



CLE: “...And Here’s the Top Ten!”

“...And Here’s the Top Ten!”
Ethics and Malpractice Avoidance Guide
Lawyers Mutual of Kentucky CLE Series

Join Pete Gullett as he provides his top ten practical steps to avoid or prevent the likelihood of receiving a claim. This seminar will cover the most prevalent types of legal malpractice claims, including allegations of failure to know the law, failure to properly commence an action, failure to calendar properly, and more. Attendees will be able to identify higher risk activities and how to proactively avoid making costly mistakes. And, if you haven’t taken care of your old dog recently...this seminar is for you!

Presented by:



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**“...AND HERE’S THE TOP TEN!”
AN ETHICS AND MALPRACTICE AVOIDANCE GUIDE**

Lawyers Mutual of Kentucky
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INTRODUCTION

“Top Ten” lists seem to be more popular than ever, perhaps because they appeal to our need to receive reliable information in a format that we can digest quickly as we rush through our hectic lives.

Accordingly, with USA Today as our model and David Letterman as our muse, we hereby break with all grand traditions of subtle and sophisticated ethics analysis and offer a few simple lists that speak volumes to any lawyer who wishes to avoid malpractice claims and Bar complaints.

So ... from the home office in Louisville (*as Letterman might say*), we are proud to present:

TOP TEN WAYS TO AVOID MALPRACTICE AND MISCONDUCT

10. Be mindful of how your practice area(s) affects your risk of receiving a malpractice claim.

Certain areas of practice carry a higher risk of liability than others. Understanding how risky your practice areas are can assist you in evaluating and mitigating liability risk.

Areas of law most likely to generate a malpractice claim:

<u>Area of Law</u>	<u>LMICK¹ 2021</u>	<u>LMICK 2020</u>	<u>LMICK 2019</u>	<u>2019 ABA</u>
Personal injury (for plaintiff)	24%	33%	20%	16.30%
Real estate	27%	16%	14%	12.37%
Collection & bankruptcy	11%	15%	42%	8.21%
Workers’ comp	5%	6%	2%	1.82%
Estate, trust & probate	6%	9%	6%	11.98%
Family law	7%	5%	6%	12.81%
Criminal law	6%	2%	1%	5.95%
Corporate & business org.	2%	3%	0%	5.22%
Labor law	0%	1%	1%	2.33%
Personal injury (for defendant)	2%	1%	1%	3.01%

¹ Lawyers Mutual Insurance Company of Kentucky

9. Be mindful of how the stage of the case affects the risk that you will do or fail to do something that becomes the basis of a malpractice claim.

Much like practice areas, certain stages of the case pose more liability risk than others. Year after year, the preparation and filing of documents stage is significantly higher than other stages of the case. This serves as a good reminder to slow down and double check the filings and procedural requirements.

When an error is likely to occur during various stages of case development.

<u>Stage of Case</u>	<u>'19 ABA Study</u>	<u>'15 ABA Study</u>	<u>'11 ABA Study</u>	<u>'07 ABA Study</u>
Preparation, filing of documents	35.24%	32.66%	24.86%	25.51%
Pre-trial, pre-hearing advice	6.95%	6.40%	8.55%	11.29%
Commencement of action	16.16%	16.76%	17.31%	17.32%
Advice	13.59%	14.59%	20.19%	12.68%
Settlement/Negotiation	8.78%	5.77%	6.79%	7.67%
Trial or Hearing	5.52%	7.34%	5.33%	5.56%
Title Opinion	1.31%	1.93%	4.46%	5.21%
Investigation/Other than Litigation	5.36%	4.89%	3.25%	6.04%
Appeal Activities	1.64%	1.66%	1.60%	2.36%

8. Be mindful of how the nature of your task affects the risk that you will do or fail to do something that will result in a malpractice claim.

Putting the risk associated with the stage of the case that we see in #9 and the stats on the nature of the task, below, reminds us the importance of filing a claim or complaint the correct way the first time.

There is significant risk in getting the filing of a complaint correct the first time. Even when a matter feels routine, have a process in place to double check the filing to ensure no errors are made.

