acquire the requisite skill or knowledge to take them on. Consider rejecting cases if you don't have the needed time and resources to be thorough and prepared. Properly assessing your cases will help you reduce your exposure to other malpractice risk factors, including inadequate experience in the law and inadequate preparation.

CALENDARING SYSTEM

A calendaring system is an important risk management tool to manage deadlines. Claims resulting from

a missed deadline may be due to a clerical error, miscalculating deadlines, filing at the last minute, not knowing the statute of limitations, or general neglect due to procrastination or personal difficulties. Here are some calendaring errors the PLF has seen:

- Waiting until the last minute to electronically file a complaint that got rejected and missing a statute of limitations;
- Failing to appear at a final resolution conference in a case because the date was not calendared, resulting in judgment by default against the client;
- Missing a statute of limitations by untimely serving the registered agent of the corporate defendant;
- Miscalendering an administrative hearing in a case, resulting in the lawyer not appearing at the hearing.

A missed deadline is an avoidable mistake if lawyers have a reliable calendaring system to keep track of deadlines and dates. Some lawyers use rule-based calendaring software to generate a list of deadlines for a case based on applicable statutes and court rules in their local jurisdiction. When a statute or rule changes, affecting a deadline, the software automatically recalculates all the dates in the system. Other lawyers calculate manually to determine the deadlines. Whatever method you use, make sure the deadlines are promptly entered into your calendaring program.

Have one calendaring system as the main point of entry. Don't use multiple calendars (one for the office, one for home, one on your phone, and one using sticky notes). It's hard to keep track of dates and deadlines when you enter them in different places.

Enter all dates related to a case, including court dates, statutes of limitation, litigation deadlines, discovery deadlines, and client appointments. Also enter reminder dates so you have advance warning before the deadlines. Tickle dates to review your files on a recurring basis.

Adding reminders to follow up or confirm that work is complete and blocking out time to do work prior to a deadline will help you avoid at least four other risk factors — failure to follow through, inadequate

preparation, failure to file/record documents, and failure to meet deadlines.

The firm should have a master calendar that pulls important deadlines and dates in cases from all the lawyers' individual calendars. This practice makes it easier for one lawyer to cover for another if an emergency occurs. A calendaring error made by one person could also be noticed and caught by another.

Make sure you back up your calendar by making a duplicate copy of the calendar. Synchronize your calendar across all your devices so you can have easy access to it. If calendaring is delegated to staff, make sure they are properly trained on how to calculate deadlines and how to use the calendaring program.

The PLF has CLEs and practice aids on calendaring available at www.osbplf.org > *CLE* > *Past* and at www.osbplf.org > *Practice Management* > *Forms*.

FILE MANAGEMENT

How you manage your files can present a malpractice risk. Proper file management can help you reduce the risk because it allows you to find the documents you need and encourages documentation. One aspect of file management is implementing a system to organize, store, and retrieve files. When you cannot find documents because they are misplaced, lost, or not properly labeled, it might jeopardize the success of your client's matter or affect your ability to represent the client. It also may lead to missed deadlines and other malpractice risks.

The second important aspect of file management is documentation. It is essential that lawyers keep a record of their communications with clients and other parties, as well as major events and milestones related to the client matters.

Documentation serves many useful purposes. It conveys information in writing to clients and gives them time to process the information. It helps prevent misunderstanding by giving the client a chance to dispute the content of the conversation. It also helps the lawyer articulate the thought process behind an action or a decision. Finally, it may help ward off a claim for legal malpractice and provide the lawyer with evidence to defend against one. If a conversation is

not documented, the client can later argue that it never occurred. But if the conversation is followed up with a letter to the client, it is harder to dispute it later.

Lawyers can document the files in different ways. One effective method is to contemporaneously memorialize the conversation or event in writing and then promptly send it to the person with whom you had the conversation by mail or email or any manner you know he or she will receive it. A second method is to write a contemporaneous and detailed memorandum to the file. A third method is to take handwritten notes during the interaction or conversation. The least effective method is doing any of these things after the fact — instead of contemporaneously.

Lawyers need to use judgment in deciding which method to use while keeping client relations in mind. Some clients may get annoyed when you send them too many “CYA” letters. You might want to explain the purpose for sending the letters (e.g., convey information, give them time to process, prevent misunderstanding, etc.).

Below are some areas you should document:

- **Commencement, scope, and termination of representation** – Use an engagement letter to document when your representation of a client begins and the scope of your legal services to avoid misunderstanding on what you will do for the client and when. Use a disengagement letter to document the termination of the attorney-client relationship when the matter is concluded or for other reasons. Use a nonengagement letter when declining a prospective client. This type of letter documents that an attorney-client relationship does not exist and that the lawyer is not responsible for any deadlines or statute of limitations in the matter. Both nonengagement and disengagement letters will help protect lawyers against allegations they failed to take an action before the statute of limitations expired. Sample engagement, nonengagement, and disengagement letters are available at www.osbplf.org > *Practice Management* > *Forms*.
- **Client’s instructions and lawyer’s advice** – Follow up with a letter to a client to document any advice given to the client and the client’s instruction. Decisions about settlement, authority

to settle, dismissal, or appeal should all be documented. This will help avoid finger-pointing if the matter goes south and the client does not get the desired result.

- **Important conversations with clients, opposing parties, and other parties involved** – By documenting these conversations, you will have evidence to help defend any claims for malpractice.
- **Major events and milestones in the matter** – Any significant event that happens in the client’s matter should be documented, such as filing of pleadings or the court’s ruling on a motion. Even when the matter is not currently active, it’s still a good idea to inform clients in writing of major milestones in the case and its status. This might help stave off a claim that you didn’t take action on the matter.

Proper file management, particularly documentation, can help improve client relations and allow you to prove what went on in the case, which can go a long way in avoiding malpractice.

I will discuss the last three components of an effective office system in the next issue of *inBrief*. ■

Special thanks to Bruce Schafer, recently retired Director of Claims at the PLF, for his input on documentation.