Managing Malpractice Risks – Common Pitfalls in Law Practice

Waukesha County Bar Association
November 16, 2017

Matt Beier, Claims Attorney
Wisconsin Lawyers Mutual Insurance Company

I. Will You Ever Have a Malpractice Claim?

ABA says statistically every lawyer will experience 1 to 3 claims in their career.

II. Think You Ever Committed Malpractice?

- You may not know how close you came
    - Nothing triggered the problem so it remained undiscovered
    - Your client didn't pursue a claim
    - Easy to overlook something

III. 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
B. Negligence – a breach of the duty owed to the client
C. Proximate cause – causal relationship between duty and damage
D. Actual collectible damages – defendant in the underlying case must be collectible

IV. Statute of Limitations

A. Six years - Wis. Stat. § 893.53

B. *Bleecker v. Cahill*, 2017 WI App 28

For a malpractice claim to accrue, it must be capable of present enforcement and a claim cannot be enforced until the plaintiff has suffered actual damage. Plaintiff was not reasonably certain to suffer harm when he signed the lease on his lawyer's advice in 2003. Rather, claim accrued in 2013 when lessee exercised an option that resulted in reasonably certain financial loss to the plaintiff.

V. Who Is Making the Mistakes?

A.	Lawyers in practice 6 – 15 years	30% of all WILMIC claims
B.	Newer lawyers, first five years of practice	12% of all WILMIC claims
C.	Lawyers practicing 40 years or more	5% of all WILMIC claims
D.	Solo practitioners	34% of claims (ABA)
E.	Firms of 2-5 attorneys	32% of claims (ABA)

VI. Dabbling – Extremely Risky

A. Approximately 44% of all claims reported involve areas of practice in which lawyers devote LESS than 10% of their total practice in.

B. Less than 3% of all claims involve areas of practice in which lawyers devote 80% to 90% of their total practice in.

VII. Riskiest Areas of Practice *(Frequency)*

Where do malpractice claims come from?

A. Top Five Areas of Practice – since WILMIC started in 1986

1.	BI/PI – Plaintiff	19%
2.	Real Estate	17%
3.	Bankruptcy/Collections	11%
4.	Estate, Probate, Trust	11%
5.	Family Law	10%

B. Common Sources of Claims – Areas of Practice – 2015

1.	Bankruptcy/Collections/FDCPA	23%
2.	Estate, Probate, Trust	18%
3.	Real Estate	13%
4.	BI/PI – Plaintiff	10%
5.	Business Transactions	10%
6.	Criminal Defense	10%

C. Common Sources of Claims – Areas of Practice – 2016

1.	Bankruptcy/Collections/FDCPA	21%
2.	Estate, Probate, Trust	21%
3.	Real Estate	21%
4.	Family Law	18%

D. Common Sources of Claims – Areas of Practice – through June 30, 2017

1.	Bankruptcy/Collections/FDCPA	27%
2.	Estate, Probate, Trust	17%
3.	Real Estate	17%
4.	Criminal Defense	13%

VIII. Most Common Mistakes for all Areas of Practice

(All claims since WILMIC's inception in 1986)

A. Administrative Procedures and Calendaring – 14% of all claims

1. Failure to react to your calendar
2. Failure to know or ascertain correct deadline
3. Failure to calendar properly

B. Client Communication – 14% of all claims

1. Failure to obtain consent/inform client
2. Failure to follow a client's instructions

C. Planning Error in Choice of Procedures – 13% of all claims

D. Failure to Know or Properly Apply the Law – 12% of all claims

E. Inadequate Discovery and Investigation – 12% of all claims

IX. Four Areas of Claim Vulnerability

A. Initial Contact

1. An initial contact is not only the first time you meet a potential client, but also the first discussion of a new matter with an existing client.

2. How can you "underwrite" a potential client or matter in the initial interview?

    a. Assess client's attitude toward the matter specifically and lawyers generally.

b. Honestly assess <u>your</u> expectations, including:

1) Time for matter;

2) Competence: Do I do this kind of work now, or do I have time and resources available to handle competently?

3) Is the size and scope of client's matter reasonable for my practice?

4) Chance of success: As defined by client? As defined by me?

5) Cost: will it be in proportion to size of problem?