Activities at issue in malpractice claims presented to LMICK during 2019, 2020 and 2021:

<u>Activity</u>	<u>2019 %Total</u>	<u>2020 %Total</u>	<u>2021 % Total</u>
Commencement of action or proceeding	45.78%	23.86%	26.19%
Pre-trial or pre-hearing	15.06%	18.18%	13.10%
Consultation or advice	1.81%	2.27%	2.38%
Settlement and negotiation	2.41%	5.68%	5.95%
Title opinion	6.63%	4.55%	15.48%
Prepare, transmit or file document (other than pleading)	14.46%	22.73%	10.71%
Trial or hearing	0.00%	3.41%	7.14%
Written opinion (other than title)	0.00%	0.00%	0.00%
Tax reporting or payment	0.60%	3.41%	1.19%
Post trial or hearing	1.81%	3.41%	4.76%

7. Be mindful of the types of error you are most likely to commit.

Failure to know or properly apply the law is consistently a top error alleged in malpractice claims.² Many times, this alleged error is related to a lawyer stretching their practice into a new practice area that is beyond their area of expertise. Some areas of law require highly specialized knowledge to practice competently and taking a case here or there is not going to be sufficient.

Additionally, when accepting a case, do the research first. Do not wait to complete research “as the case progresses.” This allows you to fully evaluate the case for the client and plan for important steps in the case process. It can also help flag whether you might be in over your head before an issue arises and allow you to bring in co-counsel or refer the case out, when appropriate.

A. LMICK Claims Experience in FY 2019, FY 2020 and FY 2021

Errors alleged in malpractice claims presented to LMICK during 2019, 2020 and 2021:

<u>Alleged error</u>	<u>2019 % Total</u>	<u>2020 % Total</u>	<u>2021 % Total</u>
Failure to know or properly apply the law	58.43%	25.00%	29.76%
Failure to obtain the client’s consent	0.00%	0.00%	0.00%
Error in public record search	5.42%	4.55%	14.29%
Failure to know or ascertain deadline correctly	2.41%	6.82%	2.38%
Procrastination in performance of services/lack of follow-up	2.41%	2.27%	2.38%
Failure to calendar properly	3.61%	10.23%	5.95%
Inadequate discovery of facts or inadequate investigation	0.60%	6.82%	8.33%
Failure to react to calendar	0.60%	4.55%	1.19%
Planning error in choice of procedure	12.05%	11.36%	16.67%
Conflict of interest	1.81%	4.55%	1.19%
Fraud	1.81%	6.82%	7.14%
Failure to file a document, where no deadline involved	1.20%	0.00%	1.19%
Failure to understand or anticipate tax	1.20%	1.14%	0.00%
Clerical error	2.41%	3.41%	0.00%
Failure to follow client’s instructions	2.41%	6.82%	3.57%
Improper withdrawal from representation	1.81%	0.00%	2.38%
Libel or slander	0.60%	1.14%	1.19%
Lost file, document or evidence	0.00%	0.00%	0.00%
Malicious prosecution or abuse of process	0.60%	2.27%	2.38%

² For additional tips, see the LMICK Article [Failure to Know or Properly Apply the Law Still Top Error](#).

B. Other studies, showing types of alleged error by category and sub-category:

<u>Administrative Error:</u>	<u>LMICK 2019</u>	<u>LMICK 2020</u>	<u>LMICK 2021</u>	<u>ABA 2019</u>
Procrastination	2.41%	2.27%	2.38%	3.54%
Failure to calendar properly	3.61%	10.23%	5.95%	7.40%
Failure to react to calendar	0.60%	4.55%	1.19%	2.54%
Failure to file document – no deadline	1.20%	0.00%	1.19%	1.50%
Clerical error	2.41%	3.41%	0.00%	4.08%
Lost file – document evidence	<u>0.00%</u>	<u>0.00%</u>	<u>0.00%</u>	<u>0.55%</u>
Total	10.23%	20.46%	12.93%	19.59%

<u>Substantive Error:</u>	<u>LMICK 2019</u>	<u>LMICK 2020</u>	<u>LMICK 2021</u>	<u>ABA 2019</u>
Failure to know law	58.43%	25.00%	29.76%	15.90%
Planning error – procedure choice	12.05%	11.36%	16.67%	7.35%
Inadequate discovery/investigation	0.60%	6.82%	8.33%	8.22%
Failure to know or ascertain deadline	2.41%	6.82%	2.38%	6.57%
Conflict of interest	1.81%	4.55%	1.19%	4.90%
Failure to understand or anticipate tax	1.20%	1.14%	0.00%	0.93%
Public record error search	5.42%	4.55%	14.29%	1.90%
Drafting error	0.00%	0.00%	0.00%	5.26%
Error in math calculation	<u>0.60%</u>	<u>2.27%</u>	<u>0.00%</u>	<u>0.90%</u>
Total	82.52%	62.51%	72.62%	51.93%

