THE VIEW
MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY
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# Special Focus: Understanding Specialty Area Malpractice Risk

By Todd C. Scott, VP of Risk Management

Legal malpractice claims, like cans of paint, come in a wide variety of colors. Although there are common malpractice hazards to all who practice law, such as faulty office systems and poor client communications, understanding your professional liability exposure primarily involves having a good understanding of the risks associated with your specific area of practice.

In 2013, Minnesota Lawyers Mutual Insurance Company (MLM) will be helping lawyers take a closer look at the risks associated with their chosen area of practice. Specialty areas of law, such as real estate, personal injury, family law, trust and estate planning, as well as corporate formation, all have unique and varied claim exposures, so it is important for lawyers to recognize their individual malpractice risks.

Insurers regularly examine the various and unique risks associated with specialty areas of law, and as practice areas develop and change over time, so does the potential for a malpractice claim associated with the specialty area.

For example, between 2004 and 2011, the ABA Standing Committee on Lawyer's Professional Liability tracked over 18,000 malpractice claims asserted against real estate practitioners. During the years of the study, claims against real estate practitioners ranged from 17% to nearly 24% of all malpractice claims, a trend that was a direct reflection of the increase in transaction volume in the real estate market during that same period of time.

The American Bar Association routinely tracks and analyzes data for over 25 specialty areas of practice. The ABA analysis, as well as MLM's claim data, highlights some of the changes in practice area exposures:

- **Real Estate –** With dramatic changes in the real estate market over the past few years, real estate practitioners, for now, report more malpractice claims than practitioners in any other area of law.

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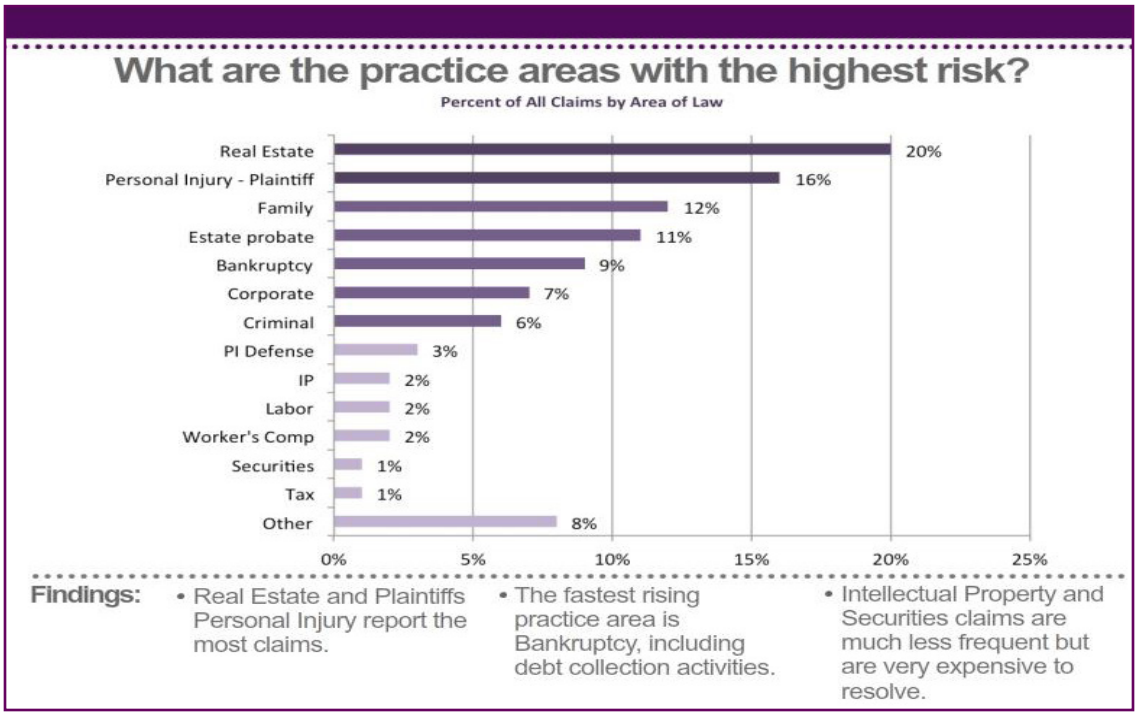


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- **Collection and Bankruptcy –** Malpractice claims against collection and bankruptcy attorneys are on the rise and have increased more than any other area of law.
- **Personal Injury –** Claims against personal injury attorneys remain persistent and troublesome, and are still the most expensive claim matters to resolve.
- **Family Law –** Malpractice claims involving family law matters have grown in complexity, and an increase in errors involving client retirement accounts have made these claims more expensive to resolve.
- **Criminal Law –** This area of law, which had previously experienced few claims, has steadily increased in claim activity every year, contributing to a 56% increase in the rate of malpractice claims involving criminal law matters since 1985.

