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WSSFC 2023

QOL/Ethics Track – Session 1

Interactive Legal Malpractice Claim Scenario

Presented By:

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Paul A. Kinne, Gingras, Thomsen & Wachs, Madison
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About the Presenters...

Brian C. Anderson is Director of Claims for Wisconsin Lawyers Mutual Insurance Company, a professional liability insurance carrier in Madison, Wisconsin. He works with lawyers in resolving malpractice claims made against policyholders. He enjoys the challenge of helping place policyholders at ease during a time of stress, when they are facing a legal malpractice claim or grievance. Before joining Wisconsin Lawyers Mutual in 2003, Anderson practiced personal injury law and served as legal counsel for an insurance company in Madison. He began his career in general practice in Janesville. Mr. Anderson has written and lectured on legal topics relating to law firm risk management and legal malpractice. He earned his J.D. in 1992 from the University of Wisconsin-Madison Law School and his B.S. in 1989 also from the University of Wisconsin-Madison. He is a member of the State Bar of Wisconsin and the Wisconsin Defense Counsel. He serves on the content planning committee for the State Bar of Wisconsin's Solo/Small Firm Conference.

Paul A. Kinne has been practicing law since 1993. He graduated from UW Madison Law School in that same year, joining Gingras Law Office. He has been at that firm or one its incarnations since. Attorney Kinne has served as the chairperson for the Wisconsin Association of Justice Civil Rights Committee, and he has been recognized by his peers as a Best Lawyer in employment law from 2011 to the present. He has handled over a dozen legal malpractice cases in his career, co-counseling two to positive verdicts for the plaintiff. He lives in Middleton, Wisconsin, with his wife of 25 years and his youngest child, a freshman in high school.

Monte E. Weiss is the founder of Weiss Law Office, S.C. His practice primarily focuses on diverse insurance coverage issues for both insurance companies and policyholders. As a part of his practice, he has drafted several personal lines property and casualty insurance policies, including homeowner and automobile policies. He also is regularly retained to defend bodily injury and property damage cases. Monte’s courtroom experience includes numerous jury and civil court trials as well as arguing cases before the Wisconsin Court of Appeals, the Wisconsin Supreme Court and the United States Court of Appeals for the Seventh Circuit. Upon receiving a request to assist with the regulatory system that governs the conduct of Wisconsin’s attorneys, Attorney Weiss served on District Investigation Committee Two of the Office of Lawyer Regulation having served a 9 year term. His involvement with District Investigation Committee Two helps him effectively serve his clients in the defense of legal malpractice claims as well as grievances with and complaints filed by the Office of Lawyer Regulation. Mr. Weiss has helped shape and develop Wisconsin law on a number of critical issues that impact insurance law. In addition to his efforts in the courtroom, he has authored numerous articles regarding insurance coverage and other insurance industry-related topics and is a regular speaker on these same issues.

INTERACTIVE LEGAL MALPRACTICE CLAIM SCENARIOS

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October 19, 2023
10:20 am – 11:35 am

I. Do You Need Malpractice Insurance?

Typical Concerns:

- It costs too much.
- I'm not going to be doing expensive, complex work anyway.
- I don't really have any assets to protect.

Consider:

- Duty of professionalism requires that an attorney whose error or omission has truly "cost" a client make restitution.
- Good for your peace of mind, thus for your best performance.
- Mistakes happen.

II. Glossary of Terms

One of the realities we live with as lawyers in this consumer-oriented age is that clients are no longer shy about making professional liability claims against lawyers. As lawyers, you are always responsible for the work that you do, and the firms you work in are responsible for errors (real or perceived) on the part of the lawyers in the firm. A strong partnership with your professional liability carrier provides protection and security in the event a claim is made.

Here are some terms you should know:

<u>Claims-Made-and-Reported Policy</u>

Professional liability policies are claims-made-and-reported policies, not occurrence policies.

Most of us are more familiar with occurrence policies; that is, if an insurance policy is in effect when the accident happened - the car crash or the fire - there is coverage for the claim.

