COMMON MALPRACTICE MISTAKES
WITH TIPS ON HOW TO AVOID THEM

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I. INTRODUCTION[1]

Nothing strikes terror into an attorney of conscience like the fear of committing legal malpractice. Malpractice carries with it the potential for economic and emotional harm to clients and the consequent impact on self, including possible disciplinary action, the embarrassment of failing to act competently, and confirmation of the self-doubts inherent in working in a competitive and ever-changing work environment.

Information about malpractice claims, the types of acts involved, which areas of the law have the most malpractice claims, the frequency of claims, and the average cost per claim would be reasonable information that every practicing attorney should know. Logically, a person practicing in a high risk area of the law might want to know that and adjust management decisions to reduce risk. Every attorney would have an interest in implementing office procedures to avoid potential claims.

Yet, current, detailed information is hard to discover. Malpractice carriers hold their claims history as confidential, both to protect the insured and to safeguard proprietary information. Finding aggregated, public information from which one might draw conclusions about malpractice claims has proved to be difficult.

This paper will cover common legal malpractice mistakes and how to avoid them when representing individuals.[2]

II. MOST COMMON MALPRACTICE MISTAKES[3]

According to Dan Pinnington, author of "The Most Common Legal Malpractice

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[11] I make no claim to be an expert in the field of legal practice. I do not represent parties in legal malpractice cases.

[2] These remarks are aimed at practitioners who represent individuals rather than corporate clients. There is a fair amount of difference in claims arising from corporate clients rather than individuals.

[3] This section borrows heavily from Dan Pinnington's 2010 article, "The Most Common Legal Claims by Type of Alleged Error."

Claims by Type of Alleged Error," American Bar Association (ABA) Law Practice, July/August 2010, the following is a list of the top ten types of claims based on a ranking of 42,076 legal malpractice common claims collected in the early 2000s from across the U.S. and reported by the ABA Standing Committee on Lawyers' Professional Liability's Profile of Legal Malpractice Claims 2004-2007 and 2000-2003 reports.

1. Fail to Know/Apply the Law	11.3%
2. Planning Error	8.9%
3. Inadequate Discovery/Investigation	8.8%
4. Fail to File Documents; w/o deadline	8.6%
5. Fail to Calendar	6.7%
6. Fail to Know Deadline	6.6%
7. Procrastination	5.9%
8. Fail to Obtain Client Consent	5.4%
9. Conflict of Interest	5.3%
10. Fraud	5.0%

Pinnington's article goes on to offer definitions of the terms used in categorizing the Claims as outlined below, except that closely related categories have been combined here along with citation to applicable ethical rules under Indiana Rules of Professional Conduct (RPC).

A. Competency (RPC 1.1)

Interestingly, the top three most common errors (failure to know or properly apply the law, planning error, and inadequate discovery/investigation) involve competency. "Failure to know or properly apply the law" occurs when the attorney was unaware of the legal principles involved or failed to determine the appropriate principles. This includes the failure to draw the appropriate legal implications of the known facts.

"Planning error" includes strategies errors where the attorney has adequate knowledge of the facts and legal principles but makes an error in judgment about how the case should be handled.

"Inadequate discovery of facts or inadequate investigation" arises when the attorney failed to discover critical facts through a careful investigation or through discovery.

B. Missing Deadlines (RPC 1.1 and 1.3)

The next three errors include failure to file documents where there is no deadline, failure to calendar deadlines, and failure to know the deadline, which also includes the failure to act in a timely manner.

C. Procrastination (RPC 1.1 and 1.3)

Procrastination includes a delay in dealing with a client's matter even if no formal violation of a time limit occurs. A lack of follow up is included in the definition.

D. Failure to Obtain Client Consent (RPC 1.0(e) and 1.4)

This includes a failure to fully inform the client about the various legal alternatives or risks involved, and a failure to obtain the client's consent to proceed.

E. Conflict Of Interest (RPC 1.8)

Broadly, the attorney has a conflicting interest to that of the client, even if the attorney did not know about the conflict. The defined scope of this category is not as specific as the RPC's references to conflict of interest.

