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WHAT ARE THE BEST PRACTICES TO AVOID BEING SUED FOR MALPRACTICE?

BY MARK M. MIKHAIEL

ANSWER

Statistically speaking, 80% of lawyers will get sued at least once in their careers.[1] While jurors tend to have favorable views of health professionals, jurors disdain lawyers. (Generally speaking, health professionals receive a defense verdict 80–90% of the time in jury trials. The opposite is true in legal malpractice. More than 90% of legal malpractice jury trials result in a plaintiff verdict).[2] In 2009, the ABA's Legal Malpractice Consortium held a mock legal malpractice jury trial, recording the following comments about attorneys: "lawyers cannot be trusted," "lawyers are arrogant, condescending, and outright rude," and "everybody knows lawyers are liars." There is a deep-seated cultural bias against lawyers, one that has been growing for half a century.[3]

There are good professional practices that will greatly decrease your chances of being sued:

1. Conduct Thorough Conflict Checks.

Consistent and thorough adherence to conflict check policies, both internal and external, will reduce exposure to malpractice claims. Conflict avoidance should be viewed as an integral part of law firm management. One way to thoroughly investigate potential conflicts is to circulate an internal memorandum outlining the proposed scope of representation. This affords all attorneys in the firm the opportunity to recognize potential conflicts that might not otherwise appear by traditional means of cross-referencing prospective clients via a computer database. Claims based on conflicts are not a relic of the past. In 2020, a Cuyahoga County jury awarded a plaintiff $32 million for its claims against global law firm Dentons. In *Dentons*, the firm's US arm was disqualified for failing to disclose conflicts related to its Canadian counterpart. This case highlights the need for a robust conflict checks system, one that is readily understandable and accessible to all attorneys. Similarly, attorneys should be wary of joint representation, which can and often does, lead to significant conflicts. Chief Justice Warren E. Burger aptly held a half-century ago, "[j]oint representation of conflicting interests is suspect" because "the advocate finds himself compelled to refrain" from vigorously defending his clients.[4]

2. Send Non-Engagement Letters.

If an attorney-client relationship "turns largely on the reasonable belief of the prospective client," the best way to avoid any misunderstandings on the part of a prospective client is to send a non-engagement letter.[5] This letter is important for two reasons: (1) it avoids the "accidental client" and (2) it allows the prospective client to find other representation. It is also best practice to avoid including any specific statements on the statutes of limitations. Personally, I simply state the following: "I have not performed any research on when the statute of limitations expires in your potential case. Accordingly, should you wish to pursue this case, filing a lawsuit sooner will always be preferable to waiting until later, and may be required. There are a number of excellent lawyers in Cleveland, and the Cleveland Metropolitan Bar Association is a good starting place to find one. I am sorry that I am unable to help you."

3. Use and Obtain Signed Engagement Letters.

To ensure that there is no misunderstanding on the scope of representation, you should prepare and require a client to sign a detailed engagement letter. This will ensure that the terms of representation are clearly communicated to the client. This simple task — ensuring a signed engagement letter is in the client file — should give you some peace of mind as well as reduce malpractice exposure. While Ohio does not mandate a formal engagement letter, believing that the attorney-client relationship can be "formed by implication based on the conduct of the lawyer and expectations of a client," it is still a best practice to reduce to writing the scope of representation.[6]

4. Communicate Clearly — IN WRITING — Throughout the Representation.

One of the simplest things a lawyer can do to avoid a claim of malpractice is to ensure frequent and accurate communication with the client. As Anne Thar wrote thirty years ago, "every unanswered [telephone] call plants a seed of discontent."[7] Similarly, in the modern digital age, it is vital to promptly respond to written correspondence, and to do so accurately. There are good and business reasons to timely respond to client inquiries: satisfied clients are less likely to bring claims, and more likely to pay their bill.

5. Properly Terminate the Representation.

Just as it is a prudent practice to obtain a signed engagement letter, it is equally important to ensure that a client understands that the representation has concluded. Ohio's Rules of Professional Conduct relating to former clients are more lenient than the conflicts rules related to current clients. Advising that the representation has ceased commences the one-year statute of limitations for a malpractice claim.

[1] https://www.abajournal.com/advertising/article/solo_attorneys_are_most_likely_to_be_sued_for_malpractice_find_out_how_to_b

[2] Manuel R. Ramos, Legal Malpractice: The Profession's Dirty Little Secret, 47 Vanderbilt Law Review 1657 (1994)).

[3] See Katherine L. Kenney, Panelists Predict Insurance Marketplace Five Years from Now, 30 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 341 (May 21, 2014) (reporting on the ABA National Conference of Legal Malpractice where panelists discussed whether there was a "bias" about lawyers); also see Manuel R. Ramos, Legal Malpractice: The Profession's Dirty Little Secret. 47 VAND. L. REV. 1657, 1681 (1994) ("the most obvious and most publicized change regarding the legal profession" is the general public's hostility towards lawyers).

[5] *Holloway v. Arkansas*, 435 U. S. 475, 482, 489, 490, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)

[6] *Cuyahoga Cty. Bar Ass'n v. Hardiman*, 2003-0hio-5596, *10 (Ohio 2003).

[7] *Id.*

[8] *Anne E. Thar, Update Your Practice to Avoid Malpractice Claims, 83 ILL*

Mark is a Partner at Schneider Smeltz Spieth Bell LLP. Mark frequently represents clients in complex commercial and professional liability disputes, with a particular emphasis on plaintiff-side legal malpractice, shareholder, fiduciary and business tort litigation. Mark has been a CMBA member since 2014. He can be reached at (216) 472-2401 or mmikhaiel@sssb-law.com.