

## Tips for Avoiding Legal Malpractice

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### The Top Five

- Client Selection
- Conflicts of Interest
- Communication
- Documentation
- Case Management

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### Client Selection

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#### HIPPOCRATES OFF THE RECORD



*"First, treat no lawyers."*

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Client Selection-Client History

Prior Lawyers

- Non-payment of fees?
- The lawyer fired the client?
- The client sued the former firm?
- Former firm refused the client's request?

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Client Selection-Expectations

Unrealistic Expectations

- Unrealistic expectations lead to unhappy clients
- Unhappy clients lead to malpractice claims.
- Educate the client to set appropriate expectations

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Client Selection-Motives

Inappropriate motives

- Is the client pursuing and/or defending the case based on "principle" or "retribution?"
- The client is constantly in litigation
- Does the client "love" to litigate?
- The risk is that the lawyer will end up being the defendant in the client's next lawsuit

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Client Selection-Working Relationship

- The client knows all the answers
- The client wants to be a lawyer
- Will the client listen to and/or consider the lawyer's advice? ■
- Be familiar with Rule of Professional Conduct Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)

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Client Selection – Fees and Expenses



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Client Selection – Fees and Expenses

- Can the client pay fees, expenses and/or a retainer?
- Risks
  - Collection suits result in malpractice counterclaims or suits
  - Disputes over fees and file transfers lead to suits or complaints to the Disciplinary Board

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Client Selection-Competency

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*"You seem to know something about law. I like that in an attorney."*

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Client Selection-Competency

**ARE YOU THE RIGHT LAWYER?**

Are you and/or your firm a good match for the client?

Are you qualified to do the work?

Can you properly staff the case?

Are you too busy?

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Communication

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**Communication**

A majority of all legal malpractice suits arise out of an attorney's failure to communicate with a client

- Keep your clients apprised of every material event related to the matter; let them know what is going on
- Promptly return phone calls, letters and/or emails. Clients want to feel like you have time for them
- Provide copies of all substantive materials, including but not limited to pleadings, correspondences, etc.

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**Communication – Scope of Engagement**

- Engagement letters
- Rule 1.2 (Scope of Representation and Allocation of authority Between Client and Lawyer)
  - Describe the objectives and the risks involved in pursuing the case
  - Identify who will be working on the matter and in what capacity (attorneys, paralegals, your secretary, etc)
  - Explain the fee structure—what you will be charging, when payments are due, how and when fees can be changed, and the result of non-payment

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**Communication – Non-Engagement letters**

- If you decline the representation, you should send a non-engagement letter—Rules of Professional Conduct Rule 1.18 (Duties to Prospective Clients)
  - It is imperative that the client understand that you are not representing him or her
  - Identify significant or impending deadlines
  - Do not offer any legal advice because if you do the letter may be construed as a continuation of the attorney-client relationship

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Communication-Informed Clients

- Provide periodic status reports.
- Although many decisions in litigation are tactical and traditionally made by the lawyer, they should be discussed with the client. Make sure the client knows why you are making a decision.
- Rules of Professional Conduct Rule 1.4 (Communication)

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Communication-Informed Clients

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MANKOFF

*"No, Thursday's out. How about never—is never good for you?"*

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Documentation

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*"Good news, chief, a computer virus destroyed all our documents."*

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**Documentation**

- Document all issues discussed with the client, opposing counsel and anyone else involved in the case
- Always document advice and/or legal opinion given to the client
- Always adequately document work performed
- Documentation can be in the form of notes to the file, confirmation letters, memoranda, emails, and even timesheets

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**Case Management**

- Always identify applicable statute of limitations
- Communicate any deadlines to your client in written form, even if you have already told him or her verbally
- Use a calendaring system
- Duplicate ticklers
- Supervise other attorneys

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**Conflicts of interest – Current Clients**

- A lawyer can not represent a client if such representation will be directly adverse to another client—Rules of Professional Conduct Rule 1.7 (a)(1) (Conflict of Interest: Current Clients)
- A lawyer cannot represent a client if there is a significant risk that such representation will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer—Rules of Professional Conduct Rule 1.7 (a)(2) (Conflict of Interest: Current Clients)

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Conflicts of interest – Waiver by Current Clients

- Notwithstanding Rule 1.7 (a)(1), a lawyer can represent a client if:
  - The lawyer reasonably believes he or she will be able to provide competent and diligent representation to each affected client;
  - The representation is not prohibited by law;
  - The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal and
  - Each affected client gives informed consent.

Rule of Professional Conduct Rule 1.7(b)(1)-(4)  
(Conflict of Interest: Current Clients)

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Conflicts of Interest – Dual Representations

- Wills
- Pre-nuptial agreements
- Co-defendants
- Buyer/sellers in sales
  - Fiorentino v. Rapoport, 693 A.2d 208 (Pa. Super. 1997), appeal denied, 701 A.2d 577 (Pa. 1997)

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Conflicts of Interest – Dual Representations

- There can be no secrets among the parties
- You can not be involved in any disputes between the parties
- You should advise each party to seek independent counsel for advice on and review of a waiver of dual representation
- Clients must understand that individual interests may be downplayed
- Clients must also understand the potential strategic disadvantages

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**Conflicts of Interest – Former Clients**

**Former Client - Rules of Professional Conduct Rule 1.9 (a)**  
(Duties to Former Clients)

Adversity prohibited if:

- Would require use of information obtained under Rule 1.6; or
- Involves the same or a substantially related matter as prior representation
- Unless the former client gives informed consent

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**Conflicts of Interest – Systems**

- Conflict checks
  - Standardize
  - Computerize
  - Check for all corporate affiliations of potential clients and potential adversaries
  - Require independent waiver approval
  - Require written conflict waivers internally
  - Require written conflict waivers externally

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**Conflicts of Interest – Systems**

- Appoint an “ethics” attorneys
- Require written waivers
- Independent sign off for waivers
- Avoid problem of rainmakers who never see a conflict

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