

Tips for Avoiding Legal Malpractice & Surviving Grievances

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| 31. | Do not attempt to recover attorney’s fees as a “piece of the client’s action” without dotting the I’s and crossing the T’s. | 12 |
| 32. | Do not accept compensation from a third-party other than a client, for representation of the client, without dotting the I’s and crossing the T’s. | 12 |
| 33. | Do not attempt to prospectively limit your liability for professional negligence, in writing or otherwise. | 12 |
| 34. | Do not exercise a unilateral right to convert a fixed-fee or hourly fee agreement to a contingent fee agreement after the commencement of the representation. | 12 |
| 35. | Have a written representation agreement signed by the attorney and the client and initialed on all pages by both the attorney and the client. | 13 |
| 36. | Do not accept an assignment of a portion of another attorney’s contingent fee agreement with a client without independently determining that the other attorney complied with TDRPC 1.04 in all respects. | 13 |
| 37. | Obtain a guardian ad litem to protect the client’s interests if you have reason to believe that a potential new client lacks legal competence to enter into the representation agreement. | 14 |
| 38. | Do not charge a non-refundable retainer without being CERTAIN you understand <i>Cluck v. Comm’n for Lawyer Discipline</i> , 214 S.W.3d 736, 739–40 (Tex. App.– Austin 2007, no pet.). | 14 |
| 39. | Make certain your representation agreement contains a specific description of the professional legal services that you and/or your firm will provide, and those that you and/or your law firm will not provide. | 15 |
| 40. | Include in your representation agreement a very detailed explanation of how the attorney’s fee will be calculated. | 16 |
| 41. | Address frequency of billing in your written representation agreement, and comply with the frequency set forth in the written representation agreement. | 16 |
| 42. | Address frequency of client communications in your written representation agreement and comply with the agreement as written. | 16 |
| 43. | Address in the written representation agreement the specific expenses that will be charged by you or your firm, and the rates for each. | 16 |

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| 44. | Include the statute-mandated information that must be provided to each client with respect to the availability of the grievance process. | 16 |
| 45. | Include in your written representation agreement the specific identity of the client. | 16 |
| 46. | Include in your written representation agreement the identity of which persons are entitled to receive confidential communications, and in what manner. | 17 |
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| 52. | Disclose in writing the risk of various rule, statute and common law bases of sanctions potentially applicable to your representation of the client. | 20 |
| 53. | Include a merger clause and a no-reliance clause in your written representation agreement, if factually appropriate. | 20 |
| 54. | Include “anti-contract of adhesion” language to your agreement, where factually appropriate. | 21 |
| 55. | Attach a copy of or a link to the applicable disciplinary standards to your written representation agreement and expressly incorporate its terms into your representation of the client. | 21 |
| 56. | Encourage your new client to have your proposed form of representation agreement reviewed by counsel of the client’s own choosing, at the client’s own cost, to ensure that you are both satisfied that the individual terms of the agreement, and the agreement as a whole, are fair to both the attorney and the client. | 21 |
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Introduction - Tips for Avoiding Legal Malpractice and Surviving Grievances

Lawyers are busier than ever. Courts issue opinions and orders multiple times per week. We are expected to keep up with procedural law, the substantive law that controls disposition of our clients' legal matters, and the law controlling our ethical duties to our clients. Those ethical duties are spelled out in numerous different ways. Court opinions construing attorney fiduciary duties, professional negligence, fraud and the like provide some of that guidance. The Texas Disciplinary Rules of Professional Conduct, the ethical opinions that construe them, and restatements, cases, statutes, and rules from other jurisdictions all form part of the kaleidoscope of information that we must process in order to assure that we meet the ethical obligations that we owe to our clients and to the legal system as a whole.

This paper is an effort to help Texas attorneys stay current with new ethics information that has become available over the past month or months, or year or years, as the case may be. It is a good start to assisting the average practitioner in meeting his or her ethical obligations to his or her clients, and to the legal system as a whole. With that, let's explore 50 everyday strategies that lawyers can use to avoid professional misconduct.

1. Do not give dispositive weight to an American Bar Association ethics opinion that is right on point.

Meador, In re:, 968 S.W.2d 346, 349, fn. 1 (Tex. 1998) (orig. proceeding):

This ten-person standing committee of the American Bar Association is charged with "interpreting the professional standards of the Association and recommending appropriate amendments and clarifications...." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT viii (ABA Center for Professional Responsibility, 3d ed.1996). It issues advisory opinions on ethics questions of general interest submitted by attorneys. *See id.*; *see also* Klein, Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant, 61 TEMP. L. REV. 1171, 1179 n. 54 (1988). **While the Committee's opinions are often cited as persuasive authority by state disciplinary bodies, the opinions do not bind those bodies.** *See, e.g.,* ABA INFORMAL OP. 1420 (1978) ("Enforcement of legal ethics and disciplinary procedures are local matters securely within the jurisdictional prerogative of each state and the District of Columbia."); Hellman, When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions, 10 GEO. J. LEGAL ETHICS 317, 326 (1997) ("ABA opinions are binding upon no one. ABA opinions represent the views of a small committee of a private association, and they construe that private association's Model Rules and Model Code. The power to determine whether and to what extent either of these model documents will be put into force in any state is exercised by a state authority, most commonly the state's highest court." (notes omitted)).

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