



TYLA POCKET GUIDE:

GRIEVANCE
AND
MALPRACTICE 101



BE AN UNCOMMON LEADER.®

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TEXAS YOUNG LAWYERS ASSOCIATION

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No lawyer ever wants to receive a grievance or malpractice claim. But most lawyers are likely to receive at least one of these claims throughout their law career. This pocket guide will provide practical tips and resources on how to avoid and deal with these issues.

THE TEXAS DISCIPLINARY SYSTEM DISCIPLINARY SYSTEM STATISTICS

In Texas, the areas of law that generally receive the most grievance claims each year are as follows:

Top Areas of Law Grievated (High to Low)

- Criminal
- Non-client Relationship
- Family
- Civil
- Personal Injury
- Immigration
- Other (areas of law)
- Probate/Wills
- Real Estate
- Bankruptcy
- Workman's Comp
- Traffic

The rule violations that are most commonly alleged in those grievance claims are as follows:

Top Rule Violations Alleged (High to Low)

- Communication (TDRPC 1.03, 2.01)
- Neglect (1.01)
- Integrity (2.01, 4.01, 3.03, 8.02(a), 8.04(a)(3))
- Declining or Terminating Representation (1.15)
- Safeguarding Property (1.14)
- Conflicts (1.06 - 1.13)

- Tribunals (Part III)
- Fees (1.04)
- Non-clients (Part IV)
- Confidentiality (1.05)
- Advertising & Solicitation (Part VII)
- Law Firms (Part V)

THE FUNCTIONS OF THE CHIEF DISCIPLINARY COUNSEL

The Texas attorney disciplinary system is administered by the State Bar of Texas Office of the Chief Disciplinary Counsel (CDC). The CDC represents the Commission for Lawyer Discipline (the Commission) in disciplinary litigation. If a grievance is filed against you, the CDC becomes a party to the grievance suit. It will investigate the matter, and if just cause is found, prosecute the disciplinary case.

OUTLINE OF THE DISCIPLINARY PROCESS

If you are faced with a grievance claim, below is an outline of what the grievance process may include. This authority is found in the Texas Rules of Disciplinary Procedure.

1. Step One: Grievance Filed
2. Step Two: Classification
 - Upon filing, the CDC has 30 days to decide whether it is a complaint or an inquiry. An inquiry does not allege professional misconduct and is dismissed. A complaint, however, alleges professional misconduct and is investigated. Regardless of whether the grievance is dismissed or upgraded for investigation, the Respondent attorney receives a copy of the grievance and notification of the CDC's decision.
 - Once Respondent receives notice that the grievance has been upgraded to a complaint, the Respondent has 30 days from receipt of the notification to provide the CDC with a written response (or rebuttal) to the allegations of professional misconduct.
3. Step Three: Investigation
 - Just cause must be determined within 60 days from Respondent's written response deadline.

- “Just cause” means “such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of professional misconduct requiring that a sanction be imposed, or suffers from a disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.”
 - If no “just cause” is found, the CDC presents the complaint to the Summary Dismissal Panel (“SDP”).
 - The SDP determines whether the complaint should be dismissed or should proceed. A tie vote results in dismissal. There is no appeal from the SDP’s decision. Venue is in the county of the alleged misconduct.
4. Step Four: Notification & Election
- If “just cause” is found or if the SDP votes to proceed, the CDC notifies the Respondent in writing.
 - Respondent must elect to have the complaint heard in district court or by an evidentiary panel within 20 days from receipt of this notice.
 - If Respondent fails to elect, the complaint proceeds before an evidentiary panel.
5. Step Five: Evidentiary Petition
- An evidentiary petition is filed within 60 days from receipt of Respondent’s election or election deadline.
 - The evidentiary petition states the factual allegations of professional misconduct, lists the disciplinary rules allegedly violated, and demands that Respondent be disciplined as warranted.
6. Step Six: Respondent’s Answer
- Respondent must file a responsive pleading specifically admitting or denying each allegation of misconduct.
 - Respondent must file no later than 5:00 p.m. on the first Monday following the expiration of 20 days after service.
7. Step Seven: Discovery
- Requests for Disclosures
 - Depositions
 - Interrogatories
 - Request for Production