Claims-made-and-reported policies operate very differently. In order to have coverage under a claims made-and-reported policy, there needs to be a policy in effect at the time a reasonably prudent lawyer knew or should have known of an error or omission. In addition, notice *in writing* must be given to the carrier. Both of those events must happen during the policy period in order for there to be insurance coverage. The legal work giving rise to the claim may have been done years earlier.

Many lawyers are unaware of the fact that most professional liability policies are written for a one year period. Each policy is separate, meaning that any claim or potential claim must be reported during the policy period in which the lawyer first becomes aware of the probability of a claim or potential claim. This means that every lawyer in the firm should know the expiration date of the firm's professional liability policy.

It also means it is possible to carry professional liability insurance every year for ten years without a claim, and then first hear of a claim in the eleventh year, when the firm decided not to buy insurance in order to save some money. There is no coverage for that claim even if the work was done during one of the previous ten years when a policy was in effect. It is also possible for a law firm not to have insurance for a number of years, purchase a policy and then first learn of a claim. If the firm gives the carrier prompt notice under the new policy, there would be coverage for a claim for work done during the prior years in which no policy was in effect. (Caution: There may be other policy terms barring coverage in this instance. See Retroactive Date below).

Wrongful Act

Most policies define a wrongful act in fairly similar ways. WILMIC defines it as an act, error, or omission that is negligent or alleged to be negligent in the rendering of or failure to render professional services. But how does your policy define "professional services?" For example, would that include your work as a notary? Acting as a trustee or fiduciary? Giving financial advice? Serving as an officer or director of an unrelated business?

Timing

Just as you can't purchase insurance after the building has started to burn, you will not be eligible for insurance for any claim a reasonably prudent lawyer should have known about (even before the client knows or is aware of the problem). An insurance policy will not cover known problems.

To protect your coverage, if you know of a claim or potential claim and are completing an application for insurance, you need to report the problem on that application. Coverage will be excluded for that matter under the policy to be issued. If you are staying with your current insurer, your report should trigger coverage under your current policy. If you are changing carriers, you need to report the claim or potential claim under

your existing policy. Remember that *not* reporting in the current policy period jeopardizes coverage.

Retroactive Date

A retroactive date in the policy means that any legal work done before that date is not covered, regardless of when the claim is made arising out of that work. Policy language in some insurance policies is written so that, although a retroactive date is never mentioned, the coverage clause only covers any claims made for work done for the firm named in the policy and during the policy period. In that instance, you may have a de facto retroactive date and not even be aware of it. Read your policy language!

Prior Acts Coverage

Policies allowing prior acts coverage provide coverage for all professional services rendered from the beginning of the lawyer's career. Lawyers changing firms need to be especially aware of the implications of prior acts coverage versus retroactive dates. If your old firm's policy only insures current employees and the new firm only insures work done commencing with the date you begin work for that new firm, you may have what is known as a gap in coverage. That is, you will have no coverage for your work done at the old firm.

Gaps

Watch out for gaps in coverage, especially when you are changing carriers (review policy language carefully to see what the new carrier is offering as to prior acts), changing firms, merging firms, starting a new law firm with experienced lawyers, or quitting practice. Also, when a lawyer has been uninsured and now wants insurance, gaps can occur, as a retroactive date is quite likely to be included in the new policy.

Burning Limits

Most policy limits include the cost of defense. Thus, every dollar spent defending a claim reduces the dollars available to pay the claim. For example, if your policy limits are $100,000 per claim and $60,000 of that is spent defending you, there is only $40,000 left to pay any resulting damages. This is a consideration in deciding what policy limits a lawyer or law firm should consider.

Tail Coverage

Officially known as an "extended claims reporting period endorsement," tail coverage can be issued to a firm or an individual under certain defined circumstances. For example, when a firm changes insurance companies or ceases to do business, the firm is eligible to purchase a tail endorsement. A tail is also available to an individual retiring from the practice of law; a tail for an individual lawyer changing firms and wanting to avoid a gap may be available, but not as a right under the policy. You may need to ask

your carrier about this possibility.

