To Reduce Malpractice Risk, Improve Client Communications

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If you, a partner or your firm were sued for legal malpractice, who would you blame?

The client for being unrealistic or unreasonable in his or her expectations? The situation because it was untenable or a no-win scenario?

Or would you blame yourself—or the target of the malpractice claim—and admit that you could have done more to avoid whatever transpired to lead to the lawsuit?

Certainly, no situation is the same, and any of the culprits above could be to blame. But, often, if attorneys take a look at the communication process and protocols laid out at the beginning of a client relationship and carried out through the engagement, the frustration that led to the client's malpractice claim may have been avoided.

An American Bar Association study of the 10 most common legal malpractice allegations found the most common was a failure to know the law. The 10th was fraud. In between were issues such as failure to obtain client consent, not addressing or eliminating client conflicts of interest, issues of planning or deadlines, or just "procrastination."

Most can be characterized as a "failure to communicate" with the client or—of concern to a managing partner—with other attorneys in the firm.

At its root, the failure to communicate between attorney and client, or the attorney and others in the firm, often is at the foundation of issues that lead to malpractice claims. An associate may be facing challenges or unfamiliar areas of law and not seek out the advice of a partner, mentor or another attorney who could lend guidance. Or an attorney doesn't address client concerns or fails to keep the client informed when issues arise.

The attorney avoids the conversation, and as time passes, he or she becomes afraid of the shadow cast by the situation.

How can a firm thwart such communication avoidance? Encourage an open-door policy—between managers, partners and associates—to discuss any matter. Almost all problems are fixable, assuming they're addressed early.

Know Your Limitations

Attorneys frequently face limitations, whether in their scope of work or whether potential conflicts of interest should reasonably prohibit taking on a client.

Attorneys do a disservice to the client when they fail to admit they're not the right attorney for the job. This is especially true for sole practitioners who may be reluctant to turn away a case, client or opportunity. Instead, he takes on the case beyond his practice area, convincing himself: "I'm smart. I can figure it out."

If the attorney fails to inform the client, and the other party prevails, the client could claim failure of the attorney's ethical duty to inform the client.

Conflicts of interest are particularly thorny for attorneys, especially those in larger firms. Most issues arise when attorneys fail to disclose a conflict, especially one they knew of but felt was inconsequential. The Florida Bar guidelines are clear, but common sense might give even more clarity. If you question a possible conflict, err on

the side of overdisclosing. Many clients will waive legal or business conflicts. However, clients might become suspicious if they later learn of undisclosed conflicts.

Conflicts also arise when one attorney doesn't define the client or scope of an engagement. For example, imagine an attorney is hired by one party in a business arrangement or transaction, but has also provided advice to other parties seen as "partners" in the transaction. The others may view it as a shared relationship. If disagreements arise, the attorney could be caught in the middle. Courts have ruled that without clear contractual distinctions of who the attorney works for—and doesn't work for—the other party might reasonably expect a shared interest.

Moreover, as an assignment grows (a concept called "scope creep" in business circles), the attorney may find himself providing additional services not originally considered or anticipated.

A well-drafted retainer agreement signed by the client can help clearly define the scope of the engagement. The agreement also can serve as a written reminder for the attorney that anything not on the document is beyond the scope of the relationship.

An addendum or new agreement should be drafted to incorporate new client needs.

The agreement also must include the client's responsibility to fully disclose any relevant information regarding the matter. Just as an attorney should not be reticent to discuss a matter with a client as mentioned above, a client should know that withholding information or relevant documents is in violation of the agreement. You may need to remind the client of the importance of the attorney-client privilege.

To be sure, retainer agreements aren't necessary for every discussion or brief engagement. But regardless of whether an agreement is in place, internal policies should require documentation of every discussion, especially related to input, strategy, pursuit or settlement.

Open, honest client communication, supported by well-drafted retainer agreements, can strengthen client relationships, mitigate risk of malpractice claims and bolster a defense should a claim be made.

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