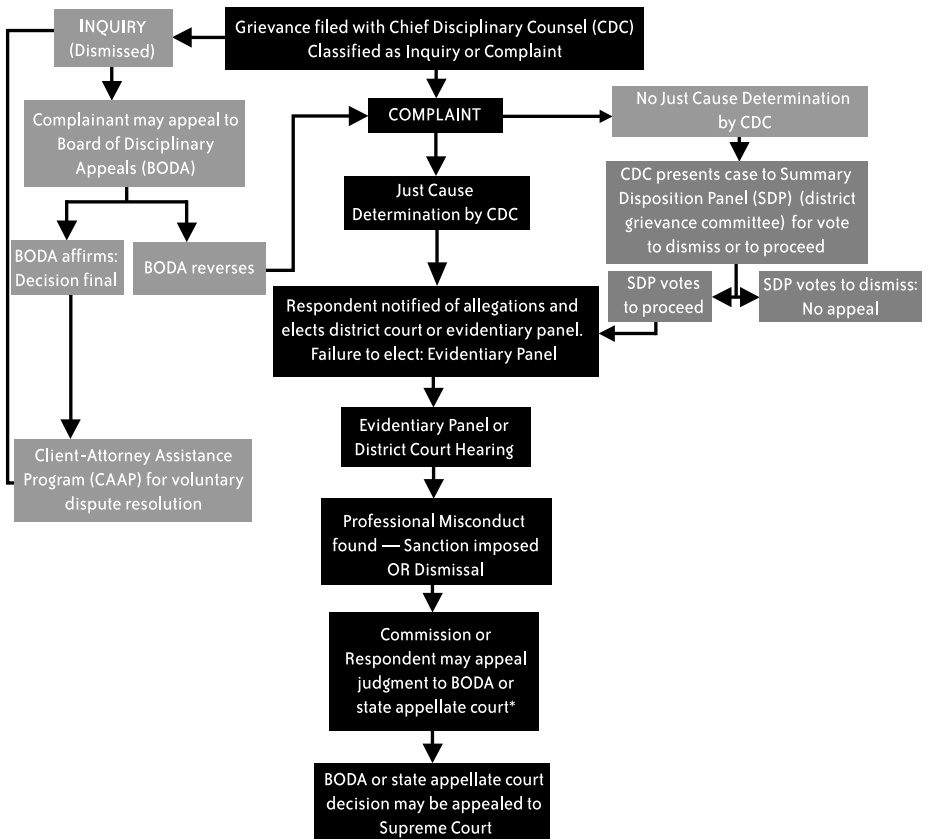
- Request for Admissions
 - Subpoenas
8. Step Eight: Evidentiary Panel Hearing
- Panel: Generally the evidentiary panel consists of 4 attorney members and 2 public members
 - Quorum requirements: Quorums vary with the type of panel, which can be a 6-member panel or a 3-member panel. A quorum requires that a majority of the members of the panel be present AND that at least one public member be present for every two attorneys who are present.
 - Venue: County of Respondent's principal place of practice. If there is no principal place of practice in Texas, venue is in the county of Respondent's residence. If there is no residence or principal place of practice in Texas, venue is in the county where professional misconduct occurred. In all other instances, in Travis County.
 - Parties present: Commission for Lawyer Discipline (represented by CDC) and Respondent. Complainant is a potential witness but not a party.
 - Burden of proof: Commission must show allegations by a preponderance of the evidence, i.e. – the panel must be persuaded that the facts are more probably one way (CDC's way) than any other way (Respondent's way).
 - Procedure of hearing:
 - a. Panel chair's opening remarks
 - b. Commission's opening statement (optional)
 - c. Respondent's opening statement (optional or may reserve)
 - d. Commission's case-in-chief
 - e. Commission rests
 - f. Respondent presents defense
 - g. Respondent rests
 - h. Commission's rebuttal
 - i. Commission's closing statement
 - j. Respondent's closing statement
 - k. Commission's rebuttal
 - l. Panel deliberations (private)
9. Available Sanctions:
- Private reprimand
 - Public reprimand
 - Probation of suspension (Respondent may practice law with conditions)
 - Partially-probated suspension (Combination of active and probated suspension)

- Active suspension (Respondent cannot practice law during this term)
- Disbarment

10. Terms and Conditions of Probation Could Include:

- Restitution & attorneys fees with a due date
- Judgment may also include (if the evidence supports inclusion):
 - o Additional hours of CLE courses
 - o Law practice management
 - o Rehabilitative monitor
 - o Psychological assessment reports
 - o Substance abuse assessment
 - o Random drug screens
 - o Trust account reporting
 - o Trust account audit

