



Empower Yourself to Avoid the Risk of Failing to Know or Apply the Law

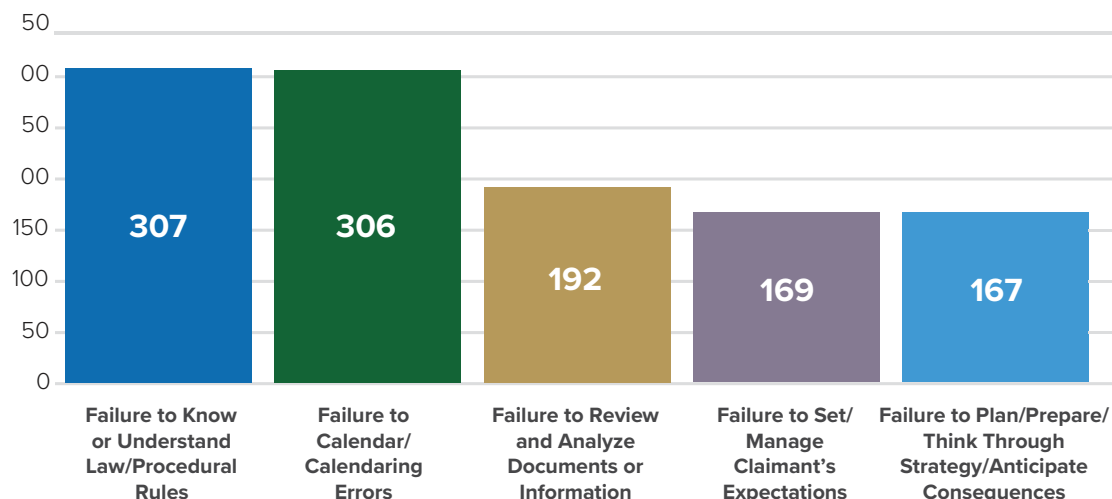
By Rachel Edwards

Malpractice can be an intimidating topic for attorneys. It often triggers us to bury our heads in the sand or feel as though we have no control over the likelihood of making a mistake. Fortunately, the ability to collect and analyze claims data allows us to identify trends, draw conclusions, and provide tips for how to manage risk.

The American Bar Association reviewed claims data from a number of legal malpractice insurance carriers throughout the United States and Canada spanning 2016 to 2019. Substantive errors, such as the failure

Factors Causing Malpractice Claims

PLF Claims Closed 2019-2022



to know or properly apply the law and inadequate discovery or investigation, accounted for a little over half of all the claims. Of the top five reported individual error types, failure to know or properly apply the law continues to be the most frequent basis for alleged malpractice, comprising nearly 16% of all claims in the ABA study.

These statistics are consistent with information the PLF gathered from reports on closed claims between 2019 and 2022. In line with the data from the ABA, our numbers revealed that failure to know or properly apply the law is the number one driver of malpractice claims, with failure to calendar and calendaring errors following close behind.

Failure to Know or Properly Apply the Law

It may seem intuitive, yet additional context and examples can provide helpful insight into the root causes. The Lawyers Indemnity Fund, (<https://www.lif.ca/>), a legal malpractice insurance company in British Columbia, parses out the two distinct problems that lead to this type of malpractice:

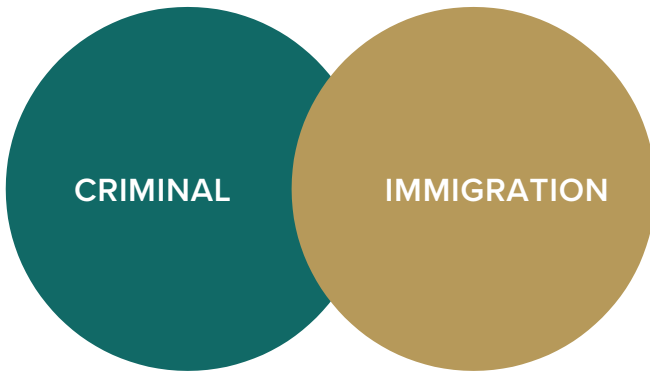
1. Ignorance of the law. You may not know a law exists, or you have some knowledge of the law, but

you don't understand the limits of that knowledge, and you don't dig into the law to determine its impact on the matter. For example, a family law practitioner represents a client in a divorce but is unfamiliar with one of the spouse's retirement benefits. The attorney doesn't investigate further and omits the necessary language in the judgment to ensure a proper distribution.