Attorneys should know whether the policy language requires the insurance company to issue a tail under qualifying circumstances or if the insurance company has a right to underwrite and decide whether or not to sell you a tail endorsement. This may be very important if you have had claims experience with your current company. Remember, too, that tail coverage is an endorsement to a currently existing policy. The limits in effect in the policy to which the endorsement is attached are the limits of the tail as well.

Exclusions

Every lawyer needs to know what activities are excluded in the firm's policy. Typical exclusions include intentional acts, services provided for unrelated enterprises, actions as a director or officer of a company, work done for an entity other than the named law firm, billing disputes and more. Some policies exclude coverage for legal malpractice counterclaims in response to a firm suing for fees. Fraud and illegal acts are always excluded.

III. What is a "claim?"

A. Defined in most policies as a demand for money or services that relates to remedying the alleged wrong.

1. "Wrongful act" is defined in WILMIC's policy as an act, error or omission that is negligent in the rendering of or failure to render "professional services" to others.

2. "Professional services" is defined in WILMIC's policy as services rendered to a person or entity in your capacity as a lawyer or notary public.

B. What is a "potential claim?"

1. Defined in WILMIC's policy as any circumstance, act, error or omission in rendering professional services which a reasonably prudent lawyer would expect to be or become the basis of a claim, potential claim or grievance. An example of a "potential claim" is a mistake you know about that the client may not yet know about, or the client may know about it but not have made a demand for you to fix it or pay for it.

2. Potential claims must be reported during the policy period to ensure coverage.

3. Once a potential claim is reported, coverage is granted under the policy terms of the policy in effect at the time of the report, even if the subsequent claim is made after the policy period ends.

4. Failure to report a potential claim during the policy period in which the insured lawyer first becomes aware of the potential claim can result in a loss of coverage.

5. Additional benefits may be available. For example, WILMIC's policy provides coverage for legal counsel to represent the policyholder in proceedings involving a grievance before the Office of Lawyer Regulation. "Grievance" is defined as set forth in **Wisconsin Supreme Court Rule 22.001(5)** – "'Grievance' means an allegation of possible attorney misconduct or medical incapacity received by the office of lawyer regulation."

IV. Elements of Legal Malpractice (Tort or Contract)

Lewandowski v. Continental Casualty Co., 88 Wis. 2d 271, 277; 276 N.W.2d 284 (1979); *Estate of Campbell v. Chaney*, 169 Wis. 2d 399, 485 N.W.2d 421 (Ct. App. 1992).

A. Lawyer-client relationship.

1. Existence of lawyer/client relationship (privity—required for duty).

a. Plaintiff has the burden of proving the existence of the attorney/client relationship.

b. The contractual relationship may be expressed or implied from the circumstances and does not require payment of fees.

c. Depends on the intent of the parties, with the client's subjective belief prevailing over the lawyer's.

d. ABA Comment to **SCR 20:1.3 Diligence**: "[4] …Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so…"

B. Negligence – a breach of the duty owed to the client.

1. Plaintiff must prove negligence through the use of expert testimony. *Olfe v. Gordon*, 93 Wis. 2d 173, 181; 286 N.W.2d 573, 576 (1980).

2. Four exceptions to expert testimony rule:

a. breach of a duty other than a legal duty, e.g. failure to follow a client's instruction;

b. an obvious breach of duty that does not involve specialized knowledge, e.g. failure to file an action within the requisite statute of limitations;

c. admission of breach of duty; and

d. in certain cases, a breach will be found as a matter of law.

C. Proximate cause – causal relationship between duty and damage.

To establish causation and injury in a legal malpractice action, the plaintiff is often compelled to prove the equivalent of two cases in a single proceeding or what has been referred to as a "suit within a suit." This entails establishing that "but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action." *Glamann v. St. Paul Fire & Marine Insurance Co.*, 144 Wis. 2d. 865, 870, 424 N.W.2d 924, 926 (1988)

D. Actual collectable damages – defendant in the underlying case must be collectable.

E. Statute of Limitations

1. A tort malpractice claim has a three-year statute of limitations under §893.53 Wis. Stats. Or six years under §893.43, when based on a contract.

