



# Covid-19's Anticipated **IMPACT** on Legal Malpractice and **How to** **Protect Your Firm from the** **IMPENDING RISE IN CLAIMS**

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The 2008 worldwide economic downturn resulted in a significant increase in the filing of not only litigation overall, but specifically the filing of malpractice actions against attorneys in the years that followed. Clients who lost money, assets, jobs, and real estate looked to others, including their attorneys, to recover that which they had lost. In the year following the recession of 2008, the number of LPL claims in the fields traditionally considered most susceptible to legal malpractice claims (real estate, family law, trusts and estates, bankruptcy, and personal injury) doubled from the previous five-year average. Now, many industry experts believe the same thing is going to happen as a result of the Covid-19 pandemic. Here is why:

First, just as in 2008, an unprecedented number of people have suffered financially almost overnight. Jobs have been lost or reduced; businesses have closed; contracts have been breached; leases have been defaulted on. As with every economic downturn in the past, a certain number of clients will undoubtedly be looking to their attorneys to mitigate their losses, regardless of whether the attorney's conduct played any role in bringing about the loss or could have otherwise avoided the outcome. Should the attorney have advised that there was a pandemic exception to the business interruption coverage the client obtained, or that the scope of a force majeure clause in a contract or commercial lease would not be triggered by an airborne virus? Some clients may claim the attorney should have done more to protect their interests and the economic losses they suffered following a pandemic were foreseeable and reasonably should have been avoided.

Second, as shut-down orders were issued, attorneys were forced to take their practices "in house" – literally. Some did it seamlessly; others struggled mightily. Many attorneys for the first time found themselves not wanting, but having, to work from home. With entire law firms forced to work remotely, access to staff and resources became challenging, particularly for attorneys accustomed to working in an office environment. Suddenly deprived of immediate access to staff and other attorneys, as well as in person meetings, mediations, and

depositions, many attorneys found themselves struggling to operate remote platforms such as Zoom or Microsoft Teams, greatly hindering their ability to perform tasks that seemed routine when working in an office environment. These challenges could lead to mistakes caused by the sudden forced transition from practicing law in an office to practicing from home or an alternative remote space.

Third, with these uncertain economic and social times, attorneys may find themselves venturing into fields of law in which they have no prior experience. With so many clients either no longer employed, out of business, or on the brink of insolvency, attorneys may be tempted to take on matters beyond their legal comfort zone to supplement reduced fee collection and simply continue earning a living. Should a personal lawyer agree to draft a will/trust for the family of a person in dire health due to Covid-19? Should a trust and estate attorney take on a personal injury claim? They may be tempted to do so if it means keeping the lights on. But, if mistakes are made due to inexperience or unfamiliarity with the area of law, legal malpractice claims and disciplinary action may follow.

Fourth, emergency rules enacted in some jurisdictions during the pandemic tolling deadlines for filing claims will complicate the statute of limitations analysis for years to come. With no uniform policy from jurisdiction to jurisdiction concerning filing deadlines and statutes of limitations, for multi-jurisdictional attorneys, the potential variance in such

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emergency rules between jurisdictions only serves to compound the risk of filing errors. As missed deadlines remains one of the top causes for LPL claims, we can reasonably expect an even greater increase in such claims in the near future. Lawyers should check local rules, orders, and other authority to ensure they do not miss the limitations periods for filing claims.

Despite Covid-19, it remains each attorney's primary ethical duty to protect the interests of their client. Under the current circumstances, many legal experts are starting to argue this duty includes an obligation that attorneys be "technologically competent" such that they can effectively communicate with their clients, achieve their clients' objectives while utilizing secure resources to safeguard client confidences, and in countless other ways navigate the "virtual" hurdles to practicing law during this pandemic.

An attorney's failure to learn how to utilize the technology available to them could result in various violations of the rules of professional conduct – such as Rule 1.1 of the Rules of Professional Conduct, which requires attorneys to perform legal services with competence – as well as an increased risk of professional liability claims.

In this different world in which we now find ourselves, attorneys might consider the following to protect themselves from a potential malpractice claim:

- Stay in regular and frequent contact with your clients and **DOCUMENT EVERYTHING IN WRITING**;
- Stay in regular and frequent contact with your attorneys and staff;
- When communicating with your clients, ask if their objectives have changed because of Covid-19;
- Since every jurisdiction seems to be different, regularly check all levels of applicable authority – statutes, court rules, emergency rules, chamber rules, executive orders, etc. – to confirm deadlines and make sure they are met – do not assume your case is on hold;
- When video conferencing or connecting to remote servers, use secure internet connections, passwords, and dual authentication methods;
- Educate attorneys and staff to recognize phishing/hacking e-mails; and
- Take advantage of the many online resources addressing Covid-19 issues in the legal profession.