

Professional Malpractice

How To Avoid Malpractice Claims

Twenty-five practical tips for attorneys, CPAs and other licensed professionals

By Laurence G. Thoma

Professional malpractice lawsuits continue to rise and are a seemingly normal part of business for licensed professional service providers such as attorneys, accountants and physicians. In most cases, these claims stem from a client's disappointment that things did not work out as they had expected.

Only a small percentage of these claims result in significant recoveries, due to the fact that most claims are eventually proven to be unfounded. However, this is no consolation to the professional, as defending oneself or one's firm, even in a baseless case, is very expensive and time consuming. Therefore, everything possible should be done to avoid being the target of a malpractice claim.

I have been involved in numerous lawsuits and arbitrations, as a damage expert for the defense. Based on this experience, I have compiled a list of key

Thoma is a senior partner at WithumSmith+Brown, Certified Public Accountants and Consultants. He is a nonpracticing attorney and a CPA who holds numerous professional accreditations.

guidelines that will help minimize the risk of exposing oneself or one's firm to professional malpractice claims.

1. *Communicate clearly and regularly with your client.* It is imperative from the initial contact that there is continuous open communication between the professional and the client. Effective communication will build a strong relationship with the client and can help in avoiding problems down the road. Provide back-up through written reports, letters or e-mails when appropriate on significant issues.

2. *Provide a written engagement letter or contract.* Providing a written agreement will set the tone for effective and ongoing communication. Clearly identify the client and set forth the specific items that you will be responsible for, and be very clear about the items you will *not* be responsible for. Make sure your client knows his responsibilities to you and your firm, such as keeping fee payments current. Obtain upfront retainers as appropriate. Have the client return an acknowledged and signed copy of the letter or contract for your files.

3. *Don't be afraid to say "no thanks."* Don't take on client engagements for which you are not adequately trained or for which you do not have adequate expe-

rience. Usually you can trust your initial instincts when this type of situation arises. Choose your clients carefully and be sure they can afford your services. Beware of the potential client who needs something done immediately or in a rush!

4. *Document your files.* A professional should continuously document all issues discussed, all meetings with details of attendance and topics, etc. Depending upon the licensed profession, the documentation should be put in an appropriate format.

5. *Avoid all conflicts of interest.* This can be a delicate issue with multiple parties, husbands or wives, or prior clients. A conflict-avoidance protocol should be established, and if a conflict does arise, continue only after appropriate waivers are obtained and you feel reasonably assured that the conflict issue will not resurface. If you feel uncomfortable, go with your instincts and refer the client to another trusted professional.

6. *Calendar upcoming events/critical dates.* Attorneys and all professionals need to be mindful of filing dates, appearances, statutes of limitations, etc.; accountants need to be aware of tax filing deadlines, architects and engineers need target dates to avoid costly construction delays; health-care professionals need to be mindful of deadlines for insurance submissions, etc. All professionals need to keep a detailed calendar (and a back-up) of both historic and future important dates and events. By meeting or beating deadlines, you will likely have a satisfied client.

7. *Maintain appropriate levels of*

errors-and-omissions insurance. Never practice “naked” as a professional without an adequate level of malpractice coverage, and be aware of the need for “tail insurance” as appropriate when bringing another professional on board or affiliating with another practice.

8. *Prepare detailed bills on a regular/periodic basis.* Professionals should implement a billing system that provides regular and current detailed bills. Certain professionals bill by the hour and some bill by procedure or job number and they need to provide itemized and detailed bills on a regular basis, indicating both current and past-due amounts with enough detail that the client knows exactly what work has been done. The engagement letter or contract should have provisions that outline possible courses of action and the responsibilities of the professional if bills are not paid on time. Pursuing clients for past-due fees is not a good thing and may invite unsupported malpractice claims.

9. *Withdraw when appropriate.* When fees are not being paid as agreed upon or when a situation arises that puts you at ethical or professional risk, take the appropriate steps to remove or limit yourself from further exposure. Do it properly, promptly and in writing. Today, virtually nothing is undiscoverable and complete transparency is the best option. Your engagement letter should address this issue and allow you to withdraw or suspend work without subsequent liability.

10. *Use extreme caution when suing for fees.* Most malpractice claims come about when a client is being sued for unpaid or past-due fees and the client makes an unfounded counterclaim. Most insurance carriers recommend providing for binding arbitration in fee-related matters to avoid malpractice counterclaims. Engagement letters or contracts should cover this aspect of one’s professional relationship with a client.

11. *Notify your insurance carriers.* It is recommended that every professional notify their carrier at the very first sign

that they may have a potential professional malpractice claim instituted. Insurance carriers are there to assist you and if you don’t notify them promptly, you may find yourself without coverage. Also, some carriers will adjust their deductible if you report a matter before it becomes a claim.

12. *Treat all matters both large and small with the same attention.* Small matters can become big headaches if you are sued for malpractice.

13. *Manage your clients’ expectations.* Be open, honest and forthcoming and document conversations regarding client risk. Clients need to know the pros and cons of their situation. Never guarantee a particular result or outcome, or be unyielding to compromise, and let your clients make the decisions that will ultimately affect them.

14. *Return phone calls/correspondence promptly.* Not doing this is one sure way to end up with an unhappy client.

15. *Don’t try to hide your mistakes.* If a mistake is made, own up to it, discuss it, seek appropriate advice, as necessary. By not doing this, matters are always made worse. Develop a good “bedside” manner and tell it like it is. Don’t try to cover it up.

16. *Don’t think it cannot happen to you.* Do not be one of the many professionals who think malpractice claims only happen to the other guy. Always be on the alert.

17. *Always follow professional rules of conduct, professional ethics and professional standards.* If you waiver on these even slightly, you open yourself up to added risk.

18. *Don’t become personally involved, either emotionally or financially, with your client.* First, your insurance may not cover you and second, it is simply not a good idea. The general public and juries do not look kindly on these types of relationships.

19. *Don’t do “little” things that may annoy clients.* Such as making them wait, being tardy, postponing or delaying matters, not being prepared or sending large

bills with no detail.

20. *Know your profession and your competition.* Make sure you have had adequate training and experience when dealing with specialized matters. As you continue to grow as a professional, you will need to learn new concepts, methodology and terms that were not necessarily in your original schooling.

21. *Maintain confidentiality.* Being discreet when discussing client matters is of utmost importance in portraying yourself as a professional. Also, if you or your records are subpoenaed, call your carrier for advice regarding lawful compliance without compromising your professional standards or the right of privacy between you and your client. Providing information without proper counsel could put you at risk of a lawsuit later.

22. *Set up a risk management plan.* Whether you are a solo practitioner, a small group or a sizeable firm, if you were to become ill, etc., who would handle your clients? Think about it. An unintended mistake by an administrative person or paralegal could be very costly. Plan ahead.

23. *Maintain your required continuing professional education.* Failure to do so can have grave consequences, especially if your license lapses during a pending matter.

24. *Be mindful of your practice setting.* You should look to your malpractice carrier to see what services you are most at risk for. They can provide you with the areas of practice most likely to generate malpractice claims and other relevant information to avoid such claims. Their legal departments may even provide guidance on engagement letters and contracts.

25. *Avoid outside factors that may contribute to professional misconduct.* It should go without saying that alcohol, drugs, gambling, loose lips, reckless driving and perhaps some other outside factors should be avoided due to their ability to negatively contribute to your client’s perception of you as a professional, and they may come back to haunt you in a malpractice claim. ■