Client Relations

<u>Error:</u>	<u>LMICK 2019</u>	<u>LMICK 2020</u>	<u>LMICK 2021</u>	<u>ABA 2019</u>
Failure to obtain client consent	0.00%	0.00%	0.00%	5.61%
Failure to follow client instruction	2.41%	6.82%	3.57%	9.09%
Improper withdrawal of representation	<u>1.81%</u>	<u>0.00%</u>	<u>2.38%</u>	<u>2.00%</u>
Total	4.22%	6.82%	5.95%	16.70%

Intentional Wrongs

<u>Act:</u>	<u>LMICK 2019</u>	<u>LMICK 2020</u>	<u>LMICK 2021</u>	<u>ABA 2019</u>
Malicious prosecution	0.60%	2.27%	2.38%	4.81%
Fraud	1.81%	6.82%	7.14%	4.65%
Violations of Civil Acts	0.00%	0.00%	0.00%	1.15%
Libel or slander	<u>0.60%</u>	<u>1.14%</u>	<u>1.19%</u>	<u>1.17%</u>
Total	3.01%	10.23%	10.71%	11.78%

C. Experience at LMICK and the ABA 2019 study both indicate that missing deadlines is one of the most serious dangers:

<u>Deadline Error</u>	<u>LMICK 2019</u>	<u>LMICK 2020</u>	<u>LMICK 2021</u>	<u>ABA 2019</u>
Failure to know deadline	2.41%	6.82%	2.38%	6.57%
Failure to calendar	3.61%	10.23%	5.95%	7.40%
Failure to react to calendar	<u>0.60%</u>	<u>4.55%</u>	<u>1.19%</u>	<u>2.54%</u>
Total	6.62%	21.60%	9.52%	16.51%

6. Be mindful of the kind of grievance your client is most likely to make in a Bar complaint.

The kind of grievances in Bar complaints provides insight into what makes your client(s) angry. The Kentucky Bar Association Office of Bar Counsel compiles data on both the basis for complaints as well as the violations that lead to private reprimands and dispositions of discipline. The charts below calculate the percentage of total charges (but keep in mind, most complaints allege multiple rule violations).

Inadequate communication is at the top of each list. Duties on termination of representation as well as lack of diligence also top each list. Putting processes in place to ensure you regularly communicate with clients, clearly communicate the termination of representation (in writing!), and being diligent throughout the representation will serve you well in mitigating your risk of a bar complaint.

<u>Type of misconduct alleged</u>	<u>Rule potentially violated</u>	<u>Percentage of total</u>
Inadequate communication	1.4	23%
Lack of diligence	1.3	18%
Duties on termination of representation	1.16	17%
Dishonest conduct (Fraud or misrepresentation)	8.4 (c)	8%
Misappropriation of client funds	1.15	7%
Conflict of interest	1.7 – 1.9	5%
Fairness to opposing party & counsel	3.4	4%
Criminal conduct	8.4 (b)	4%
Excessive or improper attorney’s fee	1.5	4%
Candor toward the tribunal	3.3	3%
Unauthorized practice of law	5.5	3%
Lack of competence	1.1	1%

<u>Violations in Private Reprimands</u>	<u>Rule potentially violated</u>	<u>Percentage of total</u>
Inadequate communication	1.4	29%
Duties on termination of representation	1.16	17%
Excessive or improper attorney’s fee	1.5	14%
Lack of diligence	1.3	13%

<u>Violations on Disposition</u>	<u>Rule potentially violated</u>	<u>Percentage of total</u>
Inadequate communication	1.4	21%
Duties on termination of representation	1.16	15%
Lack of diligence	1.3	15%
Candor in the discipline process	8.1	10%
Excessive or improper attorney’s fee	1.5	10%

5. Be knowledgeable in matters of legal ethics, law office management and protection against risk.

In addition to meeting your annual ethics CLE requirements, lawyers should be intentional in learning and understanding trends in legal ethics, issues that arise in practice management, and tips for mitigation of risks related to their cases. Developing your legal ethics knowledge will provide you with a better understanding of where your liabilities are and how you can best mitigate your risks. To get you started, we recommend the following reading materials to have access to and refer to regularly.

