CNA

PROFESSIONAL COUNSEL®

Advice and Insight into the Practice of Law®

Proceed with Caution: Avoiding Nontraditional Legal Malpractice Exposures

Introduction

"Did you hear about that law firm that was sued for legal malpractice alleging _____?" If asked to fill in the blank, many practitioners would assume one of the traditional legal malpractice allegations of missing a statute of limitations, failure to correctly interpret the law, failure to include a clause in a contract or lack of experience in a specific area of practice. Another general assumption is that the plaintiff is a former client of the law firm.

Understandably, legal malpractice exposures are probably not a hot topic in the daily conversations and concerns of a law firm. Practitioners are busy providing legal services, building a book of business, maintaining attorney-client relationships, keeping track of billable hours and perhaps even trying to get paid for those legal services. In this article, we will look at some of the unexpected situations that may lead to an allegation of legal malpractice or a disciplinary complaint. The simple truth is that not all legal malpractice and disciplinary complaints are filed by clients. Whether or not the complainant has standing to file, the complaints must be addressed expeditiously and that steps have been taken to avoid the legal malpractice exposure.

Traditional Legal Malpractice Exposures

For those curious as to where each area of practice ranks in legal malpractice claims, attorneys may review the American Bar Association's ("ABA") Standing Committee on Lawyers' Professional Liability's quadrennial study, *Profile of Legal Malpractice*. The 2020 study is the most recent publication and covers claim activity from 2016 to 2019. It provides detailed data on areas of practice that generate the major allegations of legal malpractice, alleged errors and detailed breakdowns of law firm size, timeframes for closing of files, amounts of alleged damages and other areas of importance. The *ABA Profile of Legal Malpractice* provides a useful national snapshot of legal malpractice allegations. Allegations of error are identified by the subcategories of Administrative Errors, Substantive Errors, Client Relations and Intentional Errors.

The vast majority of legal malpractice allegations are filed by clients. However, there are circumstances in which non-clients attempt to file legal malpractice and disciplinary allegations. Attorneys must appreciate where nontraditional legal malpractice exposures exist so that they may take steps to avoid the unexpected exposures.

Attorney-Client Adjacent

For the practitioner, understanding and defining who the client is in the attorney-client relationship is usually clear – the client is the one who signed the well-drafted engagement agreement. However, practical perspectives are often challenged in the reality of day-to-day practice. There are multiple individuals in the orbit of the attorney-client relationship that will incorrectly assume that they are part of the attorney-client relationship, and thus are entitled to information, as well as access to the client file and attorney.

Family Dynamics

One of the most challenging areas of practice generating allegations of legal malpractice arise from family members of a client in Wills, Trusts & Estates practice. Part of the representation may involve carrying out the wishes of a deceased client and while attempting to distribute assets in accordance with the wishes of the former client, beneficiaries assume the attorney is representing their interests, thus harboring the incorrect view that an attorney-client relationship has been established. When such beneficiaries do not receive what they want or expect from an estate or trust, they may assert a legal malpractice claim against the attorney involved with the disbursements. An important step in these situations is informing beneficiaries that they are free to retain counsel but they are not being represented by the attorney for the estate or trust. The estate attorney should also clarify with the trustee, executrix, or executor that the attorney is assisting them in their assigned capacity to distribute assets and not as a beneficiary of the trust or estate.

Continuing with the theme of family, some clients may require financial assistance in retaining legal counsel and will seek support from family. Unless it is explained at the outset of the representation, family members may assume that by paying the legal fees, they are part of the attorney-client relationship and should be kept apprised of the status of the matter. Irrespective of the sensitivity of the information, the family member paying the attorney fees may expect to obtain all information associated with the matter.

When the representation involves criminal matters, dissolution of marriage, parental responsibilities or bankruptcy, the client will seek to maintain the privileged nature of attorney-client confidential communication. At the outset of the representation, therefore, the attorney may wish to clarify that by agreeing to pay the legal fees for the client, the family member will not be treated as the client. This understanding should be reflected in writing and signed by the family member who has agreed to assist in the payment of professional services and other legal fees.

Is there such a thing as "casual" legal advice? From a risk control perspective, the answer is absolutely not.

"Casual" Legal Advice

Is there such a thing as "casual" legal advice? From a risk control perspective, the answer is absolutely not. Practitioners have lives outside of the office and interact with people seeking legal advice who are not their clients. The general population may not appreciate that most attorneys are not "general practitioners" familiar with every aspect and every possible area of law practice. For example, a medical patient needing brain surgery would not seek out a family physician for specialized medical care. Similarly, an individual encountering a property dispute should not seek legal advice from an attorney concentrating in taxation.

