

LEGAL MALPRACTICE AND ETHICAL VIOLATIONS: CAN CHARACTER AND FITNESS EXAMINATIONS HEAD THEM OFF?

by Timothy J. Gephart and Angela M. Hoppe

Editor's Note: This article is based on Timothy J. Gephart's portion of the plenary session "What Bar Examiners and Candidates for Licensure Can Learn from Those in Lawyer Discipline" at the 2010 NCBE Annual Bar Admissions Conference held on April 15–18 in Austin, Texas. Gephart's presentation was intended to provide a look at the risk assessment of bar admission candidates from the perspective of someone who has worked in the field of lawyer malpractice claims.

Attorney David Moskal's tragic descent from celebrated "Tort King"¹ to protagonist in a cautionary tale ending in his own suicide is a story well known in the Minnesota legal community and beyond. While earning millions of dollars through his representation of tort plaintiffs, Moskal was also pilfering millions from his own firm and clients. After serving five years in prison, Moskal was released in 2003 and was allowed to relocate to Colorado to assist in caring for his elderly mother. In 2006 Moskal was sent back to prison briefly for engaging in conduct in Colorado reminiscent of his prior acts. In 2008 the Colorado Supreme Court enjoined Moskal from the unauthorized practice of law after clients of his employer were led to believe by Moskal that he was their attorney. On August 3, 2009, Moskal committed suicide.

How could a man described by colleagues and clients as kind and compassionate end up stealing from an array of vulnerable clients, including "a mentally disabled person, a stroke victim, a disabled person, a homeless person, two clients who were

HIV-positive or dying of AIDS, 12 elderly clients, two minors and eight dead people"?² Could this misconduct have been prevented through a more thorough character and fitness examination before bar admission? Did Moskal exhibit behaviors in law school that might have been indicative of future problems?

Of course, Moskal's story is an extreme example of behaviors that may have catastrophic consequences for both lawyer and client. There are more common, less severe behaviors leading to complaints of legal malpractice and violation of ethics. Is it possible, through character and fitness examinations, to uncover those behaviors that might ultimately lead to malpractice or ethical violations?

COMMON CLAIMS: EXPLORING THEIR ROOTS

Applicant Behavior as an Indicator of Future Problems

One of the most common types of errors leading to malpractice and ethical violation claims—failure

to provide a client with sufficient information as to the status and/or development of the client’s case—stems from a lack of diligence and failures in communication skills. Figure 1 shows the frequency of common types of such substantive errors. Communication issues are by far the most frequently complained-of substantive errors. When a lawyer fails to keep the client informed, the client’s perception is that neither the client nor the case is important to the lawyer. That perception, regardless of the quality of the legal work, often drives the client’s behavior. While clients may not be able to readily judge the quality of the legal work provided, they are very adept at judging the difference between average and excellent customer service, good communication being a key factor.

In addition to not keeping clients properly informed, other frequent substantive errors are missed deadlines and failure to properly investigate the case. A number of these errors can be attributed

to lawyers practicing outside their areas of expertise. Lawyers that “dabble” in different areas of practice are far more likely to make substantive errors.

Figure 2 shows the frequency of common types of administrative errors. Many administrative errors are caused by mistakes in calendaring or failure to react to a calendared event. Another common administrative error is failure to properly use a conflict checking system. Conflict checking systems ensure that conflicting interests of represented parties are recognized in a timely manner and that the situation is dealt with according to applicable ethical rules. The effectiveness of those systems is dependent upon accurate and complete data input. We encourage our insured attorneys and firms to employ proper office systems to help them stay organized and to make sure that documents are prepared and filed on time, statutes of limitations are not missed, and pieces of evidence and documents are properly maintained. Of course, the best systems