Recommended resources:

Kentucky Rules of Professional Conduct (Supreme Court Rule 3.130). [The unannotated, free version is available online](#). We recommend accessing the annotated version with comments and related cases through your favorite research database or [via print copy from Thomson West](#).

[American Bar Association Model Rules, unannotated version is available for free](#). For a more complete review of the rules, including related cases and legislative histories, we recommend the [Annotated Model Rules of Professional Conduct](#), American Bar Association, (Ninth Edition, 2019).

Todd B. Eberle, Richard H. Underwood, Timothy S. Chase, Kurt X. Metzmeier, Tracy J. Taylor, [Kentucky Legal Ethics Opinions and Professional Responsibility Deskbook](#), (University of Kentucky College of Law Office of Continuing Legal Education, 4th Edition 2021). [Available for free online](#).

[Restatement of the Law \(3d\) of the Law Governing Lawyers](#) (Thomson West 2020-2022)

[Profile of Legal Malpractice Claims](#), ABA Standing Committee on Lawyers Professional Liability (20016-2019).

Long & Levit, [The Law Office Guide to Purchasing Legal Malpractice Insurance](#) (Thomson West 2022 Edition).

Mallen, [Legal Malpractice](#) (Thomson West 2022 Edition).

Don't forget as a LMICK insured you also have access to the monthly LMICK Minute newsletter addressing current issues and trends in legal malpractice claims.

4. Be proactive in **preventing malpractice from occurring**.³

- A. **Calendar every case, not just those in litigation.** Calendaring reminders to review a file regularly (at least monthly in most cases) will help prevent missing important deadlines. Use multiple calendaring systems, if needed.
- B. **Use engagement, non-engagement, and termination letters.** Confirm in writing your decision to accept a case or your decision to withdraw or decline representation. This provides documentation that you have communicated your decision to the client or potential client. Failure to routinely

³ Pulled from Lawyers Mutual Insurance of California's Checklist and the [American Bar Association's Top Ten Malpractice Traps](#)

utilize these letters in your practice can have detrimental results, including vulnerability to malpractice claims for not protecting the interests of a client you did not think you represented.

- C. ***Do not sue clients for fees.*** A significant percentage of malpractice claims stem from lawyers suing for fees and the client countersuing for malpractice. At the time of engagement, discuss the billing practices and expectations and include provisions in the written engagement letter detailing the firm's policy for non-payment, including withdrawing from a matter. Additional proactive billing practices, including monthly invoices with detailed billing entries, can help reduce the number of late payments lawyers deal with. Also, make sure to copy clients on all significant correspondence; clients that see you working are more likely to pay. For those clients that still don't want to pay, consider reaching out and speaking to them personally before turning to mediation or arbitration to resolve the dispute.
- D. ***Take only those matters in which you have experience (or associate with someone who does have experience or knowledge about a specific case).*** Lack of knowledge of the law remains a top alleged error in malpractice claims. Lawyers have a responsibility to know the law and thoroughly research the issues at the outset of the case. If expanding into a new practice area, work with another lawyer that knows the law and can assist you in navigating your cases in the new practice area.
- E. ***Maintain good client relations.*** Communication with your client is key to preventing a client from becoming disgruntled. Remember, communication is a two-way street. Often, when a client feels heard, they are more open to hearing the lawyer's advice (and less likely to become disgruntled).
- F. ***Do not have a personal or a financial involvement with your clients.*** Not only can financial involvement with clients raise potential conflict of interest issues, it also presents a can of worms if business relations start to sour. (*See E. Maintain Good Client Relations.*)
- G. ***Research potential conflicts of interest before you take the case.*** At the end of an initial meeting, explain that you have to complete a conflicts check and, if clear, you will then send the engagement letter for review and signature. If there is a conflict, send a non-engagement letter.
- H. ***Investigate your case carefully before bringing a lawsuit or filing a claim.*** In addition to researching the legal issues, make sure you are reviewing and investigating the facts of the case. Do not evaluate the case on just the client's word. Instead, exercise diligence in gathering and reviewing relevant documents and identifying potential witnesses. Ensure you have enough information to fully evaluate the case for the client and determine an appropriate strategy before filing a claim.
- I. ***Document everything leaving a paper trail understandable by third parties.*** Having a paper trail that only you understand will not assist you if you are sued for malpractice. Ensure your documentation is easily understood, including letters to the client.
- J. ***Know when to reject potential clients or cases.*** Learning to say no is key. If you do not like a potential client in the first meeting, do not agree to take their case. Even if you like the client, if the claim is weak or you know there are problems, trust your gut and decline representation.

