



PROGRAM MATERIALS
Program #32123
June 23, 2022

Attorney Ethics Concerns With Cyber- Based Legal Malpractice Claims

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Cyber-Based Legal Malpractice Claims and Ethics Concerns

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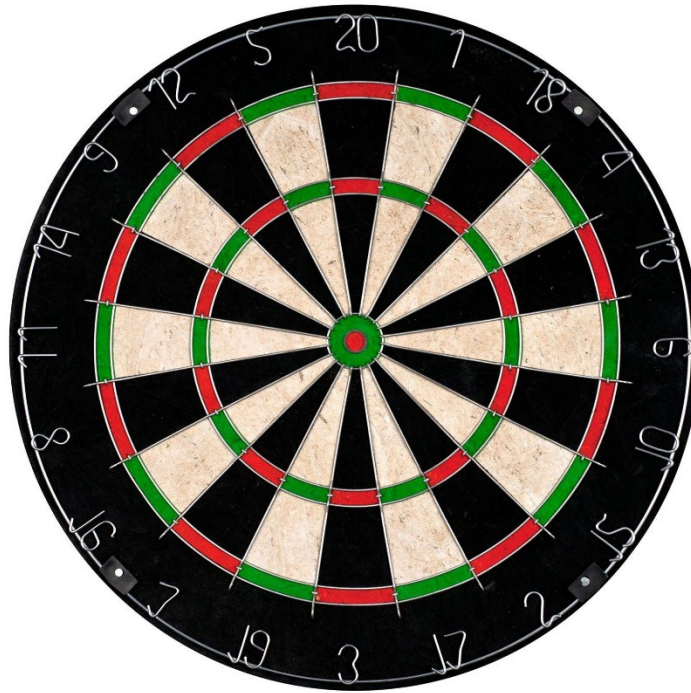
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Ethics

**Legal
Malpractice**

Ethics v. Malpractice

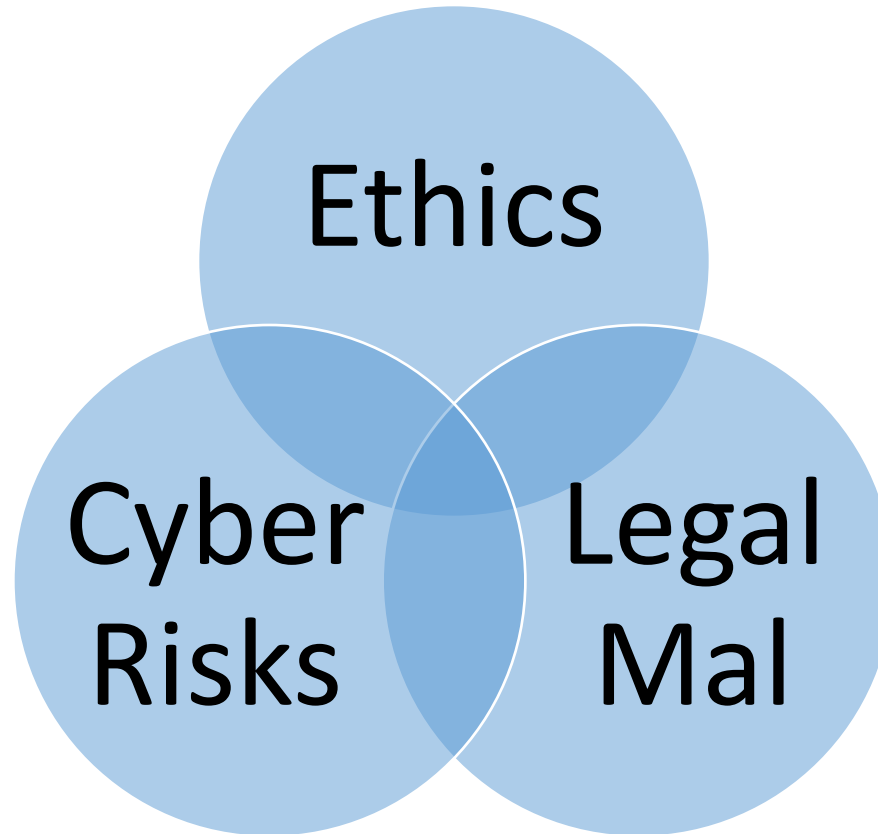


Ethics v. Malpractice

- Professional Ideals v. Common Practice
- Intent v. Negligence
- Course of Conduct v. Act/Omission
- State Bar v. State Courts

