New Lawyer Program

KENTUCKY BAR ASSOCIATION

Lawyers Mutual of Kentucky: Preparing for Legal Malpractice Claims

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LAWYERS MUTUAL OF KENTUCKY: PREPARING FOR LEGAL MALPRACTICE CLAIMS

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I. ATTORNEYS CONTINUE TO BE SUED FOR LEGAL MALPRACTICE WITH REGULARITY

A. The American Bar Association reports that four out of five lawyers will be sued for legal malpractice at some point of their careers.[2]

B. Sixty-two percent of malpractice claims are filed against law firms with one to five attorneys.[3]

C. Kentucky attorneys on average face two to three legal malpractice lawsuits during their legal careers.

1. 2024 was 1.62 per 100 lawyers insured.

2. 2023 was 2.32 per 100 lawyers insured.

3. 2022 was 2.21 per 100 lawyers insured.

4. 2021 was 1.94 per 100 lawyers insured.

5. 2020 was 1.96 per 100 lawyers insured.

D. Claims frequency for Kentucky attorneys by practice area in 2024 include:

Real Estate	27%
Estate, Trust, and Probate	20%
Personal Injury – Plaintiff	20%
Family Law	11%
Other	9%
Collections & Bankruptcy	3%
Workers' Compensation	3%
Corporate/Business Organization	3%
Consumer Claims	1%
Criminal	1%
Local Government	1%
Personal Injury – Defendant	1%

[1] Updated January 2026.

[2] "Ways to Avoid Legal Malpractice," *Around the ABA*, December 2016.

[3] "Profile of Legal Malpractice Claims," ABA Study, 2016-2019.

E. Since 1990, claims frequency for personal injury-plaintiff and real estate are two of the highest practice areas where Kentucky attorneys experience claims.

F. The stages of a case most likely to generate a malpractice claim are:

1. The preparation and filing of documents.
2. The pre-trial and pre-hearing advice.
3. Commencement of an action.
4. Advice.
5. Settlement/negotiation.
6. Trial or hearing.
7. Title opinion.
8. Investigation/other than litigation.
9. Appeal activities.

G. Types of errors most likely to generate a malpractice claim are:

1. Failure to know or properly apply the law.
2. Failure to obtain a client's consent.
3. Error in public record search.
4. Failure to know or ascertain deadline correctly.
5. Procrastination in performing services.
6. Failure to calendar properly.
7. Inadequate discovery of facts or inadequate investigation.
8. Failure to react to calendar.

H. Typical errors can be discussed as:

1. Administrative errors.
2. Substantive errors.
3. Client relations.
4. Intentional wrongs.

II. DOES A MALPRACTICE CLAIM EQUATE TO AN ETHICS VIOLATION OR VICE VERSA?

"Violation of a (professional conduct) rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."[4]

A. Kentucky is one of the states in the United States which does not equate a legal malpractice claim with an ethical violation.

B. While a legal malpractice lawsuit does not automatically give rise to an ethical violation, there may be malpractice claims that do result in a violation of the Kentucky Rules of Professional Conduct found in Supreme Court Rule 3.130.

1. Competence (SCR 3.130(1.1)).

2. Diligence (SCR 3.130(1.3)).

3. Fees (SCR 3.130(1.5)).

4. Conflicts of interest (SCR 3.130(1.7); (1.8); (1.9)).

5. Safekeeping property (SCR 3.130(1.15)).

6. Declining or terminating representation (SCR 3.130(1.16)).

7. Candor toward the tribunal (SCR 3.130(3.3)).

III. LEGAL MALPRACTICE LAW IN KENTUCKY

A. What constitutes a legal malpractice claim? Issues could be:

1. Was there an attorney-client relationship?

2. Did the attorney or law firm make an error?

3. Was the client damaged as a result of the error?

B. "Third party" claims also arise under malpractice law when "professional duties" are relied upon:

1. Borrower as "client" when title examination performed for lending institution. *Siegle v. Jasper*, 867 S.W.2d 476 (Ky. App. 1993).

2. Beneficiary as a "client" when prepared for your immediate client. *Hill v. Willmott*, 561 S.W.2d 331 (Ky. App. 1978).

[4] SCR 3.130 XXI.