6) Will I get paid?

c. Assess the client's expectations through good listening techniques.

d. Communicate mutual expectations: What are the client's goals? What are the lawyer's goals?

e. Seriously consider refusal or referral of matter: Refer competently. (There is a potential claim for negligent referral.)

f. See SCR 20:1.2(a) Scope of Representation: "… [A] lawyer shall abide by a client's decisions concerning the objectives of representation, ... (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

g. Know who is your client … and who isn't:

1) You can be liable to persons other than the person you understand is your client.

2) "Clients" want you to represent opposing interests, e.g., husband/wife in divorce; buyer/seller in sale of business; lender/ borrower in loan.

a) Can you represent both parties? See SCR 20:1.7(b).

b) What malpractice risks are there? What do the Rules of Professional Conduct require?

c) How can risks be minimized?

h. Respect your partners and others you practice with.

i. Listen to your stomach: Act on your instincts—if there are red flags or you feel uncomfortable at the first meeting, it will likely only get worse.

C. Communication

"The single biggest problem in communication is the illusion that it has taken place." --*George Bernard Shaw*

SCR 20:1.4 Communication.
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0 (f), is required by these rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests by the client for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

1. With the client:

a. Candor is critical.

b. Rules of Professional Conduct require:

1) Keep client regularly informed (SCR 20:1.4 Communication);

2) This includes the good and the bad. (SCR 20:1.4 and 20:1.7)

"What to Do After Making a Serious Error." Pierce & Anderson. Wis. Law. Feb. 2010.

3) Respond to client inquiries in timely manner: If you can't, be sure someone else in your office can;

4) Provide client with sufficient information to allow client to make informed decisions (SCR 20:1.4(b)).

c. Communication must be clear:

1) Non-technical.

2) Geared toward each client's individual level of sophistication: Your job to figure out what that is (and to know that if it goes wrong, whatever you did may not be enough).

a) A primary area of claims is plaintiff's personal injury representation; an area with few claims is insurance defense.

b) Recognize relative sophistication of clients, e.g., insurance company has an understanding of costs and risks; ability to convey and receive technical information; feeling of control during lawsuit; ability to envision life after the lawsuit in a realistic manner.

d. Communication needs to be documented:

1) Letter of engagement outlining scope of representation and fee agreement;

2) Advice regarding risks and unanticipated costs;

3) Advice regarding alternative approaches;

4) Status reports: even if it's "nothing has occurred;"

5) Instructions to client or from client, particularly if instructions run counter to your advice. Do an "IAY" letter: "I advised you ..."

e. Communication includes good listening skills:

1) Conversational techniques;

2) Providing client with an opportunity to speak and think, to establish client's level of sophistication and understanding;

3) Elicit information: ask questions.

D. Competence

SCR 20:1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

a. *In re Disciplinary Proceedings Against Boyle*, 2015 WI 110, ¶ 43 –

i. In a legal malpractice action, "a plaintiff must prove that, but for the attorney's negligence, the plaintiff would have prevailed on the underlying litigation." In other words, this standard requires the plaintiff to prove a case-within-a-case.

ii. OLR does not have to demonstrate causation and damages because "…the goal of a disciplinary proceeding is…to protect the public, the courts, and the legal profession from attorneys who fail to meet minimum standards of conduct." *Id.*

See also, "Defining Legal 'Competence' Depends on the Arena," Kaiser, *Wisconsin Lawyer*, Vol. 89, No. 10 (Nov. 2016).

1. Most claims are made against experienced lawyers.

a. "Competence" includes not only knowing the law, but also having adequate resources, including time, to properly handle the representation. (SCR 20:1.1 Competence "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge,

skill, thoroughness and preparation reasonably necessary for the representation.")

b. Not only must the lawyer be "competent," but the lawyer's staff must be competent as well.

2. The standard of care is that degree of care, skill, and judgment that is usually exercised under like or similar circumstances by lawyers licensed to practice in this state. (WI Civil Jury Instructions - 1023.5) But see *Duffey v. Tank Transport*, 535 N.W. 2d 91 (Ct. App. 1995) where an attorney who concentrated his practice in an area of law was held to a higher standard.

3. How does a lawyer achieve and maintain competence?

a. Continuing legal education and independent study;

b. Affiliation with experts, other lawyers;

c. Maintenance of adequate resources and time to keep updated;

d. Use of checklists and practice guides.

