

Managing Malpractice Risks – Common Pitfalls in Law Practice During the COVID Era and Beyond

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I. Pandemic Law Practice – Adjusting on the Fly

- A. In a newly destabilized work environment, lawyers need to be adaptable.
- B. Just as the 2007 financial crisis forever changed the business of law, the 2020 pandemic will forever change the practice of law. Simply put, law firms must quickly change how they operate internally to navigate a new reality of remote work. Once out of the genie, there will be no “old normal” to which law firms will return in 2021 or beyond.
 - 1. Figure out how to blend, not balance, work and life.
 - 2. If you can successfully juggle your numerous responsibilities, professional and personal, on a continuous spectrum, you can make this work.
- C. Some essential freedoms apply to work-life blend:
 - 1. The Freedom to Rethink When and Where Work Happens. In study after study, the vast majority of Millennials asserts a strong desire to have some autonomy in setting their work hours and location. While some firms have been hesitant to trust their associates to work occasionally outside the office, all firms must now learn to trust and supervise their associates remotely.
 - 2. The Freedom to Work, Think, and Connect Digitally. The internet is not a highway onto which you merge on and off; rather you can be a “digital native” who fully lives in the digital and non-digital worlds.

Use the internet and digital connectivity with your clients, the courts and adversaries to its fullest extent. This will make you a better lawyer and better advocate.
 - 3. The Freedom to Unplug. Lawyers may be superheroes, but we are not robots. We must give ourselves—and each other—the time and space to step away from the stresses of work. After a healthful break, we can return our focus to work with renewed focus and enthusiasm.

Before the pandemic struck, the notion of a standard workday was already becoming unrealistic and unsustainable—and not just because of Millennial demands. For years now, our clients have not operated on a Monday through Friday, 9 to 5 schedule. To the contrary, clients rightly expect their lawyers to help them as needs arise. Meeting our client demands requires us to destabilize the traditional workday.

That brings us to....

II. Client Communication

- A. At WILMIC, we certainly see our share of clients complaining about communication with their lawyer. Even in so-called “normal” times, over 20 percent of the claims reported to us are a result of poor client communications.

Now, with the coronavirus pandemic keeping many of us working at home, it is even more important that you keep your clients informed.

- B. With clients just as stressed as the rest of us, and feeling the same uncertainty, timely communication is the key.
- C. Wisconsin Supreme Court Rule 20:1.4

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.

D. With that in mind, and striving to maintain the appropriate standard of care during these unusual times as your office procedure (and in many cases, location) changes, here are some ways to do that:

1. Reach Out to Clients Proactively

Don't leave clients guessing as to how you will be working and communicating with them during this stressful time. Clients are much happier when their lawyer takes out the guesswork and lets them know what's happening.

2. Keep Up with Your Emails

Working at home, it's easy for small things to get lost. If you're now working at home, keep up with emails the way you would at your office.

3. Stay Connected Working from Home

Again, if you're staying at home at not getting into the office because of the current public health crisis, be sure you can get client calls and voicemail messages at home. Nothing irritates clients more than unanswered phone calls.

4. Tell Them Where You Are

Make sure your clients know what arrangements you have made during this pandemic. If you have changed your office status, put out an email to your clients, send a regular letter if you must, put it on your voicemail messages, your website and social media if you use that. They should know where you are and where they can find you.

E. Your new working procedures - Let your clients know how you are working during this pandemic:

- Will any meeting dates change?
- Court dates?
- Do you want them to do video conferencing with you?
- If video conferencing or by speaker phone, make sure your client is the only one in the room. Confidentiality still applies!

F. Don't Forget Office Mail

You may be working from home, but your mail probably hasn't stop coming to the office. Don't forget about that. Make sure you have a strategy to get the mail, sort it and process it appropriately.

G. Manage Expectations

1. Putting a message on your voicemail greeting and in your emails and letting clients know your response time may be slightly longer or that you are doing things a little differently during this pandemic may help manage their expectations.
2. In the best of times, clients want immediate answers. In uncertain times, they may want to know even more about when they can expect to hear back from you.

H. Other Client Communications Issues

1. Client relations errors (common thread in majority of malpractice claims):
 - o Communicate at the client's level of understanding
 - o Determine the client's expectations and encourage realistic expectations
 - o Promptly convey all developments to the client, particularly adverse developments, preferably in writing
 - o Show an interest in the client as a person
 - o Return all phone calls promptly; be on time for appointments; and avoid taking telephone calls during office conferences
 - o Provide client with copies of finished work product
 - o Share the decision-making process with the client
 - o Avoid personal or financial involvement with clients
 - o Respect importance of matter to client, including careful guarding of client confidences
 - o Solve more problems than you create
2. Client selection
3. Write the letter – put everything in writing
 - a) Engagement letter
 - b) Non-engagement letter
 - c) Disengagement letter
 - d) Termination of Representation letter
4. Make the phone call
5. Talk about expectations with the client

III. Suing for Fees

- A. Before suing for fees, always consider the following:
1. Was the client pleased with the outcome of the case?
 2. Are you critical of your own performance?
 3. Has an uninvolved attorney assessed your representation?
 4. Is the amount at stake worth the risk of a claim?
 5. Is there an alternative to a lawsuit for unpaid fees?
 6. How will your malpractice carrier handle a claim?
 7. Would a judgment be collectible?

IV. Billing policies

- A. Lawyer who did the work should always read the bill
- B. Important on-going communication tool with client
- C. Be detailed and consistent

SCR 20:1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b)(1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney's fees, is more than \$1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by par. (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement 85 stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

(f) Except as provided in SCR 20:1.5(g), unearned fees and funds advanced by a client or 3rd party for payment of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to SCR 20:1.5(h). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred.