III. AREAS OF THE LAW THAT ARE SUBJECT TO THE MOST MALPRACTICE CLAIMS

Herbert M. Kritzer and Neil Vidmar, "When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims and Their Resolution," Duke Law School Public Law & Legal Theory Series No. 2015-29 (2015)[4] cite to the ABA Standing Committee on Lawyers' Professional Liability reports, "Profile of Legal Malpractice Claims," to identify the areas of practice that produce malpractice claims. They averaged the percentages across six reports, covering time periods from 1983 to 2011. They consolidated the areas of claims into the following categories:

Area	**Percentage of Claims**
Real Estate	21.4
Personal Injury/Plaintiff	18.6
Commercial Transactions	11.7
Family Law	9.9
Estates, Trust & Probate	8.7
Collections/Bankruptcy	8.5
Personal Injury/Defendant	4.5
Criminal	4.4
All Others	12.5

The 2015 ABA study shows personal injury-plaintiff, real estate, family law, trusts and estates, and bankruptcy and collections as the top five areas, dropping commercial transactions down the list. Lorelei Laird, "ABA Study Suggests Legal Malpractice Insurers Are Settling Sooner," ABA Journal posted October 17, 2016, http://www.abajournal.com/news/article/aba_study_suggests_legal_malpractice_insurers_are_settling_sooner. The 2015 study also noted increased in the costs of claims and costs in litigation.

[4] This article has collected legal malpractice data from a variety of sources. It offers critiques as to the problems with data collection, including a lack uniformity in the available data.

IV. INDIANA'S LEGAL MALPRACTICE LAW

Legal malpractice, while different than attorney misconduct under Indiana Rules of Professional Conduct (RPC), is connected to the RPC, which contains the standard of conduct to which attorneys are held. Not all ethical violations under the RPC involve legal malpractice, but most actions involving legal malpractice will be connected to the ethical duties established by the RPC. For instance, RPC 1.1 requires "competent representation" and defines the meaning with detailed commentary about acquiring the necessary knowledge and skill to handle a particular matter.

Statute of Limitations. Indiana Code § 34-11-2-4 is the applicable statute of limitations for legal malpractice as two (2) years. Legal malpractice claims are governed by tort principles whether brought as a tort, a breach of contract, or both. *Atlantic Credit & Finance, Inc. v. Robertson*, 2016 U.S. Dist. LEXIS 1612, 1617 (7th Cir. 2016)

The Discovery Rule. The statute of limitations begins to run upon discovery by the plaintiff, or in the exercise of ordinary diligence when the plaintiff could have discovered an injury caused by legal malpractice. *Id.*

Continuance Representation Doctrine. The statute of limitations does not commence until the end of the attorney's representation of the client. This doctrine was first adopted by the Indiana Court of Appeals in 2003. *Biomet v. Barnes & Thornburg*, 791 N.E. 2nd 760, 765 (Ind. Ct. App. 2003). The rationale includes: avoidance of disrupting the attorney-client relationship unnecessarily; prevent stale claims; and enable the defendant to preserve evidence. *Id.* at 765-766. The policy allows an attorney to continue the effort to remedy a bad result. The client is not forced to terminate the relationship. *Id.* at 766. But, the doctrine does not limit the client's ability to terminate the relationship and seek redress immediately. *Id.*

Standard of Review. The standard of review for legal malpractice is the same as for tort cases.

> To prove **legal malpractice** under Indiana **law**, a plaintiff must show: (1) employment of the attorney, (2) the attorney's failure to exercise ordinary skill and knowledge, and (3) damages to the plaintiff proximately resulting from that failure. *Hacker v. Holland,* 570 N.E. 2d 951,955 (Ind. App. 1 Dist. 1991). **In** a typical **legal malpractice case**, the plaintiff must prove that "as a result of the lawyer's incompetence . . . the client . . . lost his **case** or paid a larger judgment than would have been awarded had the defendant performed competently." *Transcraft v. Galvin, Stalmack, Kirschner, & Clark,* 39 F.3d 812, 815 (7th Cir. 1994).

American Int'l Adjustment Co. v. Galvin, 86 F.3d 1455, 1459 (7th Cir. 1996)

Issues then may arise as to the existence of an attorney-client relationship, what ordinary skill and knowledge is under the circumstances, and whether the damage to the client resulted from the attorney's failure to exercise ordinary skill and knowledge.

Expert testimony is usually required to establish the standard of care in legal malpractice case by which the attorney's conduct is measured. *Storey v. Leonas,* 904 N.E.2d, 229, 238 (Ind. Ct. App. 2009). The only exception noted by the *Storey* court would be where the conduct was so obvious that any lay person would recognize it. For a more detailed discussion, see *Price Waicukauski & Riley, LLC v. Murray,* 47 F.Supp. 3d 810, 818-824 (S.D. Ind. 2014).