PROCESSING A GRIEVANCE FLOWCHART



TIPS ON HOW TO PREVENT A GRIEVANCE

- **Supervise your employees.** Always know what your employees are doing and oversee any important tasks they are doing for clients. If you are not able to personally do this, appoint a lawyer in your office that you trust to do this.
- **Have a backup lawyer to cover for you if disaster strikes.** You never know what the future holds for you. So if disaster strikes or you have a three-week bout of the flu, make sure you have someone who can step in and cover your responsibilities to your clients while you are unable.
- **Always respond to any phone calls or emails you receive from clients within 48 hours.** If you are personally unable to do this, assign someone in your office to respond on your behalf.
- **Keep clients informed.** Ensure that your clients are informed about all important events that occur in their case, any offers of settlement your office receives, any deadlines that may exist in the case, and what they should expect regarding future fees owed and the timeline of their case. Make sure you document these conversations in writing.
- **Document correspondence you have with clients, including phone calls.** This will protect you in the event a client ever claims you have not provided them with information or responded to their inquiries.
- **Properly calendar deadlines and inform clients of deadlines in writing.** Missing a deadline is one of the easiest ways to invite a grievance or malpractice claim. Designate someone in your office to calendar all of the deadlines in cases and set your calendar to send reminders when the deadlines are approaching.
- **Withdraw from representing a client who does not comply with your employment contract.** When you enter into an attorney-client relationship, there are certain things that you expect from your client that are laid out in the engagement agreement. The client's compliance with these agreements will affect your ability to represent them and how successful you will be at your job. If your client is not complying with their responsibilities, your performance in representing them will be affected and this may cause you to fall short of your duties as their lawyer. No client is worth jeopardizing your law license over.
- **Have every client execute an employment contract.** Always enter into a written employment contract with every client that clearly spells out things such as your scope of representation, your hourly rate, actions you expect from the client, and your right to withdraw for a violation of the employment contract. This will help you manage client expectations, protect you from a

client who refuses to follow your advice or pay for your services, and will help protect you in the event your duties or the scope of your representation of them is ever questioned.

- **Collect your fees up front if possible.** At the time you are retained, collect a retainer that will cover all of the initial work that needs to be done on the case and request that your client replenish the retainer funds before they are exhausted. Set up a system that alerts you when the retainer balance is getting low. Working on credit greatly increases your chances of not getting paid for your work.
- **Keep your client's funds in a separate trust account until attorney fees are earned or expenses are paid (or reimbursed).** This should be obvious, but you would be surprised at how many lawyers get in trouble for not following this rule. Just keep them separate.
- **Seek the help of outside experts on issues that are beyond your capabilities.** If you are ever unsure about handling a matter for any reason seek appropriate help to assist you or refer the issue to another lawyer. As a lawyer, you cannot be an expert on everything. Therefore, it makes sense to seek the help of experts on particular issues that may arise with a client that you are not familiar with. This not only protects you, but it also better serves the client. Most clients will appreciate you seeking the additional assistance for their issues.
- **Keep an organized client file for every case.** You should always have a file for every client that contains correspondence that has been sent or received by you, the pleadings, any order entered, your fee agreement with the client, and any discovery that has been conducted on the case. This is essential in educating you on what tasks have been done and will also assist you in defending against a client who may question what work has been done on their case.
- **Don't lie to clients.** We all have the client who expects all of our attention on their case all of the time. So when they call to check up on the status of their case sometimes it may be easier to tell the client that certain tasks have been done that you may not have had time to get to yet. This little fib could turn a low-level disciplinary offense (like not returning calls) into a major one (neglect). If you cannot be honest with a client, then you need to withdraw or pull in another lawyer to assist you with the case. It is not worth risking your law license over.
- **Document all of your work in writing.** You should always look to the worst-case scenario and protect yourself proactively when representing a client. Keep a physical or electronic paper trail of all of your communications

with your client, the work that has been done, decisions that are made, and advice that you have given. This will help protect you from false allegations that may be made, misunderstandings, and can help you respond to any grievance claims that may be made.