4. How do the Rules of Professional Conduct relate to malpractice claims?

Violation of a rule is not necessarily malpractice. (See Preamble to SCR Chapter 20.) Malpractice is not necessarily a violation of an ethical rule. (You can have a conflict of interest and still do a good lawyerly job in representation.)

E. Billing

1. At initial contact, assess cost of representation, together with client's ability and willingness to pay.

2. Document fee agreement.

3. Discern client's attitude through use of an advance fee payment. Note: This goes into your trust account until earned. When it is earned can be described in fee agreement.

4. Bill periodically and consistently, clearly detailing the work performed and the charges submitted. Bill for time covered by advance fees in same manner, with clear accounting of charges and credits and remaining balance.

Note: Often one of the first things asked for in a malpractice suit is copies of all the attorney's bills. Prepare them for scrutiny. Proofread. Proofread. Proofread.

5. Keeping the client abreast of developments, especially negative developments, can lessen "shock" of unexpected time and/or expenses, and may prevent a later dispute about the fee agreement, and amount or quality of work performed by the lawyer.

6. Lawsuits for unpaid fees often generate a malpractice counter-claim. Before bringing such a suit, undertake the following analysis:

   a. Was the client pleased with the outcome of the underlying representation?

   b. Are you critical of your own performance?

   c. Has an uninvolved attorney assessed your representation for possible areas of criticism?

   d. Is the amount at stake worth the risk of a claim? (i.e., what's your malpractice insurance deductible?)

   e. Is there any alternative to a lawsuit for unpaid fees, i.e., State Bar Fee Arbitration program?

   f. How would such a suit harm your reputation? How will your malpractice insurance carrier handle such a claim?

   h. Would a judgment be collectable?

   i. How much will you have left after taxes?

   j. See SCR 20:1.5 Fees.

X. Claim Reporting and Underwriting

A. What is a "claims-made-and-reported" policy?

Provides coverage for matters first made against you and reported in writing to the insurance carrier during the policy period.

B. When should I report a matter?

When you first become aware of a matter that a reasonably prudent lawyer might expect to be the basis of a claim, the insurance carrier must be notified in writing.

C. What if I can fix the problem?

Not reporting a matter during the policy period in which you became aware of it could void coverage. Under most policies, an attempt by a lawyer to unilaterally remedy a problem or simply pretend that it does not exist could jeopardize coverage.

D. What types of matter should I report?

- The existence of a claim (allegation of a mistake and a demand for payment) is usually obvious. For example, when a client alleges that you made a mistake and demands restitution, a claim exists. The recompense sought by a client could range from a return of your fees to a demand for outright payment of financial loss allegedly suffered.

- Other matters may be more subtle and you may be either reluctant or unsure to report it. For example, in reviewing a file, you may discover a problem of which no one else is aware. Although you may want to look the other way, you have a duty under the terms of your policy to inform your insurance carrier immediately. Plus, your ethical duty is another matter.

- You receive a Subpoena to testify, or you receive an OLR grievance.

E. What if I believe that the allegation is frivolous?

As a condition of coverage, you have the duty to report any circumstance which could give rise to a claim, regardless of whether or not you believe the matter is defensible. If the matter is without merit, by reporting it to your insurance carrier you have done your duty and have triggered protection just in case the matter would mushroom into a problem.

F. What is the importance of timely reporting?

Prompt reporting has a number of benefits to both you and your insurance carrier:

- Mitigation
- Defense
- Accurate accounting to the applicable fiscal year, affecting financial statements and rate making

- Timely reporting to reinsurance carriers (participation by reinsurance carriers varies from one treaty year to another; only those carriers receiving premium will tolerate paying a claim)
- Thorough, complete disclosure builds trust (lawyer & underwriter; underwriter & reinsurance carrier)
- Benefit other policyholders/owners of a mutual insurance company

G. What happens if a known matter is reported after my policy expires?

Coverage is only provided if a known matter is reported, in writing, to the insurance carrier before the policy expiration date. Once your policy expires, coverage terminates, regardless of when you performed the professional services.

If, after a matter is reported to an insurance carrier, it is determined that you knew or should have known of a matter that could potentially become a claim – based on the reasonably prudent lawyer standard – then coverage could be contested.

XI. Claim Impact – Insurability & Premium

A. Will my reporting of any matter automatically tarnish my insurance record?

Underwriters for a reputable insurance carrier will look beyond the existence of a reported claim and consider a number of factors.