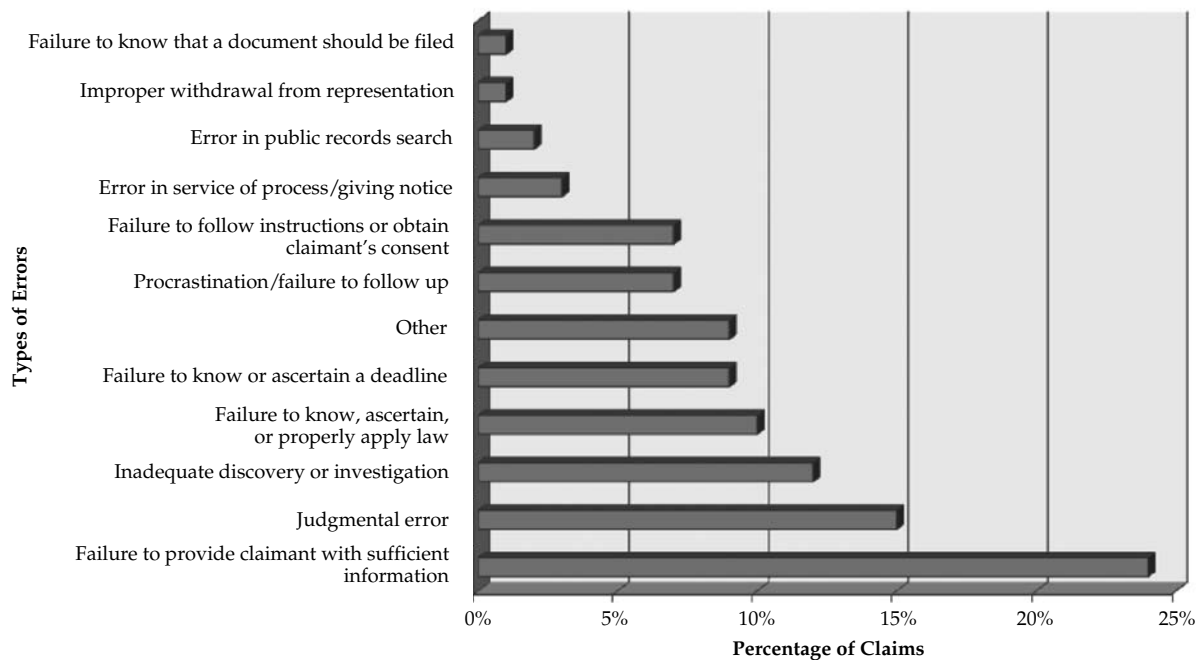


Figure 1: Frequency of substantive errors leading to malpractice claims

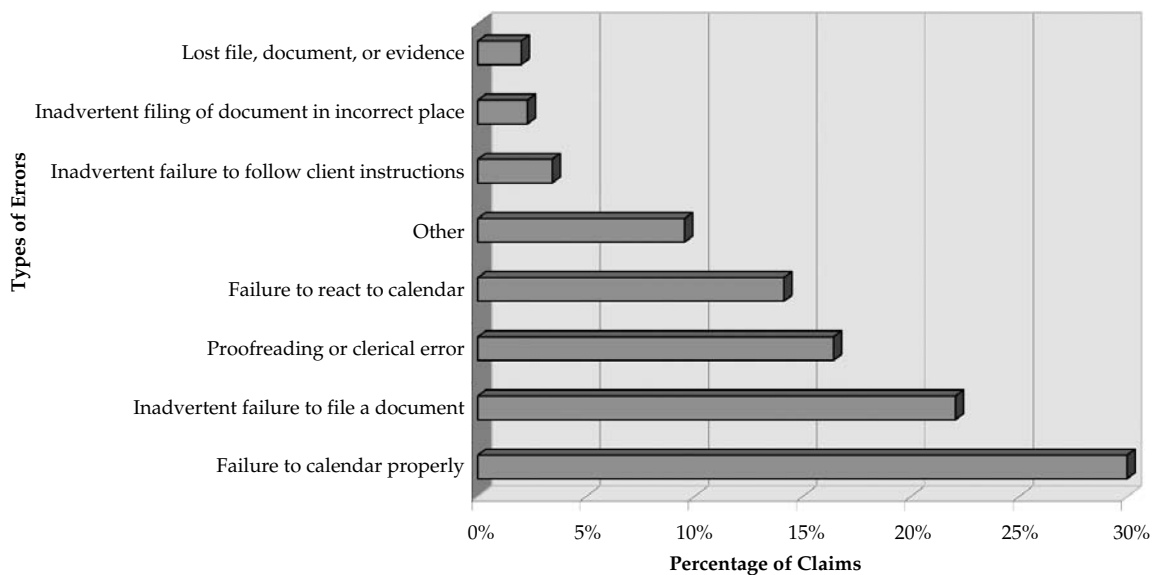


Figure 2: Frequency of administrative errors leading to malpractice claims

are of no value in preventing claims unless they are properly administered and used by all.

Understanding the connection between applicant behavior and common errors might allow a red flag to be raised for bar examiners when, for instance, an applicant demonstrates problems with communication or diligence. Such problems can manifest themselves in a number of ways; for example, an applicant might fail to completely fill out an application or to respond in a timely manner to inquiries regarding the application.

Since one would assume that an applicant's primary concern during the bar application process would be admission to the bar, what could cause these behaviors? One possible answer is that applicants are coddled too much in undergraduate institutions and law schools, which don't impress upon students the importance of deadlines, supporting instead the concept of "flexible" deadlines. This is a serious concern, considering that in the practice of law, a deadline is a deadline. It is firm, and missing one can subject an attorney to discipline and mal-

practice claims, while also possibly causing the client to lose his or her case. While an argument can be made in law school that being a day late turning in a paper is of no consequence and can therefore be (and often is) excused, this same argument will rarely, if ever, carry the day in court.

Mental Health Conditions, Chemical Dependency, and Substance Abuse

Past mental health conditions (such as depression or personality disorders), chemical dependency, and substance abuse may also be good indicators of future problems. Left untreated, of course, these conditions certainly are indicators of future issues involving malpractice or ethical violations and should therefore be taken seriously. According to ABA estimates, up to 18% of lawyers will develop problems related to substance abuse, and many people will be affected by the consequences of the lawyers' impairments.