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Reduce the risk of malpractice claims

A signed disclaimer can confirm who you're representing and minimize any misunderstandings

By J. Randolph Evans and Shari L. Klevens, Special to the Daily Report

Legal malpractice claims just keep coming. Rarely does a week go by without another article about a new legal malpractice claim. Sometimes, these claims arise out of a simple mistake. Other times, claims arise out of a lawyer stretching too much to just make it another month.

Yet, most times, claims do not involve any mistake or error by a lawyer. In fact, well over one-half of all claims against lawyers lacked any merit. Unfortunately, they are still legal malpractice claims.

Typically, meritless claims are dismissed or abandoned. But that is little comfort of lawyers who have had claim. After all, when a claim is made, lawyers must deal with it. Needless to say, it is a distraction from the practice of law. The lawyer must invest the time to defend, report it to colleagues and insurers, and pay whatever deductible might apply.

Beyond that, claims leave a lasting impact. From the moment a legal malpractice claim is made, lawyers must answer "yes" to the question, "has a claim ever been made against you?" It is an answer that does not change with the claim's dismissal or abandonment.

The bad news is that most lawyers will have more than one claim over the course of their careers. The good news is that there are things that lawyers can do to reduce their risk of having a legal malpractice claim. The most important first step is to recognize the difference between "legal malpractice" and a "legal malpractice claim."

Legal malpractice only occurs when a lawyer breaches a professional duty that proximately causes damages. Anything less than all three (duty, breach and proximately caused damages) is claim, but not malpractice.

Duty

Lawyers' duties are in a state of flux. Certainly, lawyers owe their clients a professional duty. The question of who, besides their clients, lawyers owe a duty is somewhat more uncertain. It is clear that lawyers do owe some duties beyond just duties to their clients.

Most often, this amorphous duty risk arises out of a transaction with only one lawyer. It could be a residential real estate transaction with a single closing attorney. It could be a divorce agreement with only one lawyer. The common denominator is a misconception by non-clients that the lawyer is looking out for their interests as well as their clients'.

There is a simple, effective way to minimize this risk. Leave nothing to chance or misinterpretation.

To reduce the risk of a misunderstanding, lawyers should make clear who they represent. In addition, they need to make clear that they have not and are not undertaking any duties to anyone else.

In the residential real estate context, this involves a simple one-paragraph disclaimer signed by all of the participants at the closing. It does not have to say much. Instead, it need only confirm three things: (i) the identity of the lawyer's client; (ii) that the lawyer is not and has not undertaken any duty to anyone else; and, (iii) that the signators understand and agree that the lawyer has not undertaken any duty to anyone other than the client.

Lawyers can use the same kind of form in other situations involving people other than the lawyer's client. For example, if a lawyer interacts with an unrepresented spouse in a divorce proceeding, communicate only in writing unless the unrepresented spouse signs the disclaimer.

Importantly, the disclaimer should match the lawyer's engagement letter to the client. So, the identity of the client in the disclaimer letter should track precisely the identity of the client in the disclaimer. Any ambiguity typically operates to the lawyer's disadvantage.

Breach of duty

Lawyers have the duty to exercise the level of skill, care, prudence and diligence commonly possessed and exercised by lawyer in Georgia. Basically, this means that a lawyer must do that which an ordinarily skillful Georgia lawyer would have done under the same or similar circumstances.

Because the practice of law changes, so does the standard of care in Georgia. But this has always been true. Computers replaced word processors which replaced typewriters which replaced quills. The specifications for briefs in some jurisdictions now involve word counts and formatting restrictions; yet lawyers have a duty to comply with the restrictions or face the risk that a court will strike their brief.

In addition, Georgia's ethics rules (as contained in the Rules and Regulations of the State Bar of Georgia) can be evidence of the standard of care. Georgia's ethics rules change.

Georgia lawyers must stay abreast of these changes (as well as changes in the law) and adapt their practices accordingly. Saying that "it is the way things have always been done" is not a defense to a legal malpractice claim. Instead, lawyers must in fact perform their legal services in accordance with the standard of care today.

Georgia's continuing legal education programs (managed by Larry Jones and Steve Harper) do an incredibly effective job of providing Georgia lawyers with the resources to stay up on the law and the modern-day law practice. But lawyers must do more than just attend mandatory continuing legal education seminars.

There are plenty of places for Georgia lawyers to look for help. The State Bar of Georgia has a multitude of resources available to help Georgia lawyers at Gabar.org. The Daily Report includes regular practice tips for lawyers at DailyReportOnline.com.

For effective prevention, lawyers and law firms must learn and adapt their law practices or face higher risks of legal malpractice. As the practice changes, so must lawyers and law firms.

Proximately caused damages

Legal malpractice involves more than just the breach of a professional duty. In addition, there must be some proximately caused damage. For example, a lawyer who misses the statute of limitations for filing a frivolous or meritless claim has not committed legal malpractice. A lawyer who fails to timely file a meritless appeal does not commit legal malpractice.

For legal malpractice, legal services in accordance with the applicable standard of care (as opposed to the services render) would have made a difference. Filing a frivolous claim or appeal would not make a difference. Hence, no legal malpractice.

Of course, the reverse is also true. There are times when a client suffers damage but there is no duty or breach of the standard of care. This is an important distinction.

Far too often, when confronted with an error, lawyers are prepared to admit legal malpractice. This is a costly mistake. First, they are undertaking liabilities which would not otherwise exist. Second, most professional liability insurance policies contain a "no admission" clause. Lawyers admitting liability in violation of a "no admission clause" risk the forfeiture of their insurance coverage.

Importantly, the party asserting a legal malpractice claim bears the burden of proving that the lawyer's mistake caused some damage. In the litigation context, this means proving that there would have been a different result if reasonably skilful and prudent legal services had been performed. For closing documents, it means that the alleged error actually impairs or damages someone to whom a duty was owed. A mistake without consequence is not legal malpractice.

Legal malpractice does happen, but it does not have to be inevitable. The first step is understanding what it is, and what it is not.