- **Read disciplinary decisions.** It is important to familiarize yourself with the disciplinary process and any changes or decisions that are being made with regards to our disciplinary rules. Make an effort to read disciplinary decisions each month so that you are aware of the mistakes others have made, how to avoid those mistakes, and to serve as a reminder that your law license is a privilege that should be carefully guarded.
- **If you have any substance abuse or mental health issues get help!** There are a significant number of attorneys who are suffering with some kind of impairment. It happens. The worst thing you can do is suffer in silence and not get help. This will only make matters worse and could lead to you losing your law license. The State Bar has a full-time, professional lawyer assistance program called, Texas Lawyer Assistance Program (TLAP). TLAP provides confidential help for lawyers, law students and judges who have concerns about substance abuse or mental illness in regards to themselves or a colleague. TLAP is here to help. **You can call TLAP any time of day or night at 1-800-343-8527.**

WHAT TO DO IF YOU RECEIVE A GRIEVANCE NOTICE

- **Breathe.** A complaint does not mean a finding of professional misconduct. It is merely a complaint.
- **Cooperate.** A lawyer who fails to respond in writing to allegations of a complaint is likely to violate Rules 8.01(b) and 8.04(a)(8) of the Texas Disciplinary Rules of Professional Conduct unless he or she can assert a privilege or other legal grounds for failure to do so. This will only make a bad situation worse.
- **Tell your side of the story.** You must file a response telling your side of the story. Calendar the response deadlines and file a response! You do not want a default decision entered against you.
- **Be candid and honest.** A lawyer's dishonesty or lack of candor can be more damaging than the allegations in the complaint itself. Your answer to the allegations against you should be honest, done in a professional tone, responsive to the allegations against you, and should include enough detail to demonstrate that there has not been any misconduct on the lawyer's part.

- **Talk to another lawyer you respect.** It is impossible for you to be objective about complaints against your license. Therefore, you must talk to someone about the complaint and how to handle the licensing board inquiry. You need someone who will be honest with you and that you can be honest with in return.
- **Do your diligence.** Familiarize yourself with the claim that has been made against you and the ethical rules that apply. It is also helpful to look at the disciplinary case law that has been handed down on the facts similar to your case. This will give you a good idea about what kind of exposure you could face.
- **Hire counsel.** Hire a lawyer that deals with grievance claims to help navigate you through the process and ensure that you are taking all of the steps necessary to protect yourself.

FREQUENTLY ASKED QUESTIONS REGARDING GRIEVANCES

- **Will my malpractice carrier get notice regarding the grievance filed against me?**

No. Your malpractice carrier will not be contacted regarding any grievance claims filed against you. However, most carriers require that you tell them in your application for legal malpractice insurance about grievances filed against you. Take a look at your policy and abide by your insurance carrier's requirements.

- **Is there a statute of limitations on the filing of a grievance?**

Yes. Under the Texas Rules of Disciplinary Procedure § 15.06, there is a four (4) year statute of limitations on allegations of professional misconduct, except in cases in which disbarment or suspension is compulsory. However, limitations will not begin to run where fraud or concealment is involved until such professional misconduct is discovered or should have been discovered in the exercise of reasonable diligence by the Complainant.

- **Can my license be suspended while the grievance claim is being investigated?**

It can under the Texas Rules of Disciplinary Procedure Part 14. Should the CDC reasonably believe, based upon investigation of a complaint, that an attorney poses a substantial threat of irreparable harm to clients or prospective clients and the CDC is authorized or directed to do so by the Commission, the CDC shall seek the immediate interim suspension of the attorney.

- **If I am disbarred, how long does that last?**

At least 5 years. Under 11.01 of the Texas Rules of Disciplinary Procedure, you “may petition to have your law license reinstated at any time after the expiration of five years from the date of final judgment of disbarment or the date of Supreme Court order accepting resignation in lieu of discipline.”

- **If I am concerned about the ethics of a particular action, who should I call?**

Call the State Bar of Texas Ethics Helpline at 1-800-532-3947. Ethics attorneys answer your questions on a first-come, first-served basis from 8:00 a.m. to 5:00 p.m., Monday through Friday. The Ethics Helpline is a free service for Texas-licensed attorneys; however, the advice is not confidential and not binding.

