

Chicago Daily Law Bulletin®

Volume 162, No. 24

Serving Chicago's legal community for 161 years

Being proactive best way to avoid malpractice claims and headaches

Malpractice is not a popular topic in legal circles. We try to keep a strict eye on deadlines, protect the client's interests and never consider a claim could be lurking. Yet good habits are not always enough. Exposure can occur in unexpected ways and at unexpected times. For sole practitioners, dealing with the economic, reputational and emotional stresses of a claim without assistance can be crippling. Solos should be proactive.

For advice on preventing legal malpractice, there may be no better resource than Tim Gephart, vice president of claims at Minnesota Lawyers Mutual Insurance Co. MLM insures lawyers across 15 states, including thousands of sole practitioners.

Gephart personally has steered MLM's claims administration department for more than three decades and serves as a law school faculty member and frequent lecturer on loss prevention. When it comes to legal malpractice, Gephart has seen every variation.

Gephart offers some basic suggestions for minimizing claim exposure in solo practice.

Choose transition counsel and make a written succession plan

As more self-employed attorneys reach retirement age, and as Illinois moves closer to mandatory succession planning (see Professional Conduct Rule 1.3, Comment 5), Gephart confirms that failing to make a succession plan creates vulnerabilities for the sole practitioner or his estate.

The two core elements of succession planning are the selection of transition counsel in the event of disability or death and written instructions for handling active cases, addressing client funds and winding down or selling the practice.

To promote proper succession planning, Gephart helped write a downloadable practice guide for MLM insureds. Sample plans also are available on various state bar association websites, including California, New Mexico and West Virginia, and are easily located by

performing a simple Google search for "sample attorney succession plan."

If you have not yet selected transition counsel and prepared a succession plan, put it at the top of your list. For help finding a colleague to serve as transition counsel, join the Sole Practitioners Bar Association of Illinois (ilsolobar.org) for free and post your confidential request to other association members.

Avoid "dabbling" in new areas of law

Recent strains on the economy have caused lawyers to consider new areas of law outside their comfort zone. Gephart calls this the "dabbling effect" and warns such forays can lead to client assertions of legal neglect.

Gephart directs all counsels contemplating new areas to the "competency" requirements of Professional Conduct Rule 1.1 — which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Do not be seduced by a subject's apparent simplicity. You may miss the nuances and pay dearly for it.

If you are determined to expand to new types of law, Gephart suggests a temporary apprenticeship with experienced co-counsel, who can teach you the ropes.

Use caution when crossing state lines

As new communication technologies blur geographic boundaries, solos should consider whether activities directed out-of-state may constitute the unlicensed practice of law. Many states have restricted pro hac vice work in recent years, and various non-litigation activities — such as preparing legal documents, providing advice or sending demands to non-Illinois residents — may be prohibited.

In such cases, Gephart recommends you seek guidance from the target state's ethics commission or bar association and avoid potential legal hazards.

Fee collection may be perilous

Gephart stresses that malpractice claims often surface as counterclaims in fee collection law-

SOLE SPEAK



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suits.

Before suing for fees, solos should balance the risks against the chances and costs of recovery. Collection lawsuits may be hampered by expensive discovery, appeals, bankruptcies and general collectability problems. A counterclaim for malpractice, no matter how baseless, may turn a potential recovery into a liability.

Finally, Gephart emphasizes that collection problems can be avoided through retainer arrangements and careful client screening. If your gut signals a potential client may be a problem, listen to your instincts.

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Watch out for Internet scams

Internet scams have infiltrated the practice of law, and sole practitioners may be prime targets.

For example, Gephart describes an ongoing collection scam that has victimized counsels across the country, involving a prospective "client" and opposing "debtor" who are in league with each other.

The client retains unwary counsel to collect a hefty sum from the debtor, who promptly capitulates and surrenders a cashier's check. The attorney-victim deposits the

check in his client trust account, retains his fee and wires the balance to the client.

After the attorney wires the funds, he discovers the cashier's check was a phony instrument, leaving a negative balance in the client trust account. The deficiency balance not only triggers an ethics inquiry, but may spawn malpractice claims by other clients with funds in the account.

Report potential claims promptly

Self-employed practitioners may be reluctant to report potential problems to their insurer, hoping the matter will go away quietly and never rise to a claim. Gephart counsels against this.

First, timely reporting may be essential to trigger the insurer's coverage obligations. If you believe there may be an issue with a client or former client, report it. Don't gamble with your practice on the line.

Second, early reporting gives the insurer a chance for early resolution, known in the insurance world as "claim repair."

When a lawyer misses a lien for a real estate closing, for example, early notice may allow the insurer to file a quick quiet title action and allow the sale to close. Similarly, with early notice on a missed statute of limitations, insurance counsel might invoke

tolling or seek application of a longer period. Rapid assistance from your insurer could make the difference.

Use your insurer's resources

Gephart's parting advice to solos is to make liberal use of insurance company resources. Among other things, MLM offers Continuing Legal Education courses, online practice guides and a telephone hotline to address questions impacting coverage, risk management and claim avoidance. Explore what your insurer has to offer. It will be worth the effort.

In sum, take the time to consider steps for mitigating the chances and effects of legal malpractice claims on your sole practice. Thinking it will never happen is not a solution.