THE NEW KID ON THE BLOCK: DON'T GET BEATEN UP

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The most prevalent reason for legal malpractice claims is the failure to know or properly apply the law. According to the American Bar Association ("ABA"), 11.3% of legal malpractice claims arise from these types of mistakes.[1]

Trends from the last few years show consistent factors contributing to the failure of lawyers to know or apply the law correctly. First, the law itself has become more complicated.[2] From newly enacted state tort reforms to complex federal regulations such as the Secondary Payers' Act, the law is becoming more complex daily, and it is important to stay abreast of these changes. Second, due to the recent recession and the downturn in legal business, attorneys have a reduced financial ability to turn away cases, even if they have little or no experience in that area of law. Desperate times may seem to call for desperate measures, but dabbling in new areas of law can be risky. The third factor, while not unique to the last few years, still generates significant malpractice claims – it is not uncommon for an attorney to be asked by a friend or family member to look into a legal issue for them. This casual, off-the-cuff advice leads to increased exposure to legal malpractice.

Examples of errors from recent malpractices cases, all resulting from failure to know or apply the law, include:

- Failure to file an objection to discharge in bankruptcy no later than sixty (60) days after the first date set for the § 341 creditors meeting believing that when the § 341 creditors meeting was postponed, the deadline would be extended.
- Failure to update and analyze title exams before a real estate closing thereby resulting in missed priority interests or defects.
- Failure to understand evidentiary requirements for expert opinion testimony regarding medical specialties resulting in a dismissal of a possibly meritorious claim.
- Failure to appreciate procedural and evidentiary differences between "run-of-the-mill" tort cases and specialized cases such as products liability or medical malpractice.
- Failure to comply with ante litem notice requirements when suing municipalities.
- Lack of familiarity with tax code changes when advising businesses.
- Drafting a will or estate plan for the first time.

Legal malpractice is not the only risk that an attorney faces when he or she handles matters without sufficient expertise. Disciplinary actions are also often pursued. ABA Model Rule 1.1 states that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In some states, the maximum penalty for violation of this rule is disbarment, but an attorney can also face monetary fines, public and private reprimands, and temporary suspension of his or her license.

There are several things an attorney can do to minimize their exposure to the risk of an error based on failure to know or apply the law. First, an attorney should be aware of his or her limits. When asked to take a case that is outside of the attorney's area of practice, he or she should carefully analyze the scope of the requested representation. For example, if the representation involves an unfamiliar area of law, the attorney should factor in the additional time and tools it will take to become familiar with the area of law.

- Decline the case unless you have adequate time and resources to become competent in the area of law.
- Strongly consider associating counsel on the case who is experienced in the area. For solo practitioners, associating another attorney on the case may be costly and burdensome, but it is a crucial step for purposes of learning the new area of law and for adding protection from these legal malpractice or disciplinary claims.
- In firm settings, do not casually appoint an attorney who has experience in the area of law to "supervise" the case; make the knowledgeable attorney the pig as opposed to the chicken.[3]
- At a minimum, take one or more CLE courses on the subject. Attorneys in most states have a mandatory continuing legal education requirement. Attorneys should strive to meet these requirements through meaningful and educational programs.
- Keep up to date as the law develops—there is no substitute for reading the advance sheets.

Almost every attorney has taken on representation involving an unfamiliar area of law. To do so safely requires extra effort to catch up with the rest of the pack. Find someone in the field who will be your sounding board if you do not associate them directly. If litigation is involved, consider getting a copy of all pleadings filed in a similar matter between respected attorneys and figure out why each was prepared. And above all, carefully evaluate each activity as you go forward and keep your eyes open for steps that should be taken. Every dollar spent for a malpractice premium or deductible payment is important but the emotional effect of a claim is something that cannot be appreciated until you experience it.

1. Statistics are according to the 2004-2007 and 2000-2003 Profile of Legal Malpractice Claims studies prepared by the ABA Standing Committee on Lawyers' Professional Liability. See DAN PINNINGTON, THE MOST COMMON LEGAL MALPRACTICE CLAIMS BY TYPE OF ALLEGED ERROR, http://www. americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_webonly_webonly07101.html.
2. DANIEL E. PINNINGTON, ARE YOU AT RISK? THE BIGGEST MALPRACTICE CLAIM RISKS AND HOW TO AVOID THEM, http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_ articles_v36_is4_pg29.html.
3. As to eggs and bacon, the chicken is involved but the pig is committed.

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