Avoiding Legal Malpractice Claims

14 The Forum 459 (1979) and 50 N.Y. St.B.J. 557 (1978). By Ronald Mallen

Malpractice claims are not limited to the medical profession. It is important that lawyers be constantly vigilant to avoid such claims themselves. The author of this article gives wise advice on the subject.

There is no simple panacea for preventing malpractice or for avoiding malpractice claims. Even skilled and knowledgeable attorneys will make errors in representing their clients. On the other hand, competent representation will be a defense to a malpractice action. There are some types of malpractice claims which we cannot avoid. Thus, we cannot mollify the vehemence of adversaries who seek to revenge the "wrongs" of litigation against the attorney and his client by a malicious prosecution or abuse of process action. However, within our control are several primary causes of malpractice claims which arise not because the attorney has been negligent in his representation but because he has been either derelict in his professional relationship with his client or has ineptly managed the business aspects of the practice of law!

It cannot be overemphasized that a good client relationship may not only help in avoiding unmeritorious claims but may also be the decisive factor which persuades a client not to sue his attorney even for a valid malpractice claim. The following is a list of suggestions which should help minimize exposure, which should certainly improve the attorney-client relationship and may ultimately prove to increase the attorney's business.

Great Expectations. Do not create great expectations. A common complaint is that the attorney "promised" or represented that there would be a substantial recovery or an ironclad defense. When such expectations are not realized the client may sue for legal malpractice upon the seemingly valid assumption that if the case or defense were that good, the lack of success must be attributable to the attorney's incompetence. Moreover, the attorney may find that his promise or representation provides the client with a viable cause of action for breach of an express contract or for breach of a warranty.

Even if the attorney's statements do not provide the basis for a cause of action, such representations may constitute the main evidence as to the quality of the underlying action. This ultimately places the attorney in the precarious position of having to contradict the accuracy or veracity of his own statements. Prudence dictates that the attorney should not promise, represent, or guarantee any specific result or dollar recovery. Although the quality of the client's case should not be unnecessarily denigrated, the attorney should make the client understand the vagaries of litigation and uncertainties which necessarily affect the predictability of the eventual outcome.

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Fees. A surprisingly high percentage of legal malpractice suits take the form of cross-actions filed in response to the attorney's lawsuit to recover his fees. Such actions often result because the attorney failed to articulate, explain or secure agreement as to the fees at the outset of the attorney-client relationship. The following suggestions may help to minimize the risk of an unhappy or uncooperative client when the attorney seeks payment of his fees:

- Before performing any service, advise your client as to the amount of or the basis for computation of your fees. A fee arranged or modified during the representation may be voided by the client. Moreover, from a practical point of view, the best time to negotiate a fee is when the client seeks the attorney's services. At that time, a client is concerned about the legal problem and needs the ability of the attorney to assist in its solution. After the problem is resolved or proves to be insoluble, the attorney's value to the client will rarely be what it would have been initially. A favorable conclusion becomes the expected and inevitable result. But, a bad result becomes the attorney's fault.
- The fee agreement should be expressed in writing, and, whenever possible, the writing should be signed by the client. The formalization in a writing not only solemnizes the details of the undertaking, but also provides a source of evidence should litigation develop.
- Whenever practical and appropriate, bill your client periodically and explain the basis for your charges. Statements for services are more palatable when billed on an interim basis rather than as a relatively large sum. Moreover, periodic billing does provide a form of ongoing assurance that the attorney is continuing to devote effort to the client's cause.
- Maintain detailed and complete time records for all services rendered, including hours and description of services. This enables you to explain the basis of your fee charges if that becomes necessary. Carefully maintained time records will more than justify the effort by assuring accurate billing. Experience demonstrates that attorneys who attempt to reconstruct time records at a later date will usually understate or forget the amount of time devoted to a particular matter. Moreover, should litigation prove necessary, without such records the attorney is less likely to adequately demonstrate the value of his services.