2. Starts running:

a. The date of injury, rather than the date of the negligent act, or

b. When the client knows or reasonably should discover that they have been harmed

V. Who Is Making the Mistakes? (2012-2022)

		Frequency	Severity
A.	Lawyers in practice 0 to 5 years	8%	5%
B.	Lawyers in practice 6 to 15 years	19%	13%
C.	Lawyers in practice 16 to 30 years	34%	44%
D.	Lawyers in practice 31 to 40 years	21%	16%
E.	Lawyers in practice over 40 years	15%	18%

During the ten-year period of 2012-2022, the lawyers who were practicing with 16 to 30 years were the costliest group, while the lawyers in practice less than five years, were the lowest in both cost and number of claims reported.

VI. Where do malpractice claims come from?

A. Common Sources of Claims – Areas of Practice, by frequency (2012-2022)

		Frequency	Severity
1.	Bankruptcy/Collections/FDCPA	18%	10%
2.	Estate, Probate, Trust	15%	21%
3.	Personal Injury – Plaintiff	13%	27%
4.	Real Estate	11%	9%
5.	Family Law	11%	5%

B. Five most common errors resulting in malpractice claims, by severity (2012-2022)

1. Administrative Procedures and Calendaring – 31% of all claims

    a. Failing to react in a timely manner to your calendar.
    b. Failing to know or ascertain the correct deadline.
    c. Failing to calendar properly.
    d. Procrastination.
    e. Clerical error.

2. Client Communication – 18% of all claims

    a. Failing to inform the client.
    b. Failing to obtain a client's consent.
    c. Failing to follow a client's instructions.

3. Planning error in choice of procedures – 13%

4. Inadequate discovery / investigation – 12%

5. Failure to know/apply applicable law – 11%

VII. Why do claims come from these areas?

A. Areas of Practice

1. Bankruptcy and Collections/FDCPA

    a. Dabbling (not familiar enough with bankruptcy laws).

    b. Failure to file complete and accurate bankruptcy schedules.

c. Choosing wrong type of bankruptcy for your client's economic circumstances.

d. Filing bankruptcy when not appropriate.

e. Missed deadlines.

2. Estate Planning/probate

a. Unhappy and disenfranchised beneficiaries.

b. Conflict of Interest.

c. Scope of Representation.

3. Personal Injury - Plaintiff

a. Unsophisticated clients with unrealistic expectations.

b. Inadequate communication.

c. Numerous deadlines (missed SOL).

4. Real Estate

a. Frequent transactions.

b. Part of general practice; more of WILMIC's policyholders report doing real estate work than any other area of practice.

c. Technical area.

5. Family Law

a. Emotionally distraught clients with unrealistic expectations.

b. Inadequate communication.

c. System not designed for solving these problems.

B. Types of Errors

1. Calendaring

a. Establishing sufficient back-up.

b. Using existing system.

c. Over-extended lawyers.

2. Client Communications

a. Unsigned fee agreements.

b. "My lawyer never told me!"

c. My lawyer should have done what I told her to do.

3. Planning error in choice of procedures

4. Inadequate Discovery/Investigation

a. Limitations placed on lawyer by client.

b. Over-extended lawyers.

c. Expanding liabilities.

5. Failure to Know/Apply Law

a. Fluid state of law.

b. Perception that use of practice aids becomes unnecessary with experience.

c. Over-extended lawyers.

d. Expanding standard of care from increased specialization.

e. Practicing outside of areas of expertise (dabblers), substantive or jurisdictional.

VIII. How can risk of malpractice claims be reduced?

A. Calendaring Errors

1. Create a two-person system with a third party reminder.

2. Establish an office procedure for unexpected absences.

3. Calendar sufficient lead time.

4. Use the systems you create.

B. Client Communication

1. IAY letter: “I advised you…”.

2. Document, document, document!

3. “cc” client all pleadings.