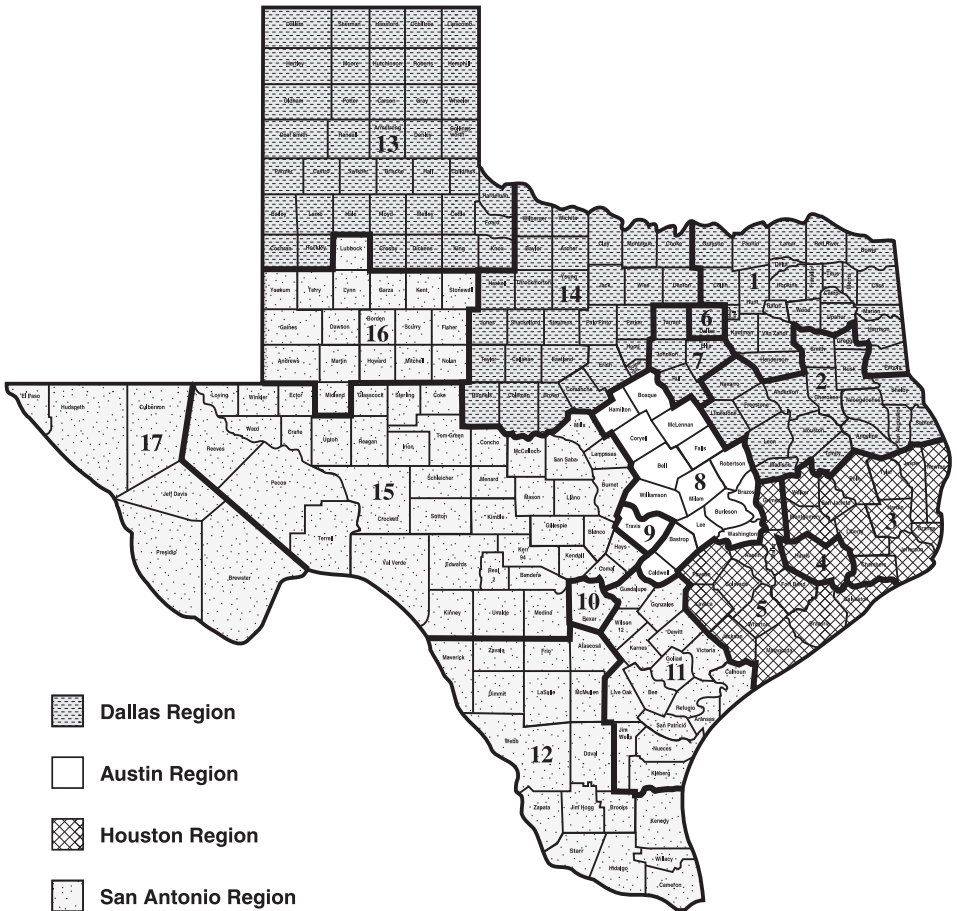
CHIEF DISCIPLINARY REGIONAL OFFICES

The CDC’s headquarters is located in Austin. However, there are also regional offices in San Antonio, Dallas, and Houston. Each regional office is responsible for the investigation and prosecution of disciplinary matters within its region and is managed by a regional counsel.

- **AUSTIN**
Chief Disciplinary Counsel
1414 Colorado Street
Austin, Texas 78701
Phone 512-427-1350/877-953-5535
Fax 512-427-4167
- **DALLAS**
Chief Disciplinary Counsel
14651 Dallas Parkway, Ste. 925
Dallas, Texas 75254
Phone 972-383-2900
Fax 972-383-2935
- **HOUSTON**
Chief Disciplinary Counsel
600 Jefferson, Ste. 1000
Houston, Texas 77002
Phone 713-758-8200
Fax 713-758-8292

- SAN ANTONIO
 Chief Disciplinary Counsel
 Travis Park Plaza
 711 Navarro Street, Ste. 750
 San Antonio, Texas 78205
 Phone 210-208-6600
 Fax 210-208-6625

The regions for the CDC are broken up as follows:



MALPRACTICE

WHAT CAN A LAWYER BE SUED FOR?

In Texas, lawyers are generally sued for malpractice under the following four claims. These claims include:

1. Negligence

- Negligence is the most common claim. The client must prove the four elements of a standard negligence claim: duty, breach of duty, proximate cause, and damages. *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989). Generally speaking, the ultimate questions are (1) whether the lawyer did something a reasonable and prudent lawyer would not have done (or failed to do something that a reasonable and prudent lawyer would have done) under similar circumstances, and (2) did such deviation from the applicable standard of care matter, i.e. – did it actually cause the client’s damages.