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

- A. Communicate at the client's level of understanding
- B. Determine the client's expectations and encourage realistic expectations
- C. Promptly convey all developments to the client, particularly adverse developments, preferably in writing
- D. Show an interest in the client as a person
- E. Be courteous: Return all phone calls promptly; be on time for appointments; and avoid taking telephone calls during office conferences
- F. Provide client with copies of finished work product
- G. Share the decision-making process with the client
- H. Avoid personal or financial involvement with clients
- I. Respect importance of matter to client, including careful guarding of client Confidences
- J. Solve more problems than you create

VI. Administrative Procedures and Calendaring

- 1. Good calendaring system
- 2. File Management
- 3. Office Procedure
- 4. Staff Training and Development

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.

**VII. The Rest Of The Story (apologies to Paul Harvey) –
General Malpractice Information: What You Always Wanted To Know But Were
Afraid To Ask!**

- A. Will You Ever Have a Malpractice Claim?
 - ABA says statistically every lawyer will experience one to three claims in their career

B. Elements of Legal Malpractice (Tort or Contract)

1. Lawyer-client relationship
2. Negligence – a breach of the duty owed to the client
3. Proximate cause – causal relationship between duty and damage
4. Actual collectible damages – defendant in the underlying case must be collectible

C. What Constitutes a Claim?

1. Demand for money or services that relates to remedying the alleged wrong
2. What should be reported?
 - A. “Claim”
 - B. “Claim incident” or “potential claim”

Potential claim - Some 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.

3. What is a “claims-made” policy?

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

4. When to report a claim

- A. As early as possible – sometimes a claim can be “repaired”
- B. Failure to report a claim as required by the policy during the policy period may result in forfeiture of coverage

5. 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.

D. Statute of Limitations

1. Three years

2. Starts running:
 - a) When the negligence occurs, or
 - b) When the client knows or reasonably should discover that they have been harmed

E. Who Is Making the Mistakes?

1. Lawyers in practice 15 – 20 years - 30% of WILMIC claims
2. Newer lawyers, first five years of practice - 10% of WILMIC claims

F. Dabbling – Extremely Risky

1. Approximately 40% of all claims involve areas of practice in which lawyers practice LESS than 10% of the time
2. Less than 1% of all claims involve areas of practice in which lawyers practice 90 – 100% of the time

G. Riskiest Areas of Practice

Where do malpractice claims come from?

Common Sources of Claims – Areas of Practice – since WILMIC started in 1986 (30 year claim history)

- | | | |
|----|-----------------------------|-----|
| 1. | Personal Injury – Plaintiff | 20% |
| 2. | Real Estate | 17% |
| 3. | Bankruptcy/Collections | 11% |
| 4. | Estate, Probate, Trust | 11% |
| 5. | Family Law | 10% |

Common Sources of Claims – Areas of Practice – 2020

- | | | |
|----|------------------------------------|-----|
| 1. | Bodily & Personal Injury Plaintiff | 15% |
| 2. | Estate, Probate, Trust | 14% |
| 3. | Bankruptcy/Collections | 14% |
| 4. | Real Estate | 12% |
| 5. | Family Law | 11% |

H. Most Common Mistakes

1. Administrative Procedures and Calendaring – 24% 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
2. Failure To Know The Law Or Properly Apply It – 15% of all claims
 3. Planning Errors In Choice Of Procedure – 13% of all claims
 4. Inadequate Discovery and Investigation – 12% of all claims
 5. Client Communication – 12% of all claims
 - o Failing to inform the client
 - o Failing to obtain a client's consent
 - o Failing to follow a client's instructions

I. Avoiding These Mistakes

1. Failure To Know The Law Or Properly Apply It
 - a) Law is broad – take the time to check it
 - b) Law is ever-changing
 - c) Court interpretation changes the law
 - d) Legislature enacts new law every year – keep up with the changes
2. Planning Errors In Choice Of Procedures
 - a) Knowing the law isn't enough
 - b) Identify the right issue to get the right solution
 - c) Frame the question properly
 - d) Identify the client's goals – don't just do what they ask and nothing else
3. Inadequate Discovery and Investigation
 - a) Client may not want you to spend a lot of time on the case in order to save on fees
 - b) Lawyer is busy – trusts the client provided all the necessary information
 - c) 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
4. Client Communication
 - a) May be the easiest to prevent
 - b) Client selection

- c) Write the letter – put everything in writing
 - * Engagement letter
 - * Non-engagement letter
 - * Disengagement letter
 - * Termination of Representation letter
- d) Make the phone call
- e) Talk about expectations with the client

VIII. Cyber Security Risks

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably likely death or substantial bodily harm;
- (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (3) to secure legal advice about the lawyer's conduct under these rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law or a court order; or
- (6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

A. What is Cyber Risk?

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

2. 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.
- B. Why Should Attorneys Care About Cyber Risk Exposure? Especially in the COVID Era
1. Almost every law firm is now dependent on technology – more so now than ever before
 2. Reports are out there that hackers are particularly active during this pandemic
 3. Attorneys gather large quantities of sensitive information on clients and employees
 4. Attorneys store and transmit Personal Identifiable Information (PII)
 5. Attorneys process credit cards or transmit bank information
 6. Law firm websites and usage of the internet are quickly becoming the 21st century law firm "buildings."
- C. Law firm dependency on technology, now heightened during the pandemic
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.
- D. 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.