Don't end up in the worst chair in the room

Tips from legal malpractice defense counsel

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When you think about preventing legal malpractice in your office, the first thing that comes to mind is probably *calendar*, *calendar*, *calendar*. While missing a deadline is a common way to expose yourself to liability, there are several other areas in litigation full of pitfalls that we regularly see lawyers fall into.

James Joyce said: "A man's errors are his portals of discovery." Thank you Mr. Joyce, but we prefer prevention for our brethren, so here are some ways to avoid having your own "portal of discovery."

General principles

Like any cause of action for negligence, a claim for legal malpractice requires that the standard elements of duty, breach, causation, and damages must be established. Specifically, a legal malpractice action arising from litigation requires that the client establish that, but for the attorney's neglect, usually negligence or breach of a fiduciary duty, the litigation would have ended in a more favorable result to the client. Litigation by its very nature requires the exercise of judgment by the attorney in how to achieve the client's objectives. Reasonable attorneys may disagree regarding whom to depose, what experts to retain, whether to have a jury trial, which witnesses to call or cross-examine, what issues to argue, or theme of the case.

Thankfully, errors in judgment that are debatable, uncertain, or tactical, even if ultimately unsuccessful, will not necessarily give rise to a colorable claim for legal malpractice. Rather a claim arises only when an attorney's act or omission fails to demonstrate exercise of the knowledge and the degree of care and skill that a reasonably careful attorney would have used in the same circumstances, *and* that act or omission caused your client to get a lesser result than they would have absent the act or omission.

Client consent: Don't assume anything

Often when a legal malpractice claim is filed, the attorney is not at fault so much for negligence in the handling of the case, as for negligence in the handling of the attorney-client relationship. Generally, a lawyer must communicate matters which affect the procedural and substantive rights of a client, promptly respond to reasonable inquiries of a client, and keep a client reasonably informed of significant developments in matters which the attorney has agreed to provide legal services. (Rules Prof. Conduct, rule 3-500.)

It is easy to look back after a lawsuit is filed against you and realize that you knew that particular client was going to be a "problem." However, in the absence of a total breakdown of the attorney-client relationship, it is sometimes difficult to identify at the time whether a client is just particularly demanding, or angry about their circumstances, and someone who will blame you if they have second thoughts about their case result. Some "red flags" to watch out for include unrealistic expectations about case value, refusal to acknowledge problems with the case, asking the same questions repeatedly indicating that they are not understanding your verbal explanations, refusing to follow your recommendations, emotional instability, lies, or lack of frankness with you.

Clear communication is the key to managing the expectations of your client. In a lot of actions this means conveying complex concepts and numerous factors that may affect the realities of the case to someone who may have a hard time seeing past the simple fact that they feel they have been wronged, are in ongoing physical pain, emotional turmoil, and economic hardship. The most dangerous thing that you can do is assume that the client has understood and has consented to the course of action that you are recommending.

Informed consent requires the attorney explain in terms the client can understand, the relevant circumstances of the decision being recommended, the facts and basis for the suggested course of action, and the reasonably foreseeable consequences. With a few exceptions, conflict and fee issues being primary, verbal informed consent of the client is sufficient to meet the attorney's duty under the Rules of Professional Conduct.

One of an attorney's basic functions is to advise, and liability can exist because the attorney failed to provide this function. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered. Further, if counsel elects to limit or prescribe the scope of his representation of the client, particularly regarding claims which the client might peruse if adequately advised, then counsel must make such limitations "very clear" to his client. (See *Nichols v. Keller* (1993) 15 Cal.App.4th 1672.)

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Because you have a duty to inform the client about their rights and alternatives under the circumstances, it can be a breach of the standard of care to fail to effectively communicate these options. To memorialize these discussions, especially if your client is demonstrating "red flag" behavior, put in writing any material changes in the case, and your evaluation of their affect on the case. This has the added benefit of clarity about the content of your discussions, and because people learn in many different ways, listening being only one of them, setting things out in writing may also add to your client's understanding and appreciation of their case.

Material changes in the case include, for example, a treating doctor opining in deposition that there is no causal link between an incident and the injuries complained of. Such a development should be explained in writing, as well as the projected impact on the case value and probable outcome. This could also include decisions regarding whether to plead all available causes of action, or dropping causes of action before trial to clean up the complaint and take only your strongest causes of action to trial.

Reasonable settlement offers that the client does not accept should be put in writing, as well as your evaluation of what the outcome will likely be relative to this settlement offer. We often hear that while such decisions were verbally confirmed with the client, it was not put in writing because the attorney did not want to undermine the attorney-client relationship as confirming letters look too harsh. At the end of the day, a client that would be put off by such a letter is exactly the client that needs to be receiving your advice in writing, so that with the passage of time, the benefit of hindsight, and possibly a lighter pocketbook, a dispute does not arise later regarding why particular decisions were made.

Issue spotting: Additional causes of action

IRAC (*sic*) is not just a country in the Middle East. Don't forget your law school issue-spotting skills and be on the lookout for any additional legal issues affecting your clients. While the scope of your representations should be detailed in your retainer agreement, you also have a duty to alert your client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. So even if you only represent the client for the injuries arising out of a specific automobile accident, if you become aware of facts that indicate that your client was illegally fired from their job using the accident as a pretext, you have a duty to advise them of the existence of these claims. (See *Nichols v. Keller* (1993)15 Cal.App.4th 1672 [worker's compensation attorney failed to advise the client of potential third-party claim]). You are under no obligation to widen the scope of representation to include these issues that arise, but always confirm in writing that you are not going to be retained for the specific purpose.

