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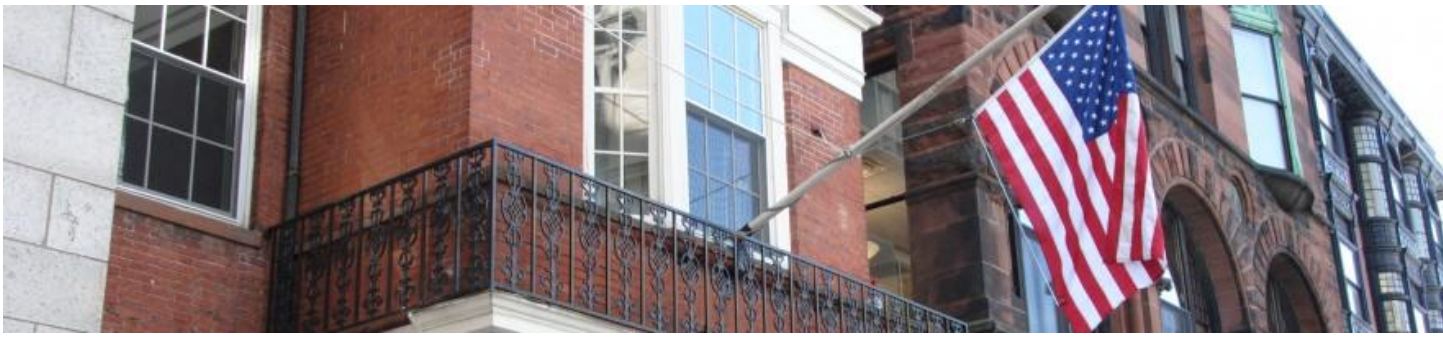

Staying Out of Harm's Way – Avoiding Legal Malpractice Claims

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Practice Tips

Every law firm—no matter its size, reputation, or practice area—will someday face the specter of a legal malpractice claim. No firm is immune. However, there are steps attorneys and their firms can take to minimize the risk of a claim and to maximize their ability to defend themselves. The authors have handled several legal malpractice cases and in all these cases there have been aggravating factors that have made the case much more difficult to defend and increased the settlement value of the case. Despite lawyer jokes, we are actually human and we do make mistakes. However, what we do not want to do is to exacerbate those mistakes through ancillary errors that put the lawyer or firm in a bad light. By avoiding such errors, the law firm will decrease its exposure and will be in a position to contest the claims, rather than having to capitulate to avoid negative publicity. This article will identify some of those ancillary errors and suggest ways to avoid them.

The following fictionalized scenario illustrates several possible errors: A senior associate in a multi-national law firm is approached by a former colleague and now in-house attorney with an opportunity to defend his company in a litigation matter. The case involves a former employee who sued the company for millions of dollars alleging wrongful termination. The senior associate has never handled this type of matter before and, in fact, has never before tried a case. However, he figures that the case is sufficiently similar to other cases on which he has helped partners that he believes he could represent the client effectively and, really, what are the chances the case will actually go to trial? In his pitch to in-house counsel, the senior associate represents he is an experienced litigator (but does not mention that he has never before tried a case) and promises that the case will be overseen by a very experienced senior partner. He crafts a proposed litigation budget for the client and, in his enthusiasm to win the client, produces a budget that is unrealistically low, far below those of the other firms in the mix. The client is pleased with the pitch and the budget and retains the attorney and his firm. The senior associate is pleased with himself, because he is up for partner within the year.

Their pleasure is short-lived. The in-house counsel sees himself as an active participant in the litigation team. He raises concerns about strategy decisions and legal arguments. The senior associate ignores the client's request to advance certain defenses and proceeds with the litigation without addressing the client's concerns. In doing so, just in the discovery phase alone, the senior associate and his cadre of more junior associates rack up legal fees more than ten times what he had estimated the fees would be through trial. This helps his bid to become partner, but does not endear him to the client.

The case eventually proceeds to trial and the senior associate, now a new partner, takes on the role of lead trial counsel even though he has never taken a case to trial. He does not bring in a senior partner to help try the case. At trial, the attorney continues to ignore the questions and suggestions of the client. In so doing, he fails to make a legal argument that has merit and could have significantly impacted the result. The jury verdict is a disaster for the client, with damages exponentially greater than the attorney or the client ever expected. After all appeals are exhausted, the client brings a malpractice action against the firm.