C. Planning Errors In Choice Of Procedures

1. Knowing the law isn’t enough.

2. Identify the right issue to get the right solution.

3. Frame the question properly.

4. Identify the client’s goals – don’t just do what they ask and nothing else.

a) Client may not know enough to ask about other options.

a) Lawyer should explain the benefits and drawbacks.

b) Know where the client wants to be – and why.

d) Write a good engagement letter.

D. Inadequate discovery/investigation errors

SCR 20:1.3 Diligence A lawyer shall act with reasonable diligence and promptness in representing a client.

ABA COMMENT

[2] A lawyer's work load must be controlled so that each matter can be handled competently.
[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable

promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

1. Client may not want you to spend a lot of time on the case in order to save on fees.

2. Lawyer is busy – trusts the client provided all the necessary information.

3. If you take a case – commit to it – including investigation and verifying the facts. If you can't make that commitment, consider not taking the case.

E. Failure to know/apply law errors

1. Stay current in substantive areas of practice.

2. Develop and maintain a network of referral attorneys.

   a. refer matter;

   b. refer part of matter;

   c. call for guidance.

3. Use practice aids.

4. Maintain adequate resources, including time, to undertake representation.

F. Client relations errors *(common thread in majority of malpractice claims)*

1. Communicate at the client's level of understanding.

2. Determine the client's expectations and encourage realistic expectations.

3. Promptly convey all developments to the client, particularly adverse developments, preferably in writing.

4. Show an interest in the client as a person.

5. Be courteous: Return all phone calls promptly; be on time for appointments; and avoid taking telephone calls during office conferences.

6. Provide client with copies of finished work product.

7. Share the decision-making process with the client.

8. Avoid personal or financial involvement with clients.

9. Respect importance of matter to client, including careful guarding of client confidences.

10. Solve more problems than you create.

G. Dabbling – extremely risky:

1. Approximately 45% of all claims involve areas of practice in which lawyers practice LESS than 10% of the time.

2. Less than 8% of all claims involve areas of practice in which lawyers practice 90 – 100% of the time.

IX. Assessing the Case

A. Initial contact.

1. Administrative errors at the initial client in-take stage can later result in malpractice claims. Incomplete information on firm's client in-take form:

a. Non-lawyer legal professional often charged with duty of completing initial client in-take;

b. Accident data obtained at the outset of a case is often crucial to the subsequent timely handling of the same:

- the date of the accident;
- the names, addresses and ages of the people involved;
- insurance information concerning the people involved/vehicles involved;
- the location of the accident; and
- backup information regarding emergency contacts, neighbors, witness to the accident/injuries.

2. Review of client intake decisions/information.

Screen clients carefully and ask yourself - is this a claim outside of the scope of my practice? Has the client visited with several other attorneys before contacting me? Is the client listening to my

advice or reasonable with regard to his or her expectations? Does the client and/or client's family appear to be difficult to work with? How did this client come to your office? (Referrals that are flattering may also represent a difficult case or clients to work with).

3. Adequate and complete retainer/engagement letter.

4. Identify potential conflicts of interest.

B. Client expectations.

1. About 20% of personal injury claims involve procrastination by counsel who knows it's a weak claim, but do not want to disappoint their client.

2. If there is no mutual understanding with regard to the value of the claim, be prepared to say no or turn the client away. Over inflated expectations need to be handled as follows:

a. Share concerns with your client in writing so that your position is documented.

b. Be realistic early on and especially before a lawsuit is filed, as these concerns may become the fault of the lawyer if they are first raised on the day of mediation or the day before trial.

c. Share records and reports along with the defense strategies with your client.

d. Gather all of your client's past medical records so that you can carefully evaluate the case and discuss concerns with client at an early date.

e. Explain your fee agreement from the outset and explain cost and the need to have the client involved in the process, to include the demands that will be placed upon a client, before filing suit. Tell the client what is going to be expected of them and the time frame they are dealing with.

f. Settlement statements should be in writing, itemized and signed by the client before disbursing any settlement proceeds. Include a disclaimer regarding unknown subrogation claims or medical bills as a

part of your settlement statement. The client may not have brought all of the medical bills incurred or treatment facilities visited to your attention. Use caution before sending letters of protection on a client's behalf.

g. Confirm all settlement offers and decisions to the client in writing. This will serve as documentation with regard to the negotiation process and protect the attorney from claims that he did not keep the client informed throughout the negotiation process.