³ A study conducted in Washington in 1995–1996 showed that over 20% of male Washington lawyers exhibited what were most likely alcohol-related problems—over twice

the estimated 9% alcohol abuse rate for adults in the United States.⁴

Untreated depression is a problem in the legal community, causing harm to clients and leading to severe consequences for attorneys. Untreated depression can lead to suicide, and, in fact, lawyers commit suicide at six times the rate of the general population.⁵ Self-medicating with alcohol or other drugs can also lead to client and case neglect, which will eventually result in malpractice claims or ethical violation complaints.

Once attorneys (and presumably applicants for the bar as well) have undergone treatment, however, there are positive results. Specifically, chemical dependency treatment has been shown to have a tremendous impact on the incidence rate of attorney disciplinary and malpractice complaints. A study in Oregon, completed in 2001, analyzed a group of 55 recovering attorneys (see Table 1). The results showed that five years before beginning sobriety, the group had 76 disciplinary complaints and 83 malpractice complaints. Five years after sobriety, however, the numbers dropped to 20 disciplinary complaints and 21 malpractice complaints. To put this in perspective, these attorneys had a disciplinary rate of 7% five years after beginning sobriety, as compared to a 9% disciplinary rate in the general population of attorneys in the state. Similarly, these attorneys had an 8% malpractice rate five years after beginning sobriety, as compared to a 13.5% malpractice rate among Oregon attorneys generally. This study indicates that attorneys who have sought treatment and maintained sobriety for at least five years are actually at lower risk of malpractice or ethical violation complaints than members of the general pool of attorneys.

