Section of Litigation Woman Advocate

Avoiding Malpractice Risks for Litigators

By Gilda R. Turitz – May 20, 2014

The adage "hindsight is always 20/20" never seems to ring as true as when a lawyer confronts a malpractice claim. The unhappy client may have a legitimate beef: A classic example is blowing a statute of limitation on a client's claim. Or the unhappy client may complain about more subjective judgments such as strategies followed or specific tactics taken, or simply getting a bad result. The litigator's regrets then surface. Among them: "If only I had never taken them on as clients." "If only I had written that email confirming they didn't want me to depose that important witness." "If only we had researched the issue that gutted our defense." "If only we had subpoenaed those third-party documents in time for trial."

Many complaints against litigators are rooted in real or perceived failures to properly manage client expectations about what will happen as the case proceeds and how much it will cost, as well as the likelihood of success or failure of a specific strategy or the case as a whole. By their nature, litigation matters are fraught with conflict and can be highly emotional or stressful to the clients, even in corporate business cases. Clients hate surprises, which may include unexpected bad rulings or higher bills than anticipated. Such surprises may cause upset clients to scrutinize the litigator's performance and find fault when they would not have done so if they had been properly prepared. Written confirmation of agreements with clients about strategy decisions and budgets (or estimates for phases, tasks, or expenses, particularly experts and e-discovery) will ameliorate surprises. Advising clients promptly of any changes will also avoid later misunderstandings and claims that the litigator failed to represent and advise the clients appropriately.

While attorneys can never completely insulate themselves from potential malpractice claims, litigators can mitigate their risks by being aware of significant areas of pitfalls and best practices to avoid them.

Client Intake

A litigator should make sure the client is a good fit for his or her practice and the firm's client base. Certain red flags should make a litigator wary. If the client is changing lawyers, find out why, especially if this is not the client's first change. Such behavior may indicate a client who is uncooperative, difficult to manage, or impossible to please under even the best circumstances. Beware the proposed client who does not conform to the firm's reasonable requests for retainers, or who balks at signing representation agreements or providing initial documentation to evaluate a case—or any other indicia of lack of cooperation. When a firm has a slow period of productivity, attorneys often feel more pressure to overlook these potential problems, but litigators should stick to their standards and make sure the client is one they want to have, one who will not become a high-maintenance nightmare they will later want to fire.

Conflict Analysis

Conflicts of interest present some of the most common reasons attorneys are sued for malpractice. Initial conflicts checks are critical to ensure that representation can be undertaken from the inception of a matter. The search is only as good as the information input and the quality of the firm's database. In a litigation context, one problem area is that of updating and running supplemental conflicts checks as new parties enter the case. In addition, even though individuals associated with companies (such as senior management or partners) may not be parties to a litigation, they should be entered into the database to ensure that all potential conflict situations will be addressed. Litigators should also consider the aspect of "business conflicts" that may not be disqualifying, but which may lead to client discontent later and a malpractice claim if a client believes that representation of other companies in the firm's practice (such as business competitors) undermined the effectiveness of the firm's representation.

Initial Evaluation and Subject Matter Expertise

An adequate initial investigation, including client interviews and document review, is critical to evaluate whether a potential case is within the attorney's and firm's competence and

whether they can adequately represent the client. While attorneys can certainly educate themselves in new areas to undertake representation without committing ethical violations or falling below the standard of care, in some instances a matter may require specialized expertise that a litigator cannot reasonably develop in time for a particular case. Such a circumstance may require turning the case down or associating qualified counsel to assist in specialized areas—as, for example, in tax, certain intellectual property matters, or tribal law. Litigators should be mindful that under Federal Rule of Civil Procedure 11 and state analogs they may be sanctioned for signing pleadings without adequate factual basis; to do so may also expose them to malpractice claims and even claims for malicious prosecution for continuing to pursue a case without adequate basis if the adversary achieves a successful termination.

