**How to Manage the Risks Associated with Substantive Malpractice Missteps**

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A report entitled “Profile of Legal Malpractice Claims 2020-2023,” published in 2024 by the American Bar Association Standing Committee on Lawyers’ Professional Liability, provides a statistical analysis of claims data collected from various lawyer-owned and commercial insurance companies for the period January 1, 2020 through December 31, 2023. This report is full of interesting data such as the percent of claims by area of law where we learn that that attorneys who practice in the estate, trust and probate area led the pack having been responsible for 13.58% of all reported claims. The report also provides data on claims by type of activity and by number of attorneys in the firm. The most troublesome activity, accounting for over 35% of claims, was the preparation, filing, or transmittal of documents such as deeds, leases, contracts, wills, trusts, and formal applications. Firms of 1 to 5 attorneys were responsible for over 52% of all claims, which isn’t unexpected given the number of attorneys who practice in small firms.

As a risk manager, the data most concerning to me was this. The percentage of errors categorized as substantive errors came in at 51%. In short, over one half of all reported claims were based on missteps such as a failure to know the law, a failure to properly apply the law, a failure to know or ascertain a critical deadline, inadequate discovery, a conflict of interest, and the list goes on. These types of errors are difficult to address through the sharing of a practice tip because substantive errors are a competency concern, not a failed office procedure. While it’s easy to help an attorney develop a more effective calendar system or tighten up file documentation practices, it’s far more difficult to discuss and address what in reality is often simply bad lawyering. That said, here are a few suggestions that can help reduce your risk of making a substantive error.

The first and most important practice tip I can share is one you hear repeated over and over for good reason. Take it to heart. Don’t dabble! Truly, there is no such thing as a simple will, personal injury matter, contract, or any other type of legal matter. What looks like a simple contract may in reality be a trap due to a lack of awareness of a unique local law that significantly affects the contract’s terms, which happens to be an example of an actual case ALPS handled years ago that resulted in a loss payout into the six digits. If you are not prepared to handle more difficult or complex matters in a given area of practice, don’t accept the seemingly simple ones because too often a dabbler will fail to see where the problems are. Stated another way, a dabbler doesn’t know what he doesn’t know, which is a problem in and of itself. If any client or prospective client asks you to do work that is beyond your comfort zone or outside of the areas in which you regularly practice, caution is in order. If you feel you must accept it, only do so if you are willing to seek guidance from a trusted colleague or mentor knowledgeable in the practice area, partner with an experienced co-counsel, or are able to commit to devoting whatever amount of time is necessary to thoroughly research the matter.

Second, prioritize CLE. I see this repeatedly. Too many attorneys rush to take whatever CLE is available when their reporting period is about to expire. They’re simply going through the motions to get the credit, regardless of the relevancy of the subject matter to their practice. Making matters worse, who hasn’t witnessed fellow attendees doing something other than staying focused on the CLE presentation? I have watched attorneys browse the Internet, catch up on work, take naps, and check in and then spend the bulk of the event outside of the meeting room. In fact, I have even witnessed someone check into a CLE event with golf clubs in hand. He signed in, picked up the materials and then headed out for eighteen holes. With alternative formats such as videos, teleconferences, and web presentations, it’s even easier to pay only half-hearted attention.

The better approach would be to take CLE that is relevant to your practice area. Seek out quality programs and try to get as much from the experience as possible. Stay attentive, ask questions, and read the supplemental materials after the program has ended. CLE can be an effective way to stay current on major developments in your principal areas of practice if you invest in the process. One side note here, don’t minimize the value of any educational opportunities that focus on improving your research and legal writing skills as well as those that focus on trust accounting procedures. Trust me; there are more than a few of us who could benefit from these types of programs.

Third, and this is one that catches a lot of attorneys off guard, don’t fall into the trap of thinking that because the work is just a legal favor for a friend, family member, or staff member it’s okay to not give it your all. Nothing could be further from the truth. There is no exception to Rule of Professional Conduct 1.1 Competency that lists all the circumstances where it’s permissible to practice “legal light.” Favor or not, this is real legal work. You can and may ultimately be held accountable for any unsatisfactory outcomes.

Fourth, commit to conducting a regular and thorough file review on every matter. If possible, this process should involve multiple levels of oversight and include tasks such as ensuring that all factual information is correct and that no key facts have been missed, reviewing all documents before filing, verifying legal research (to include any generative AI research!), and reviewing any applicable statutes to confirm the accuracy of calendared critical deadlines.

And finally, prioritize your own health and well-being as a way to stay sharp and focused because shoddy work is shoddy for a reason. If you invest little or no time pursuing personal interests or taking vacations because your workload is beyond reasonable, your energy level and performance will suffer. That’s pretty much a given. Mistakes are more likely to happen when you are tired, the work has become mundane because it’s all you do day in and day out, or if burnout has started to enter the picture. For similar reasons, don’t minimize the importance of nurturing the important personal and professional relationships in your life. If these relationships are neglected for too long, the support systems they represent may not be there when you most need them. This too can all to easily lead to missteps down the road.

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