THE SHELY FIRM, PC

2018 Legal Malpractice Trends – And How to Avoid Them

Winter, 2019

By Lynda C. Shely

The following ethics materials are Arizona-focused but are applicable to law firms in other jurisdictions. Please consult relevant state court rules/statutes for variations. Obviously reading this article does not create an attorney/client relationship with Lynda.[1]

Risk management for any size firm includes understanding not only the minimum requirements of the Rules of Professional Conduct, but also what types of conduct actually result in claims or bar complaints against firms. One carrier, Aon, provided the following statistics for claims tracked during the past 12 years.

Practice Areas:

Aon 2018 statistics for all size firms show the following practice areas receive the most claims:

#1 Commercial Litigation

#2 Corporate & Transactional Matters

#3 Intellectual Property

#4 Real Estate

#5 Trusts and Estates

Most Common *Reasons* to Notify Carrier:

All carriers have standards for reporting certain incidents/demands/threats to the carrier in order to be eligible for possible coverage. Not all reported incidents result in compensable claims. Here are the three most common reasons to notify a carrier:

#1 Mistakes (substantive errors in the law, missing filing deadlines and statutes of limitations, etc.)

#2 Fraud/Misrepresentation (either by a lawyer or a client)

#3 Conflicts of Interest (between joint clients, people/entities who *thought* they were clients, current clients v. former clients, and business/personal relationships with clients)

Highest Payouts for Claims:

#1 Dishonest lawyer (one who knew of client dishonesty and assisted)

#2 Dishonest client (client misrepresentations and\or actual fraud)

#3 Conflicts

How to Avoid Claims:

- **Run conflict checks over and over again**

While conflicts of interest might not be the reason for the highest claims payout, they are one of the most common reasons for a claim to proceed to trial and judgment against a firm. Train all staff and lawyers about the importance of entering accurate information into the firm conflict database – both before retention and during retention every time a new party, expert witness or opposing party ownership change.

Remember that all joint representations of two or more co-clients, including spouses, in any one matter MUST have a written conflict waiver. It is not sufficient to have a waiver that simply says the clients waive "any and all future conflicts." That does not satisfy the requirements of ER 1.7(b), which requires a written waiver whenever there is the potential that someone or something might materially limit a lawyer's independent professional judgment on behalf of a client. Comment [8] to the Rule explains: "[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.[. . .]"

Comment [6] to ER 1.0 (the terminology Rule that defines "informed consent") provides some guidance regarding what must be disclosed in order to obtain a client's "informed consent":

> [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See ERs 1.2(c), 1.6(a), 1.7(b), 1.8(a), and 1.9(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or

other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

- **Double-check docketing and open status of all files**

While missed filing deadlines and incorrect legal analysis may not result in the largest claims payouts, these errors cause the most anxiety in lawyers. Lawyers are responsible for assuring that all deadlines are entered accurately, electronic filing of pleadings are confirmed as filed, and client-imposed deadlines are met…when possible. Every lawyer should know how mail (both paper and electronic) is processed at the firm to assure that the staff who actually process the mail are docketing deadlines, copying documents to clients, and alerting the responsible attorneys to any new issues/deadlines. An amazing number of errors occur when a staff person is interrupted while trying to electronically file a pleading and the document never actually is filed.

As for substantive law mistakes, the easiest ethics advice is don't dabble. Never try to assist an existing client or new client in an area of law in which you know nothing. Either decline the matter or consult with someone who is competent in that area of law. Also, there is a reason why states require continuing legal education (not just in ethics) – statutes and cases change the law every day. Court rules seem to change at least every year. Stay up to date on your substantive areas of practice and assure that staff who assist in these areas also receive annual training on any rule changes or statutory requirements.