2. DTPA

- Lawyers are sometimes sued under the DTPA, but such claims can be difficult because the DTPA has a specific exemption for professional services. Furthermore, Texas courts are reluctant to allow “claim fracturing,” taking what should be a negligence claim and calling it something else (breach of contract, DTPA, fiduciary duty, etc). That said, under the right factual scenario, a DTPA claim can survive. *See, e.g., Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998).

3. Breach of Fiduciary Duty

- Like DTPA claims, Texas courts will take a hard look at alleged fiduciary-duty claims to ensure that such claims are not simply negligence claims cast under a different name. While negligence claims generally assert some sort of mistake on the lawyer’s part, true fiduciary-duty claims generally assert that “the attorney obtained an improper benefit from representing the client.” *Murphy v. Gruber*, 241 S.W.3d 689 (Tex. App.—Dallas 2007, pet. denied). For example, an attorney can breach his fiduciary duty by, among other things, subordinating his client’s interests to his own, retaining the client’s funds, engaging in self-dealing,

improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends. *Id.*

4. Breach of Contract

- Clients may also have a claim for breach of contract. The attorney-client relationship derives from mutual consent and in that respect, it is largely shaped by agreement entered into between the lawyer and the client.

LEGAL MALPRACTICE CLAIMS – GENERAL PRINCIPLES

Generally, the following principles apply to legal malpractice suits:

- These claims require an attorney-client relationship.
- Typically, two-year statute of limitations governs these claims. For malpractice claims arising out of representation in litigation, this period is tolled during the representation. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991) (holding that “when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted.”).
- The claims may not be split, or fractured. Courts are hesitant to allow a plaintiff to divide or fracture legal malpractice claims into breach of contract claims (or other claims, for that matter). See *Goffney v. Rabson*, 56 S.W.3d 186, 190-94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (holding that because legal malpractice claim was dropped before trial, plaintiff was not entitled to recover on her breach of contract, DTPA, and breach of fiduciary duty claims).
- To obtain damages in a legal malpractice suit, the client must prove not only that the underlying suit would have been successful but for the malpractice of the attorney, but he must also establish the amount of damages he would have recovered had he been successful—this is also referred to as the “suit within a suit.” *Fireman’s Fund Am. Ins. Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67, 70 (Tex. Civ. App.—Tyler 1975, writ ref’d n.r.e.).
- Expert testimony is required in a suit for malpractice. *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113 (Tex. 2004).
- Generally, strict privity applies in a malpractice suit. *Barcelo v. Elliott*, 923 S.W.2d 575, 578-79 (Tex. 1996). That is, lawyers typically cannot be sued

by non-clients unless the lawyer engaged in fraudulent conduct. *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ).

LEGAL MALPRACTICE – MOST COMMON ALLEGED ERRORS

The most common alleged errors in a legal malpractice suit include:

- Failure to know or properly apply the law
- Failure to know or ascertain deadlines
- Failure to obtain consent or inform client
- Failure to calendar properly
- Inadequate discovery or investigation
- Conflicts of interest

TIPS ON HOW TO AVOID MALPRACTICE SUITS

- **At a minimum, comply with applicable rules of ethics and professional conduct (Texas and ABA).** These rules can be found at:

www.legalethicstexas.com/ethics-resources/rules/texas-disciplinary-rules-of-professional-conduct.aspx

www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

- **Know the law.** Familiarize yourself with the law that applies to your client's issue and/or suit before you begin any representation.
- **Know the local rules.** Almost every county has a set of local rules that apply to suits filed in that county. Generally these can be found at the clerk's office or on the county's website. If you are not familiar with the local rules in a county you are practicing in, obtain a copy of the local rules and familiarize yourself with them.
- **Have your client sign a written fee agreement.** Your fee agreement should clearly identify who the client is, the scope and terms of the representation, identify the work the lawyer will do on the case, and the fee arrangement.