- K. ***Obtain client consent before proceeding in a vital area of the case.*** Best practice is to provide a written update on the status of the case with your recommendation and then receive consent to proceed in writing. If a verbal conversation occurs about the strategy and next step, you should follow-up with written confirmation.
- L. ***Know what to do upon receipt of a malpractice claim.*** Call your legal professional liability carrier immediately upon receipt. If uninsured, retain legal counsel immediately (do not try to handle the case, yourself).

3. Be responsive when you receive a Bar complaint.

- A. ***Do not fail to make a timely response to any Bar complaint or investigation.*** Call your legal professional liability carrier as soon as you receive a bar complaint so you can have the support you need to file a timely response. Keep in mind, the new rules allow Bar Counsel to move for indefinite suspension of your law license if you fail to timely respond to a complaint. Then, if the attorney does not seek reinstatement after five (5) years, Bar Counsel can move for permanent disbarment.
- B. ***Do not make matters worse by attempting to cover up your mistake.*** The discipline for the mistake is rarely as severe as the discipline for the cover-up. This is why it is so important to act quickly to get a team behind you for support immediately, either through your insurance carrier or, if uninsured, by retaining counsel.

2. Be healthy and sober.

Studies throughout the nation have repeatedly demonstrated that alcohol, drugs and mental illness (including depression) are substantial contributing factors in many, and perhaps most, cases of professional misconduct that result in suspension or disbarment. Lawyer well-being is and always will be a risk management issue.

The Kentucky Bar Association provides resources to support lawyer wellness through two main programs:

- [KYLAP \(Kentucky Lawyer Assistance Program\)](#) is a confidential program of the Kentucky Bar Association that offers free help to judges, lawyers, and law students who are struggling with mental health issues, such as depression, anxiety, substance use disorders, stress, compulsive gambling, or any other condition that may adversely impact the individual's personal or professional life. Pursuant to Supreme Court Rule 3.990, all communication with KYLAP is confidential. *Contact KYLAP at (502) 226-9373 to get help for any Kentucky lawyer in need.*
- [LAW \(Lawyers Advocating Wellness\)](#) provides a variety of CLE programming and other resources to support lawyer wellness.

Lawyers Mutual of Kentucky along with the Kentucky Bar Association and several other legal organizations formed the Mental Health Collaboration Group, focused on responding to lawyer wellness issues in Kentucky. LMICK supports this group's mission by sharing and creating wellness resources on our [website](#) and [our social media](#).

1. Be honest.

No matter what else happens in your professional career, no matter what else you may do or fail to do, pledge to yourself that you will be honest in dealing with whatever comes along. *See SCR 3.130 (8.4)*. It is, without question, the single most effective thing you can do to limit your exposure to a malpractice claim or a disciplinary suspension. Even in an age of top ten lists, some things never change.

PETE'S TOP TEN

1. Don't go in business with a client.
2. Keep your client on the same page with you and be able to prove it.
3. Don't think the standard of care moves with your profit margin.
4. Avoid people and causes you dislike.
5. Don't throw good money after bad in the courthouse.
6. Be careful.
7. File your case before the deadline.
8. Don't assume your clients are your friends.
9. Behave like a human being.
10. Take good care of your old dog.

TOP TEN – Katje Kunke, *President, Wisconsin Lawyers Mutual Insurance Company*

1. Stop lying to your calendar about who is in charge of your life.
2. "No" is a complete sentence.
Corollary: Somebody married my ex-husband.
3. If you don't like your client, you better love your carrier.
4. Conflicts of interest piss everyone off.
5. Your client already knows how this is going to turn out.
6. Never give bad news to a hungry client.
7. You have to let clients make dumb choices.
8. What your client heard matters more than what you said.
Corollary: Nobody remembers what anyone said.
9. They may call it "Practice," but they're kidding.
10. When they smile and nod, your client is not understanding or agreeing with you.