The demand letter's main claim is that the senior associate failed to make a legal argument that a reasonable attorney would have made in the case. This is a standard malpractice claim based on the negligence standard articulated by the courts. To prevail, the client must show that the senior associate failed to "exercise the degree of care and skill of the average qualified petitioner." *Fishman v. Brooks*, 396 Mass. 643, 646 (1986). On this standard, the firm has some quite plausible defenses to the claims.

Moreover, the client will face the hurdle of providing adequate expert testimony to prove the senior associate's negligence. In *Pongonis v. Saab*, 396 Mass. 1005 (1985), the Supreme Judicial Court explained that expert testimony is required to demonstrate an attorney's negligence unless "the claimed legal malpractice is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence." This is not an easy hurdle to clear. The Appeals Court, in *Colucci v. Rosen, Goldberg,*

Slavet, Levenson & Wekstein, P.C., 25 Mass. App. Ct. 107, 111 (1987), required a client to demonstrate through expert testimony that the attorney's failure to learn about and comply with a procedural statute, which was both crucial to the client's case and widely known within that field of law, was negligent. If the client in this fact pattern wants to challenge the senior associate's trial strategy and legal arguments, it will need to prepare itself for a battle of the experts.

An additional hurdle for the client in this fact pattern is the element of causation. To prove causation on a litigation malpractice claim, a client must present a "trial within a trial" and show that he would have "probably" prevailed in the underlying case but for the attorney's negligence. *Fishman*, 396 Mass. at 647. For the most part, this hurdle also requires expert testimony that establishes a link between the attorney's negligence and the bad outcome for the client. *See Frullo v. Landenberger*, 61 Mass. App. Ct. 814, 818 (2004).

The hurdles for the plaintiff are high, but what makes the case highly risky to defend are the attendant embarrassing and aggravating factors—the legal fees so far exceeding the proposal, the senior associate not being forthcoming about his lack of trial experience, the failure to address the client's concerns that actually had merit, and the failure to bring in a senior attorney who had significant trial experience. The risk that such embarrassing allegations would become public make it impossible for the firm to defend. It has to settle.

As you read this sample fact pattern, you probably think to yourself that this example is exaggerated and that there is no way I or my firm would make similar mistakes. Think again—this example is a disguised, real life situation involving a prestigious law firm (not based in Massachusetts), and as lawyers we all face at least some of the pressures that led the lawyer and firm astray. What follows is a discussion of the errors cited above and how firms and individual attorneys can take steps to avoid these pitfalls.

1. Always be objective and straightforward with a client

Nothing exacerbates the damage in a legal malpractice case more than the plaintiff being able to allege that his lawyer or law firm was not straight with him. What lawyer or firm would want to litigate a legal malpractice case in which their honesty and credibility are questioned? In addition to reputational damage, the lawyer and law firm are now at risk of greater liability. The Appeals Court, in *Frullo v. Landenberger*, 61 Mass. App. Ct. at 822, has signaled that a client can bring Chapter 93A claims in cases of alleged deceit or dishonesty. "There is no doubt that the provisions of G.L. c. 93A apply to attorneys." *Id.* Not only does this create exposure to multiple damages and attorney's fees, but it also gives the opportunity for the client to avoid the hurdle of expert testimony on negligence. Claims grounded in allegations of dishonesty, fraud, deceit, and misrepresentation are not subject to the same expert testimony requirement applied to professional negligence claims. *See Brown v. Gerstein*, 17 Mass. App. Ct. 558, 566-67 (1984). Resist the temptation to puff or exaggerate. The resulting leverage to settle (especially with the possibility of multiple damages) will be difficult to withstand.

2. Puffing during the pitch

Being straightforward applies as much to the pitch as it does to the post-engagement work. Competition for work can be very intense and you might be tempted to exaggerate your qualifications and minimize your estimate of projected cost. Again, resist the temptation. Any statement the lawyer or law firm makes regarding its experience and expertise is bound to become part of a disgruntled client's complaint in a legal malpractice action. One recent and sensational example is the complaint filed by infamous UBS whistleblower Bradley Birkenfeld against Schertler & Onorato, LLP, the firm that represented him in his whistleblower suit. Birkenfeld now alleges that the firm and its attorneys "falsely represented themselves to [Birkenfeld] as experienced in and knowledgeable about federal whistleblowing laws and procedures" when, in reality, they had "very limited experience in the area." Complaint at ¶ 14, *Birkenfeld v. Schertler & Onorato, LLP*, Civil Action No. 0008397-12 (D.C. Super. Ct. Oct. 31, 2012). There are few better ways to undermine the defense of a legal malpractice claim than to have misrepresented to the client your familiarity with a particular type of transaction, your expertise in a particular area, or your trial experience. It will magnify any error the attorney may have made. Again, you and your firm will pay a premium for not wanting this case to be litigated in the public eye.