- **Get paid a retainer up front.** At the time the fee agreement is entered into, get a retainer up front. Set up an accounting system to remind you when the retainers get low and require your clients to replenish their retainers.
- **Control client expectations.** Clearly communicate with your client in writing what they should expect with regards to their case, any problems with the case, all available courses of action, the timeline of the case, fees that are involved in each action taken, and the effects of all decisions that are made.
- **Define and monitor goals and objectives.** Define all goals and objectives in writing with your client when your representation begins and revisit these with your client as the case progresses to ensure that the actions you are taking are in line with the client's goals and objectives.
- **Determine the extent of the client's involvement in the case and involve the client in major decisions.** Discuss the amount of involvement your client wants to have in the case and involve the client as requested. Discuss any major decisions that are made in the case with the client and document these communications in writing.
- **Document everything.** Document all communications with your client and keep an organized file of all of your correspondence, pleadings and orders, and agreements that are made in the case. Keep a copy of the file for at least seven years from the date the case is finalized.
- **Establish a reliable calendaring system.** Find a reliable way to calendar all of the important events that occur in your client's case and set your calendar up so that it provides you with reminders prior to an event occurring.
- **Meet deadlines.** Calendar all of the deadlines in your client's case and communicate these to your client. Don't leave things to the last minute.
- **Return all calls and correspondence.** Return all calls or correspondence from your client within forty-eight (48) hours.
- **Be very cautious about suing a client for unpaid fees.** Even if such a suit is warranted, it is usually met with a counterclaim for malpractice from your client.

- **Practice malpractice avoidance.** Assign a lawyer in your office to be in charge of malpractice avoidance audits on cases.
- **Look out for issues.** Look for warning signs in employees and fellow lawyers for substance abuse issues and if they have an issue, get them off any cases and into treatment.
- **If you reject business, turn it down in writing.** Follow your instincts on whether to avoid taking a case. If you reject business, turn it down in writing and specifically explain that you are not going to be that person's lawyer. Then, send the potential client referrals for other lawyers that they can contact.
- **Be cautious about being general counsel or local counsel on any suits.** The risk you take in being a general counsel or local counsel is seldom worth it. You are setting yourself up to be blamed for a poor decision made by someone else or a mistake that is made by someone you don't control.
- **Be cautious about providing courtesy representation.** When performing courtesy representation, most lawyers don't treat these cases the same as a paying client and they tend to cut corners on their representation and the attention they give the case. This almost always gets you in trouble and can turn a good deed into a malpractice suit.
- **Do not guarantee results.** You should never guarantee results you are not certain you can deliver. Things happen and you can never be certain what the outcome might be in a given case until the case is finalized.
- **Provide detailed time entries.** Have a system of documenting all work that is done by you or your staff on every case. Provide these detailed time entries in the form of a billing statement to your clients each month.
- **Be cautious about multi-client representation.** If you ever have a suit that involves the representation of multiple parties, obtain written consent from all of the parties and keep this in your file. Be cautious and pay close attention to how such representation can (1) affect applicable privileges, and (2) lead to possible conflicts among joint clients.

- **Never let your non-legal staff practice law.** Appropriately supervise your staff and ensure that they are not taking any actions that you are not aware of or overseeing.
- **Check conflicts thoroughly on any new employees or lawyers.** Check conflicts thoroughly on any new employees or lawyers from other law firms. Many conflicts that may exist cannot be waived and cannot be remedied with a “Chinese Wall.” Therefore, ensure that all of the conflicts are cleared before bringing on that new employee or lawyer.
- **Run a conflicts check on any potential new clients.** When a potential new client calls to schedule an appointment, have a system in place that identifies the potential client, the adverse parties, and the potential adverse parties or third parties in the current or potential suit. Run this conflicts check before obtaining any confidential information.
- **Conduct necessary discovery needed to investigate every client’s case.** You cannot properly advise your clients on their legal remedies or possible outcomes without knowing what their case entails. Conduct the discovery that is necessary for you to turn an educated guess into educated advice.
- **Limit your trust accounts to \$100,000.** It is never wise to risk your client’s money and your law license on the integrity of a bank.
- **If your client refuses to pay your bill, withdraw from representing the client and provide the appropriate notices to the client in writing.** Document all efforts you have made and all notices you have sent to the client in writing and keep these in the file.
- **Form a professional corporation or limited liability partnership.** In order to protect yourself and your assets from another lawyer’s negligence in your firm, it is advisable to form a professional corporation or a limited liability partnership.
- **Carry good malpractice insurance and be familiar with the policy.** Many malpractice claims may be resolved within your policy limits without exposing

you or your estate to the risks of malpractice. Familiarize yourself with your policy and its requirements. This will save you time and will prevent stress from the unknown.

- **Keep a copy of your client's file.** You should always keep a copy of a client's file for at least seven (7) years from the date your representation of them ended.