To better help lawyers recognize the hazards associated with their unique practice areas, MLM will be focusing its risk management advice on practice specialties throughout the year. In this issue of *The View,* you will find articles highlighting the types of claims typically reported against attorneys in certain fields of law, such as real estate, personal injury, family law, business law, collection and bankruptcy. The authors have also included practical advice for specialists about the best ways to avoid the most troubling claims.

Throughout 2013, MLM's online CLE webcasts will take a closer look at the particular risks associated with several different practice specialties. On January 31, MLM's CLE webcast, "Attorney Debt Collection: Avoiding the Hazards and Pitfalls," will examine the trends that are affecting lawyers who collect a debt on behalf of a client and the reasons behind the explosion in debt collection malpractice claims.

On February 28, our CLE webcast, "Ethical Client Representation in Family Law Practice," will bring together some of the most experienced family law practitioners to discuss changes in the practice of law that expose family law lawyers to complicated and expensive malpractice traps. Look for this program and others that focus on specialty areas of law in the coming months.

As always, MLM's experienced attorneys are available to take your calls and questions about your practice habits in your specialty area, and to assist you in looking for ways to avoid becoming the subject of a malpractice claim. Policyholders can call MLM's HelpLine at any time and reach a qualified risk management advisor at 855-692-5146.

Finally, look for new practice resources from MLM in the coming months with advice and recommendations focusing on specialty areas of practice and the best ways to avoid having an expensive and troublesome malpractice claim. MLM is always producing help guides, checklists, and booklets, alerting lawyers to the changing nature of professional liability and the best ways to take simple, practical steps to avoid a malpractice problem. ▪


## 2013 Monthly Webcast Series

**MLM offers all its policyholders three hours of complimentary webcasts per year.**

**A $120 value!**

*(Complimentary code valid from July 1, 2012 thru June 30, 2013)*

Schedule

| | |
|---|---|
| February 28 | Ethical Client Representation in Family Law Practice |
| March 29 | Tablet Wars: Getting the Most from Your iPad, Android or Surface Tablet |
| April 25 | Ethics Traps for New Lawyers & New Firms |
| May 30 | Elimination of Bias: Recognizing Chemical Dependency |
| June 27 | Business of Lawyering: The Purchase & Sale of a Law Practice |
| July 25 | New Hazards for Litigators: Medicare Secondary Payer Act |
| August 29 | Cloud Computing: 7 Important Rules Every Attorney Should Know |
| September 26 | Ethics: Effective Time Management and Putting Off Procrastination |
| October 31 | Ethics: Best Practices for Your Firm's Accounting Procedures |
| November 21 | Ethics: Client Engagement by Networking Professionally and Ethically |
| December 19 | Lawyer Websites: Practice Tips for Practicing Law on the Web |

Program cost of $40 for non-MLM insureds and for MLM insureds exceeding the three complimentary uses.

All programs are scheduled for one hour and broadcast 9:00 AM to 10:00 AM (CST). Program times and topics may be subject to change.

Webcast registration at
**www.mylawyersmutual.com**


# Malpractice & Ethics Claim Avoidance in Practice Areas

## BUSINESS LAW

By Michelle Lore – Claim Attorney

When business deals go bad, clients inevitably want someone to blame. Unfortunately, it's often the lawyer – the one with the "deep pocket" in the form of a professional liability policy. While it's not possible to prevent a malpractice or ethics claim from ever being asserted, adhering to the following tips can at least minimize the risk.

**Maintain a conflicts-of-interest database – and use it!** Reliance on memory alone is not a reliable or advisable strategy for determining whether a conflict exists. Regular use and proper maintenance of a good conflicts-checking system is imperative to avoiding malpractice and ethics claims based on conflict allegations. The conflicts-of-interest database should be regularly updated and searched every time a new client comes in to the office. When new parties are brought in to a matter, the database should be checked again.

**Identify the client and memorialize the scope of representation.** Many malpractice claims stem from a lawyer's failure to clearly identify his or her client when handling a matter involving multiple parties, such as setting up a small business. Attorneys must be clear who they represent and adequately identify and memorialize the scope of that representation in writing, either in a letter or retainer agreement.