3. Consultees on “non-legal” matters may see you in your attorney capacity. *Everett v. Downing*, 182 S.W.2d 232 (Ky. 1944).

4. “Non-client” when you have not communicated your representation, or not properly disengaged, or made a '“negligent” referral, or had responsibility for a case referred to another attorney. *Lovell v. Winchester*, 941 S.W.2d 466 (Ky. 1997).

C. Statute of limitations on non-litigation claims are discussed in *Wolfe v. Kimmel,* 681 S.W.3d 7 (Ky. 2023).

D. Claims by clients on lawyer’s use of artificial intelligence (“AI”) without verifying accuracy of AI information are on the rise, as well as court sanctions against attorneys who file pleadings, briefs, motions, etc., in court using AI-generated material that is false, inaccurate, and/or a “hallucination.”

IV. AVOIDING LEGAL MALPRACTICE CLAIMS

A. Avoid claims by avoiding certain areas of the law: Personal injury-plaintiff lawyers, real estate, etc.

B. Areas of law with rising number of claims: Trust and estates and family law.

C. Tailor your law practice to avoid legal malpractice claims.

1. Calendar deadlines by computer system with backup plans and people.

2. Litigation docket system.

3. Respond to all pleadings when received.

4. Educate your support staff.

5. Learn eFiling procedures.

6. Keep good client relationships.

D. Avoid representation of clients when:

1. “Gut test”: You don't like the client or don't “believe” in the cause.

2. Client “fired” by another lawyer.

3. Case rejected by other attorneys.

4. Case not financially remunerative to the client.

5. Client contends “It's the principal.”

E. Keep good client relations.

1. Don't oversell the merits or value of the case.

2. Don't predict "results" of the case.

3. Be candid, honest, and truthful about the case with the client.

4. Explain the dangers of social media.

5. Share all decisions in the case with the client and discuss expenses of the case.

6. Respect and educate your client throughout the representation.

7. Always return calls, emails, texts, etc. within a reasonable time.

V. "TOP TEN WAYS" TO MAKE A GOOD CASE FOR YOURSELF[5]

A. Don't go into business with a client.

B. Keep your client on the same page with you and be able to prove it.

C. Don't think the standard of care moves with your profit margin.

D. Avoid people and causes you dislike.

E. Don't throw good money after bad in the courthouse.

F. Be careful.

G. File your case before the deadline – don't wait until the last minute in case there's a mistake!

H. Don't assume your clients are your friends.

I. Behave like a human being.

J. Take good care of your "old dog."

VI. PROTECT YOURSELF BY PURCHASING LEGAL MALPRACTICE INSURANCE

A. There are no legal or ethical requirements to purchase malpractice insurance – however, some attorneys consider it part of their responsibility to clients.

[5] Lawyers Mutual of Kentucky's "Top Ten."

B. Purchasing insurance is a practical consideration for you, your law partners, and your family.

C. Effective October 18, 2017, SCR 3.023:

> On or before September 1 of each year, every active member of the (KBA) shall certify to the Executive Director ... (i)f engaged in the private practice of law, whether the member is currently covered by a policy of professional liability insurance with the minimum limits of $100,000 per claim and $300,000 aggregate for all claims during the policy term (unless exempt) ... (AND) Each member who has previously reported being covered ... shall notify the Executive Director in writing ... if the insurance policy ... lapses, terminates or is no longer in effect for any reason.... The information disclosed pursuant to this Rule will be made available to the public...

VII. WHAT IS MALPRACTICE INSURANCE AND HOW DOES IT WORK?

A. Malpractice policies can be divided into four parts:

1. The declarations page.

2. The insuring agreement.

3. The conditions.

4. The exclusions.

B. The declarations page identifies the named insured, the policy limits, the deductible, the amount of coverage, the policy term, and any special forms such as endorsements.

1. The declarations page often incorporates the provisions of the application for the policy in order to make it part of the policy. This is done to protect the insurance company in the event the information provided to the company for the policy becomes an issue.

2. The application asks numerous questions about the claims background; nature of the law firm's practice areas; attorneys' legal practice; knowledge about existing and potential claims.

