

# PREVENTING LEGAL MALPRACTICE AND GRIEVANCE CLAIMS AVOIDING THE HAZARDS ALONG THE COURSE

## OVERVIEW

General Duty for legal malpractice – See Attached

Top bear traps on the course and how to avoid them.

Preventative maintenance - Screening the potential clients – Written and clear engagements.

### 1. What is Legal Malpractice?

The relationship as attorney-client must exist before any claim for legal malpractice may be brought.

- Legal malpractice typically refers to an attorney's breach of two-related but distinct duties.
  - (1) The duty of reasonable of care, and
  - (2) the fiduciary duty.
- A breach of the first duty gives rise to a claim of professional negligence. A breach of the second duty gives rise to a claim of fiduciary duty.
- A breach of fiduciary duty can also rise to a grievance.

### 2. How Likely is Legal Malpractice with A Client

The average lawyer will have three legal malpractice claims made against him or her during the course of a career.

Source: Mallen and Smith, Legal Malpractice.

- The following areas of law have the highest percentage of claims.
  - Personal injury 21.6%
  - Real Estate 20.1%
  - Family law 10.3%
  - Estate, trust and probate 9.7%
  - Collection and Bankruptcy 7.3%

Source ABA Standard Committee on Lawyers Professional Liability.
- Trends observed over the last 20 years.

Plaintiff personal injury lawyers have consistently had the most claims.

Real estate claims are catching up.

Small firms had the most claims

Severest claims have been claimed against the larger firms.

- Lawyers are increasingly being sued by non-clients.

*Saffer v. Willoughby*, 143 N.J. 256 (1996) and *Innes v. Marzano-Lesnevich*, 143 N.J. super. 198 (Application. Div. 2014).

### THE BEAR TRAPS

1. Missing deadlines.
2. Poor client relations.
3. Ineffective client screening.
4. Inadequate Research and Investigation
5. Conflicts of interest and conflicts of matter.
6. Inappropriate involvement in client interests.
7. Lack of adequate documentation of work.

### AVOIDING THE BEAR TRAPS

- Practice Malpractice Insurance.

Know your limits of liability.

Know what is excluded.

Be accurate on your application.

Disclose all potential claims.

Prior knowledge exclusion may exclude coverage where, at the time of the insurance application, the lawyer knew of or reasonably should have foreseen the claim, but did not disclose it to the insurer.

### **Avoiding Bear Trap No. 1 Missing Deadlines**

An office-wide calendar and its use. Standard calendaring system.

Avoid procrastination.

Know the law.

- Remain interested in the case. Non-engagement letters.

## **Avoid Bear Trap No. 2 Poor Client Relations**

- 1. Get it in writing**
  - a. With the parties.
  - b. What is the attorney retained to do?
  - c. Fee structure.
  - d. What are the client's obligations?
- 2. Listen. Establish client goals and objectives.**
- 3. Set expectations.**
  - a. Value of the pinky finger.
  - b. Course of action.
  - c. Services being performed.
  - d. Outcome.
  - e. Time table.
  - f. Talk to the client as if he/she were in middle school. Clear language.
- 4. Good client communication.**
  - a. Return phone calls timely.
  - b. Be prompt for appointment times.
  - c. Send status updates.
  - d. Copy on correspondence.
  - e. Meet or beat all deadlines.
  - f. Explain delays.
  - g. Support staff.
    - i. Call fire.com.

- ii. Call trackingmetrix.com.
- iii. Vocaroo.

**5. Ask for client input**

- a. How am I doing?
- b. How's the firm doing?
- c. During and after.

**6. Document, document, document**

- a. Close out letters.
  - i. Disengagement.
  - ii. Conclusion of case.
  - iii. Testimonials.

**Avoid Bear Trap No. 3 Ineffective Client Screening**

1. Establish criteria by which clients, cases and transactions will be evaluated and accepted. One way to avoid legal malpractice claims is to identify potential clients who are likely to become problem clients down the road.

- a. Client has already gone through one or more lawyers on the same matter.
- b. Client expresses unrealistic expectations.
- c. Client is unwilling to agree to your fee.
- d. Client has a personal vendetta.
- e. Client wants a "tough attorney".
- e. Analyze the screen procedures.
  - i. Do you have time to take on the new case?
  - ii. Do you have the expertise necessary to handle the case? Don't dabble.
  - iii. If it's a contingency fee do you have the adequate funds to take the case.
  - iv. Is the prospect client a family member or friend.
  - v. Has the client brought the matter at the 11th hour.
  - vi. Is the client irrational or confrontational during the initial meeting? Don't hesitate to turn down a potential client and if you do send the non-engagement letter. Advise the recipient in the non-engagement letter you have decided not to

accept the representation. Advise the recipient the statute of limitations may be applicable to their case. Advise the recipient he or she should seek other counsel.

#### **Avoiding Bear Trap No. 4 Inadequate Research and Investigation**

- a. Areas include failure to know or properly apply the law.
- b. Failure to know or ascertain a deadline.
- c. Inadequate discovery or investigation and planning or procedural choice errors.
- d. The attorney of record is ultimately responsible.

#### **Avoiding Bear Trap No. 5 Conflicts of Interest and Conflicts of Matter**

- a. Representation of two parties.
- b. Representation of opposing theories of law.
- c. Representation of opposing sides of an issue.
- d. Personal involvement in client's business.
- e. Serves as a director or officer of a client company. Have an unclear statement of non-representation.
- g. Conflicts arising from law firm acquisition or lateral hires. Avoid conflicts by doing appropriate conflicts check. Retainer agreement/engagement letter.

#### **Avoiding Bear Trap No. 6 Inappropriate Involvement in Client's Interests**

#### **Avoiding Bear Trap No. 7 Lack of Adequate Documentation of Work**

- a. Office procedures can prevent documentation of work errors.
- b. Check accuracy and content of outgoing documentation letters, briefs, and contracts and motions.
- b. Good file management including paper file and digital scanning.
- c. Recording telephone messages and memorandum.
- d. Daily procedures regarding mail, phone messages and appointments. Office backup off-site backup. Adhere to the prepare for the crash mentality.

## REVIEW

### Ten Ways to Avoid a Malpractice Claim

1. Put your agreement with client in writing.
2. Return all the calls and correspondence.
3. Copy the client on documentation.
4. Know your limitations both in terms of competence and time.
5. Avoid entering into business dealings with clients.
6. Never get romantically involved with a client.
7. Look out for conflicts of interest.
8. Have a good calendaring system.
9. Once a matter is concluded send a letter to the client confirming you no longer represent the client.
10. Don't sue the client.