**Don't represent multiple parties.** It's far too easy to say "yes" when a longtime client and his children walk in to a lawyer's office and ask the lawyer to prepare documents to transfer the family business to the kids, or draft the paperwork necessary to effectuate a real estate transaction from the father to the son. But if the deal goes bad, or the parties have a falling out, they are bound to come back at the lawyer claiming a conflict of interest in representing all of the parties to the transaction. The best and safest course of action is to insist that each of the parties obtain separate counsel.

**Avoid entering into business contracts with clients.** Rule 1.8 of the Model Rules of Professional Conduct gives fair warning to attorneys that getting involved with clients in any capacity other than legal advisor is dangerous. That includes activities such as investing in a client's business, accepting stock in lieu of fees or making loans to clients. If the transaction goes bad, rest assured the lawyer's involvement in the deal will be carefully scrutinized, and the lawyer may end up facing an ethics or malpractice claim by the client. Thus, lawyers who dare to enter into business deals with clients are advised to follow the letter of the rule carefully.

**Be cautious when serving on client boards – or any boards!** When outside counsel becomes an officer-director in a corporate client, the attorney's independence is diminished. When asked to assume such a role, attorneys are advised to provide full disclosure of the conflicts of interest and potential loss of attorney-client privilege. If that isn't enough to discourage a client's request, the lawyer should nonetheless consider declining the offer anyway. Many lawsuits are brought against officers and directors, and attorneys and their law firms run the risk of not being covered in most instances.

Law firms should also establish policies and procedures with respect to attorneys serving as officers, directors or employees of any outside for-profit or not-for-profit business enterprise. At a minimum, a firm should require the attorney to procure directors' and officers' liability insurance, and prohibit the attorney from providing legal services to the business enterprise. ▪

## REAL ESTATE

By Alice Sherren – Claim Attorney

With the economic boom of a decade ago and the resultant bust we are experiencing now, real estate claims have been on the rise. Deals that would have been lucrative in the boom economy instead resulted in major losses, and investors want someone to blame. Foreclosures and refinances are also on the rise, along with related malpractice claims for various reasons, such as drafting errors, title search mistakes, and lien priority issues. It is important to manage your real estate practice to minimize malpractice risks.

**Avoid conflicts of interest.** It can seem that when everyone wants the same thing in real estate transactions, the parties can streamline the process by using only one lawyer to close the deal. Be careful. While joint representation of a buyer and seller in a real estate transaction is not prohibited, there are instances when it is not permissible (and many more when it is ill advised). Be sure you fully understand the relationships between and among the parties, and discuss potential conflicts with them, before agreeing to represent more than one party to a transaction. Remember that even when parties agree on all the terms and simply need the lawyer to reduce those terms to writing, there may still be conflicts and the lawyer cannot avoid malpractice liability by claiming he was merely a scrivener for the deal. It is important that engagement letters make it clear what you have agreed to do, who you represent, and who you don't. And as always, be very careful when considering entering into business or real estate ventures with clients.

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**Supervise nonlawyer staff.** While it makes sense to utilize nonlawyer staff, especially for the high volume routine paperwork common in a real estate practice, if a law firm has a poor nonlawyer staff to lawyer ratio, the potential for malpractice increases exponentially. ABA Model Rule 1.1 on competency and Rule 5.3 on supervision make the lawyer responsible for work done by nonlawyer staff. This means the lawyer should always review all work done by nonlawyers to ensure no mistakes are made. Even though some transactions are very similar to others, avoid routine and volume-based mistakes by being certain to adequately address each client's individual needs and communicate with the client.

**Avoid burnout.** Controlling the volume and pace of your practice is critical to your personal and professional life. It is important to know your limits. Realize that while additional staff and delegation can help your practice run more efficiently, you still need adequate time to supervise the work of nonlawyers. ▪

# FAMILY LAW

By Angie Hoppe – Claim Attorney

As anyone who has ever practiced family law knows it is a challenging practice area. Resources of time and money are limited and emotions frequently run high. In terms of frequency, family law claims typically rank as the third or fourth highest number based on practice area. Knowing these challenges and statistics, what can an attorney do to better manage his or her practice and prevent claims?

**Evaluation of assets.** With respect to dissolution cases, the identification and evaluation of all marital assets is paramount. Lawyers need to be complete in identifying and documenting all assets belonging to the parties. It is also important to document how an asset will be evaluated for purposes of property settlement and the reasoning behind the evaluation. Many legal malpractice claims arise out of improper evaluation of assets.

**Second Lawyer Syndrome.** Another consideration for family law attorneys is "Second Lawyer Syndrome." This references relying on a first attorney's work without independent assessment. This can be dangerous as the current attorney will be held responsible for any mistakes or detriment to the client. For this reason it is important to verify all information and make a thorough and independent assessment of issues and information gathered by the first attorney.

