AVOIDING LEGAL MALPRACTICE LAW SUITS

An Expert’s Perspective

James King is a sole practitioner in San Diego, CA and has been practicing law for more than 30 years. His trial testimony as a legal expert has been praised by juries and judges for his unique ability to distill complex legal issues into understandable concepts.

A graduate of Stanford Law School (Order of the Coif, Law Review), Mr. King has consistently qualified as an expert whenever his testimony has been offered.

Jim's practice is focused on the following areas:

- Legal Ethics
- Attorney Fee Disputes
- Standards of Practice in Litigation and Trials
- Legal Malpractice and Professional Liability
- Attorney Professional Responsibility.

He can be reached at jking1737@gmail.com or (858) 753-1737.
TABLE OF CONTENTS

THE GOLDEN RULES: ........................................................................................................... 3

I. THE INCEPTION OF THE ATTORNEY-CLIENT RELATIONSHIP.............................. 4

II. TERMINATION ............................................................................................................. 6

III. THE EFFECTS OF ETHICAL VIOLATIONS IN MALPRACTICE CASES .............. 7

IV. TWO IMPORTANT AREAS........................................................................................ 7

V. DURING THE REPRESENTATION ............................................................................. 10

DISCLAIMER: The following materials and accompanying Access MCLE, LLC audio program are for instructional purposes only. Nothing herein constitutes, is intended to constitute, or should be relied on as, legal advice. The author expressly disclaims any responsibility for any direct or consequential damages related in any way to anything contained in the materials or program, which are provided on an “as-is” basis and should be independently verified by experienced counsel before being applied to actual matter. By proceeding further you expressly accept and agree to Author’s absolute and unqualified disclaimer of liability.
THE GOLDEN RULES:

1. Don’t Procrastinate

2. In all Dealings with the Client, Do What is Best for You AS A FIDUCIARY!


4. Realize: “No Good Deed Goes Unpunished” and You Can’t Be “Partially Pregnant”

5. Communicate as Much as Possible with the Client – Transmit “Bad News” in Writing

6. Consider All Issues and Keep a Paper Trail (Smith v. Lewis (1975); Aloy v. Mash (1985))

7. “The Devil Is In the Details” (Calendaring, Computer Back-Up, etc.)

8. Correct Your Mistakes – Never Try to Rationalize or Cover Them Up

9. If you or any attorney for whom you are responsible has a substance problem – solve it!

10. Never Make the Same Mistake Twice

Best Over-All Sources:

Mallen & Smith, Legal Malpractice ("M&S"); The Rutter Group, California Practice Guide on Professional Responsibility (in particular Chapters 3 & 6); Stern & Felix-Retzke, A Practical Guide to Preventing Legal Malpractice; Blumberg & Baughman, Preventing Legal Malpractice
I. THE INCEPTION OF THE ATTORNEY-CLIENT RELATIONSHIP

A. You need to make clear who is, and who is not, a client, and the scope of representation. Hence, you need written communications:

1. Declining representation (“Declination Letter” or “Non-engagement Letter”) where you’ve met with a potential client. (see M&S, Section 2:12).

B. Clarify who is, and who is not, the client.

1. Issues easily arise with start-up corporations, multiple people, etc. A classic example is a small business in which the attorney may think she is representing only the entity, but the individual founders, officers, directors also think she is representing them and they may confide in her.

2. Two or more clients (including a solely-owned corporation) = one potential conflict. Then follow the Rules on joint clients (e.g., CRPC 3-310)

C. Clarify and Limit Scope of Representation

1. Classic examples are litigation/transactional; tax advice in litigation

2. Be aware that if you limit the scope beyond the standard of practice, you run the risk of a finding that your agreement is “illusory”, an impermissible waiver of the client’s rights, and/or unconscionable