X. Practical Tips from Claims Experience

Claims experience can teach Wisconsin attorneys how to avoid legal malpractice claims (and it's much more comfortable to learn from other people's mistakes).

Typical errors:

A. Missed deadlines.

1. Over 35% of all personal injury claims involve missed deadlines.

2. Missed statute of limitations (failure to file a personal injury claim within the applicable statute of limitations) is the most common mistake, but other deadlines can cause problems, too.

3. Why is the statute of limitations filing deadline missed?

- practicing out of jurisdiction (even different Wisconsin local rules can be a problem)
- handling claims involving municipalities, the State of Wisconsin and/or individuals employed by the state or local governments
- claims involving minors
- clerical errors (typographical or filing errors)
- failure to independently verify facts relevant to the statute of limitations date, identify the correct defendant or insurance carrier from a reliable source (may also apply to finding all relevant insurance policies/proceeds)
- procrastination and avoidance (low priority or "not as good as I thought" claims)
- failure to prepare case adequately for trial ("I thought it was going to settle.")

B. Failure to know or properly apply the law.

C. Planning error in choice of procedures.

D. Inadequate discovery/investigation.

E. Failure to obtain client's consent or inform the client.

F. Failure to follow client instructions.

G. Failure to understand/anticipate tax consequences.

H. Clerical error; lost file, document or evidence.

I. Error in public record search.

J. Improper withdrawal from representation.

K. Warning signs that should raise red flags:

- "I knew I shouldn't have taken that case" (You were uncomfortable with the client or the case from day one).
- Other attorneys were fired or refused case.
- Clients (or clients' family members) have unreasonable expectations concerning the value of the case.
- Unable to reach a mutual understanding concerning the handling of medical bills, expenses, medical liens and attorney's fees.
- Unable to secure experts or other witnesses in support of the underlying claim (liability or damages).
- Jumping into the case at the last second.

XI. Communicating with Clients

A. Communication in legal representation.

1. Why does this matter?

a. It's a rule: SCR 20:1.4(b) **Communications**. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

b. Communication fosters shared decision-making, which results in higher satisfaction for both client and lawyer.

c. A fully informed person who is part of the decision-making process "invests" in the decisions.

d. A client's investment in their own matter results in ownership of the outcome.

e. An "owned" outcome is more satisfying to a client.

f. Poor communication to or from the client results in unmet expectations. Unmet expectations cause clients to:

i. bad-mouth their lawyer;
ii. take their business elsewhere;
iii. delay or refuse to pay their bill;
iv. file a grievance; or
v. make a malpractice claim.

2. Who should communicate what?

a. Client-to-lawyer communications:

i. expectations
ii. needs vs. wants
iii. priorities

b. Lawyer-to-client communications:

i. expectations, including scope of retainer

ii. comprehension of client's goals, needs, wants and priorities

iii. billing:

- tell clients what your billing policy is
- follow your billing policy
- recognize billing as important communication
  - ✓ bill tells client what the lawyer is doing and how much effort is going into representation (can be the best evidence in the defense of a legal malpractice claim, even in a contingency fee retention)
  - ✓ payment tells lawyer is in agreement with pace and process
  - ✓ lack of payment is a warning sign that should not be ignored. It may signal dissatisfaction with work and if promptly addressed, allow re-allocation of resources
  - ✓ see SCR20:1.5 **Fees**

3. How to communicate effectively.

a. Understand clients don't hear much of what you say to them:

i. technical jargon

ii. not in client's comfort zone

iii. not what they want to hear

b. Use plain English, specifically if client isn't formally educated.