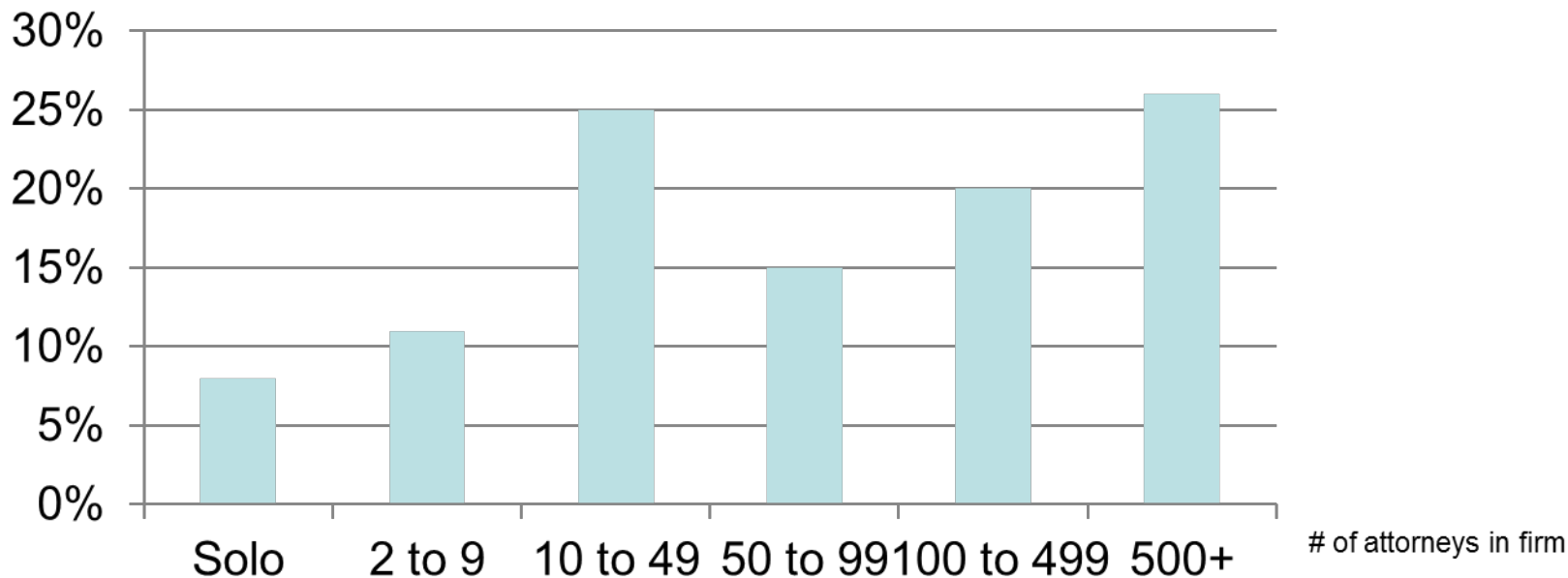
Cyber-Based Claims

- Technology and risks increasing exponentially
- Lawyers/firms as an easy target
- Economic downturn
- COVID-19 and remote work



Cyber Statistics and Cases

- More lawyers, more tech, more trouble
 - ABA 2016 Legal Technology Survey



Duty to Disclose Malpractice

- ABA Model Rule 1.4 – client communication
- ABA Model Rule 1.7 – personal interest of the lawyer
- ABA Opinion 481 – Rule 1.4 “error is material”
- Restatement (Third) Law Governing Lawyers § 20
- Common law duty to disclose malpractice