3. The amount of coverage selected by an attorney is usually subject to two policy limits: (1) a per claim of occurrence limit; and (2) an annual aggregate limit for all claims made during the policy period.

   a. The “per claim” limit, often expressed as the occurrence limit, means that the company will pay no more than that sum as the total amount

of all claims arising out of the same act or omission (or related acts or omissions) despite the number of claimants.

b. The "aggregate" limit usually is defined as the total limit of a company's liability for all claims made within the term of the policy plus any additional time provided for in an extended reporting endorsement.

4. The claims or aggregate limit are often expressly stated to be independent of the number of named insureds.

C. Virtually all policies contain deductibles. A "deductible" is the sum of money paid by an attorney as the first dollars incurred for a claim.

1. Deductibles apply to monetary judgment, award, or settlement.

2. Deductibles may also apply to defense costs or claim expenses.

3. Review the policy to see if the insurance company pays all sums in excess of the deductible or if the policy reduces the amount of the stated policy limit by the amount of the deductible.

4. An insurance company may require a higher deductible if the attorney practices a high-risk specialty: federal or state securities work; patent law; personal injury-plaintiff; trademark law; entertainment law; real estate syndication law; money management or financial services.

D. Who is the "insured"?

1. The term "insured" includes the individuals and entities named on the declarations page.

2. Others afforded coverage because of their relationship to the named insureds are called "additional insureds" or simply "insureds."

3. Coverage for a partnership typically includes all of the partners and their employees.

4. "Of counsel" attorneys must be specifically and separately identified if not partners.

5. Coverage for professional corporations usually includes officers, directors and employees, and the shareholder-employees (attorneys).

6. Coverage for an "insured" usually includes vicarious liability that is the liability for another's acts or omissions for which the insured is legally liable. Thus, if an employee is negligent, the policyholder will be entitled to a defense and indemnity for derivative liability.

7. Coverage for former employees, associates, or partners is typically included.

8. Coverage for new employees may be automatic or may be conditioned upon the requirement that written notice be provided to the insurance company within a specific time period.

9. Coverage for retired attorneys may be provided but such coverage will only extend to professional services rendered prior to the date of retirement from the insured firm.

E. What are the basic provisions of a policy?

1. A typical policy covers an attorney's "acts, errors or omissions." The act or omission must result in a legal liability that causes a claim for damages.

2. Coverage is typically limited to liabilities "arising out of the performance of professional services for others in the insured's capacity as a lawyer." Some policies may also include coverage for professional services rendered as a notary public or as a title insurance agent.

3. Difficulty can arise in determining whether the insured acted as a "lawyer" and whether the services rendered were "professional."

4. In determining whether certain conduct falls within the policy's coverage, courts have been liberal in finding professional services.

   a. Question focuses on whether the basic retention was for legal services or for skills that do not ordinarily constitute the practice of law. Thus, if the purpose of the retention is for legal services, then the rendition of non-legal services that are incidental to that task is covered by the policy.

   b. The services performed are legal as long as the purpose of retaining the lawyer was to obtain the benefit of the attorney's knowledge, skill, and experience in the law.

5. Lawyers who are retained by clients for non-legal functions are not entitled to coverage.

6. Often the policy's insuring agreement requires that the professional services, the subject of the claim, were performed for "others."

   a. Note that this requirement may preclude coverage where the attorney occupies dual capacities as a fiduciary, such as both executor and attorney for an estate.

   b. This limitation may be modified by a specific clause providing "fiduciary coverage." Ordinarily, the coverage applies only if the

services in dispute are those ordinarily performed by a lawyer, such as services provided as administrator, conservator, executor, guardian, or trustee.

7. Was there an “insurable event”?

    a. Liability insurance is to indemnify the insured against specific liabilities. Predicate of coverage is the occurrence of an insurable event during the policy period.

    b. The “occurrence policy” was the initial form of coverage offered for lawyers. With these policies, the insurable event, which triggers coverage, is the “occurrence” of an act, error, or omission during the policy period. This form evolved from the traditional coverage provided by a general liability policy, such as a homeowner's policy or an auto policy.

