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Seven Steps for Avoiding Legal Malpractice

By Attorney Shannon B. Jones

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Litigation is expensive, time-consuming and can be emotionally difficult to handle. If litigation is filed against an attorney, that attorney can easily spend upwards of $100,000 defending a simple malpractice suit.

A defendant must also spend a significant amount of time preparing a defense, including meeting with a lawyer, responding to discovery and participating in proceedings. A professional who is sued for malpractice must endure the scrutiny that is given to the professional's work, which can be very difficult and uncomfortable. As most of us know, we live in a very litigious society. This propensity to sue is best exemplified by a story I recently heard from a client. He was in a financial/real-estate class. The class was asked how they intended to get rich. Half the class responded that they would receive their riches through lawsuits.

Litigation pervades the legal industry in the form of legal malpractice suits more than many other fields. However, many suits can be avoided if attorneys are cognizant of their responsibilities and expected standard of care.

The following article is a brief discussion of quick and easy steps to assist attorneys in avoiding malpractice suits. By following these suggestions, attorneys can also make their practice more efficient and better assist their clients.

1. Communicate with your client.

Although communicating with a client seems like elementary advice, it is amazing how many attorneys do not adhere to it. In fact, a majority of all legal malpractice suits arise out of an attorney's failure to communicate with a client. If attorneys communicate effectively with their clients, they can avoid a lot of problems and improve client satisfaction.

Communication includes asking and listening to what the client wants from a matter. Sometimes a client's interests or motivations are not what the attorney expects.

For example, I recently represented a client in a construction defect case. The client was more interested in rescinding the purchase contract than receiving damages from the developer, even though it meant receiving less net proceeds from the case.

Keep your clients apprised of every event related to the matter. I send my clients copies of all substantive letters and pleadings prepared in any matter.

Providing copies of this information also helps in getting the bills paid timely. If a client sees the work you are doing on a matter, the client understands what he is paying for and is less likely to complain or inquire about the bills.

E-mail has become an extremely effective and cost-efficient means of keeping clients informed. I periodically e-mail my clients reminders, inquiries and quick updates. It is not time consuming and clients appreciate the effort. Also, by printing out copies of e-mail messages, attorneys have a written record of what was discussed.

Although many decisions in litigation are tactical and traditionally made by the attorney, it is helpful to discuss some of these choices with the client. I have seen malpractice cases filed after trial arising out of tactical decisions, which were clearly within the realm of the attorney's discretion, but the client was unhappy with the attorney's judgment.

For example, consider discussing the following issues with your client: which witnesses to call at trial; your proposed juror profiles; voir dire decisions (you should have your client present during jury selection); and areas or topics the attorney intends to cover on direct and cross-examination.

If an attorney does not want to cover a particular topic with a witness, make sure the client knows why.

Malpractice suits also arise because attorneys fail to timely return telephone calls. Clients' calls should always be returned promptly, preferably within 24 hours. If the attorney is unavailable, the attorney's secretary or assistant can return the call and advise the client regarding when the attorney will be available.

In many legal malpractice suits, the clients were unhappy with the attorney prior to the issue leading up to the suit. For example, the clients are dissatisfied with the service, and then discovered a reason to sue. If clients are satisfied, which usually means the communication was effective, they are more inclined to work out a resolution with the attorney instead of filing suit.

2. Document your files.

Attorneys should document all issues discussed with clients, opposing counsel and anyone else involved in the matter at issue. Documentation can be in the form of notes to the file, confirming letters or memoranda.

If a lawsuit is ever filed, the client will claim that the client was not properly advised. If there is written documentation in the file, the client will be hard-pressed to take such an incredible (as in not credible) position.

3. Avoid conflicts, including dual representation.

Recently, I have seen a rise in legal malpractice suits arising out of dual representation. A dual representation arises when an attorney represents multiple parties in a matter who have potentially conflicting interests.

This situation frequently arises when attorneys are asked to represent parties in the following situations: partners; a corporation, shareholders and/or directors; multiple parties to a contract; an employer and employee; or an agent and broker.

A dual representation arrangement also arises when multiple parties negotiate a contract and ask an attorney to prepare the written contract. In these situations, the attorney is representing multiple potentially irreconcilable and conflicting interests.

It is recommended that the attorney avoid this situation altogether. However, if the attorney agrees to represent multiple parties, he should prepare a written notification of the conflict and have each party sign a waiver.

Even when these documents are executed, the attorney cannot advise one client to the detriment of the other. For example, an attorney preparing a partnership agreement cannot give any advice to one partner that may affect the other. If an attorney gives such advice, by definition, the he has committed malpractice.

4. Statute of limitations.

The failure to file an action within the applicable statute of limitations is arguably the second most common form of legal malpractice next to the failure to properly communicate with a client.

If a potential client discusses claims with an attorney, the attorney should immediately determine the applicable statute of limitations. If the attorney accepts the representation, he should immediately calendar the dates on his personal calendar and through the firm's calendaring system, if applicable.

If the attorney does not accept the representation, it is advisable that he notify the client in writing that he will not be representing the client, but inform the client of the applicable statute of limitations and that the claim must be filed within the specified time.

Many times the statute of limitations is missed by an attorney who is not practicing within his area of expertise. For example, if a construction defect attorney is representing a client in an employment harassment case, the attorney may be unaware that the statute of limitations for some labor code violation claims can run within one year.

If an attorney is accepting representation in unfamiliar fields, the attorney should be especially cognizant of the applicable statutes of limitations and should consider consulting with counsel who specializes in that field.

5. Tender claims to insurance carriers, when applicable.

There is a recent trend in legal malpractice cases arising out of attorneys failing to tender their clients' claims to insurance carriers.
If a client is sued, it is arguably within the attorney's standard of care to tender coverage to the insurance carriers under which there is potential coverage. When in doubt, the attorney should tender coverage.

6. Analyze and recommend settlement, when applicable.

Several years ago, I represented a client in a nuisance case, which, if handled properly, should have settled in the first few months of litigation. Unfortunately, the opposing attorney advised his clients not to settle and encouraged them to proceed to trial. After the trial, the opposing party had to sell their home to pay for attorney's fees. (They lost the case.)

I read an article two years later that a jury awarded a judgment against the same attorney for failing to properly advise his clients (different clients) regarding settlement. This is not an isolated case.

It is within an attorney's standard of care to advise a client on settlement options. If the client is interested in settlement, the attorney should pursue that alternative even if it means sacrificing fees in the future.

7. Maintain errors and omissions insurance.

All attorneys should maintain errors and omissions insurance. If attorneys work for a firm, they should make certain that the firm has sufficient coverage and that the attorney is included in that coverage. By following these simple steps, attorneys should minimize the chance of being sued, better serve their clients and become more effective.

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