c. Deliver "bad news" as early as possible.

   i. While client's need for you is great (more inclined to listen to you).

   ii. In a place the client may be more comfortable and "able" to hear you:

      - in their home or office;
      - on the phone to them in their home or office;
      - in a neutral location, e.g., public place, remembering SCR 20:1.6 **Confidentiality of Information;**
      - sitting next to them in your conference room or office, rather than across your desk from them or in another "power" position.

d. Say you're on the same team, e.g., refer to "our case," "our motion," "our plan."

e. Tell your client you'll follow-up with a written communication, and then do it.

f. Pause often and long enough to let the client talk too. Invite client to talk with open-ended questions, requests for opinions and suggestions, analysis of situation.

g. Listen for the purpose of gathering more information rather than the purpose of responding.

h. Use plain English—critique your letters for comprehensibility.

i. Confirm your understanding of client's instructions.

j. Confirm your advice to client, especially if client's instructions are counter to your advice.

k. Repeat expectations regarding process timing, options, actions, and payment of fees.

l. Report unexpected developments, especially bad ones, promptly and clearly.

m. Send copies of work product with a brief translation if necessary:

i. Brief may be incomprehensible to client.

ii. Negotiation letter to opponent may change a client's expectation of outcome.

iii. Expert's opinion may be buried in technical jargon, with effect that expert's opinion is unclear.

iv. Caveat: take care not to condescend, e.g., "in case you don't understand," or spoon-feed a client by taking away their opportunity to comprehend and analyze development of matter.

n. Be on time for client appointments—client's perception if you're late is that you do not value the client or the client's time.

o. Return phone calls promptly, or have someone in your office do so if you can't. Failure to do so shows lack of interest in the client.

p. Don't use a client's time tending to other clients' matters, e.g., take other calls.

q. Ensure reception area maintains all clients' confidences.

4. What isn't going to happen:

a. Clients don't have, or feel, a mutual duty to communicate with their lawyers.

i. intimidated,

ii. assume lawyer already knows or will ask for information "if it's important."

b. The burden of ensuring good communication between client and lawyer rests primarily on the lawyer.

B. Where does this leave us?

No matter how good a lawyer is, those legal skills are useless unless the lawyer and his or her staff communicate on a regular basis and in a comprehensible manner with the client. Effective communication techniques also include setting priorities and better satisfying clients by addressing their needs and expectations.

XII. Conflicts of Interest

Supreme Court Rules on conflicts:

20:1.7	Conflicts of interest current clients
20:1.8	Conflict of interest: prohibited transactions
20:1.9	Duties to former clients
20:1.10	Imputed Disqualification: general rule
20:1.11	Special conflicts of interest for former and current government officers and employees
20:1.12	Former judge, arbitrator, mediator or other 3rd-party neutral
20:1.13	Organization as a client

A. Conflict systems.

1. What do you do?

a. Names submitted to computer check? Then what?

b. What is included? Staff? Spouses? Employment of spouses? All names used by persons on list?

2. Why use a conflict system?

a. Avoids breach of the Rules of Professional Conduct. Often not a matter of "common sense and good manners."

b. Avoids "appearance of impropriety."

c. The world requires it. Your reputation depends on

it.

3. When do you need to use it?

   a. At the very first contact with any potential client, before confidential information is on the table.

   b. When opening any file.

   c. When new parties are added in any manner to any representation.

B. Conflicts and malpractice.

A conflict of interest is not, in and of itself, malpractice. It is a breach of the Rules; but:

- Client's **perception** of a conflict may result in a claim because of heightened scrutiny of work; a perception that attorney exercised "bad judgment" or committed other error.

- Conflicts may add "enthusiasm" for what might otherwise be a lackluster malpractice claim.

- A representation that includes a conflict may be okay ethically—with a waiver, but may still create the problems referenced above, and may still subject lawyer and firm to a claim for malpractice.

C. Define your role carefully, especially when you have more than one person in your office at a time or when the referral source (banker, broker, title company) sends you clients of theirs to make their deals work.