2. Not thinking it through. You know the law, but you don't fully consider all the legal strategies, issues, or steps required to get your client the result they want. For example, an experienced estate planning practitioner uses a template to draft a complex trust for a business client to allow for distributions of stock to family members, with the goal of minimizing tax liability. The attorney has drafted many trusts for business clients but never this particular type, and they don't do the research to assure that the template language will achieve the client's goals.

Reasons for Failure to Know or Properly Apply the Law

What is causing attorneys to fall into this trap? Although it's difficult to pinpoint all the reasons, insight into claims data shows that these are the main culprits:



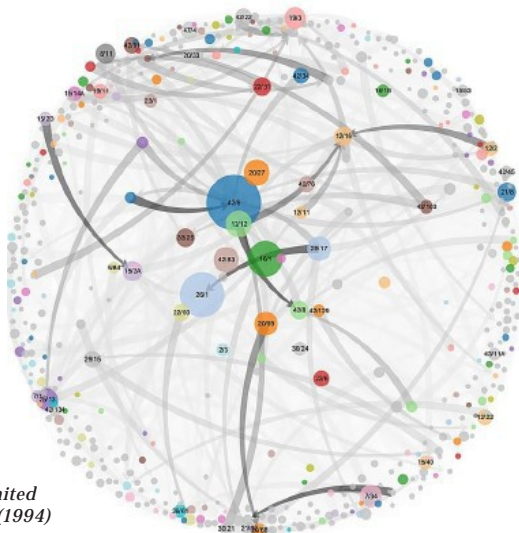
1. Unfamiliar areas of law

It could be general inexperience for a new attorney or a new area of law for an experienced attorney. A common example is the conscious choice to expand into a new practice area but failing to do the necessary research to prepare for taking on those types of cases. Another situation involves an attorney who is competent in a particular practice area but fails to recognize an overlapping area of law unfamiliar to them. For example, estate planning matters often require knowledge of complex tax issues, domestic relations cases frequently involve property distribution and tax issues, and criminal matters often intersect with immigration issues.

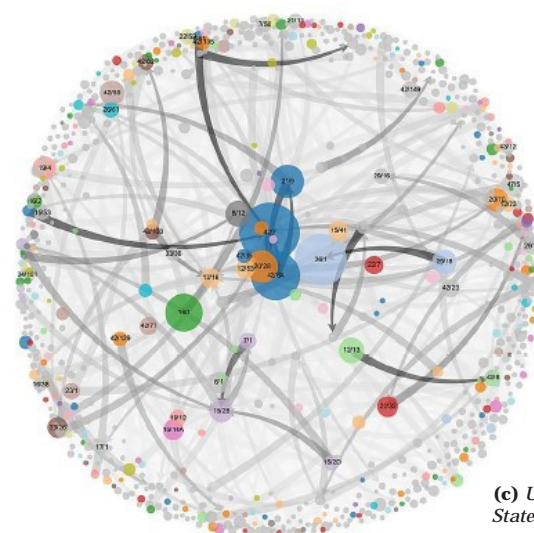
2. Increasing complexity in the law

The law in this country has become more complex over the past few decades. Many factors play into this, such as population growth and increasing interconnectedness, resulting in more societal issues requiring laws to address them. Additional legislation begets more case law to interpret that legislation. Those tasked with understanding and applying the laws often must integrate information from multiple sources to obtain a complete picture.

The more interwoven, the harder it can be to comprehend the law's implications. The diagrams below compare the U.S. Code in 1994 and 2018. The circles reference different chapters in the Code, and the arrows connecting the circles indicate that text contained in one chapter is cited in another. These charts provide a helpful visual representation of the growth in volume and connectivity of federal legislation. Growth in volume is especially notable in areas involving public health, social welfare, and financial regulation.



(a) United States (1994)



(c) United States (2018)

Figure 4, Katz, D.M., Coupette, C., Beckedorf, J. et al. Complex societies and the growth of the law. *Sci Rep* 10, 18737 (2020). Reprinted with permission.