Financial Pressures Leading to Lawyer Malpractice

Many attorney malpractice claims arise from representation of a client in an area of practice unfamiliar

Table 1: Impact of Chemical Dependency Treatment on Lawyer Disciplinary and Malpractice Complaints in Oregon: 2001 Study of 55 Recovering Lawyers

Period	Disciplinary Complaints	Malpractice Complaints
Five years before beginning sobriety	76	83
Five years after beginning sobriety	20	21
Group	Disciplinary Rate	Malpractice Rate
Five years after beginning sobriety	7%	8%
All lawyers in the state	9%	13.5%

Source: Ira Zarov and Barbara S. Fishleder, *New Study Shows Recovery Saves Dollars*, HIGHLIGHTS OF THE A.B.A. COMMISSION ON LAWYER ASSISTANCE PROGRAMS (ABA, Chicago, IL), Vol. 5, No. 2, Spring 2002. In Joan Bibelhausen, Director, Lawyers Concerned for Lawyers, “Mental Health and Addiction in the Legal Profession.”

to the lawyer. The numbers of claims arising from lawyer theft and from lawyers falling for Internet schemes have also increased. For example, one insured firm was contacted by a client via e-mail engaging counsel to assist in the collection of a debt of more than \$500,000. The lawyer working on the case received a cashier’s check for \$185,000, apparently issued by Chase Bank, purportedly as partial payment of the debt. The lawyer deposited the check into the firm’s trust account and was directed by the client to wire the money to a bank in Istanbul, Turkey. Two days after the wire transfer, the lawyer was informed that the check was a counterfeit instrument, thus leaving a significant deficiency in the firm’s trust account due to this scam.

The common thread running through these seemingly unrelated types of claims—unfamiliar practice areas, lawyer theft, and lawyers falling victim to Internet schemes—is the mistaken assumption that the activity will bring in a great deal of quick and easy money. This often occurs when money is needed to shore up a practice that has fallen on hard

times due to a myriad of financial pressures, including the burden of substantial student loan debts, a problem that all jurisdictions wrestle with as it relates to character and fitness. These claims invite the question: would routinely checking credit scores as a part of the character and fitness examination, as some jurisdictions do under certain circumstances, have merit?

SO WHAT DO WE DO?

Reflecting on this information raises the question of whether a more proactive approach could be taken with regard to the character and fitness examination.

Personal Vouchers and Interviews

Admission to the bar requires demonstration of an applicant's good character and fitness. This includes virtues such as "honesty, trustworthiness, diligence and reliability."⁶ A candidate must have affidavits from others attesting to his or her character and fitness and must also submit to a background check. Some jurisdictions also conduct personal interviews, whether face-to-face or via telephone, between bar examiners and candidates.

A few jurisdictions have additional requirements. For example, in Delaware applicants are required to participate in a five-month-long clerkship as a condition for bar admission. Each applicant must have a member of the Delaware Bar who has been practicing for a minimum of 10 years and who has been designated by the board as the applicant's mentor vouch for his or her character. This mentor supervises the applicant throughout the applicant's participation in specific legal activities.⁷ Mentors in this program have an affirmative duty to swear to personal knowledge or reasonable investigation of the applicant's character and fitness. The Board of Bar Examiners relies heavily on the certification by

the mentor that the candidate possesses the requisite positive character traits for admission to the bar.

Interviewing candidates pre-admission on a more routine basis, as is feasible, might also aid bar examiners in the character and fitness evaluation process. While reviewing written documents can certainly give some insight into an applicant's character and fitness, nothing can really compare with a face-to-face interview. Most employers, for instance, would never consider making a hiring decision based only on an applicant's written application. Alternatively, a telephone interview might prove to be a useful tool.

However, while the procedures noted above might provide excellent insight, they are often not financially feasible. Law schools each year are graduating more and more students, most of whom will seek admission to the bar. To require all to participate in a mentoring program such as the Delaware model, or to require in-person or, at a minimum, telephone interviews with all candidates, would be extremely expensive and labor-intensive and would therefore not be practical in most states.

The Role of the Law Schools

One way to potentially strengthen character and fitness investigations would be to work more closely with and encourage more direct involvement from law schools. The Honorable Sam Hanson, former justice for the Minnesota Supreme Court, has made the following suggestions for generating greater cooperation between law schools and bar examiners:

- Law schools should impress upon students, during their first year and periodically thereafter, the importance of full disclosure on bar applications.