- Exposure to breach of fiduciary duty claims
- Malpractice insurance considerations

Malpractice Overview

- 80% of lawyers sued for malpractice during their career
- 70% of claims are against firms with 1-5 attorneys
- Legal mal claims up around 20% from 2012
- 1/3 of errors reported involved preparation, filing and transmittal

Legal Malpractice, Generally

- “Case within a case”
 - Elements - “that would be malpractice”
 - (1) attorney-client relationship (privity);
 - (2) negligence/breach of duty;
 - (3) proximate causation; and
 - (4) actual damages.
- Breach of duty is not enough – dismissal if *any* element is missing
- Breach of fiduciary duty and other duplicative claims

Ethics Overview

- Model Rules' Preamble & Scope: violation does not give rise to a cause of action against a lawyer and rules are not to be used to impose civil liability
- Know the rules for each jurisdiction
- Rules are generally admissible to establish standard of care

Privity

- Attorney/Client relationship creates the duty
 - Strict privity requirement in many states
 - Explicit undertaking to perform a specific task
 - Subjective/unilateral reasonable belief of client
- Payment for services
- Privity spectrum (California to New York)
- Scope of services
- Problem of jury perception

Ethical Considerations and Privity

- Jurisdiction's and model rules
- Retainer
- Client communications
- Incapacitated or incompetent clients
- Unrepresented parties and witnesses
- Arbitration clauses and informed consent
- Conflicts of interest
- Attorney-client privilege and the "at issue" doctrine

Breach of the Standard of Care

- Attorney must exercise the care, skill, and diligence commonly exercised by other attorneys in similar conditions and circumstances
- Professional/attorney judgment rule
- Role of attorney experts
 - Affidavit of Merit

Ethical Considerations and the Breach of the Standard of Care

- ABA/model rules and most states' rules
 - Recognize distinction between ethics and malpractice
 - Majority of jurisdictions ethics violation as evidence of a breach (minority – presumption of malpractice, conclusive of malpractice or totally inadmissible)
- Expertise in an area of the law – “specialist”
- “Practice” in other jurisdictions

Proximate Causation

- Negligence not enough, must proximately cause damage
 - Criminal context, innocence requirement
- “But for” causation
- Prior/subsequent/co-counsel
- Sophisticated client doctrine
- Client satisfaction and speculation

Ethical Considerations and the Proximate Causation

- Agency principles
- Actual/apparent authority
- Settlement considerations
- Most mistakes do not cause recoverable damage or ethics violation but still a failure of professional duties to a client

Damages

- Generally only pecuniary loss - must be actual, ascertainable and not speculative
 - Emotional distress, loss of liberty, etc. not generally recoverable
- Collectability

Damages – Extra Considerations

- Pre-judgment interest generally available
 - Accrual date
 - 9% NY
- Attorney's Fees to Cure Malpractice
 - Massachusetts M.G.L. c. 93A (consumer protection statute) allows attorney's fees and potential for multiple damages

Ethical Considerations and Damages

- Non-pecuniary damages and ethical obligations
- Emotional distress, loss of liberty, reputational damage, etc. not recoverable
- Matrimonial, family, criminal law concerns

Ethics and Malpractice Wrap Up

- Elements of malpractice claim and ethics rules overlap
- Each aspect of representation presents risks and challenges
- Know rules of each jurisdiction
- Practice point: Best risk avoidance tool is contemporaneous communications **IN WRITING**

Threats of Ethics Violations or Malpractice

- By other lawyers - often an ethics violation in and of itself
- By client – could be used to terminate representation
- By client - about another lawyer
- Criminal implications

Pro Bono Risks - Ethics and Malpractice

- Ethical requirements and legal malpractice standards apply equally to paying and pro bono clients
 - Friends and family
 - Pro bono organizations
 - Non-legal charitable work
 - Condo/coop and religious boards
 - Malpractice insurance considerations
- Pro bono work is a major source of risk for attorneys