WHAT TO DO IF YOU ARE SUED FOR MALPRACTICE

- Call your malpractice insurance carrier
- Hire a lawyer to represent you
- Stop any form of communication with the client who has filed the suit against you
- Don't get rid of anything in that client's file

FREQUENTLY ASKED QUESTIONS REGARDING MALPRACTICE

- **Can I represent myself in a malpractice suit filed against me?**
Yes, but it is not advised. There is an old adage that one who is his own lawyer has a fool for a client.
- **Does my malpractice carrier provide me with a lawyer if a suit is filed against me?**
Typically, yes. Look closely at your policy to ensure it provides defense coverage. There is also nothing wrong with talking to your carrier about who it plans to retain and your options.
- **Should I have any communication with the client who filed the malpractice suit against me?**
This is generally not a good idea unless you are still representing the client. In that circumstance, you should communicate what is necessary in order to comply with your legal and ethical obligations while making arrangements to withdraw from representation or allowing another lawyer to substitute in your place. Further, once a suit is filed and you know the former client is represented by counsel, your communications must go through his or her lawyer.

- **Is there a statute of limitations on the filing of a malpractice suit?**

Yes. It is typically two (2) years, but there are some exceptions that can toll the accrual of a claim. A breach of fiduciary duty claim generally has a four (4) year limitations period.

- **Does my current malpractice carrier cover me for acts done years ago before my current policy?**

It depends on your coverage. If you have a “claims made” policy, you are typically covered for any claims filed during the policy period, irrespective of when the injury or malpractice occurred. Alternatively, a “tail coverage” rider to your policy may provide you with coverage for acts that occurred before the current policy period. Without this, you may be insured only for acts committed from the date of the policy forward. Failure to purchase tail coverage may be the equivalent of having no insurance when it comes to acts that were done before your current policy was put into place.

- **If I change law firms, leave private practice or retire, am I still covered by my previous law firm’s malpractice policy for work that I did while employed there?**

It depends. If your previous law firm is still in business and has a policy that covers both its current and previous employees, then chances are you are covered for legal work you did on behalf of that law firm. However, if your previous law firm is no longer in business, dropped its insurance coverage, or changed malpractice carriers or policies, then you may not be covered. In Texas, legal malpractice policies are not regulated by the Texas Department of Insurance, and policies can vary greatly from one insurance company to another. There is no standard policy form that law firms are required to carry that provides coverage for former employees. However, under certain circumstances you may be able to buy a “tail policy” from your current carrier to cover your prior legal work. For more information about these policies, contact Texas Lawyers’ Insurance Exchange (“TLIE”) at www.tlie.org or 1-800-252-9332. TLIE also offers a substantially discounted policy for lawyers in the first three (3) years of practice.

USEFUL RESOURCES

- **The Texas Disciplinary Rules of Professional Conduct**
Tex. Gov't Code Ann. Tit. 2. subtit. G. app. A (Vernon Supp. 2002)(Tex. State Bar R. art. 10 § 9)
- **The Texas Rules of Disciplinary Procedure**
Tex. Gov't Code Ann. Tit. 2. subtit. G. app. A-1 (Vernon Supp. 2002)(Tex. State Bar R. art. X, § 9)
- **The State Bar Act**
Tex. Gov't Code Ann § 81.001, *et seq.*
- **Ethics Hotline**
1-800-532-3947
- **Texas Lawyers Assistance Program (TLAP)**
1-800-343-8527
- **State Bar of Texas**
www.texasbar.com
- **Board of Disciplinary Appeals**
www.txboda.org
- **Opinions from the State Bar of Texas Professional Ethics Committee**
www.law.uh.edu/libraries/ethics
- **Texas Access to Justice Foundation**
www.teajf.org
- **Texas Center for Legal Ethics**
www.txethics.org
1-800-204-2222

- **Download a free copy of the Texas Disciplinary Rules of Professional Conduct**
www.legalethictexas.com/ethics-resources/rules/texas-disciplinary-rules-of-professional-conduct.aspx
- **Download a free copy of the ABA Model Rules of Professional Conduct**
www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html
- **Client Attorney Assistance Program (CAAP)**
http://www.texasbar.com/AM/Template.cfm?Section=Problems_with_an_Attorney&Template=/CM/HTMLDisplay.cfm&ContentID=23699
- **“A Lawyers Guide to Client Trust Accounts”**
<http://www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides/TrustAccounts/TrustAccountBooklet.pdf>
- **Texas Bar CLE and Law Practice Management**
<http://www.texasbarcle.com/CLE/LMHome.asp>

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