**Proper communications.** A third major issue arising in family law cases (and cases in all practice areas), surrounds communication. A flourishing practice can make it difficult to meet client communication needs, especially when a client is emotional and confused about the process. Claims arising out of lack of communication may not have any actual damages, but can also draw ethical complaints from frustrated clients who feel they are in the dark. Claims where a client raises the issue of failure of the lawyer to explain the terms of the settlement fully, including tax implications, asset transfers and the like, are not infrequent. It is also important to remember that under Rule 1.4, proper communication is not just good client service, it is also an ethical requirement.

**Fee disputes.** Finally, many claims involving family law arise when an attorney sues the client for fees. No matter what practice area, this is never a wise idea if preventable. Oftentimes a fee suit leads directly to a counterclaim for malpractice, regardless of validity. If this is a business decision an attorney makes, it is important to consult local ethics rules to determine what must be given to the client and what can be withheld for nonpayment.

Family law can be a rewarding and exciting practice area. But as with any area of practice, it comes with challenges. Making sure cases are properly evaluated from start to finish and honing positive client communication skills will go a long way in creating a flourishing practice and limiting malpractice risk. ▪

# PERSONAL INJURY

By Alice Sherren – Claim Attorney

Personal injury cases can be extremely lucrative for plaintiff lawyers, but personal injury law remains among the leading practice areas for malpractice claims, both in terms of frequency and severity. Personal injury law can be complicated. There are endless pitfalls, and should a mistake be made, the resulting damages can be extensive.

**Don't dabble.** It can be difficult to turn away a client who seems to have a slam-dunk personal injury case, but if this is not your area of practice, tread with caution. Personal injury law continues to grow more specialized, and novices may find themselves facing a malpractice claim instead of a large contingency fee. Consider referring cases to experienced personal injury lawyers or associating with an experienced personal injury attorney.

**Keep an eye on deadlines.** The most common malpractice error in personal injury cases continues to be missed statutes of limitations. When you take a case, be certain you have researched the appropriate statute of limitations for the type of case and defendant, that you have the correct date of event, and that you have calendared each deadline accurately and with reminders. A workable calendaring system is vital to any practice, but especially for personal injury practices.

**File early.** Some cases may require significant discovery before all of the defendants are even identified. Be certain you start discovery early so that the statute of limitations does not run before a vital defendant is discovered and sued.

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**Crossing state lines.** If a case includes out of state defendants or is in a jurisdiction where you are not admitted, be very careful. Check the credentials of local counsel and be sure responsibilities in the case are thoroughly discussed and documented. Miscommunication with local counsel can lead to missed deadlines and increases malpractice risks significantly.

**Medical liens and tax consequences.** When considering settlement options, be sure to talk with your clients about the impact of taxes and medical lien payments. Unless you are well versed in tax law and keep up with the ever-hanging tax code, consider involving an accountant or tax lawyer to help advise your clients. Be certain that your clients understand what medical liens are, how they will be handled, and how they will impact their settlement. Especially for issues of import like taxes and liens, documenting discussions in writing is a good practice. ▪

# DEBT COLLECTION

By Todd C. Scott – VP Risk Management

More than any other area of law, malpractice claims against attorney debt collectors have increased significantly over the last four years. According to a study published by the ABA Standing Committee on Lawyers' Professional Liability, claims in the Collection and Bankruptcy area jumped by 1.93 percent between 2007 and 2011. The jump in claims occurred after years of an overall decline in this area since 1985.

Overall, the ABA study published in 2012 indicated that 9.2% of all malpractice claims reported during the four-year period of study were asserted against attorneys practicing in the area of Collection and Bankruptcy. Although the claim category reported by the ABA includes all aspects of federal bankruptcy law, the jump in claim activity is generally attributed to a sharp rise in malpractice claims asserted against collection attorneys, acting on behalf of a third party, and are alleged to have violated a provision of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692 et seq.

The recent downtown in the American economy may have contributed to the increase in FDCPA claims against attorney debt collectors. The more consumers default on their credit agreements, the more attorneys are hired by companies to pursue the debts. For the many new lawyers trying to handle debt collection matters, the FDCPA can be a minefield of malpractice concerns. Lawyers who regularly defend FDCPA claims asserted against collection attorneys provide the following advice:

**Understand whether you are a debt collector.** The FDCPA applies only to "debt collectors" and defines a debt collector as one who, "regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due another," 15 U.S.C. §1692a(6). Whether the attorney is presumed to be a debt collect as defined the FDCPA can depend on the percentage of debt collection matters that make up an attorneys practice. However, keep in mind that any effort to collect a debt on behalf of a third party, whether they are your client or even a family member, can potentially subject an attorney to an FDCPA claim, and taking on these matters should be considered with caution.