- **Talk to clients – especially annoying clients – and document those communications**

This is not another reminder to communicate with clients…well, maybe it is. In addition to the Bar charges lodged by clients who feel neglected, malpractice claims also arise when clients perceive that their lawyers did not advise them regularly or sufficiently about an issue/option. Do not avoid problematic, needy, annoying, dissatisfied clients. If anything, those are the clients who should receive *extra* attention and of course assure that everyone on the client legal team documents the communications – including emails, voicemail messages left for a client, dates when documents were mailed to clients, and of course confirming receipts that clients received the communications (whenever possible).

- **GET OUT when client's story does not add up**

Clients sometimes lie. They also sometimes intentionally engage in fraudulent behavior. The ethics and practical standard is that clients should go to jail, not their lawyers. In all seriousness, client fraud and misrepresentations may cause claims for a firm if the firm does not promptly extract itself once the lie is discovered. In all civil matters a lawyer is obligated to correct misstatements of facts (including material omissions) made to a tribunal. ER 3.3(a) requires:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

At least in Arizona, the standard is that a lawyer must correct the record before the tribunal – even if the client does not consent. It is not sufficient to merely withdraw from the representation.

Even if the matter is not before a tribunal but is a transactional matters, lawyers still cannot lie. ER 4.1 provides:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

This standard is more difficult to apply than ER 3.3 – besides the fact that lawyers cannot *knowingly* lie to someone else. ER 4.1(b) must be read in conjunction with ER 1.6, the confidentiality Rule. There are several *permissive* reasons when a lawyer *may* disclose confidential information without client consent, including to alert someone to a client's intent to commit a crime, to mitigate or rectify financial harm to someone due to the client and lawyer's conduct, and to comply with a court order. If ER 1.6 would *permit* the disclosure of information, then ER 4.1(b) will *require* the disclosure of the information to avoid assisting a client's crime or

fraud. For instance, if a lawyer is representing a client in selling a business and the lawyer learns that the client had the lawyer prepare financial statements that contain false information about the company's financial health, ER 1.6(d)(2) permits the disclosure of the falsity to mitigate financial harm to the buyer and ER 4.1 then will require the disclosure to avoid assisting the client's fraud.

From a risk management perspective, lawyers must remember that once they make the disclosures necessary to avoid being a co-conspirator with a client, the lawyer must withdraw from the representation.

- **Supervise – even the partners**

Another category of liability for firms are lawyers doing dishonest things. This includes lying about completing work for a client, fraudulent billing practices (this includes partners billing associate work at the partner's rate, and billing multiple clients for one project), secretly keeping fees paid by clients, and falsifying documents. No one wants to believe that their colleagues would engage in such deceptions…but it happens. Managing partners/practice group leaders/office managers should incorporate regular reviews of *all* attorneys work and billing practices, as well as establish confidential reporting procedures when staff or lawyers perceive a problem with a supervising attorneys' actions. ER 5.1 requires that managing attorneys have in place reasonable measures to assure that all lawyers comply with the Rules of Professional Conduct – as well as basic honesty. Also provide training on what are appropriate billing practices – do not assume that laterals have the same understanding of billing ethics as your firm.

Due diligence of lateral hires also should include asking if they have had any motions for sanctions, civil suits, or bar discipline investigations filed against them. And then check with Bar regulators to confirm the information.

- **Lawyer wellness = Less Claims**

Lawyers unfortunately mistakenly believe they must be perfect. There is no such thing. But many lawyers lose enthusiasm for their careers due to unreasonable expectations of clients, the stress of having to generate revenue for the firm, and the drain of believing they must be available 24/7 to respond to emails, cell phone calls, and instant messages. Lawyers suffer from a plague of mental health issues (depression, anxiety, OCD, bipolar disorder, etc.), "self-medication" through alcohol and substance abuse, and addictive tendencies (gambling, sex addiction, gaming) due to the stresses of the profession.

Professional liability carriers cannot quantify the amount of claims resulting from lawyer impairment but speculate it is a huge contributing factor to claims. Firms also see significant turnover in staff and lawyers when well-being is not part of the firm culture. Job satisfaction and having a sense of meaning and purpose at work actually are part of the ethical obligation of competence. Lawyers cannot be competent if they are depressed, addicted, or hungover.