Discovery
Malpractice claims may arise from a failure to take adequate discovery, or for advising the client on stonewalling the adversary's legitimate discovery efforts, which may lead to sanctions including, in extreme cases, terminating sanctions. Clear and documented communication with clients is key to protecting counsel, especially when clients do not cooperate in providing necessary information to answer discovery, or when they instruct litigators not to take or participate in depositions or obtain document discovery from third parties. E-discovery requirements present other challenges because of strict court rules, cost considerations, and the scope of production that may be necessary. Noncompliance with such requirements may lead to potential sanctions against attorneys as well as clients. Attorneys must be especially vigilant with respect to required litigation holds, and they must educate clients about their responsibilities in this area. These discovery issues may result in adverse rulings leading to claims.

Dispositive Motions
An area of risk with summary judgment or summary adjudication motions is the failure to comply with often highly technical court rules about their submission and the production of admissible evidence with proper foundations. Denial of an otherwise meritorious motion being considered because of a failure to comply can be a fertile source of dispute between client and counsel. Such a situation may also jeopardize the client's rights and require it to go to trial when it otherwise would not need to. Another area of risk is the failure to take sufficient discovery in time to garner evidence to oppose a summary judgment motion. To avoid such pitfalls, litigators should plan discovery with adequate lead time.

Settlement
Attorneys have an ethical duty to transmit settlement demands and offers to their clients. Beyond transmittal, they must also help the client evaluate the risk of accepting or negotiating what is offered, or proceeding to litigate. That requires candid communication about the strengths and weaknesses of the client's legal position, the risks and costs of continuing to litigate, and an evaluation of the judgment value versus the settlement value of the case. If clients feel forced into settlement because they were not adequately advised, or they believe the litigator was not aggressive enough (or successful in motion or discovery practice), or they feel their concerns were not heard, clients may have settlor's remorse—and this may lead to claims against counsel. Clear, written communications on the benefits and detriments of alternative courses of action, and the client's decision—especially if it is against counsel's recommendation—are critical to protect counsel from a later claim.

Trial
As all litigators know, a trial is a fluid event with testimony and judge's rulings constantly changing the landscape. Trial is an emotional rollercoaster for most clients, so properly preparing them for what will happen at trial is key to their understanding the risks of putting their case in the hands of a third-party decision maker. Trial counsel must vigilantly preserve the client's rights by making appropriate motions promptly. Similarly, counsel must protect the record for appeal in the event of an adverse decision. Protecting the record requires particular discipline to ensure that discussions off the record, where important points were discussed or decisions were made, are put on the record—and that all evidence introduced gets formally admitted or, if objections are sustained, there is a record of such objections or offers of proof, if applicable.

Winding Up the Case
At the end of a case, particularly where counsel is handling the client's judgment or settlement funds, counsel must ensure that required accountings are accomplished promptly and the client receives everything to which it is entitled. The firm should adhere to clearly stated policies about returning client documents, or their storage or disposition, so there is no misunderstanding about responsibility for such matters. This is especially important if there will be an appeal handled by a different firm. Good practice dictates sending a letter stating that the particular engagement is concluded, to clearly demarcate termination of that representation and start any claims limitation period.

Resolving Client Fee Issues
Client disenchantment about the cost of fees or expenses such as experts should be resolved as early as possible. They can be the source of clients looking for fault to negotiate a lower bill or nonpayment altogether. If the attorney and client cannot resolve their fee issues, the attorney should be aware of the jurisdiction's limitation period for malpractice claims before bringing a collection action on fees because such suits more often than not generate a counterclaim for professional negligence and requests for disgorgement.

Despite best efforts to resolve issues with disgruntled clients, litigators may find themselves with an overtly threatened claim or awareness of sufficient displeasure expressed by the client—for which they may recognize they possibly did act negligently—to notify the carrier as to a claim or "circumstance" under their professional liability policies. All litigators should familiarize themselves at the renewal date of their policy with its

current terms, especially the coverage definitions and exclusions, and the notice requirements. For example, some policies consider a "claim" to encompass a request to the firm for an agreement to toll the statute of limitation on any claims. In the unfortunate event that a malpractice claim cannot be avoided, failure to comply with policy notice requirements can jeopardize coverage. While no litigators can completely protect themselves from malpractice claims, maintaining clear and candid communications with clients and adhering to court rules and requirements will help protect all parties' rights.

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