Cyber Risks

- ABA's 2019 Legal Technology Survey
 - 8% of attorneys using AI
 - Decrease in number of attorneys working remotely with public Wi-Fi
- ABA's 2016 Legal Technology Survey
 - Firms with 500+ attorneys $\frac{1}{4}$ of cyber claims
 - "Danger Zone" 10-49 attorney firms $\frac{1}{4}$ of cyber claims
- ABA Cybersecurity Handbook

Ethical Considerations and Cyber Risks

- No clear standard
 - Issue left to each state and bar, attorneys and firms face challenges in complying with varying and evolving state laws and bar opinions.
- ABA/model rules
 - The ABA Cybersecurity Handbook
 - ABA Model Rule 1.6 Part (c) - “reasonableness” standard
- Courts and state bar ethics opinions

Legal Malpractice and Cyber Risks

- Elements of a malpractice claim remain the same
- Duty/standard of care still prevailing practice customs
- Telephone/meetings to confirm electronic communications
 - Zoom versus phone

Develop Risk Management Strategy and Policies

- Identify vulnerable data and threats
- Establish a written response plan
- Detect incidents
- Protect and mitigate against intrusion
- Update the procedure
- Enact firm-wide data handling and notification policies and procedures
- Breach simulations
- Notify counsel and carrier (follow policy)

Communications with Counsel

- Attorney-Client Privilege
- Seeking or giving advice
- In-house counsel
- Who are the “Real Clients”?

Understanding Your Risks from Others' Systems (or lack of systems)

- Communicate with businesses that are vital to the transaction process
- Contract with clients, vendors and others to allocate liability
- Ensure your vendors, etc. maintain insurance –
 - Due diligence when choosing
 - Assign/limit liability
- Limit Access to necessary information (and update!)

Vendor Due Diligence

- Reputation
- Financial condition
- Insurance
- Information security controls
- Employee training
- Disposal of information
- Vendor breach response team/plan

Vendor Contract Considerations

- Confidentiality provision
- No further use of shared information
- Retention/Destruction of data
- Use of subcontractors
- Requirement to notify and disclose incidents
- Information security provisions
- Indemnification/Hold harmless
- Limitation of Liability

Types of Cyber Protection/Coverage

- Business interruption
- Dependent business interruption
- Cyber extortion
- Data restoration
- Breach response costs
- Crisis management/public relations expenses
- Regulatory defense/fine & penalties costs

Cyber Protection/Coverage (cont.)

- Security liability – For clients
- Media content liability
- Technology errors and omissions liability
- Privacy liability – For clients, employees
- Additional insured protections

Retain Data Breach Counsel

- Attorney-Client Privilege/Work Product
- Determine the scope of the incident and facilitate containment
- Prioritize the response effort
- Preserve evidence
- Investigate the source of the incident
- Suggest law-enforcement officials to contact
- Conduct interviews with key personnel
- Identify compromised systems

Timeline of a Cyber Breach

- Event
- Mobilize
- Legal position/insurance
- Law enforcement
- Stabilize
- Investigate
- Legal analysis
- Notify
- Regulatory response
- Lawsuits
- Review and improve

Testing Your System

- Data thieves change their tactics – almost daily
- State actors with near limitless resources
- New and emerging technologies require updated systems
- Business changes, like mergers or new areas of practice, can alter your computer systems
- Consider penetration testing to determine system vulnerabilities
- Update your system to maintain security

Take Away's

- Educate your people
- Have and use a response team and plan
- Protect the firm through best practices, insurance and vendor contracts

Resources

- ABA Lawyers' Professional Liability Hotline
 - 1-800-285-2221, ext 5754
- ABA Legal Technology Resource Center
- State and Local Bar Associations
- Firm, Firm's General Counsel and insurers
- Attorneys, judges, law professors and mentors
- Me

Conclusion

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