Communication. The most common complaint by clients is that their attorneys did not do anything and that this lack of diligence is obviously why the case was lost. Even if the case is competently and expeditiously handled, the failure to communicate may create the opposition impression. The impression of the "neglectful" attorney is created by negligence in handling the attorney-client relationship which is often the primary cause of a suit for professional negligence. Some simple guidelines can greatly minimize this risk.

- Periodically inform your client of what has transpired by letter or formal status report. The attorney should consider calendaring when such communications should be made,

in the same manner as any other significant deadline should be noted. It is important to remember that to the unsophisticated client, routine procedures, such as depositions or interrogatories, show the rendition of the type of services for which the attorney was hired and diligence to the client's case.

- If there are long periods of delay, such as a congested trial calendar, the reason for inactivity should be explained to your client.
- At a minimum, send copies of self-explanatory pleadings and letters.
- Personally return all telephone calls, or if there will be delay, have your secretary return the call with an explanation for the delay.

Advice. In assuming responsibility for the client's case attorneys often undertake material activities without advising or consulting with their clients. Attorneys tend to forget that the case is the client's, and that the attorney, albeit a highly skilled professional, is merely offering his services.

The attorney should not withhold information about serious problems which develop. It is equally important that the client be advised of all risks involved, even those which may be involved in the legal procedures. The failure to so advise the client may itself be a basis for liability. If the attorney selects a risky course of action, and excludes the client from that decision, the attorney may find himself with both an angry client and a liability. Where there are alternative strategies or actions which involve risk, the prudent course of action is to inform and advise the client and let him choose. To avoid any future dispute this disclosure should be in writing.

Secure Consent. The corollary to the duty to advise the client is that the attorney take no material action which in any way may prejudice the client without securing express consent. The following acts occur with surprising frequency and are illustrative of potential liability because the attorney failed to secure the client's consent. Attorneys who settle the case without first securing authority may be liable. Defense attorneys who enter an unauthorized appearance can be liable for the con- sequences. Attorneys who consent to judgment without in- forming the client may end up paying the judgment. Similarly, liability has been imposed for the unauthorized dismissal or release of parties.

Conflicting Interests. A common basis for liability, and the most frequent breach of the fiduciary obligations occurs when an attorney who, regardless of his motives, attempts to represent multiple parties who have conflicting interests. The attorney should not undertake or continue any representation where the conflicting interests of the clients prevent undivided loyalty and competent representation to each. In any event, the attorney should disclose in writing any existing limitation on his ability to so represent the clients and specify the risk of any potential conflict. The clients' consent should be secured in writing.

The attorney should not represent both parties to a divorce, and should avoid representing both parties to a property or commercial transaction. An attorney retained by an insurance company to defend its insured owes the latter the same fidelity and

responsibility as the entity which pays his bills.

Adverse Interests. The attorney should not undertake to represent a client where he has any personal or adverse interest which may impair his obligation of undivided loyalty and competent representation. Where the adverse interest does not necessarily preclude fidelity or competence, the attorney should make full disclosure in writing of the potential adverse interest and its possible effect, and secure the client's written consent.

Similarly, the attorney should disclose in writing the interest of any former or present client which may affect or limit the quality or extent of representation.

The attorney should not enter into any business transaction with the client without assuring that the client receives truly independent legal advice. If independent legal advice can be achieved without sending the client to another lawyer, the attorney should assure that his advice is set forth in a letter to, or memorandum acknowledged by, the client.

It is imperative that the attorney preserve the client's confidences. The failure to do so, regardless of motive, can form an independent basis for liability.

Written Confirmation and Files. You should confirm all important oral instructions from, conversations with, and disclosures to your client in the form of a letter or memorandum. A similar procedure should be followed concerning key conversations and agreements with adverse counselor others. Telephone conversations can be confirmed by a memorandum, which are commercially available in a prepunched form, and which can be placed in the appropriate file. Such written confirmations may avoid misunderstandings, dissuade a lawsuit, or provide the type of persuasive evidence necessary to prevail in litigation.