**Always maintain a good understanding of the FDCPA.** The FDCPA identifies no fewer than 16 types of conduct by debt collectors that is prohibited conduct, and since the Act is a strict liability statute, proof of just one violation may be sufficient to support a summary judgment for the plaintiff seeking redress.

**The FDCPA notice requirements must be strictly adhered to.** Once an attorney takes on a debt collection assignment and begins communicating with the debtor, the attorney must disclose that they are attempting to collect a debt and any information obtained will be used for that purpose. Many FDCPA mistakes occur at the outset of the attorney's collection activities because the attorney failed to notify the consumer of some basic information required in the statute. The initial collection letter must also disclose:

1. The amount of the debt;
2. The name of the creditor;
3. That the consumer has 30 days to dispute the debt, or else the debt will be assumed to be valid;
4. That if the consumer does dispute the debt in writing, the debt collector will obtain verification of the debt and provide the consumer with a copy of the verification;
5. That upon the consumers written request within 30 days, the debt collector will provide the name and address of the original creditor, if it is different from the current creditor. 15 U.S.C. §1692 g(a)

**Never threaten to take legal action against someone who may owe a debt unless you follow through on the threat.** A threat of a lawsuit can be considered a false representation that is prohibited under the FDCPA if it is not followed up with the commencement of legal action. Therefore, before indicating to the consumer that a legal action is about to commence, make sure that all preconditions for collecting a debt under the FDCPA are satisfied and that you have the authority to proceed with the litigation.

**Carefully identify the correct debt amount that is owed by the consumer.** You may be liable under the FDCPA if you misrepresent the character, amount, or legal status of the debt. 15 U.S.C.A. §1692e(2)(A) It is a common mistake for a debt collector to pursue the wrong debt amount against a consumer, so it is important to always verify the correct amount of debt that is owed the creditor. Make sure the creditor supplies you with correct information about the debt, and the collection letter that identifies the debt is carefully reviewed for the correct information before the notice is sent to the consumer. ▪

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# THE DANGERS OF DABBLING

By Angie Hoppe – Claim Attorney

One of the riskiest behaviors an attorney can engage in, from a legal malpractice standpoint, is dabbling. What exactly is dabbling? There are two common forms of dabbling. The first is taking a case outside of an attorney's normal area of practice. The second is handling a case in an unfamiliar court. An unfamiliar court can either be outside a typical jurisdiction, or perhaps taking a case in federal court when an attorney normally practices in state court.

In these challenging economic times, attorneys may be more likely to take any case that walks in the door, even if it is an unfamiliar area of law or in an unfamiliar jurisdiction or court. If an attorney is unfamiliar with the area of law applicable to the case or the local rules of the court, it can result in not getting the best result for a client, missing an important nuance of the law, missing applicable statutes of limitations and a host of other issues. This is not to say that an attorney can never switch practice areas or try something new. What this does mean is that an attorney is required to become competent in an area of law when handling a case in a new area. This can mean seeking out an attorney mentor in that area of law, further research, continuing legal education and other methods of becoming current in that practice area.

There are also ethical implications of working in a new practice area or taking on cases in unfamiliar jurisdictions. Attorneys must also remember Rules 1.1 and 1.5. Rule 1.1 on Competence states "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation." Comment 2 to the rule states that a lawyer doesn't necessarily have to have special training to handle problems they are unfamiliar with and Comment 3 provides an "emergency exception" where inaction could jeopardize a client's interest. Rule 1.5 with respect to Fees is also implicated. Rule 1.5(a) states "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount of expenses…" To clarify, it is not acceptable to bill a client for the attorney's learning curve in a new area of law.

When deciding whether or not to take a case, there are some important things to remember: If an attorney has reservations about whether he or she is competent to take a case, think twice. There is no such thing as a "simple case" and when an attorney is unfamiliar with an area of law, it may be difficult to spot all of the important and complex issues. There is no such thing as easy money. If an attorney does try out a new practice area, it is important to get educated and one of the best ways to do so is to coordinate with an attorney who has experience in the new area of practice. ▪

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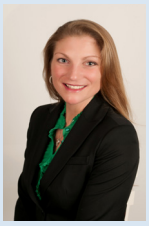

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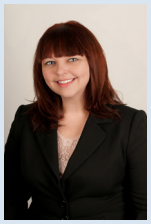

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