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Practicing law often involves extensive note-taking, file-making and drafting. Attorneys know that sometimes the necessary way to preserve an issue or to communicate with an opposing party is to reduce it to writing. But attorneys do not always take their own advice when it comes to documenting their recommendations and a client's decision-making during the course of a representation.

Consider all the decisions that have to be made during a typical representation. How much should you seek in damages? What motions should you file and when? What terms should be included in an agreement? Which witnesses should be deposed and which should be saved for trial? Should you settle the case and for how much? These are all decisions that are fairly routine but may involve a mix of attorney analysis and recommendation alongside client approval. Questions may arise later regarding what decisions were made during a representation, and why.

Here are some considerations in deciding how to document the file.

If It's Not In Writing, It's Hard to Prove That It Happened

Many legal malpractice matters involve an attorney defending or justifying a decision that was made during an underlying representation, sometimes even when those decisions were made with the input or consult of the client. If a matter does not end the way a client was hoping it would, the client may later argue that they did not really understand the risks of a certain course of action or even may not remember the discussions that were had.

People's memories of a specific conversation may differ such that the client may remember that the recommended course of action was described as a "sure thing" by the attorney, while the attorney may remember that the conversation involved an assessment of the risk of the recommended course of action. Thus, if the certain decisions, assessments or risks are not documented in the file, it can be difficult to prove what happened after the fact.

Sometimes, because juries view attorneys as constantly generating paper and voluminous files, a jury may draw special significance if a specific decision was not documented in writing. While attorneys know that it can be very difficult to document every development in a representation, the failure to do so for important decisions may lead a jury to conclude that the attorney's memory is faulty or that the attorney had something to hide.

Documenting important decisions in writing can help reduce this risk, both because it helps inform the client in real time what services are being performed and what the attendant risks are, but also because it may help those decisions stand up to scrutiny in a subsequent legal malpractice case.

Judgmental Immunity

Many states recognize the doctrine of judgmental immunity, which holds that, where an attorney acts in accordance with her or his best professional judgment, such decisions are typically not appropriate for review in a legal malpractice action. This is consistent with the general principle that reasonable lawyers can disagree on the “best” course of action for a representation and that the mere application of hindsight to an attorney’s decision is not enough to establish liability.

Thus, the judgmental immunity doctrine is a valuable tool to attorneys defending against legal malpractice claims. A subsequent legal malpractice case may review whether the attorney’s judgment was reasonable based on the attorney’s experience, any research the attorney did in support of the position taken and other factors that indicate that this is a decision for which the attorney should be afforded deference.

It may be easier to prove the attorney’s reasonable exercise of judgment, if the decision-making (and underlying factors) is documented in writing. Thus, a failure to document the process and result of critical decisions could have an impact on the defenses available to the attorney in any future litigation.

What Should Be Documented

For most attorneys with a busy docket, it can seem impossible to document in writing every single development or recommendation made in the course of a representation. Thus, it can be helpful for attorneys to give some thought to which decisions or recommendations are best suited for writing down either in the file or in a communication to the client.

Typically, the decisions that it are helpful to document are those that, after the case is over, could otherwise be difficult to prove what happened absent additional documentation. These decisions could include the decision to file (or not file) a specific motion, to hire (or not hire) a specific expert or to include (or not include) a specific term in a transactional agreement. There is no one-size-fits-all solution, though.

Documenting things in writing can also be helpful in managing client expectations. Candid discussions with a client about what a “win” might look like or what goals the client has for the representation can be a helpful tool, if the client has second thoughts at the end of the representation regarding the outcome.

The way that attorneys may choose to document these decisions varies. For example, if an attorney is making a recommendation regarding a particular course of action (such as the potential filing of a lawsuit), the attorney may consider preparing a memo to the client, identifying the pros and cons and making a recommendation. Other decisions, such as the decision on when to proceed with specific tasks, may be documented in a quick email to a client after a discussion.

Sometimes attorneys may worry that sending such writings to a client looks defensive; but such communications can be drafted neutrally simply to summarize a recent conversation or decision without suggesting that a later dispute between attorney and client is expected. Such writings can also be helpful for the attorney’s purposes if, for example, a matter has been dormant for a while and the attorney needs a refresher on the status of the case or the decisions already made.

By writing things down, attorneys may be better able to defend their work and any future claims relating to their decision-making.

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