Top Tips For Avoiding Legal Malpractice Claims

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I. Why It Matters

In recent years, law firms and legal professionals have seen an uptick in the frequency of legal malpractice claims, including significant claims with damages in excess of $50 million. One of the major factors in the increase of legal malpractice claims was the Great Recession. As the economy took a turn for the worse, legal malpractice claims spiked significantly. Importantly, however, while the economy recovered, legal malpractice claims never returned to their pre-Great Recession level. As a result, the risk of legal malpractice claims remains at an all-time high. Consequently, attorneys who fail to address the potential pitfalls that lead to claims of legal malpractice do so at extreme peril. Fortunately, there are several best practices that legal professionals can implement to minimize the risk of falling victim to a malpractice claim.

II. Only Take the Right Cases

Many malpractice claims and actions can be avoided altogether if legal professionals avoid representing problematic clients. In most instances, however, steering clear of problematic clients is easier said than done, as many factors influence attorneys to take on cases they have no business being engaged in. To further complicate matters, effectively vetting potential clients and/or matters is a difficult task in and of itself.

In order to guard against this potential risk, attorneys can implement several techniques pertaining to the client/matter screening process to effectively weed out potentially problematic clients and determine which cases the attorney should decline to take on. First, during the initial meeting with the potential client, determine whether the individual or entity has a realistic expectation regarding the outcome of the matter. In doing so, the attorney should inquire about the goals or objectives the client is hoping to achieve, while paying attention to how demanding the client seems. In addition, evaluate whether the client is committed to expending the requisite time and expense to enable the attorney to provide effective representation to the client. In doing so, the legal professional must determine whether it is in the client's best economic interest for the attorney to handle the matter, and whether the cost of representation will pose an impediment to achieving a favorable outcome for the client, as a large portion of malpractice claims pertain to disputes over attorney's fees. Importantly, clients who take issue with the cost of representation are prone to being dissatisfied with the level of legal services provided by the attorney, regardless of how exemplary the legal professional's services are in reality. Finally, the attorney should also always ascertain whether the client has a prior history of changing attorneys. A clear red flag that should raise concerns is the prospective client who has gone through several attorneys, especially if this took place in the same case that the client is seeking you to represent him or her in.

At the same time, attorneys must only take on cases that they are qualified to handle. Importantly, a large percentage of legal malpractice claims stem from attorneys who make the

decision to "dabble" in an area of law that falls outside their sphere of expertise, such as the workers' compensation attorney who decides to take on a matter involving the drafting of a contract on behalf of a business. As such, when a new potential client or case comes in the door, the attorney must honestly and accurately assess his or her skills and experience to handle the legal matter that has been brought to the legal professional's doorstep. When a new case or client falls outside the attorney's overall skillset or sphere of expertise, or the attorney does not have the time or resources to acquire the requisite knowledge and expertise, the attorney should respectfully decline the case.

Finally, if an attorney declines to represent a client, the legal professional must always confirm in writing that the attorney has not undertaken, and will not undertake, to represent that particular individual or entity. A large number of malpractice claims arise by the failure to send such letters, which are known as "non-engagement" letters. In order to guard against this malpractice risk, attorneys and law firms can create and implement a form non-engagement letter, which should inform the potential client of the attorney's decision to decline the matter. Then, whenever an attorney meets with a potential client and declines to take on the potential case, the form non-engagement letter should be sent immediately after the decision is made to confirm that the legal professional will not be representing the client.

III. Meeting Deadlines With Proper Calendaring and Time Management

One of the primary errors that lawyers make that lead to legal malpractice claims are missed court dates and deadlines, and other time management issues. The failure to adhere to deadlines and other time requirements serves as the one of key catalysts for the filing of legal malpractice lawsuits. Importantly, when a deadline is missed—most particularly one relating to the applicable statute of limitations—that terminates a right or privilege the client may have possessed, a legal malpractice claim is conclusively established. As such, attorneys must avoid missing deadlines and other relevant dates at all costs.

Fortunately, time management and deadline problems are entirely avoidable through the implementation of effective time management habits. One major technique to avoid this type of malpractice claim is to implement an effective calendaring system. Most importantly, any such system should incorporate the timely calendaring of deadlines—such as statute of limitations deadlines, discovery deadlines, expert deadlines, and dispositive motion deadlines—as soon as any such dates or deadlines are issued by the court. In addition, the attorney's calendaring system should provide multiple instances of advance notice of deadlines, such as within one month, two weeks, and one week leading up to an impending deadline. Another effective technique to avoid deadline- and time management-related claims is to break down significant tasks into their component parts, and calendar multiple reminders for the different major steps to be accomplished in completing the task. Finally, attorneys should also consider implementing matter inactivity reports—which alert attorneys of matters for which no time has been entered on a file for a given period—which can significantly aid in preventing many procrastination errors that can easily trigger a legal malpractice claim.