8. The coverage is for an act, error, or omission that occurs during the policy period no matter when the claim is made.

9. “Occurrence” form offers coverage then beyond the date of the policy's expiration so long as the act or omission occurs during the policy period.

    a. The claims-made form evolved in the early 1970s because of the problems with the occurrence form. A “claim” is the insurable event rather than an “act or omission.”

    b. The claims-made and reported form requires that the claim first be made against the insured and reported to the insurer within the policy term. With this coverage form the attorney must report a claim or potential claim to the insurance company within the policy term.

10. A predicate to claims-made and reported form coverage is that the insured neither knew of a claim, nor could have reasonably foreseen that a circumstance, act, or omission might arise as the basis of a claim or suit.

11. Primary disadvantage of the claims-made coverage form is that it doesn't provide coverage after the policy's expiration date. An attorney must then renew or obtain new coverage each year in order to avoid a gap in coverage.

12. What is “tail” coverage?

    a. Because the claims-made form does not provide coverage after the policy expiration date, insurance companies give an attorney the option of purchasing “tail” coverage. Most claims-made forms provide that if the company cancels or refuses to renew the policy, then the insured has the right to purchase “tail” coverage.

b. A “tail” policy covers only acts or omissions that occurred before the claims-made policy expired. The policy extends the time in which an attorney can report claims.

c. The endorsement relates only to the reporting period and not the coverage period. Because an extended reporting endorsement extends only the time for reporting claims, not the policy period, it does not extend the time for reporting circumstances that might give rise to a claim under a “discovery clause.”

d. Generally, insurance companies allow you to select among “tails” of various lengths, such as six months, one year, or five years. “Tails” of an unlimited duration may be available.

13. What is a “'discovery clause” in an insurance policy?

a. Coverage usually requires that you give written notice of the occurrence before the policy's expiration date.

b. Reporting a claim or potential claim pursuant to the “discovery clause” locks in coverage under the current policy for that claim or potential claim. Any claim that may arise subsequently is treated as if it had been made during the policy period and will be covered no matter when it is made.

c. Because failure to report known circumstances can result in a loss of coverage, even if reported in a subsequent policy period of the same insurer, an attorney should report every act or omission that the attorney reasonably believes could someday result in a claim.

14. All attorneys are required to cooperate with the insurance company in the defense of the suit and in any affirmative action against any person, other than an employee, for indemnity or contribution. This “cooperation” includes attending hearings, depositions, and trials; assisting in reaching a settlement; and securing and giving evidence.

15. Most policies contain language that “upon payment under this policy, the company shall be subrogated to all the attorney's rights of recovery against any persons or organizations.” This clause precludes the insured attorney's cooperation and prohibits the insured attorney from doing anything to prejudice the insurance company's subrogation rights.

16. All policies state that the insurance company has a duty to defend, which exists no matter whether the claim or suit is groundless, false, or fraudulent. In addition, the insurance company has a right to make such investigation and negotiation of the claim or suit as it deems expedient.

a. Some policies allow the insured to participate in selecting defense counsel. The policy may state that the insurance company will consider the attorney's recommendations, or it may state that the defense counsel chosen must be acceptable to both the insurance company and the attorney.

b. A policy usually provides that the insurer will not settle a claim without the written consent of the insured. To shift the financial risk of the attorney's refusal to settle, the policy may provide that, if the attorney refused to consent to the settlement, then the company's liability is limited to the amount of the proposed settlement plus the costs and expenses incurred up to that date. Such a clause is referred to as a "hammer clause."

17. Exclusions to policies need to be read carefully. The "exclusion" eliminates coverage that otherwise would be present in the policy. The meaning of an exclusion becomes an issue only if the claim first meets the requirements of the insuring agreement.

a. Typical exclusions include fraud; willful acts; or dishonest, fraudulent, criminal, or malicious acts or omissions of the insured, any partner or employee.

b. Some policies offer "innocent partner" coverage, which covers an attorney who neither committed nor participated in the dishonest acts of other members of the attorney's firm.

c. Some policies exclude claims for libel, slander, or defamation.

d. Some policies exclude punitive damages, exemplary damages, or any other damages resulting from the multiplication of compensatory damages.

e. Other exclusions that might be in the policy to review: securities rules or law; "business pursuits" other than the practice of law; fiduciary activities; failure to properly safeguard money; personal injury; sanctions imposed by courts and administrative tribunals; fee refunds/disputes; public officials; claims made from discrimination in employment practices, etc.