Although it may be an uncomfortable admission, when confronted with an individual seeking "casual" legal advice involving an area of practice unfamiliar to the attorney, explaining a lack of experience, resources or time is preferable to offering a best guess and thereby creating a potential legal malpractice exposure.

Notably, attorneys attempting to be helpful and provide legal advice in these situations have been sued for legal malpractice. There have also been cases in which attorneys have provided legal advice to a family member of a potential plaintiff, never meeting them in person, and were sued for legal malpractice based upon the information that was conveyed by the mutual contact. Although these situations are rare, attorneys must be cautious in these casual encounters. Moreover, the option remains to schedule a future meeting to establish whether or not the individual seeking legal advice should become a client.

Technology Troubles

Technology permits attorneys to be in constant contact with their current clients, prospective clients and anyone with access to the internet. Social media platforms may be helpful in keeping up with friends and acquaintances, but they also should be recognized as a potential problem for unwary attorneys. While family and friends may "tag" an attorney when they see a request for legal counsel on a social medial platform, the attorney should emphasize that an attorney-client relationship has not been established through the social media platform. Attorneys also should avoid providing/posting legal advice that may be seen by others and relied upon, thus leading to potential allegations of legal malpractice.

Although social media platforms may be useful in establishing new business, it is imperative that attorneys are cautious with prospective clients and clearly communicate the necessary steps to become an actual client of the attorney. Following initial contact, the attorney should transition communications to professional email or an in-person or virtual meeting. Again, the attorney must act in a professional manner and endeavor to control the expectations and understanding of a prospective client.

Dabbling Dilemmas

Is there really any harm in offering legal advice outside of your area of practice? Once again, from a risk perspective the immediate answer is yes. A license to practice law does not require specialization or certification in most areas of practice. A license to practice law provides attorneys with a broad spectrum of areas to choose from in their practice. Some practitioners establish law firms providing multiple areas of practice that cover the personal and professional lives of their clients. Although a one-stop shop may create efficiencies for clients, attorneys should consider whether or not they are qualified to take on representations involving new areas of practice. A lack of experience in a specific area of practice must be acknowledged as a red flag.

When presented with a representation that encompasses a new area of practice, attorneys should consider having co-counsel or a mentor to assist in the representation. If the attorney does not have the time or resources to provide competent representation to the client, then a limited scope engagement or referring the client to more experienced counsel reflects the best course of action.

It may seem a draconian analysis but an attorney contemplating a representation that would be "dabbling" in a new area of practice should consider the story that the plaintiff would tell a judge or jury in a legal malpractice action. In retrospect, will the attorney be able to establish the necessary experience to provide diligent and competent legal services to their client? If the answer is no, again the prospective client should be referred to other counsel, or co-counsel should be involved in the representation.

Family and Friends Favors Fallout

When approached by family and friends for legal representation, no one wants to envision a future potential plaintiff. Unfortunately, if family and friends do not receive what they expected over the course of the representation or believe that they have been harmed, it may lead to a legal malpractice allegation. Saving money and having a lawyer in the family often is viewed as beneficial, and family and friends may seek to take advantage of that relationship. These representations are acceptable – if the representation involves the practitioner's area of practice and the standard protocols of client intake, conflicts checks and engagement letters are followed.

Similar to dealing with prospective clients, when family or friends approach an attorney for representation in an area outside of standard practice, it should probably be declined. Attempts to be helpful by taking on representations involving residential real estate transactions, drafting of wills or trusts, taxation advice or dissolution of a marriage without requisite experience may lead to a legal malpractice complaint. Therefore, careful consideration should be given to whether representing family or friends in high stakes matters would be appropriate. Even if the practitioner has relevant experience in the area of practice, it may be best to offer a referral to another attorney rather than take on the representation of a family member or friend.

Overpromising, Misrepresentation or Miscommunication?

Establishing protocols in a law firm are essential to mitigating and avoiding legal malpractice exposures. Once a prospective client transitions to a current client, it is imperative that the attorney establish clear boundaries of what the representation will and will not involve. Part of that process is clear communication with the client on what may and may not be accomplished over the course of the representation.

One challenge for the practitioner is appreciating that the client may be inexperienced in working with an attorney and must be educated on the process and disposition expectations. Once the attorney and client have come to an understanding of what the representation will involve, it must be reflected in an engagement agreement. This foundational document establishes the boundaries of the attorney-client relationship.