The above circular graphs visually represent the interconnectedness of cross citing in the U.S. Code by comparing the years 1994 (left) and 2018 (right). The original figure also included data from Germany for the same periods. Those have been omitted since this article focuses on the United States.

3. Remote work and difficulty making connections

A strong argument can also be made that it has become more challenging to know and properly apply the law in the changing work landscape. Many attorneys rely on their professional connections for assistance, including asking questions, sending referrals, or seeking co-counsel. If you work remotely, even part-time but especially full-time, it can be difficult to make those connections and reach out for help when needed.

Apply Ethical Standard to Every Case

This type of malpractice invokes the quality of legal representation and the ethical rule regarding competency. As defined by Oregon Rule of Professional Conduct (ORPC) 1.1, the rule of competency states that a lawyer shall provide competent representation to a client, which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. We often incorrectly equate competence with intelligence. Intelligence is “the capacity to acquire and apply knowledge.” Competency is not about an attorney’s capacity to acquire and apply knowledge; it is about setting an ethical standard for the representation of clients. We also commonly apply the word “competent” to our ability to practice law in general, instead of applying it to each matter. Rather than asking, “Am I a competent attorney?” ask yourself,

“Do I have the knowledge, skill, thoroughness, and preparation reasonably necessary for this particular client matter?”

If you are unable to give a clear yes or no answer before taking on a new case, you are opening yourself up to a potential malpractice claim. Be sure you have the time and resources necessary to provide competent representation before taking on any new matter.

How to Avoid This Malpractice Trap

You have the ability to lessen your chances of committing this error, because the root cause stems

from attorneys straying into unfamiliar areas of law and not properly applying the competency standard to each matter of representation. Thankfully, you can take some actions (and steer clear of others!) to reduce your odds of falling into this common trap:

1. Don’t dabble in practice areas outside your expertise

Focus on a few practice areas at most so you can acquire the requisite knowledge and develop your expertise. Many attorneys, especially newer attorneys, often wonder how they can learn if they are discouraged from taking cases that might be a stretch for them. If you are new to private practice or have decided to switch or expand to a different area of law, you may need to accept cases where you are not yet familiar with the applicable rules, procedures, and legal concepts. Make sure you have the time and resources to perform comprehensive research and consult with more experienced practitioners if necessary.

Admittedly, it can be difficult to turn away clients when you need the business, and especially hard to decline referrals from other attorneys, family members, friends, or potential clients who have limited resources or are in dire need of assistance. Attorneys often feel tremendous pressure to accept these cases even if they fall outside the scope of their expertise. However understandable, dabbling is not a sustainable way to practice law and spells danger for both you and your clients.

2. Screen for multiple areas of law

It is not uncommon for legal matters to touch on more than one area of law. Identify those areas that may impact your practice and keep up to date on the changes in those laws. If you are comfortable handling one aspect of a client’s case but not another, advise them to find an attorney who specializes in that field. Don’t allow clients to pressure you into taking on matters you should refer to someone else. It is in your clients’ and your own best interests to focus on your areas of expertise and advise them to seek counsel for the others. Specify in writing the scope of your representation in the engagement letter.



3. Network and find mentors

Seek out professional opportunities to meet other lawyers whom you can ask for resources and guidance. Even colleagues who work in the same firm may find it difficult to connect if working remotely. Take advantage of videoconferencing software like Zoom, Microsoft Teams, or Cisco Webex, which also offer chat functionality. If you don't feel comfortable reaching out to others in your firm or are a solo attorney, consider joining a section (<https://www.osbar.org/sections>) through the Oregon State Bar, many of which are practice-area specific and offer valuable educational resources and networking opportunities, including listservs, newsletters, and regular CLEs. Even if you are not a member of that section, you can contact executive committee members and establish relationships. Also consider joining affinity, county, and specialty bar associations (<https://www.osbar.org/members/localbars.asp>). Even if not practice-area specific, these bar associations present a great networking opportunity and often provide substantive resources.

4. Consider associating with co-counsel

Failure to know or properly apply the law affects solo attorneys disproportionately. Sole practitioners often do not have access to the same level of support and resources available to those who work in multi-attorney firms. If you are unsure how to handle a legal matter, decline the representation or consider finding an attorney who is knowledgeable in that area of law and willing to co-counsel with you. That solution allows you to remain on the case and learn through experience. If co-counseling, clearly define in writing which attorney is performing what task to avoid misunderstandings.