Modifying fee agreements in the middle of a case

It is not uncommon as trial approaches to add new or additional trial counsel, and to modify the existing fee agreement with the client to compensate for the additional time, capital advanced, and risk that the attorneys are undertaking. However, the huge difference that has developed from the negotiation of the original contract is that where once you negotiated with a potential client at arm's length, (*Setzer v. Robinson* (1962) 57 Cal.2d 213), now you owe your client a fiduciary duty obligating you to exercise the utmost good faith, integrity, fairness, and fidelity towards them. (*Priester v. Citizens National Bank* (1955) 131 Cal.App.2d 314, [where a contract is made during the existence of the attorney-client relationship, the burden is on the attorney to establish the transaction is fair and reasonable, and no advantage was taken].) Any fee structure agreed to that could be considered self-dealing or overreaching for legal fees can be a breach of the fiduciary duty characterized as malpractice. Such an agreement is even further scrutinized when the attorney obtains an ownership, possessory, security, or other pecuniary interest such as a note secured by a deed. (Rules Prof. Conduct, rule 3-300.)

Whether a referral fee or a fee-sharing agreement, in undertaking to make any modifications to the client's fee structure to divide that fee with another lawyer who is not your partner, associate or shareholder, this agreement must be disclosed to the client, and you must get the client's written consent. (*Chambers v. Kay* (2002) 29 Cal.4th 142.) Failure to do so, even with the client's knowledge, will result in an unenforceable fee agreement limiting you to *quantum meruit* recovery. Ideally you should advise your client as part of this written disclosure of the option and that you are advising them to consult independent counsel regarding the new fee arrangement.

Representing multiple parties

Representing multiple clients in the same proceeding presents issues of potential and actual conflicts of interest. An attorney may represent several clients jointly in the same action if prior to undertaking the representation the attorney (1) provides each client with written disclosure of potential conflicts that may arise in the course of representation, and (2) has obtained informed written consent of each client. (Cal. Rules Prof. Conduct 3-310(C); *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898-899.)

Attorneys who undertake to represent parties with divergent interests owe the highest duty to each to make a full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice. (*Ishmael v. Millington* (1966) 241 Cal.App.2d 520.) Failing such disclosure, the attorney is civilly liable to the client who suffers loss caused by lack of disclosure. (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136.)

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Common instance where issues of joint representation arise are injuries with a spouse with a loss of consortium claim, multiple passengers in a vehicle, or partners in a business transaction.

A potential conflict is a reasonably foreseeable set of circumstances which could impair the attorney's ability to fulfill his or her professional obligations to each client in the proposed representation. Each client must be informed in writing of the relevant circumstances and the reasonably foreseeable consequences of each. (Cal. Rules Prof. Conduct 3-310(A)(1).) Typical potential conflicts that exist in joint representation include conflicting client instructions, disputes that may arise among clients, inconsistent client expectations and divergent client objectives. Further, the facts of the case may require advocating antagonistic positions of two or more clients in the same matter. And finally, there may be client disagreement as to resolution of the matter.

This often comes about when one party has a larger damage claim. That party receives a disproportionate benefit from an equal cost sharing agreement, has a greater tolerance for protracted litigation and a greater incentive to push the case to trial on the risk of a larger award. Or, for example, if facts are developed that are harmful to the injured spouse's action but beneficial to the spouse with a loss of consortium claim, the attorney may be in the position of advancing a position that is detrimental to one of the clients.

There is also a potential conflict when an attorney attempts to represent several plaintiffs in settlement negotiations where lump sum settlements are offered for all claims. In such instances, a lawyer is prohibited from entering into aggregate settlement of claims without the informed written consent of each client. In each instance, the written disclosure must be made with sufficient detail on all issues on which the clients' interest might diverge so as to allow them to make a free and intelligent decision regarding the representation. (*Klemm v. Superior Court*, *supra*, 75 Cal.App.3d 893.) Further, in any instance where your clients agree to a lump sum settlement, make sure there is an agreement in place between them as to how any disputes regarding allocation of the funds is to be resolved.

Favors: Don't do them

When it comes to legal work done as a quick favor, the old adage "no good deed goes unpunished" applies double. Although an attorney-client relationship only arises by agreement, this agreement can be express or implied, and once you agree to perform legal services, it gives rise to the duty to do so "with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." There is no exception for work for your brother-in-law George. Thus when you just file a quick complaint or government claim to protect a statute of limitations, a lis pendens, or lien, or make a courtesy special appearance, you are creating an attorney-client relationship and an attendant duty of care that makes you responsible for any mistake or omission that occurs. (See *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441.)

The danger in a "favor" is that without a formal fee agreement, a file, and a procedure for getting the case in your case management system, it is too easy to take your eye off the ball and miss a deadline or fail to follow up with additional action. Unless there has been a clear termination of the attorney-client relationship, there can arise the reasonable expectation by the recipient of the favor that you would continue to manage any important deadlines. Instead, if you undertake to do any legal work for anyone, even a quick free favor, treat them like you would any client.

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