- Law schools should report to the board any student misconduct relevant to the analysis of an applicant's character and fitness to practice.
- Law schools should avoid dispositions of law school disciplinary proceedings that include confidentiality requirements preventing disclosure of those proceedings to the board of law examiners.
- Law schools should separate mental health counseling functions from bar admissions counseling functions to respect Americans with Disabilities Act concerns and not discourage students from seeking help.⁸

Justice Hanson's last point is, of course, an important one, considering the Oregon study indicating that lawyers who have sought treatment for chemical dependency have an even lower rate of disciplinary and malpractice claims after five years of sobriety than lawyers in the general population.

Arguably, law schools are in the best position to evaluate the character and fitness of applicants due to their relationships and daily face-to-face contact with the students. Troubling behaviors may manifest themselves during law school that may bear directly on character and fitness and might eventually lead to malpractice claims and ethical violations. To the extent possible, these behaviors should be identified and dealt with before the student seeks admission to the bar.


For example, if a student has continuing difficulty meeting deadlines, the behavior should be dealt with not by extending the deadlines, but by having the student face some real consequences. Failure to improve the behavior should lead to actions such as requiring the student to attend counseling sessions. Law schools also need to continue to develop and

maintain programs to assist students with substance abuse and mental health issues. The Oregon study discussed above highlights why work in this area is so important.

It should also be kept in mind that not everyone who graduates from law school is cut out to be a lawyer. For students who are square pegs trying to fit into round holes, the sooner they make this realization, the better off they and the profession will be. We have been asked the following questions on a number of occasions by lawyers with varying degrees of experience and varying areas of practice: "I have never felt quite right practicing law. I think I'm good at it, I make a decent living and do a good job for my clients, but it doesn't feel quite right. Do you think it is okay if I look at doing something else? Do you think anyone else has ever thought about leaving practice and taking up a new career?" Identifying the "square pegs" is probably best done by the law schools, which could counsel these students and advise them on other options to make best use of their law degrees. It is doubtful that the character and fitness evaluation would spot such applicants (nor would it be the place of boards of law examiners to suggest to applicants that they are simply not cut out to be lawyers).

While both boards of law examiners and law schools have a vested interest in having only the best and brightest admitted to the practice of law, there could be some conflict, in that law schools are also looking to fill classes and to have high rates of bar admission for their students. Law schools and boards of law examiners must work together diligently to resolve these conflicts, in order to make the character and fitness evaluation process much more effective.

CONCLUSION

Evaluating a candidate's character and fitness is perhaps the most difficult task faced by bar examiners. However, the importance of this portion of the application cannot be overstated. As members of a self-regulating profession, we have the responsibility to do what is possible to keep stories such as David Moskal's from repeating. Certainly, every potential problem cannot be prevented, but the charge to protect both the public and the profession warrants a probing look at what can be done to strengthen the character and fitness examination. 

NOTES

1. Jessica Centers, *David Moskal's Final Days*, MINNESOTA LAW & POLITICS, available at <http://www.lawandpolitics.com/minnesota/David-Moskal%E2%80%99s-Final-Days/b4656d1f-398a-4dbb-bd0e-60449efd797d.html> (last visited June 10, 2010).
2. *Id.*
3. John W. Clark, Jr., *We're from the Bar, and We're Here to Help You*, GPSOLO MAGAZINE, Oct./Nov. 2004.
4. Connie J.A. Beck, Bruce D. Sales, and G. Andrew H. Benjamin, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 50-51 (1995-96).
5. Joan Bibelhausen, Director, Lawyers Concerned for Lawyers, "Mental Health and Addiction in the Legal Profession."
6. William J. Wernz, *Character, Fitness & Redemption: Measuring Fitness to Practice*, BENCH & BAR OF MINNESOTA, Oct. 2007.
7. Randy J. Holland, *The Delaware Clerkship Requirement: A Long-Standing Tradition*, THE BAR EXAMINER, Nov. 2009, at 29.
8. Sam Hanson, *The Relationship between Bar Admissions and Law Schools*, THE BAR EXAMINER, Aug. 2003.



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