D. State All Important Matters in the Retention Agreement

1. Typically, these are scope of representation, who is paying the fees, no guarantees, etc.

2. You NEED to include the right to withdraw at will (Ramirez v. Sturdevant (1994)). This is critical for two reasons: a) if you are forced to remain as counsel, not only are you dragooned into involuntary servitude, but you are also wearing a target for a legal malpractice suit; it avoids any risk of having to disclose the reason(s) why you seek to withdraw, which may itself constitute legal malpractice in that it may require disclosure of client confidences, privileged matters, secrets, and the like. Kirsch v. Duryea (1978)(Cal. Bus & Prof. Code §6068(e); CRPC 3-100)

3. You also NEED to state the client’s responsibilities and risk (e.g., if there is a fee-shifting provision in a contract case, your client may be on the hook for the other side’s legal fees, which cannot be controlled)
4. Presigned substitution of counsel? Generally held unethical, but perhaps might be if handled exactly properly

5. After *Fletcher v. Davis* (2004), include language about right to independent counsel – you never know if a Court might later hold that RPC 3-300 applies.

E. Don’t Even Think About:

1. “Stretching” your expertise, or working for free, for a Friend. If your friend had a medical problem, would she expect a good doctor to diagnose and treat her for free? You ARE a professional – and held to that standard!

2. “Stretching” Your Expertise for a lucrative fee

3. “Ghostwriting” anything. (Split in authority over whether ethical; in any event preparing a legal document for a lay client to use is like giving car keys and whiskey to a teenager – all law is nuanced now beyond lay abilities).

4. Taking mortgages, pink slips for cars, etc. as security for payment

F. A client changing counsel is a “red flag” (except in dissolution actions), so consider:

1. There is a reason why the client is changing counsel. It is almost surely not promising for you. The two most usual ones are that the client does not want to pay the attorneys’ fees, and/or that the client is unhappy with the prior attorney’s performance.

   a. If the client is unhappy with that attorney’s fees, why will she want to pay yours? And if she does not, how can you competently represent her?

   b. If the client is unhappy with the attorney’s performance, either the displeasure is reasonable or not.

   c. If the client’s displeasure is reasonable, you are becoming the “rescue attorney”, which is a lengthy subject in and of itself. In short, be aware you will probably be a witness in a malpractice case against the earlier attorney(s); all of your acts and advice will be second-guessed; your conduct may lead to a comparative negligence defense by the earlier attorney; and you may be named yourself in a malpractice case against him. At a minimum, you will have many more duties than usual. You probably want your own counsel (even if just to look over your shoulder periodically) in that situation.

   d. If the client’s displeasure is unreasonable, why will she not be unreasonably displeased with you?
2. If the attorney has changed counsel more than once already, you probably want to stay out of that hornet’s nest. Forget about whatever fee is offered – the representation will probably not be worth the inevitable headaches (and lawsuits).

G. Realize That:

1. As a matter of law, a licensed attorney has the ethical duties of an attorney in anything you do (even if not the practice of law). See, e.g., American Airlines v. Sheppard Mullin (2002)

2. You may owe legal duties as an attorney not only to non-clients who are in “privity” with clients (i.e., beneficiaries of an estate), but also fiduciary duties of the highest level to non-clients with whom there is no attorney-client relationship at all (e.g., someone who deposits moneys into your Trust Account). (see M&S Section 7:2 et seq.)

II. TERMINATION

A. Keep a clear record of the end of your representation.

1. As stated above, the Statute of Limitations is tolled during your representation. Any ambiguity about the date it ended will be resolved against the attorney. To avoid any problems, send the client a letter terminating the relationship and keep that letter for 5 years. If the relationship is cordial, a letter sent by ordinary mail will usually suffice (there is a presumption that a letter which is mailed is delivered); however, in any tense situation the attorney should send the letter by certified mail, return receipt requested.

B. Return all “client papers” promptly. CRPC 3-700 (D).

1. Your fee agreement should have provided that you are entitled to copy all such papers at the client’s expense. (Whether you can collect on that is problematic, of course.) It should also provide that the client agrees that if the client does not want the documents, you have the right to destroy them in x years. (Make sure that there is not some ethical requirement that the attorney retains all records for a certain period of time – CRPC 4-100 and the standards under it appear to deal with trust funds. They impose a 5 year record-keeping requirement in that instance.