D. Don't take a matter that makes you uncomfortable because you feel a loyalty to the client

E. Watch for problems arising out of being the "family lawyer:"

1. You did Mom and Dad's will, and now, after Dad's death, Mom's (with a little help from one child).

2. You've represented the family corporation for years; now son runs it and wants you to do his will.

3. While representing the corporation, one of the shareholders wants you to do her estate planning.

4. You serve on the board of directors and do the legal work for the company.

5. You have business relationships with your client (even a security interest or second mortgage to secure your fees counts).

6. Representing the driver and passengers on a personal injury case.

XIII. Ways to Better Serve Clients and Keep Your Practice Out of Trouble

A. Client selection.

1. Learn to say "no," especially when the client's needs/expectations/ demands are out of line (And "NO" is different from, "I can't do it, but I'll help you find someone else …").

2. Accept cases in areas of practice in which you are competent (do not dabble).

3. Listen to your staff.

4. Watch your "puffing." Nothing can replace setting reasonable expectations upfront. (You are not a magician … you are a lawyer.)

5. It's better to meet with the client and candidly discuss issues than stew over them. Cutting a client loose early in the representation is quicker and exacts a lesser toll on life than trying to carry on.

B. Documentation: Serving the client and helping yourself fulfill the duty of communication.

1. Lawyers write things down. It's expected. When you don't, there's a tendency to construe the "oversight" against you.

2. Send out professional, proofread communications: by e-mail, letter, contracts, court documents and bills.

3. Diary <u>every</u> file for follow-up and report to client (even if you say there's nothing new to report yet, but you expect "x" to happen next).

4. Consider implementing internal file audits. A fresh set of eyes may discover an issue you have overlooked.

5. Retainer letters aren't a time-drag. They are life savers. Document your scope of representation:

   - can be full blown agreement with scope of engagement (and what you aren't doing), fee agreement, payment agreement and all the particulars (including who your client is)

6. Document (at least in your file, but the real client service is by a letter to your client):

   a. important decisions (what expert we are using—or that client decided not to use an expert)

   b. when client decision is counter to your advice

7. Don't discriminate. Good clients deserve letters and explanations as much as difficult clients do.

8. Remember always: what is "routine" for you probably isn't for your client (who might not want to ask you for fear of sounding stupid). Don't let your comfort with a client cloud your judgment.

XIV. Help Yourself When It Goes Wrong (Or a Client Perceives It Has Gone Wrong)

A. Call your carrier and discuss issue or potential issue. (WILMIC calls it a "potential claim." It's when you first become aware of facts or circumstances regarding any act, error or omission committed by you that a reasonably prudent lawyer would expect to be or to become a basis for a claim, regardless of whether you believe such a claim will be made. Must be reported to trigger coverage.)

B. Organize and review your file. Keep it intact. Keep a copy.

C. Tell your client what happened and the consequences.

D. Maintain Your Professionalism.

1. Call your carrier. You can talk about your feelings of anger against that miserable, calculating, demanding, unscrupulous, unappreciative client there, but it's probably not a good idea to vent to the client.

2. Call your carrier. Don't freeze, fall on your sword or ignore it and hope it will just go away.

E. A claim is a learning experience. Hopefully, the tuition will be reasonable—and remember: per an ABA survey in 2015, 63% of claims asserted against lawyers ended with no judgment or settlement paid.

F. Consider all aspects carefully before suing a former client for fees or maintaining an attorney's lien on a contingency case that you are no longer handling.

XV. Conclusion

Facing a legal malpractice claim or an OLR grievance are some of the risks lawyers experience while practicing law. Those risks can be greatly enhanced depending upon the area of law the lawyer practices within. Frequent and clear communication with your clients is not just good client service, it can help a lawyer avoid a claim or grievance altogether. Understanding your malpractice insurance policy and the timely reporting of any claim concerns is paramount in protecting your coverage and establishing good client relations can help to mitigate and repair a potential claim, with no damage to the client.