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# In Practice: Five Ways to Invite (and Avoid) a Malpractice Lawsuit

A recent headline in another leading legal publication asserted: "Malpractice claims are on the rise." As most lawyers know, it is not hard for even legally-aware professionals like themselves to be the defendants in a lawsuit. Legal malpractice disputes will always be a part of the legal landscape, and attorneys should be vigilant to avoid them. Here are five ways lawyers commonly step into malpractice claims, and suggestions for simple means to prevent them.

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**1. Sue and Get Sued**

Lawyers typically have more time to seek legal recourse for unpaid fees than a client has to sue for malpractice. In fact, the difference in deadlines can be dramatic. In California, for example, a client generally must sue within one year of discovering the alleged malpractice and suffering injury, while a lawyer has four years to sue for breach of a written contract, or two years for breach of an oral contract.

Often, lawyers jump the gun by suing for unpaid fees before the client's time to file a malpractice lawsuit expires. The inevitable result is that the client counters with a malpractice claim. A simple solution is for attorneys to wait to file a claim for unpaid fees until the client's time to sue for malpractice expires. After the statute runs, the client can still assert malpractice as a defense to a fee claim, but only as a setoff up to the amount owed. Patience can help avoid potentially expensive and lengthy litigation and minimize risk to a lawyer's insurance premiums. It may sometimes be strategically or financially prudent to file a preemptive claim for unpaid fees before the malpractice statute of limitations expires, but that is the exception to the rule.

**2. Clear Beginnings and Clean Breaks**

Most lawyers and law firms today have standard written engagement agreements. Use them, and ensure clients sign them. In some jurisdictions, written engagement agreements are required. Even when they are not, confirming in writing critical details (like the fee structure, scope of the representation, the right to raise hourly rates, rights of the lawyers if the client fails to pay and dispute resolution options) before beginning work can prevent expensive headaches down the road. Unfortunately, attorneys do not always demand an executed engagement agreement or outline the key details in writing. Taking the time to prepare a clear and complete agreement and get it signed by the client can protect you later.

When you talk or meet with a potential client, but do not take the assignment, consider confirming that fact in writing. Managing expectations can prevent later claims about what the client believed your role would be, or what you agreed to do.

Similarly, when the attorney-client relationship ends, it would be prudent to inform the client in writing if circumstances permit. The relationship can end for a number of reasons: completion of the agreed-upon work, a client's failure to pay for the legal services, a dispute over the quality or results of the work performed, etc. Marking the end of the relationship is essential for calculating the statute of limitations on a potential malpractice claim, because the statute does not begin to accrue until the relationship ends. The statute of limitations defense can be a silver bullet, quickly and cost-effectively ending a malpractice lawsuit. However, if the attorney fails to inform the client in writing that the relationship is over, a triable issue of fact may exist regarding when the relationship ended, precluding early dismissal through this defense.

**3. Do You Represent Joe, or Joe Incorporated?**

When an individual seeks representation for a company, you should take care to distinguish who the client is: the individual, the company, its shareholders, officers and directors, or a combination. Indeed, most jurisdictions have rules of professional conduct designed to ensure lawyers understand their unique fiduciary obligations when representing an organization.

An all-too-common malpractice scenario involves the allegation that a lawyer breached a fiduciary duty to the company by elevating an individual non-client's interests over the company's. It is important to remember who the client is, and to remind the individual, preferably in writing, that you represent the company and that the individual should seek independent counsel where appropriate (for example, where the company may take an action adverse to an officer's or stockholder's interests). If you are interacting with a limited number of officers or directors, consider expanding your communications to other board members when important legal issues or developments arise. You may very well have a professional obligation to do so. If you are going to represent both an individual and the company, it may be prudent to explain the potential conflict in writing, and obtain the necessary waivers from both clients, to the extent such a joint representation may be permitted. Here's a rule of thumb: If you represent more than one individual or entity, you may want to get a written acknowledgement of the joint representation and a conflict waiver, even if quite general. A general waiver is better than no waiver at all.

**4. Who Just Sued Me?**

An attorney may believe that his relationship with a client is solid, and even amounts to friendship. In such cases, an attorney may think that such a "friend" would never consider a malpractice lawsuit. That may be so, but it is less likely when there is a bad result or a dispute over fees. Moreover, where a client files for bankruptcy, a trustee may be appointed, whose role in life is to obtain funds on behalf of the estate to pay off its creditors (as well as the fees for the trustee and the trustee's lawyer). The trustee is not the attorney's friend, and may assert a malpractice action in bankruptcy court. The trustee also succeeds to the attorney-client privilege, so even "friendly" communications may become discoverable. This reality reinforces the need to understand who the client is, delineate the relationship in writing and clearly demarcate when the relationship ends.

**5. Think Before Putting a Question to Your Lawyer in Writing**

In this litigious age, law firms have developed strategies to encourage loss prevention. One way many firms do this is by making available ethical and legal advice to lawyers through in-house counsel. One might think that the attorney-client privilege protects communications between a firm's lawyers and a law firm's in-house counsel in the same way that it does corporate employees communicating with corporate in-house counsel. However, federal district and bankruptcy courts in a number of jurisdictions may order production of attorney communications with in-house counsel where the attorney sought advice about potential or actual disputes with current clients. Such communications may be misconstrued as evidence of a breach of fiduciary duty or conflict of interest.

Recently, however, the state Supreme Courts of Massachusetts and Georgia became the first reviewing courts to weigh in, and found the decisions refusing to afford full protection to the privilege in the lawyer/law firm context to be "dysfunctional," "draconian" and simply wrong. These recent opinions hopefully signal a move toward greater protection of attorney communications with in-house law firm counsel. However, the antiquated federal decisions adopting a restrictive view remain on the books. Lawyers and law firms should therefore take cautious and deliberate steps to enhance the likelihood that internal ethical, legal and loss prevention communications will be recognized as privileged.

Four easy steps to consider taking are: (1) ensure the in-house counsel position is officially defined, and separate and apart from ordinary firm business; (2) ensure communications with in-house counsel are separate and apart from ordinary firm business (e.g., establish a "general counsel" email account); (3) establish a protocol for communications with in-house counsel and ensure lawyers understand that such communications may not be fully protected; and (4) disclose in writing potential conflicts of interest to the client when recognized, seek appropriate written waivers and consider limiting written communications until these steps are achieved.

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