2. Retain copies of all returned papers if there is any reasonable chance that the matter may return to haunt you.

C. Do not sue the client for fees until the Statute of Limitations for malpractice has run.

1. This point is stated above, but cannot be over-emphasized.
2. There is authority that a suit for fees at a time which is prejudicial to the client (i.e., during pending litigation after you have been substituted out) breaches the attorney’s fiduciary duty of loyalty.

D. Be aware of the continuing duties of confidentiality, secrecy, etc.

1. There may also be lingering fiduciary duties.

III. THE EFFECTS OF ETHICAL VIOLATIONS IN MALPRACTICE CASES

A. Ethical violations do not constitute malpractice, but may be evidence of it.

1. Mirabito v. Liccardo (1992). They can also be incorporated into jury instructions; the rationale is that the Rules of Ethics are based on the broader concepts of fiduciary’ duty, the breach of which is the essence of any malpractice claim.

IV. TWO IMPORTANT AREAS

A. The Rescue Attorney

1. Good analysis in The Rutter Group; concept is discussed in 1970s decisions (E.g., Gibson, Dunn v. Superior Court (1979); cf. Cline v. Watkins (1977)); more recent articles in various legal publications (including L.A. Daily Journal). Note that the situation can be so complicated that the Rutter Group suggests the “rescue attorney” should consider associating separate counsel from her retention [6:408.7].

2. In general, the “rescue attorney” should keep complete documentation of all she does and why she does it, make certain there is a written record of complete communications with the client(s), make sure that she obtains the best result possible under the circumstances in which she obtained the case, then refer the whole matter to completely independent counsel to consider the clients’ rights against all other counsel and herself.

a. If the “Rescue Attorney” were to also bring the action against her predecessor counsel, there would be ethical issues that would almost certainly require the client’s written informed consent. Rutter Group [6:408.6].
3. If she did a competent job given the situation she was given, it is likely that the independent counsel will prefer her as a witness than as a defendant. However, she runs the risk that independent counsel will decide to sue all the lawyers and let them blame each other. She also runs the risk that the client will change counsel yet again, creating yet another “Rescue Attorney” and putting her in the same cross-hairs as her predecessor.

4. At a minimum, she can expect that if a malpractice suit is filed against her predecessor counsel, he will argue that she was professionally negligent as well, or that the clients were at fault at various points along the line (including when she represented them), which puts everything she did at issue anyway.

5. The presenter has been the “Rescue Attorney” three times, and an expert witness in a “Rescue Attorney” situation as well. This is an area which should not necessarily be avoided – as a matter of public policy attorneys are encouraged to try to rescue clients from previous poor lawyering – but is a matter where one needs to tread lightly, and if unable to do so should avoid.

6. Note four additional aspects:

   a. In addition or substitution of the Rutter Group’s suggestion to associate other counsel from the start (who would evidently also represent the client), the “Rescue Attorney” may well want to retain her own counsel. She would hold ordinarily hold a privilege with such counsel, and may be able to rely on an “advice of counsel” defense. (Note that some cases hold that an attorney may not retain her own attorney as a ruse to hide things from her client.)

   b. Although generally the “Rescue Attorney” may not be sued for indemnity by predecessor counsel if such counsel is ultimately sued (See Gibson Dunn case above), there are some exceptions. Rutter Group [6:409].

   c. This area is very heavily nuanced, so review the current authorities and the factual situation thoroughly at the time of retention.

   d. As a theoretical matter this same analysis applies to family law matters; as a practical matter it cannot because clients in dissolution actions routinely change counsel and it is not uncommon in that area (given the emotions and other factors involved) for a client to have substituted four or five attorneys in and out of a case.