The ABA Working Group on Lawyer Well-Being (https://www.americanbar.org/groups/lawyer_assistance/working-group_to_advance_well-being_in_legal_profession/) has many resources to assist firms in supporting lawyer well-being within the firm. There is even a toolkit with tips for creative firm activities that healthy choices at work and encouraging balance between work and private time. In addition to the toolkit activities here are just a few well-being tips:

- Encourage civility with everyone (and address rude belligerent behavior immediately)
- Decrease unrealistic and arbitrary deadlines (including communicating realistic expectations to clients)
- Implement options for healthy living/exercise at the firm
- Require and monitor that all lawyers take their vacation time
- Discuss boundaries with clients and inter-office on practicing law 24/7.
- Foster true mentoring by including newer lawyers in client meetings and to facilitate transitioning senior lawyers as part of a dignified succession plan.
- Establish a written Well-Being Policy that provides support for impaired lawyers and a safe reporting procedure to seek help.

Additional Cautions to Avoid Bar Complaints:

- **Do not create fake Match.com profiles for opposing counsel**

In re Quitschau, Ill., M.R. 29433 (09/20/18)(six month suspension for creating fake match.com and Facebook profiles for opposing counsel and posting fake negative reviews about her).

- **Communicate when a matter is taking longer than expected**

Still the most common reason for a Bar charge and even one of the most common reasons for discipline being imposed against lawyers is the failure to communicate. Every client with an open matter – whether litigation or transactional – whether waiting for information from experts or the occurrence of some specific event – should be contacted *at least* monthly by someone at the firm. The responsible attorney does not necessarily need to call or email the client monthly but at least someone from the firm – paralegals, legal assistants, administrative assistants, etc. – someone should reach out to every client monthly just confirm that the firm is still waiting for [insert event/information] and if the client has any questions they should call. Just by providing that brief contact the clients are assured they have not been abandoned

- **Do not have sex with clients, ask them for sex in lieu of fees, or commit felonies….**

In re John W. Dorris III PDJ-2018-9063 (Ariz. 07/19/2018)(reprimand for ER 1.8(j) personal relationship with family law client)

In re Scott Lieberman PDJ-2018-9007 (Ariz. 04/13/2018)(disbarred for several counts and violations including Rule 41(g) because he sent his client a text message in which he asked her: "Would you rather have sex and not pay at all?")

In re Noel J. Hebets, PDJ 2018-9070 (Ariz. 08/20/2018)(disbarred for felony conviction for five counts of sexual exploitation of a minor)

Lynda C. Shely, of The Shely Firm, PC, Scottsdale, Arizona, provides ethics advice to over 1400 law firms in Arizona and the District of Columbia on a variety of topics including conflicts of interest, fees and billing, trust account procedures, lawyers changing firms, ancillary businesses, and ethics requirements for law firm advertising/marketing. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona. Prior to moving to Arizona, Lynda was an intellectual property/antitrust associate with Morgan, Lewis & Bockius in Washington, DC. Lynda received her BA from Franklin & Marshall College in Lancaster, PA and her JD from Catholic University in Washington, DC.

Lynda is a past president of the Association of Professional Responsibility Lawyers and the Scottsdale Bar Association. She serves on State Bar of Arizona Committees, and as a member of the ABA Standing Committee on Ethics and Professional Responsibility. She also is an Arizona Delegate in the ABA House of Delegates and a liaison to the ABA Task Force on Lawyer Well-being. Lynda has received several awards for her contributions to the legal profession, including the 2007 State Bar of Arizona Member of the Year award, the Scottsdale Bar Association's 2010 Award of Excellence, and the 2015 AWLA, Maricopa Chapter, Ruth V. McGregor award. She has been an adjunct professor at all Arizona law schools, teaching professional responsibility.