

# LEGAL MALPRACTICE

A PRACTITIONER'S GUIDE



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## Who We Are

The attorney-client relationship is a special one. The client entrusts his or her attorney not only to hold confidences and provide adequate advice but also to handle the matters entrusted to the lawyer in a competent and professional manner. Most clients have neither the knowledge nor experience to know whether they are being adequately represented. This makes it all the more important for every attorney to act with integrity and handle every case – particularly those cases affecting the livelihoods of their clients – with diligence and professionalism.

Attorneys are not the guarantors of a particular result, they cannot predict the future, and they are not infallible. A poor result or bad advice alone is not evidence of legal malpractice. The adage remains true that hindsight is 20/20, but when a poor outcome is the result of negligence — failure to provide the quality and kind of service that another legal professional would have provided under like circumstances and consistent with generally accepted standards of care — a legal malpractice claim may be appropriate.

The ineffective assistance of counsel can come in many forms and can occur at any stage of the proceedings. Examples include a general failure to investigate the claim, conduct or participate in discovery; routine or habitual absences from court appearances; failure to appear at trial; failure to convey settlement offers or keep the client informed of his or her case; filing in the wrong jurisdiction or venue; allowing the case to prescribe or abandon; or failing to name an indispensable party or assert a viable cause of action.

The purpose of this paper is to present legal malpractice issues from the defense perspective. We will also be discussing best practices to avoid a malpractice claim.

# What Is Legal Malpractice?



Legal malpractice occurs when there is a failure to perform according to industry standards and codes of ethical and professional conduct. It is important to keep in mind that an unfavorable outcome in a previous legal matter is not sufficient to warrant a legal malpractice claim.

Any viable legal malpractice claim will depend on the facts of your particular case. Moreover, the prevailing view on legal malpractice is that it includes any professional misconduct whether attributable to a breach of the standard of care or of certain fiduciary obligations.

## When Does an Error in Judgement Become Malpractice? Some Things to Consider



- Approximately 25% of legal malpractice cases occur through an attorney's negligence in the handling of his relationship with the client. (See *La. R. Prof. Conduct r. 1.4.*)

- Not every mistake amounts to negligence. Typically, negligence is looked at in terms of the reasonableness of an ordinary attorney at the time or under similar circumstances. This leads to an attorney's requirement to act consistently with the community standard of care.

- "Neglect" is defined as a disregard of duty resulting from carelessness, indifference, or willfulness.

- Statistics show that as much as 40% of all legal malpractice claims that are filed concern the attorney's handling of a fee arrangement or the communication of the value of all services rendered. (See *La. R. Prof. Conduct r. 1.5.*)



# Defining the Standard of Care



## Louisiana Rules of Professional Conduct

### 1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. (La. R. Prof. Conduct r. 1.1.)

### 2. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client (formerly known as the duty of “zealous representation”). (La. R. Prof. Conduct r. 1.3.)



# What Makes Up A Lawyer's Competence?

*An attorney should exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances.*

Competence is measured by an attorney's legal knowledge and skill as well as by demonstrating the appropriate amount of thoroughness and preparation reasonably necessary for the representation given the circumstances of the case.

## 1) Legal Knowledge and Skill:

Factors to consider when determining the level of legal knowledge and skill that is required for a particular case:

- Is the case relatively complex and specialized in nature?
- Is the lawyer generally experienced in the field your case demands?
- Is additional preparation or study needed to accomplish your needs?
- Should your lawyer be consulting with a lawyer of established competence or flat out referring you to one?

## 2) Thoroughness and Preparation:

Major litigation and complex transactions generally require more in-depth attention and preparation. Attention and adequate preparation often depend on what is at stake in a matter. Thoroughness and preparation are more easily understood in terms of reasonableness. You have to look at how an ordinary attorney under the same circumstances would conduct themselves.



# Looking Ahead



## Topics to be covered in future series:

1. Understanding Burden of Proof
2. Timing is Everything: Prescription or Peremption?
3. Vicarious Liability: Attorney Liability for an Employee Mistake
4. Venue: It's Time To File Suit, So Where Should I File?
5. Understanding Sanctions



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