B. If you believe, during representation, that you should have done something differently:

   1. Do NOT “double-down” on an earlier mistake by refusing to acknowledge it, rationalize it, etc. Do NOT fail to do something to try to correct the mistake for fear of exposing it.
a. This applies often in situations where an attorney suddenly comes up with a new idea in the middle (or towards the end) of a project or case. The attorney seems to face the dilemma that if he tries to advance that idea, the client (or opposing counsel, judge, etc.) will be critical that he did not do so earlier. In reality, upon reflection most such “great ideas” really aren’t that great after all – which is the reason he hadn’t thought of it earlier. But if the new idea is indeed a “game-changer”, the attorney has a duty to try to implement it. People have new insights into situations all the time, usually when they are aware of more facts or the situation has changed, and lawyers are no exception.

2. If you believe that you made a mistake:

a. You probably have a duty to the client to inform them promptly. This is generally true under the fiduciary duty of full disclosure, and there is at least one California Ethics Compendium opinion strongly on point (holding that an associate at a law firm has a duty herself to inform the client of a partner’s negligence if the partner or partnership does not). However, there is also authority to the contrary, under the general notion of a protection against self-incrimination and the right to simply withdraw silently from representation.

b. You may well also have a duty to your legal malpractice carrier to inform them promptly – most malpractice policies are “claims made” policies, which often provide that the knowledge of a potential claim triggers a duty on the attorney’s part to inform the carrier; failure to do so might negate any duty on the part of a carrier.

c. This is definitely a situation in which you need your own legal advice, and very quickly at that!
V. DURING THE REPRESENTATION

A. Stay Current on Fees – And Be Wary of Pro Bono Clients

1. If you allow the client to become so delinquent on fees that it is cheaper to sue you than pay your bills, expect the client to be economically rational.
   
a. Do not sue a client for legal fees until the statute of limitations on legal malpractice has run. In California, your Statute of Limitations to sue the client for fees (assuming you have a written fee agreement, which is required – Bus.& Prof. Code §§6146-48; if you do not, you probably do not want to open the can of worms that a suit for fees invariably generates under that circumstance) is 4 years. The client’s Statute for legal malpractice is one or two years. Also, that Statute is tolled while you are counsel.

2. Realize that a high proportion of successful malpractice cases arise in situations where the attorney is not getting paid (either because the action was intentionally pro bono out of the lawyer’s generosity, or has become so because the client ceased paying).
   
a. It is human nature to direct more attention to matters which reward one than matters which do not. (I.e., at 5 p.m., do you pick up a file for a paying client or a non-paying one? Or, if there is no paying client, do you go home instead of working into the evening for a non-paying client?)

b. This leads to the argument – which is often persuasive to a jury and/or a judge – that the attorney put this matter at the bottom of his inbox (or file cabinet) because it was not paying anything. Expect this argument to be made any time you have run up large fees which the client doesn’t want to pay (and hence comes up with some malpractice claim, regardless of the merits) or which you handled pro bono and the client now claims you bungled. Remember: “No Good Deed Goes Unpunished”.

c. If you seek to withdraw from a litigated matter, you need Court approval. If you seek such approval and are denied, realize you now have a target on your back because you can expect no future payment; the client is also probably furious and this problem now is exponentially aggravated. This is a key reason why you want to make sure the retention agreement gives you the express right to withdraw at will.

d. Potentially, a large receivable of unpaid fees may mean that you have unethically acquired an interest adverse to the client. (CRPC 3-300).

B. You cannot communicate too much with a client.
1. Your fiduciary duty of full disclosure, which is also an ethical duty of effective communication (CRPC 3-500), is usually fulfilled by sending written communications to the client whenever there is: a) bad news to convey; and b) any important client decision upon which you should be opining.