V. PRACTICAL CONSIDERATIONS

A. Every attorney is subject to having a malpractice claim over a legal career.

- Good attorneys as well as poor attorneys are subject to making mistakes. It happens despite good management practices.
- A claim may be made even if no malpractice error occurs. Clients unhappy with the outcome of a case may fault their attorney, for instance.
- Indiana appellate courts issued (not all were for publication) 10 decisions about legal malpractice between January and September 2017, inclusive, and 11 decisions in 2016; and
- Similarly, federal courts reported Indiana decisions in 7 district court cases and 3 7th circuit court cases between January and September, inclusive, in 2017, and 20 in district court cases and 5 7th circuit court cases in 2016.

B. The cost of the claim, even if successfully defended, could be significant.

- Most claims will be dismissed or settled.
- The attorney's fees for representation could exceed any actual damages, which is why a baseless claim may be settled.

C. The best approach is to avoid having a claim made.

- Establish good practices for legal work management, including documentation, communication, calendaring important deadlines, back-up systems, and protocols on case acceptance.
- Maintain good client relationships. Where good relationships exist the client will be more forgiving of errors than a client who has a poor relationship with the attorney. A good relationship is characterized by trust, communication, and a clear understanding of the scope of the representation.*
- Avoid the problem client.
    - A client whose expectations are unrealistic is likely to blame the attorney for unfulfilled expectations or unsuccessful outcomes.
    - Clients who balk at paying for services, who complain about their prior counsel, who make unreasonable demands, who do not respect boundaries, who withhold relevant information, and who are alienate office staff are unlikely to be satisfied with the attorney's services.
- Avoid suing a client or former client for unpaid fees. Doing so is an invitation to a counterclaim for legal malpractice.

*Anecdotally from my own observations, the most numerous complaints (not formal claims) against attorneys arise from communication failures with a client, such as failing to return client calls, failing to explain matters, failing to share information, failing to return client documents, etc. These kinds of complaints alone may not result in judicial claims or disciplinary complaints, but they are often the catalysts for pursuing malpractice errors when other factors also occur. Client trust is based on the attorney's consistent and reliable communication with the client.

D. Some subject areas of practice have a higher rate of malpractice claims than others. See Section III above. Increased potential for liability may occur with:

- Substantive areas of the law that require a high level of expertise about the applicable law;
- The costliness of the damages involved from legal malpractice; and
- Practicing in unfamiliar jurisdictions with local rules and practices that effectively penalize outsiders

While this is not a suggestion to avoid areas with greater liability for legal malpractice claims, it is a suggestion integrate in this information into deciding what cases to accept, the expertise of law firm staff, and the use of professional liability protection.

E. Maintain professional liability insurance and comply with the insurer's reporting requirements. Indiana does not require attorneys to maintain professional liability coverage, but there are the advantages to having professional liability insurance. These include:

- Protection of the law firm from loss due to claims and defense of claims;
- A source of information about potential liability; and
- Guidance on best practices.

VI. WAYS TO AVOID MALPRACTICE

Technically, having professional liability insurance is no protection against committing legal malpractice, but it is a way to protect the attorney and client from the consequences of malpractice and provide some peace of mind. Identify a member of the law firm to handle communications with the malpractice insurance carrier. Establish a protocol for when occurrences and claims arise. In the absence of purchasing professional liability insurance, have a self-insurance plan that allows for retaining legal counsel at the onset of a claim.

Knowing the information about the claims identified in Sections II and III above, identify areas of potential liability and take action to address specific issues of vulnerability.

A. Be Knowledgeable About Areas of Practice

Rule 1.1 of the Rules of Professional Conduct describes competence as "the legal

knowledge skill, thoroughness and preparation reasonably necessary for the representation." The Comment to RPC 1.1 explains that even a newly admitted attorney can handle matters with as much competence as an attorney with long experience.

1. Do not accept cases that are outside the scope of practice without a plan for obtaining the necessary knowledge to handle the case. This might include co-counseling with an experienced attorney in the type of matter involved.

2. Join professional groups that reflect relevant area(s) of practice. The Indiana State Bar Association has a variety of Sections and Committees in specific areas of the law. Many professional groups have list serves for members that allow attorneys to post questions and to seek others with expertise. Such groups also sponsor training events, conferences, webinars, etc. that share knowledge and provide resources for consultation.

3. Get to know the other practitioners in specific fields of law. Consul with another attorney who can be helpful in identifying legal issues and how to resolve them.