Attorneys should carefully review the language of their engagement agreement and give the client time to ask questions before signing. Some traditional language that should be avoided is "any and all matters related to…" All-encompassing language may provide comfort to a client but becomes problematic when faced with an allegation of legal malpractice for failure to render legal services to a client. Just as lack of clarity in a contract will be held against the drafter, the poorly drafted engagement agreement will be held against the attorney as the professional responsible for establishing the parameters of the attorney-client relationship.

Non-Attorney Team Troubles

Attorney-client relationships are maintained by multiple parties. Some of the most influential players in the attorney-client relationship are not attorneys and may not work within the confines of the law firm. Non-attorney support staff are a critical component in avoiding legal malpractice exposures. As technology advances, IT professionals also assist in the attorney- client relationship. Cloud and e-discovery vendors contribute to providing complete legal services to clients. For litigators, process servers are an integral part of carrying out a legal representation and advancing litigation with proper service of defendants. When these players are reliable professionals, it makes the practice of law less challenging. However, when these contributors make an error or fail to carry out their responsibilities, it may result in a legal malpractice or disciplinary complaint against the attorney and law firm.

Attorneys must understand that the errors of others involved in the attorney-client relationship may ultimately be attributable to them. Non-attorneys are an absolute necessity and their impact on the attorney-client relationship should not be overlooked. Attorneys should do their due diligence in selecting those who will assist over the course of the attorney-client relationship. Ensure proper training of non-attorney support staff and that investigation of outside vendors is completed before incorporating them into the attorney-client relationship. Over the course of the attorney-client relationship, attorneys should monitor the work of non-attorney support staff and outside vendors to confirm that assigned tasks are completed. For all those contributing to the attorney-client relationship, attorneys should be available to answer questions that arise over the course of the representation. Proper supervision is the responsibility of the attorney. Even with the best non-attorney support, attorneys must be constantly involved in what is taking place over the course of the representation to ensure that client interests are protected and matters continue to progress to resolution.

Cautionary Cases

Understandably, the nontraditional exposures may seem alarmist. However, there are multiple examples of unexpected situations that led to allegations of legal malpractice. After assisting a former law school classmate dealing with a cancelled engagement, one attorney was sued for legal malpractice.[1] A casual conversation with a former high school classmate while at a local bank resulted in a legal malpractice claim filed by a plaintiff the attorney never met in person.[2] Attorney faced disciplinary board for failure to supervise paralegal resulting in fraudulent behavior to the detriment of law firm clients.[3] An attorney was found liable for process server's failure to timely serve process in medical malpractice case.[4]

Conclusion

Legal malpractice exposures are not limited to the traditional attorney-client relationship. Attorneys must be aware of the challenges that exist with respect to prospective clients and others that are involved in the attorney-client relationship – those monitored by attorneys and those that are connected to the client. By being aware of these unexpected exposures, attorneys may act with purpose and avoid creating the misunderstandings that may lead to disciplinary or legal malpractice allegations.

This article was authored for the benefit of CNA by:

Theresa Garthwaite

Theresa Garthwaite serves as Risk Control Consultant for CNA's Lawyers Professional Services program. She is responsible for the overall assessment, evaluation and delivery of risk control services for complex risk exposures within CNA's Lawyers Professional Liability business. She is responsible for developing risk control content for presentations and publications. She oversees the "In Practice … with CNA" and "CNA's Professional Counsel" publications. Prior to joining CNA, Theresa worked as an associate in a boutique law firm, specializing primarily in plaintiffs' medical malpractice, catastrophic personal injury and wrongful death matters. She is admitted to practice in Illinois and United States District Court, Northern District of Illinois. Theresa also holds the Commercial Lines Coverage Specialist (CLCS) designation, and is a recipient of the Risk Control Superior Service Award.

1 *Wildey v. Paulsen*, 894 N.E.2d 862 (Ill. 1st Dist. 2008)
2 *Douglas v. Monroe et al.*, 743 N.E.2d 1181 (Ind. Ct. App. 2001)
3 *Mahoning County Bar Assoc. v. Lavelle*, 836 N.E.2d 1214 (Ohio 2005)
4 *Kleeman v. Rheingold*, 81 N.Y.2d 70 (1993)

Distributed By:

McGriff

1500 Riverfront Drive, Little Rock, AR 72202
Phone: 501-661-4957 Toll Free: 800-542-0226 Fax: 501-508-6959
Tiffaney.Davids@McGriff.com