3. Maintain clear lines of communication with clients

Almost every malpractice claim arises out of a client feeling personally wronged by the attorney. This is why client communication is so important. Whenever an attorney receives client complaints about a lawyer's strategic decision, the quality of work, or an unfortunate event, the attorney should respond in a way that both alleviates the concern and affirms to the client that you are on the same team. Not only will the attorney be fulfilling his ethical obligations under Rule of Professional Conduct 1.4, but he will also build a stronger rapport with the client and earn the client's loyalty. A client pleased with a law firm's responsiveness and care will be more understanding in the event that the matter sours.

4. Listen to, and get "buy-in," from the client

Clients can have some pretty harebrained ideas, but every now and then… Whether good or bad, all client ideas and suggestions need to be addressed. If you do not think it is a great idea and you discuss the idea with the client, you can often explain the weaknesses and get the client to agree with your view. Even if you and the client continue to disagree, you are most likely talking about a judgment call, which is a very difficult basis for a malpractice claim. If you ignore the client, you will only alienate the client, and if it turns out that you were wrong, you are not going to want a public record of the client being a better lawyer than you.

5. Establish clear email protocols for your attorneys

Although the law in this area is not absolutely clear, there is a reasonable chance that if a client sues you for malpractice he will be able to get his hands on the internal emails relevant to his case or

transaction. In almost every malpractice case, the most damaging document is not the contract, the court filing in the dispute, or an internal memo, but rather the informal emails among law firm attorneys. These are the communications where the smoking gun typically lies—either in the form of an admission of a mistake from one attorney to another or an error made in a hastily drafted intra-firm email. In *Vlachos v. Weil*, No. 11028/2009, 2011 WL 1348397, at *2 (N.Y. Sup. Ct. Apr. 8, 2011), a New York trial court considered the admissibility of emails in which the attorney admitted that he was at fault in failing to ensure that his clients received the money they were owed as part of a stock deal. Whether those emails would come into evidence as a party admission or not, the malpractice suit caused the lawyer's self-critique to become a matter of public record.

Finally, this probably goes without saying, but don't say anything negative or unflattering about your client in an email–it will not reflect well on you and it will not be something you will want to see the light of day. In one federal court case, a former client of Day Pitney brought forth emails in which his lawyers demeaned him, demonstrating the lawyers' "crude behavior." *Iannazzo v. Day Pitney LLP*, No. 04 Civ. 7413(DC), 2007 WL 2020052, at *10 (S.D.N.Y. July 10, 2007). Although the client was ultimately unsuccessful in his malpractice suit, Day Pitney could not call the resolution a complete success if its attorneys were on record as antagonistic to and disrespectful of the firm's clients.

6. Construct an oversight program for all cases.

Many malpractice claims arise from an attorney who is in over his or her head, either because the matter is outside the attorney's area of expertise or is too complicated for less experienced attorneys. Certainly where an attorney who is out of his depth takes on a matter that does not end well, you can be sure the client will examine the situation closely. As a remedy, every law firm should consider instituting a formal program in which a senior attorney is assigned to each matter, and meets monthly with the day-to-day manager of the case, so the junior attorney can bounce ideas, issues, or concerns off of the senior attorney. Without a formal procedure in place, the junior lawyer will often feel uncomfortable raising concerns until it is too late.

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With the number of malpractice claims rising every year, most law firms will face the specter of malpractice suits. Under the legal standards applicable to malpractice claims, errors in judgment will often be quite defensible and will not be an embarrassment to the firm. The trick is to avoid exacerbating the situation by making mistakes that put the lawyer or the firm in a bad light and that make a confidential settlement the only real option.

A Word About Conflicts of Interest

Much has been written about the trouble law firms can find themselves in when they take on matters that involve a conflict of interest. Most lawyers understand the basic ethical prohibitions on being adverse to

another client of the firm, having clearly divided loyalties, or disclosing confidential client information. However, there are many situations in which a client's waiver or even simply disclosure to the client can prevent serious problems down the road. Where an undisclosed conflict exists, the client can paint almost any attorney error as being caused in part by the law firm's conflicted loyalties. This is not where you want to be.

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