

Quarantined? Reduce Your Risk of Legal Malpractice

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During the early months of the pandemic, attorneys were forced to make significant adjustments due to the transition to working from home and the impact of the pandemic on client work. Many courts closed and in-person depositions, hearings, etc. were delayed, which meant that some attorneys suddenly found themselves with unexpected free time. The industry adjusted rapidly, however, and remote depositions and hearings became the norm until courts eventually started returning to normal operations.

Now, with the severity of the Omicron surge, some court closures and quarantines have returned to levels not seen since the early days of the pandemic. Coupled with the start of a new year, which can be a slower period for some practitioners, lawyers may again find themselves stuck inside again with lighter dockets than normal. This is particularly true where, for example, a trial scheduled for February 2022 suddenly gets delayed. Attorneys who find themselves in such a scenario can utilize the extra time to focus on the health of their firm and their professional development.

Start Strong on Collections

Managing a law practice involves a financial element of ensuring that lawyers are paid for their work. It is common for firms to wait until the end of the year to focus on outstanding invoices, at a time when pressure to collect is high. Rather than let unpaid invoices pile up throughout the year, attorneys who focus on collections from the beginning of the year stand a much better chance of collecting outstanding amounts and having a strong financial year.

This can include, at a minimum, checking in with clients regarding their financial needs and any impact current circumstances are having on the lawyer's previous understanding of the fee arrangement. This can help reduce the likelihood of misunderstandings later in the year. A work slowdown can be an optimal time to get billings in order.

Consider Potential AFAs

Some clients, particularly those feeling financial pressures as a result of the pandemic, may ask lawyers to change their fee structure or billing arrangement, including through the use of Alternative Fee Arrangements. For instance, certain clients may request to transition from an hourly fee structure to a flat fee arrangement that will allow the client to budget appropriately. However, when making changes to existing fee arrangements, courts and state bars often look to confirm that any changes made to existing billing arrangements are equitable to the client's interests. While mid-representation fee changes can be common (particularly, for example, with yearly hourly rate fee increases), non-routine changes can be subject to increased scrutiny.

California Rule of Professional Conduct 1.5 addresses the factors to be considered in determining the reasonableness of a fee. Among the factors to be considered are:

1. the amount of the fee in proportion to the value of the services performed;
2. the relative sophistication of the lawyer and the client;
3. the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services;
8. whether the fee is fixed or contingent; and
9. the time and labor required.

Considering these factors may help protect lawyers from accusations of manipulation, particularly if the client or the practice are facing financial pressures that warrant revisiting the original fee arrangement.

Check Out Continuing Legal Education

During their downtime, lawyers may take the opportunity to develop or continue to maintain their legal knowledge. For some, this may mean taking the time to learn about new developments in the law or meeting their state's continuing legal education requirements. Others may try to educate themselves in the ways that the pandemic is affecting their clients and their industry on the federal, state and local levels. By becoming informed in the ever-changing developments, lawyers may be better positioned to support their clients or even reach out to clients to ensure their COVID-specific needs are being met.

There are many online resources that provide CLE programs on a number of topics, both practice-specific and reflective of these unique times. Some law firms are even hosting their own CLE programs for in-house lawyers or clients or members of the bar.

The Risks of 'Dabbling'

When one practice area slows down, lawyers may feel pressure to make up for it by expanding their work into more booming practice areas. However, there are risks in "dabbling" in high-risk practice areas that are not within the lawyer's expertise or knowledge. This is not only because lawyers may be more likely to make a mistake when engaging in unfamiliar areas of the law (leading to a claim), but also because there are certain practice areas that are known to receive a higher number of malpractice claims (or a higher value of malpractice claims). Indeed, some insurance policy applications require lawyers and firms to specify the types of law in which they practice before issuing a policy. Dabbling outside of those areas could put coverage at risk.

In addition, the professional rules require lawyers to act with competence in their practice. California Rule of Professional Conduct 1.1 discusses the standard for competence, which may require either consulting with another attorney who is competent, or otherwise "acquiring sufficient learning and skill" before performance of the services. Accordingly, there can be risk in "dabbling" without taking steps to ensure a minimum standard of competence in other practice areas.

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