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## PRACTICE GROUP: PROFESSIONAL SERVICES

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### MOST COMMON LAWYER MALPRACTICE MISTAKES

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Legal malpractice is a term used for lawyer negligence and implies that there has been a breach of contract or fiduciary duty. There are many ways in which a lawyer can be held liable for malpractice, but we want to provide an overview of the most common malpractice errors. According to the American Bar Association (ABA), lawyers have a 4 to 17 percent chance of being sued every year, largely dependent upon their jurisdiction and practice area. By understanding and analyzing the top five most common claims associated with malpractice, law firms can avoid costly malpractice mistakes.

#### 1. Failure to Know or Properly Apply the Law (11.3 percent of all malpractice suits)

According to the ABA Standing Committee on Lawyers' Professional Liability, failure to know or apply law was the number one error in lawyer malpractice. Of the total number of errors, this represents 11.3 percent of all cases. This error applies when the attorney did the research but failed to properly understand the appropriate principles, or when the attorney was unaware of the legal principals involved.

Most lawyers work in a silo and do not partner with or seek the guidance of other attorneys when

presenting a case. The most common malpractice error, failure to know or properly apply the law, affects single attorneys most commonly, versus cases in which counsel is comprised of two or more attorneys. Taking a more team-oriented approach (if possible) can help lawyers avoid this error.

#### 2. Planning Error (8.9 percent)

This category applies to situations where, for example, a contested proceeding in which a lawyer has adequate knowledge of the facts but makes a judgment error as to how the client's matter should be handled. Planning errors are usually strategic and judgmental mistakes. It should be noted that this category does not apply if the alleged error occurs because a lack of knowledge of facts that could have been discovered by the attorney.

The vast majority of these errors from a malpractice standpoint are strategic or judgment-oriented. Attorneys should consider all plausible strategies when reviewing their client's case and, again, maybe even seek the counsel of other attorneys, if possible, for their insights on the matter before devising an approach. Having another attorney review the facts and possible outcomes of the case will help them

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make better judgments as to how to proceed. Recruiting another set of professional eyes and a different viewpoint in terms of strategy can help ensure that a planning error does not occur.

### 3. Inadequate Discovery of Facts or Inadequate Investigation (8.8 percent)

This category includes cases where the claimant alleges that certain facts that should have been discovered by the attorney in a careful investigation were not identified or discerned.

Most attorneys who are good at their craft have several cases ongoing and might not allocate a sufficient amount of time for discovering facts. Attorneys should make sure that all possible facts are investigated and discovered in each case they represent. After an attorney assumes that they have analyzed all the possible facts, they should revisit the case and all its factors at least once more to determine if there is anything missing from their analysis to avoid this potential malpractice error.

### 4. Failure to File Documents Where no Deadline is Involved (8.6 percent)

This category applies when there is no deadline by which an act has to occur to be effective, but rather where the filing of a document or notice is necessary to protect a client's interests against the claim of another party. A typical example of this is the requirement for filing a mortgage on real estate to protect the priority interest of the mortgagee against those acquiring a subsequent interest.

A good paralegal can help the attorney mitigate this type of error by ensuring that these sorts of filings are completed. These errors can be costly to

attorney's clients and the associated lawsuits often times have an easily identifiable, tangible cost and easily determined judgment dollar figure. Ensuring that a paralegal is aware of such filings and can keep the attorney accountable to see them through is vital to avoiding this costly error.

### 5. Failure to Calendar Properly (6.7 percent)

This category covers the situation where the lawyer was aware of the existence of a time deadline, but did not initiate any kind of calendar entry as a reminder to themselves or others in the office.

Again, this is sort of housekeeping issue is associated with the proper filing of documents, and can lead to a costly error. Engaging with one's paralegal on cases where there is a necessity to properly document activities to ensure accountability can help attorneys keep comprehensive and correct records.

THE ROLE OF INSURANCE IN PROTECTING ATTORNEYS  
Analyzing the top five reasons that attorneys are hit with malpractice suits provides context on how to avoid these mistakes. Not every potential malpractice mistake can be avoided, and that is why lawyers' professional liability (LPL) insurance exists. Depending upon the practice type and jurisdiction, attorneys are more or less likely to be hit with a suit in any given year. With the 10 percent annual average likelihood of a malpractice suit occurring, it is important that all practicing in the field of law take steps to mitigate this exposure. The cost of LPL insurance policies ranges with the risk of the particular law being practiced. Partnering with a well versed insurance broker who understands the various LPL carriers and how to negotiate with them for proper coverage and pricing will help ensure that your practice is best protected in the event of a malpractice suit.

## References and Resources

1. [https://www.americanbar.org/publications/law\\_practice\\_home/law\\_practice\\_archive/lpm\\_magazine\\_webonly\\_webonly07101.html](https://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_webonly_webonly07101.html)