4. Establish a relationship with a mentor who can provide guidance in the area of law and in the local jurisdiction's standard of practice.

5. Regularly attend Continuing Legal Education (CLE) events. Stay informed about changes in the law through legal publications, read case reports, and follow the news.

6. Make sure that non-attorney staff receive regular (CLE) training and understand key concepts like confidentiality, conflict of interest, and ethical behavior. RPC 9.1-9.10

7. Be clear with office staff about issues of delegation and attorney supervision. RPC 9.1-9.4

B. Identify and Calendar Deadlines

1. Calendar important dates and deadlines. Use a standard protocol that makes sure that dates are captured as a matter of course.
2. Regularly check the calendar.
3. Include back-up systems so that information is not lost or ignored.
4. Spread the responsibility, if possible, so that multiple people know about the deadline.
5. Use case management software to manage cases and network with other members of the firm.
6. Avoid taking on more work than can be accomplished within reasonable timeframes.

C. Use Time Management Techniques To Address Procrastination

RPC 1.3 requires reasonable diligence and promptness in representing a client. Advise the client of the reasonable timeframe for completion of the agreed upon work and of any factors that might affect your ability to follow the timeframe.

1. Keep a list of "to do" items for each case.
2. Calendar a time for accomplishing tasks and allow enough to complete the tasks.
3. Identify why certain tasks are ignored or postponed and address the reasons.
4. Be answerable to someone else about accomplishing tasks, such as a supervisor, about the status of a case. This can be difficult for a sole practitioner, but find a way to hold oneself accountable for work progress.
5. Do not agree to more than can be realistically accomplished. Learn to say "No."

D. Client Communications—RPC 1.4

1. Have a written agreement with the client setting out the parameters for representation and a written fee agreement. RCP 1.4 and 1.5.
2. Respond promptly to client requests for communication.
3. Document all client communications.
4. Confirm decisions in writing, especially settlement instructions.
5. Be clear. Make sure that the client understands the advice and information provided. "Informed consent" requires communicating adequate information, an explanation about the material risks, and the reasonable alternatives to the proposed course of action.
6. Copy the client with all correspondence so that the client remains informed.

E. Conflict Of Interest Issues Should Be Identified As Soon As Possible

1. Screen potential clients for conflicts with existing and prior clients. RPC 1.7.
    a. Obtain the names of all parties involved, including witnesses.
    b. Keep an accurate data base of all current and former clients.
    c. This is also important for new members of the law firm who may bring conflicts with them. RPC 1.10
2. Even when the client or clients are willing to waive conflicts, consider the potential for violating the RPC. RPC 1.7, 1.8, 1.9
3. When in doubt, do not represent potentially adverse parties.
4. Have a policy for what action will be taken when a conflict is discovered.
5. Do not engage in business dealings with client. RPC 1.8.
6. Do not solicit gifts from the client. RPC 1.8

It goes without saying that stealing from a client, committing fraud against a client, lying to a client, and engaging in illegal acts against the client are contrary to the Rules of Professional Conduct and abhorrent to the nature of the attorney-client relationship.

VII. WHAT TO DO WHEN MALPRACTICE OCCURS

A. Report Claims To The Insurance Carrier As Required By Terms Of Coverage.

B. Know If The Insurance Policy Requires Occurrence Reporting In Addition To Claims Reporting.

C. Document The Circumstances Including Dates. Maintain relevant documents.

D. Identify What Can Be Done to Correct The Error Or Minimize The Damage.

E. Take Action To Correct Errors Or Minimize The Damage.

F. Consult Others About What Steps To Take.

Seeking independent advice can help put the problem into an objective perspective, including help with discovering ways to correct the malpractice or minimize its effects on the client. The independent advice should come from a knowledgeable source.

G. Communicate With The Client And Provide Written Confirmation.

There may be hesitation to disclose possible malpractice to the client. Keep in mind that RPC 1.4(a)(3) and (b) require the attorney to keep the client informed about the status of the client's matter and to explain the matter to the client. If the legal malpractice occurs or becomes known during the course of representation, it is difficult to see how disclosure to the client can be avoided without violating an ethical rule unless the attorney is able to correct the problem without harm to the client. Even then, there probably should be disclosure to the client.

If the legal malpractice becomes known to the attorney after representation is concluded, then it may be helpful to consult with the professional liability carrier or a malpractice attorney to determine what action should be taken regarding disclosure to the former client.

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