

## Merging Of Emotional, Physical and Economic Stakes Increase Claim Risk

I am asked frequently what areas of practice are the riskiest and which are the safest. It's a simple question without a simple answer. I have, however, observed that most malpractice suits arise from of a convergence of three primary elements; and as legal professionals, we can mitigate our risks, regardless of our area of practice.

According to the ABA's most recent survey of lawyer malpractice claims activity, a fifth of all malpractice claims are filed against plaintiffs' personal injury lawyers. On the other end of the spectrum, malpractice claims seldom target attorneys practicing antitrust and international law. However, that doesn't come close to telling the whole story.

Risk has two definitions in the insurance industry. First, there's the matter of how often claims are made, regardless of the type or size of claim. This is called "frequency." The second way to measure the magnitude of risk is "severity," which considers the cost of the claim. A practice can be considered "high risk" if it generates a lot of claims, regardless of the size of the claim. Or it can be high risk if the actual number of claims is few, but those few raise the specter of large judgments or very expensive defense or both. Some representations can present both high frequency and high severity risk. Plaintiffs' personal injury practice is one example. Other types of practice have both low frequency and low severity – municipal work, for instance.

Frequency statistics cloud the risk issue a bit when they fail to consider how many lawyers practice in the areas listed. Plaintiffs' personal injury, family law (including estate, trust and probate) and real estate, when combined, account for more than half of all malpractice claims reported to the ABA survey. (Add in personal injury defense work and those areas of practice account for over 60% of the total.) Of course, these areas are the staples in any general law practice and are fields of law pursued by most lawyers. Arguably, then, it should not be surprising that so many claims arise out of these areas of practice.

It's also noteworthy that claims data is difficult to gather and interpret, especially when looking at the profession as a whole. For instance, statistics like those I've cited do not include a significant number of lawyers who don't have malpractice insurance. They don't include figures from malpractice insurers who elect not to provide claim data to the ABA. And analysis of any insurer's claims experience includes only those lawyers and firms that are insured by that carrier and is colored by that carrier's underwriting choices.

As I said, there is no simple answer in regard to the riskiest and safest areas of practice. What is clear is that all areas of practice present risk, and the only way to avoid it completely is to find a new career. Since that's not an attractive option for most of us, we are compelled to understand the circumstances that breed malpractice suits and the actions we can take to reduce the likelihood of being sued.

### **Factors that increase risk**



It's been my experience that risk seems to be strongly connected to three factors in the underlying representation – high *emotional* stakes, high *economic* stakes, and high *physical* stakes, which touch the health, well-being, location and lifestyle of the persons involved. Most cases have at least one of these elements, but the cases that include all three are the ones where the risk for malpractice claims is greatest.

Viewed from this perspective, it's no wonder that plaintiffs' personal injury work ranks at the top of the frequency list. In a personal injury suit, all three types of stakes are very high. When someone has been injured or killed, the physical stakes are great. In turn, because the injured person or the family is suing over an extremely upsetting loss, the emotional stakes are high. And, of course, the economic stakes usually are very high, either in an absolute sense or relative to the plaintiff's general economic circumstances. Plus, when you consider the client already has shown a willingness to sue, it's quite possible that a lawyer will face a malpractice claim should something go wrong in the underlying representation.

Family law, including estates, trusts and probate, also carries high emotional stakes. Divorce, adoption, child custody and death are highly volatile and often uncomfortable subjects for clients to deal with. The physical stakes seem obvious enough, especially in trusts and estates work. And the relative economic stakes clearly are high, especially when you're dealing with a client's entire net worth or, in the case of divorce, you are working out family financing for years to come.

Residential real estate practice fits this pattern, as well. While the physical stakes are not as high, they do exist as the people involved will be moving from home to home. The economic stakes are high because the purchase or sale of a home typically is the largest financial transaction the parties have ever made. And the emotional stakes are high because of the other two factors – the lawyer is helping the client with a very large transaction that will affect the client's home life.

One additional contributor to risk in these particular practice areas is the fact that representations normally involve individuals as clients. Why would that make a difference? Perhaps the phrase "it's just business" is particularly apt: institutional clients have the leeway to let certain things slide, whereas individuals are potentially more likely to take mistakes and losses and missteps more personally. Additionally, an individual client needn't jump through nearly as many hoops before "authorizing" a claim against an attorney – no boards of directors to ask, no shareholders to consider, no "chain of command" to consult.

### **Lessening the claim risk**

Now that we know how to analyze the likely risk of a particular representation, what can we do with that information? How can that help lawyers control those risks?

First, understanding that you are operating in a particularly risky area of practice ought to motivate you to work hard to control all the risk factors that you can. Since you can't control the level of the stakes, focus on what you can do. For instance, strive to make very good choices about which individuals you will represent and which you ought to turn down. In other words, consider taking the least risky of the risky clients. Screen



potential clients by examining their credit history and by interviewing them carefully and thoroughly to assess whether or not they understand the limitations of their situation.

Second, keep particularly good records so that you have strong support in defense of your actions and interactions with your client. Document each strategy discussion and the recommendations you made to your client. Document all instructions you received from your client. Document all settlement offers and your client's responses to them. And keep good notes about your own thought process. Remember, if you can't prove you exercised your professional judgment, you can't raise a defense that says, "I used my best judgment, but it turns out I was wrong."

Third, make extra efforts to cultivate good working relationships with your clients. Keep your clients involved and informed, and make sure they understand how much you care about them and their interests. Human nature does have a hand in whether or not a client decides to sue you. As to this, the fact that your clients are individuals may actually be an advantage. If the person likes you and feels good about their interaction with you; if they know you on a more intimate personal level than just business, they will be more hesitant to drag you into court when things don't go exactly to their liking.

Fourth, work hard at avoiding fee disputes. As every risk management professional knows, fee disputes always raise the risk of claims. Thus, it is even more important to avoid fee disputes in riskier areas of practice. Have thorough, clear conversations with your clients about fees and billing. Especially in contingency representations, make every effort to help your client understand what the matter is likely to cost them or likely to bring them. For instance, get down to specifics when talking about potential judgments; explain that before they put any part of a judgment in their pockets, you will take a cut for your fees and expenses and the government will take out taxes as applicable. In divorces, do your best to see that your client understands who may be responsible for attorney's fees, including whether or not your client may have to cover the other party's fees. And don't forget to explain to your client what the judge's role may be in determining ultimately how much the lawyers are paid and by whom.



Finally, understanding the level of risk ought to motivate you to examine carefully your taste for the kind of work you choose to do. If you're accepting work that falls outside your expertise or comfort level, you're increasing the risk of error. Direct your efforts where they're most valued. And if your proficiency happens to fall in a risky area of practice – regardless of how you define risky – decide if the danger is worth the reward. Usually it is, provided you take the appropriate measures to manage the risk.

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