Legal malpractice claims, such as those concerning wills, can arise many years after the services were performed. It is important that attorneys maintain and store their files until the potential of a claim is either very remote or barred by a statute of limitations. For example, in a jurisdiction which applies the discovery rule as to a statute of limitations, the law firm should maintain its file for twenty years or more.

Competent Representation. Although by virtue of having been admitted to the highest court in his state an attorney is theoretically capable of undertaking any legal work, a primary area of malpractice exposure has been that in which attorneys undertake representation in matters beyond their experience or expertise. The impropriety of such representation now reaches into basic ethical considerations, and can be the basis for discipline. If the attorney accepts such employment, he should do so upon the basis that he expects to gain the skill and knowledge necessary to competently complete the task, either through self-education or assistance from other counsel. If the attorney cannot thereby acquire the necessary skills and knowledge or does not intend to do so, he should only accept or continue the employment if he associates other counsel who have the necessary competence.

Association or Referral. Another area of exposure arises when the attorney obtains the assistance of other counsel, either because the matter is beyond his skills and knowledge or because the

attorney does not have sufficient time to devote to the client's case. If other counsel is to be associated, the attorney should secure his client's consent, preferably in writing. The writing should also delineate the division of responsibility between counsel.

If the attorney does not desire to or cannot represent the client, then he may refer the client to other counsel. In making a referral, the attorney should consider his client's needs and be wary of making any overstatements about the skills or ability of counsel to whom the client is being referred.

Calendaring. It is still true that the most commonly asserted error in legal malpractice litigation is that the attorney missed some kind of procedural deadline. For that reason, it has become almost universal for applications for professional liability insurance to specifically inquire whether the attorney maintains some sort of docket or calendar control. It is imperative that the attorney calendar all deadlines, statutory limitations, law and motion matters, trial setting dates, and all other deadlines which must be remembered. Calendar controls range from a simple date book to sophisticated computer systems. The attorney interested in instituting or improving a calendaring system should examine some of the extensive literature on the subject, as well as systems instituted by other law firms and available from commercial services.

Malpractice Claims. Considering the significant increase in the frequency and volume of legal malpractice claims, it is very probable that an attorney will at some point be either the subject of a claim or be consulted by a client seeking assistance against another attorney.

If you are consulted regarding a potential claim against another attorney, you should be careful not to criticize the attorney's conduct until you have been fully apprised of all material facts. Only a minority of legal malpractice claims prove successful for the client in litigation. There is a high probability that the client's dissatisfaction with the attorney is attributable to lack of information or breakdown in the attorney-client relationship. Moreover even if the attorney erred or was negligent, it may be that the underlying action could not have been won by any attorney. Therefore, an attorney consulted regarding a legal malpractice claim should exercise commensurate caution before pursuing litigation.

The risk of a malpractice claim mandates that the attorney carefully maintain all professional liability insurance policies. These policies written on an occurrence basis may provide the only insurance available for a claim which is made in the distant future. Yet, even the claims-made form may offer coverage for claims made after the policy period. Similarly, the attorney should retain all policies which are excess or umbrella to the primary coverages since they form part of the basis insurance protection. Although the attorney should be careful to pre serve the protection of his insurance, he should not unnecessarily reveal the fact or extent of his coverage to the claimant. Such disclosure may be the financial encouragement which results in a legal malpractice suit.

The attorney should not attempt to defend his own malpractice claim. Of course, the mere fact of a malpractice action does not indicate that the attorney erred or was negligent. But it has been the experience of those who routinely defend legal malpractice actions that the majority of the attorneys who have been negligent often do not recognize their error until explained by defense

counsel. Secondly, handling legal malpractice litigation requires skills and knowledge which are not normally possessed by the attorney who handles routine tort litigation. Also, there are often key issues of credibility involved in legal malpractice litigation which involve disagreements between the attorney and client as to what actually transpired. One cannot be a party in such litigation and competently represent himself as an advocate for his own credibility. There have been too many incidents where an attorney has materially impaired his defense by prejudicial admissions or other conduct which in some instances have constituted an independent fiduciary breach.

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