The typical review of a claim will include consultation with the claims department to help determine:

- If a claim has merit
- The degree of negligence
- The amount of alleged/actual damages
- The anticipated expense to defend the claim
- The circumstances that preceded the claim
- The lawyer's degree of cooperation in working with the claims department
- If the lawyer was practicing in an area of law not identified on the policy application
- Risk management steps installed to prevent a recurrence

B. Will a costly claim mean that I will be dropped by my insurance carrier?

In addition to reviewing the above aspects, an underwriter will also take into account:

- The lawyer's previous claim history, both frequency and severity
- The lawyer's longevity as a policyholder

C. Will my premium increase when I report a claim?

The above factors are considered and input is received from the claims department. Only after all factors are considered could premium be affected. Lawyers with no claims or less costly claims can rightfully expect to pay less premium than a lawyer with a significant claim.

XII. Malpractice Insurance for Retiring and Retired Lawyers

A. Insuring continuing liability

1. The firm is vicariously responsible for the work done by all employees (See SCR 20:5.1 – Responsibilities of partners, managers, and supervisory lawyers to be sure the firm has appropriate measures in place to follow the rules).

2. You are always liable for what you do.

3. Partners are jointly and severally liable for wrongful acts or omissions within the ordinary course of business or on account of a partner with authority causing a loss or injury to another, and for breach of trust, receipt and misappropriation of money; and jointly liable for other debts and obligations of the partnership (Wis. Stats. 178.12 (1)).

4. In an LLP or LLC, you are responsible personally for your own acts or omissions, and for those of someone you supervise, but not personally liable for a partner or shareholder's (Wis. Stats. 178.12 (2) and (3); 180.1915 and Chapter 183). For benefits of limited liability entity in Wisconsin, must follow SCR 20:5.7: register annually and pay fee; have at least a minimum level of malpractice insurance; use limitation language in firm name; provide plain-English summaries to all clients.

B. Important terminology

1. Occurrence policy – covers loss if it occurs while policy is in force (auto insurance).

2. Claims-made-and-reported policy – covers claim if policy is in effect at the time you first learn of a problem and report it to the carrier. Notice to you + report to insurance company = coverage.

3. Statute of limitations for legal malpractice (6 years generally), but the discovery rule applies.

4. Policy language requires you to report circumstances that you have reason to anticipate may become a claim, during the policy period in which you first became aware of the circumstances, or you may lose coverage. Every lawyer in a firm should know the anniversary date of the policy and thoughtfully consider what a prudent lawyer would reasonably expect to be a basis of a claim. Report those matters to the insurer to protect your coverage.

5. "Tail" insurance – extended reporting period option; this is an endorsement to a policy (same limits apply); goes into effect at end of policy period and extends time you have to report a claim, for the term of the endorsement: generally 1, 2, 3, 6 years or unlimited. (Note: look at your policy; some require company to issue a tail at appropriate times, others may allow this request to be subject to underwriting and could be declined depending on your history with the company.) Usually no deductible applies on tail claims.

6. "Burning limits" – defense costs are included in the policy limits and reduce the amount available to pay a claim. (If policy limit is $250,000 per claim and costs $120,000 to defend, only $130,000 is available to pay indemnity.)

7. Retroactive date – legal work done before this date is not covered by the policy.

8. Prior acts coverage – policy covers all legal work from the date the lawyer started practice to the present date.

9. "Gap" – period of time during which lawyer has no insurance (practicing "bare"). This can happen in a number of circumstances, often when a lawyer changes firms, or a firm dissolves and doesn't procure a tail.

C. What does your partnership or shareholder agreement say about insuring you when you retire or otherwise leave the firm?

1. Do you expect firm to continue to insure you?

   a. At what limits?

   b. What does the firm's current insurance policy provide?

   c. Will firm buy your tail? Or can you?

2. What happens if firm breaks up? Firm changes carriers? (You are no longer "named insured" on the policy.) Or the firm's insurer changes its policy terms, including the definition of "insured?"

D. Solo practitioner closes his practice and joins a large firm.

1. Learns that new firm will not provide "prior acts" coverage.

2. Doesn't have enough extra cash to buy a tail on his existing policy, if it is even available to purchase for a lawyer continuing to practice law.

3. Result: He is covered only for legal work done for new firm. He has a "gap" for all work done as a solo, even though he had a policy in effect each year of his solo practice.