IV. Proper Documentation

Another key practice that all lawyers must incorporate in order to minimize the risk of malpractice claims is proper documentation of the file. In many instances, significant case decisions will be made over the phone or in person, including matters such as which defenses to raise, witnesses to depose, or discovery to pursue. When this happens, the lawyer should take great care to summarize and confirm the decision in writing. This should be done in all instances—even when the client is unwilling to pay for such status reports—as the time expended in doing so is well spent because it will go a long way toward effectively defending a malpractice claim in the event one is pursued by a disgruntled client.

Furthermore, legal professionals must ensure that all communications with clients are documented and preserved in a way that they can be easily accessed and reviewed. It is best that attorneys never rely solely on memory of client meetings or conversations; rather, all such interactions should be documented in detail. Likewise, attorneys should retain all emails, text messages, and other written communications with clients so that the attorney can utilize these materials in the event a dispute arises between the attorney and his or her client.

Finally, it is important to note that the attorney-client privilege is waived in legal malpractice suits, and all attorney communications—including internal email correspondence between the lawyer and other members of his or her law firm—are subject to discovery. As such, attorneys must avoid documenting the file in ways that may adversely impact the legal professional's ability to defend a legal malpractice claim in the event a client comes after the attorney after a matter is brought to a final conclusion. In particular, attorneys must avoid engaging in internal email correspondence that incriminates the attorney or his or her firm, especially as it relates to correspondence criticizing the client.

V. Manage Expectations

Another important tactic to minimize the risk of malpractice claims is to maintain realistic expectations with the client. In particular, attorneys must effectively and honestly communicate to the client the range of potential outcomes of a particular matter—including the “worst case scenario” outcome—at the outset of the attorney's representation of the client. In addition, attorneys should never guarantee any type of particular result in a case. Instead, attorneys should ensure that they take a measured approach to evaluating the case and communicating that evaluation to the client, including addressing any potential issues or weaknesses of the client's position that could arise during representation of the matter.

Furthermore, attorneys should take great caution in discussing the prospective value of a case with a client. In doing so, the attorney should be reasonable and measured in his or her opinions regarding claim value, as it is oftentimes extremely difficult to accurately estimate how jurors will value a particular claim. As such, a good rule of thumb is to never specify a precise dollar figure in connection with the estimated value of a claim. Importantly, when lawyers engage in this practice, they set an anchor in the client's mind that goes undisturbed for the remainder

of the litigation process. Accordingly, if the attorney winds up resolving the matter in a fashion that is less favorable than the figure that was thrown out at the outset of the case, the attorney runs a significant risk of falling below the client's expectations which, in turn, can serve as a catalyst for the filing of a malpractice claim.

VI. Avoid Conflicts of Interest

Finally, legal professionals must ensure that they avoid conflicts of interest at all costs. Importantly, a frequent claim of disgruntled clients is that a conflict of interest precluded the legal professional from adequately and effectively representing the client's interests. Conflicts of interest can arise in a myriad of different ways. As such, as part of the screening process, attorneys must ensure that they always complete a thorough conflicts check before agreeing to any type of representation. In doing so, during the initial screening and interview process the attorney must determine whether there are any other clients represented by the attorney or his or her firm whose interests are adverse to, or in conflict with, those of the potential client at issue. Importantly, the attorney must ascertain if taking on the new matter will create not just an actual, but also even a potential, conflict with the legal professional's representation of a current or former client. Here, it is absolutely critical that the attorney always errs on the side of caution. If there is even the slightest question as to whether a potential conflict may exist, the attorney should always procure the written informed consent of the new client, as well as all present and former clients with potentially conflicting interests. Equally as important, if this consent cannot be acquired, the attorney should decline the representation, without exception.

VII. The Final Word

There are no fail-proof ways for legal professionals to ensure that they never find themselves involved in a legal malpractice dispute. Despite even the best of efforts, the odds are that most legal professionals will face a legal malpractice lawsuit sometime during the course of their legal careers. With that said, by following the best practices described above, attorneys can put themselves in the best position to proactively minimize the risk of committing an error that could give rise to a legal malpractice claim, and set themselves up with stringent defenses in the event they ever find themselves on the receiving end of a legal malpractice claim or civil action.