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A Report on Legal Malpractice Prevention Issues

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Fast-Track Rules Have Added Challenges Business Litigation: To stay out of the malpractice doghouse, business litigators can follow a few tried-and-true guidelines.

By Royal F. Oakes

One vivid memory of law school is learning that the "rule against perpetuities" is so obtuse that misunderstanding it doesn't qualify as malpractice. Business Litigators don't have the luxury of such a "malpractice mulligan."

According to Stephen M. Blumberg, a Fresno lawyer who coauthored "Preventing Legal Malpractice: California Case Studies," and who advises the Lawyers' Mutual Insurance Co. of California on malpractice prevention, business practitioners face new challenges in this field.

"The pitfalls in business litigation have been greatly compounded by the fast-track rules," Blumberg said. "New deadlines exist for everything from discovery to designating experts, to submitting trial briefs and jury instructions."

To stay out of the malpractice doghouse, business litigators can follow a few tried-and-true guidelines.

■ **Uncharted waters:** In spite of the trend toward specialities, lawyers are often required to stray from fields with which they're most familiar. The corporate lawyer sometimes has to act in the role of a litigator, because of the presence of complex corporate law issues. A litigator may have to be a corporate, or administrative or regulatory lawyer, when there's an administrative hearing that resembles a trial. These situations are fraught with danger. Most examples of missed deadlines involve lawyers who try to shift gears and work in areas that are unfamiliar. It feels a lot like being in the twilight zone, only Rod Sterling's not around to explain what's going on. The solution: eternal vigilance when you find yourself in unfamiliar

territory.

Bankruptcy law is a classic example. You should freely consult with colleagues who specialize in this area. Check with court clerks to learn the local ways, spend lots of quality time with the local rules and if the size of your firm warrants it, make sure at least one lawyer has the job of becoming familiar with an esoteric field such as bankruptcy.

■ **"Who is that masked person working on my case?"** If several lawyers work in your firm, you've probably seen the "hands-off" phenomenon, in which the partner gets the job because the client's heard about the partner, it's handed to an associate, who then hands it to a clerk or paralegal. It's a running joke in law firms, but it's not very funny to clients. Lawyers try to rationalize that the younger lawyers can do perfectly good work, and they're saving a lot of money for the client, but the clients often don't see it that way. Find out, up front, the client's expectations. If they expect you'll do all the work, explain that it's just not possible, and try to introduce them to the people with whom they'll be working to make sure they're comfortable with the arrangement.

■ **Conflicts of interest:** Beware of "Mr.(or Ms.) Green." You can give into them or work around them, but you can't ignore them. It's essential to have a system to detect the existence of conflicts of interest. This is one of these areas in which a client is bound to become so famous that a legal malpractice suit is likely. The idea of turning your back on an old client just because the new client holds out the promise of large billings, makes people very angry. Whether it's a computerized cross-

check system or the old-fashioned card file, you should diligently check every new matter against past representations.

When "Mr. or Ms. Green" walks in the door, the last thing you want to do is say goodbye just because 10 years ago you gave his third cousin (twice removed) some advice at a cocktail party. Unfortunately, that is how a lot of lawyers view a potentially lucrative engagement when it's really a troublesome conflict. Instead of ignoring conflicts: Find a solution; obtain a written waiver from all parties; convince yourself that there really is no pure conflict (perhaps you represented someone in the past, but the subject matter was totally unrelated to the new project); or bite the bullet (refer the case to someone who may refer a case back to you someday).

There are other reasons to be careful when it comes to conflicts. If you wind up being disqualified, you can lose all legal fees the new client paid; you can be forced to pay part of the legal fees the new client has to pay your replacement; and you may end up paying damages to the new or the old client, or both. It's also possible you could wind up losing your license to practice law if the facts are egregious enough.

■ **How to say "I told you so":** If you're going to say it, leave a paper trail. In a case in which your client refuses to follow your advice, you should definitely confirm that fact in writing. If you don't put it in writing, you'd be surprised how often your client ends up forgetting how he or she ignored your advice.

■ **Get out while the getting is good:** When you remove yourself from a case, again, put it in writing. Withdrawing

representation should be confirmed by a certified letter to the client, return receipt requested. The letter should state that the firm is not going to continue representing the client, and you should leave nothing to the imagination. The last thing you want is any ambiguity about whether you're still on the case.

You should advise the client that there are critical time limits that have to be met for a claim to be viable; advise clients to seek other legal counsel. But don't delve too deeply into an evaluation of the claims. Don't state the exact reason for rejecting the claim, or why the case lacks merit in your opinion, or why certain defendants aren't liable. That makes it look too much like you're still involved; giving additional advice further embroils you.

Finally, have a substitution-of-attorney form signed by your soon-to-be ex-client, or obtain a court order releasing you.

Don't nuke the deadbeats: Don't sue your client for fees. This isn't a 100 percent rule that absolutely positively must be followed, but almost always you're simply guaranteeing a malpractice cross-complaint. When that happens, the case goes to your carrier: You're going to have to pay your deductible; your premiums are going to go up; maybe you're going to get cancelled.

Avoid damaged goods. Perhaps it's an overstatement to say a lawyer should never take on a client who has terrible things to

say about lawyers, has sued them, and talks a lot about how he or she doesn't like to pay them. If your prospective client has had trouble with lawyers in the past, he or she will probably have trouble with you, too. If a client seems obsessed with being ripped off by attorneys, don't count on smooth sailing in your relationship—no matter how hard you try to be clear and fair.

How to avoid being sued for malicious prosecution: Technically, malicious prosecution isn't legal malpractice. It's an intentional tort, alleged by a party who wins a suit against the person who sued, and sometimes against the lawyer who filed the suit on behalf of the former plaintiff. The best way to avoid being sued for malicious prosecution is to name a defendant in the underlying suit only after reviewing the law and the facts, and including that a proper basis for a suit exists. Almost always, the focus of a malicious prosecution action will be on the lawyer, because the client's ever-popular defense is to simply say, "My lawyer told me I had a good case."

Monitor your younger or inexperienced lawyers: You can be the best and most careful lawyer in the world, and still get slammed if you discover too late that you've hired a few bad apples.

The solution is simple, but it's rarely employed. Review the work done by younger or inexperienced lawyers: Look at the pleadings they draft, the letters they write; sit in on or read their depositions;

sit in on a trial they're handling. The result is more work for you, but it could prevent a series of firm-crushing malpractice lawsuits. Literally grade your associates. Give them a report card.

Investigate insurance coverage: Although there are few, if any, reported cases saying that the failure to investigate insurance coverage for your client is malpractice, certainly several malpractice claims among those lines have been filed, and thus the safe practice would be to conduct such an investigation in each case.

If you fail to look into the possibility of your client's insurance coverage, be prepared for your client, in a future malpractice action, to say that you certainly had an incentive to hide the insurance coverage, because you knew you probably wouldn't be appointed to defend the case by the client's carrier.

Royal F. Oakes is a partner at Los Angeles' Barger & Wolen. Reprinted with permission of Royal F. Oakes and the Los Angeles Daily Journal.

Caution: It is not the intent of this article to establish an attorney's standard of due care for a particular situation. Rather it is our intent to advise our insureds to act in a manner which may be well above the standard of due care in order to avoid claims having merit as well as those without merit.

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