E. In the SCR's, SCR 1.17 allows sale of areas of practice, allowing (for example) a lawyer to just keep estate planning clients. May be possible to insure your part-time practice for a smaller premium.

F. Why bother with insurance at all?

1. After all, having insurance could "encourage" claims.

a. The cost is greater than the benefit: you can self-insure.

b. You don't have many assets anyway.

2. You consider yourself a professional:

a. With a duty to protect your clients from your errors; and

b. Want to protect your peace of mind and best performance.

Mistakes really do happen – even by excellent lawyers who are, after all, still human.

XIII. Cyber Liability Insurance

A. A broad range of Internet and data information-related risks. There are both 1st and 3rd party risks.

B. Cyber insurance was first introduced in the mid-1990's for technology companies to address "intangible" asset risk that were not covered under standard insurance policies.

C. Why Should Attorneys Care About Cyber Risk Exposure?

1. Almost every law firm is now dependent on technology

2. Attorneys gather large quantities of sensitive information on clients and employees

3. Attorneys store and transmit Personal Identifiable Information (PII)

4. Attorneys process credit cards or transmit bank information

5. Law firm websites and usage of the internet are quickly becoming the 21st century law firm "buildings."

D. Where does "PII" come from? Where is it stored?

1. Comes from:

- Clients
- Employees
- Credit card companies
- Financial institutions – banks
- Vendors
- Other businesses

2. Stored in:

- Law firm network computers/laptops
- Employees' home computers
- Disks/tapes
- Databases
- Flash drives
- Smart phones/tablets
- Printers
- Copy machines

E. Law firm dependency on technology

1. This dependency creates a business risk not covered in standard Business Owners Policies and only partially covered in professional liability policies.

2. Law firms gather and transmit Personally Identifiable Information (PII) from their clients such as names, addresses, birth dates, social security numbers, credit card information, and medical information.

F. Security Breach/Notification Requirements

1. Inadvertent disclosure of PII creates the possibility of identity theft. Wisconsin, along with 48 other states, has a law requiring PII to be protected and notification to affected persons if PII security has been breached.

2. The average cost for each PII record that is lost is $50-$214. This cost includes notification to victims, investigative expenses to determine loss, and credit monitoring for managing identity theft.

3. PII can be lost by something as simple as leaving a laptop or cell phone in an airplane or coffee shop, or by something as complex as a hacker attack or Botnet on a law firm's information system.

4. A loss of PII is a significant event for a law firm, requiring a prompt, effective and legally sufficient response. Unfortunately, most lawyers and law firms are not equipped to make this response.

G. Types of Losses and Coverages

1. Clients' confidential information has been lost or stolen

a) Laptop with client information left in coffee shop

b) Laptop or other device with client information left in your car – car is broken into

c) Laptop or other device, including smartphone, left on an airplane – client information on those devices

d) Smartphone left at Starbucks – client emails and other information in the phone

2. Coverages

a) Breach Notice Coverage

- Provides coverage for costs incurred by a lawyer or law firm to comply with Wisconsin's privacy breach

notice law, as well as notice fulfillment services and credit and fraud monitoring for;

b) Privacy Liability Coverage

- Covers third party liability for loss of Personally Identifiable Information

c) Security Breach Liability Coverage

- Covers 3rd party liability that arises when a virus or other malware is transmitted to a third party from a law firm's computer system.

XIV. Fair Debt Collection Practices Act (FDCPA)

A. Definitions (15 U.S.C. §1692a)

1. "Communication"
2. "Creditor"
3. "Consumer"
4. "Debt"
5. "Debt collector" (and "NOT a debt collector")

B. Actions Permitted or Restricted by the FDCPA (15 U.S.C. §1692b-j)

C. Common violations

1. Typical Claims Arising From Collection Letters – Does a perfect form letter exist?
2. Leaving messages – DON'T DO IT!

D. Damages (15 U.S.C. §1692k)

E. Defenses

1. Bona Fide Error (15 U.S.C. §1692k(c)
2. Rule 11 Sanctions
3. Safe Harbor Letters
4. Settlement strategies

F. Recent FDCPA Decisions and Emerging Trends

1. *Spokeo Inc. v. Robins*, 136 S.Ct. 15540, 1542 (2016)
2. *Arellano v. Clark Cty. Coll. Srvcs., LLC*, No. 16-15467 (9th Cir., 03/21/16)