5. Keep track of your legal research sources and changes in the law

Microsoft OneNote is a digital notebook that can be a great option for keeping track of legal research sources and information. Other digital notetaking options include Evernote and Joplin. The law is continually changing, especially in certain practice areas like landlord-tenant and court procedural rules. Block out time on your calendar for careful and comprehensive legal research. If you aren't sure where to look for information or how to proceed, tap into your network and reach out to other attorneys with more experience. Some common legal research sources for Oregon attorneys include:

- **Oregon Revised Statutes** (https://www.oregonlegislature.gov/bills_laws/pages/ors.aspx)
- **Oregon Judicial Department Rules Center** (<https://www.courts.oregon.gov/rules/Pages/default.aspx>)
- **Oregon Statutory Time Limitations Publication** (https://assets.osbplf.org/2022%20STL_Revised.pdf) (searchable in BarBooks)
- **OSB BarBooks and Fastcase** (Log-in at <https://www.osbar.org/index.html>)
- **Westlaw** (<https://legal.thomsonreuters.com/en/westlaw>)
- **LexisNexis** (<https://www.lexisnexis.com/en-us/products/lexis-plus.page>)
- **State of Oregon Law Library** (<https://soll.libguides.com/index>)
- **Multnomah Law Library** (<https://multlawlib.org>)

- **Washington County Law Library** (<https://www.washingtoncountyor.gov/law-library>)
- **PLF** (<https://www.osbplf.org/services/resources/>)
- **Practice Aids** (<https://www.osbplf.org/services/resources/#forms>)
- **CLEs** (<https://www.osbplf.org/services/resources/#cles>)
- **inPractice Blog** (<https://www.osbplf.org/blog/inpractice/>)
- **inBrief Newsletter** (<https://www.osbplf.org/services/resources/#inbrief>)
- **PLF Books** (https://www.osbplf.org/services/resources/#plf_books)

6. Build regular time into your calendar to attend CLEs

Oregon attorneys are required to attend a certain number of CLEs to maintain their active bar status. Don't just meet the minimum standards set forth by the Bar, though. Reframe your attendance in a way that supports and maintains the competency requirement for your practice. Regularly seek out the CLEs and other educational seminars relevant to your practice, even if you don't need the credits. Familiarize yourself with various CLE providers and keep them on your radar. Visit their websites and sign up to receive notifications about upcoming presentations. You can find a large collection of CLEs available through the PLF (<https://www.osbplf.org/services/resources/#cles>) and OSB (<https://www.osbar.org/cle/>). Even if it's not Oregon-accredited, you can submit an application to the Bar to seek accreditation for the program (<https://hello.osbar.org/MCLE/Accreditation/Member>).

7. Take advantage of external resources

Follow general news sources and those related to your area(s) of practice. Attend court hearings, especially if you are trying to gain more experience as a litigator. While it may seem awkward to show up at a court proceeding uninvited, public hearings are open for anyone to attend. It can be a great learning opportunity, especially for solo

attorneys who don't have coworkers to observe in court. Consider reviewing public court records. A subscription to the Oregon eCourt Case Information system (<https://www.courts.oregon.gov/services/online/Pages/ojcin.aspx>) allows you access to all Oregon circuit courts and the Oregon Tax Court. Do your own due diligence and research to verify any news sources and after attending any hearing or reviewing public court records.

8. Use checklists and templates

Trying to reinvent the wheel with every new matter will only increase your odds of making a mistake. Instead, find reliable sources of available checklists and templates that you can customize for your practice. This will save time by not having to remember the steps involved in each case type or building a template from scratch. You can find many checklists and templates available for free on our website (<https://www.osbplf.org/services/resources/>). OSB BarBooks (<https://www.osbar.org/legalpubs/>) also maintains a large collection of templates. Always double-check the original source to verify you have the most recent version.

Thinking about malpractice can be intimidating if you feel that it's totally out of your control. Certainly, no one tactic is guaranteed to prevent a claim. As we've shown, though, you have a number of options within your power to help mitigate your risk. Knowing you're taking proactive steps to protect yourself and your clients will go a long way toward better peace of mind.

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