2. In the days before e-mails, attorneys would say that they didn’t have time to put everything in formal letters. With e-mails, that argument holds no water. The situation often arises in a legal malpractice case where the attorney testifies that he advised the client on a certain important matter, the client testifies that he did not, and the lawyer has no written communication on the subject. Expect an expert to testify that the standard of practice was to put such advice in writing – at least in an e-mail, if not a formal letter - and expect every e-mail you sent to the client to be used against you to support the argument that it is not credible to believe that you put trivial advice in writing but not important advice.

C. Handle everything promptly – never leave anything to the last minute.

1. Calendar (and double-calendar) everything.

2. Set a false deadline for yourself for everything with a deadline – at least a full day before it is due. Computer crashes, copier malfunctions, electrical blackouts, illnesses, “Acts of God”, etc. may always delay anything.

3. As for all Statutes of Limitations, beat them by filing all cases as soon as possible (unless there is a good reason for delay to which the client has in writing, such as a personal injury suit where the permanence of an injury may take time to establish).
   a. Also, make sure you are aware of all possible Statutes of Limitation – such as the short (6 month) period in which to file a claim against a governmental entity. It often turns out that a defendant eventually turns out to be owned by a public agency (in particular this occurs with hospitals).

D. Stay current on the relevant law – at least follow a consistent pattern.

1. One good pattern is to check the law at the start of each case, check any changes through computerized research mid-way, and then do so again at the finale. No matter how many times you have handled a particular matter, you need to stay abreast of recent developments.

2. Be aware of the line of cases which hold that even if an attorney happens to be right in his belief as to a legal doctrine, the attorney may still be liable for legal malpractice if the attorney did not research the law and it changes or there is some nuance that would have appeared in thorough legal research. See the line of cases

3. One possible reading of the above line of cases is that the attorney may actually have done significant legal research, but later had no proof of that. Hence, be sure to keep a “paper trail” of your research, and thought processes, on important points.

E. Attorneys are usually not liable for true “judgment calls”, even if they prove mistaken.

1. When making such a “judgment call”, make sure you have informed your client of it. Better yet, obtain your client’s written informed consent (see below).

2. Although you’re allowed a mistake on a true “judgment call”, do NOT make the same mistake again. Remember the adage (variously attributed, including Einstein) that the definition of insanity is doing the identical thing twice and expecting a different result. An expert might testify that once you learned that a certain decision in a given context yielded a bad result for your client, the second time you were in that same context it was no longer a valid judgment call to make the same decision again.

3. A good analysis of attorney liability for judgment calls may be found in Chapter 19 of *M&S*.

F. Missing an issue vs. a “judgment call”.

1. The line of dissolution/pension cases cited above, *Smith v. Lewis* (1975) - *Aley v. Mash* (1985), also stand generally for an important proposition: If a lawyer properly considers an issue which is a legitimate judgment call, the attorney is protected – but if the attorney never spots the issue, even if the attorney may have handled things the same way had she spotted it, she may be liable for malpractice.

2. We all remember the “issue spotting” questions in law school and on the Bar Exam.

G. Duty to detect, discover and advice regarding pitfalls

1. Often a client will insist upon a certain direction – particularly in settlement. It is nevertheless the duty of counsel to consider whether there are pitfalls in which the client may fall, and advise the client accordingly (in writing).

2. Even if the client tells you that he does not need nor want your assistance on a particular aspect of the matter upon which you are representing him, if it turns out poorly he’ll have a valid claim that ordinary counsel of ordinary prudence would have nevertheless spotted a particular issue and advised him accordingly.
H. If the client will not authorize (or pay for) work which needs to be done:

1. Often a client who is cost-conscious (i.e., 99% of all clients) will “suggest” that something which you know is necessary be delayed as long as possible, or simply will tell you not to do it.

2. In this instance, you have only three choices:
   a. Obtain the client’s consent (and payment) to do the work; or
   b. Withdraw as counsel; or
   c. Obtain the client’s written informed consent to proceed contrary to your advice.

3. Given that in hindsight the client may always contend that her consent was not truly “informed” because she did not have her own attorney, did not understand the law, etc., as a practical matter in these situations you should: “withdraw early and withdraw often”.