

Dodging a Blank!

Avoiding a Frivolous Malpractice Claim

Malpractice claims that have no merit are one of the most frustrating aspects of practicing law. You meet all professional standards and get the best result the circumstances permit, yet some yahoo still alleges malpractice. Fortunately, such claims in Kentucky are almost always closed with no indemnity payment to the claimant. Even so, claims without merit are expensive to defend, often cost lawyers their insurance deductible, and add considerable stress for lawyers unlucky enough to find themselves the victim of a cheap shot. In the practice of law it can be just about as important to dodge a blank as it is to dodge a bullet.

The Summer 2004 issue of *Lawyers' Mutual Insurance Company of California Bulletin* has an excellent article by Stephen M. Blumberg on how to dodge a blank. In his article, "Avoiding Claims Without Merit," Blumberg points out five situations that often lead to unfounded claims that are avoidable following proven risk management practices. They are:

1. Lawyer does not clearly decline a prospective client's matter opening the door for a claim that the lawyer undertook a representation.
2. Lawyer disengages from a representation in a manner that allows the client to claim that the representation was never terminated.
3. Lawyer represents one party in a business transaction in a way that allows other parties to the transaction to claim he represented them as well.
4. Lawyer allows a bad client relationship to develop resulting in a *pro se* spite claim.
5. Lawyer's advice is rejected by client, things go sour, and client does not remember ignoring the lawyer's advice.

The one thing all these situations have in common is that the claim always results in a swearing contest between the lawyer and claimant. If the claim gets to court, a lawyer will not get the benefit of doubt from a jury, and could be found liable for a substantial amount. A second thing these situations have in common is that they are avoidable and defensible if the circumstances are properly documented. What follows are some suggestions on risk managing each situation.

●* **Lawyer does not clearly decline a prospective client's matter opening the door for a claim that the lawyer undertook a representation.**

One of the weakest defenses to a malpractice claim is when a lawyer asserts that there was no attorney-client relationship. The claimant counters that they sure thought they had a lawyer when they left the office that day. This disagreement is decided by determining whether an implied-in-fact attorney-client relationship arose based on all the circumstances from the prospective client's viewpoint. The malpractice claim is usually made well after the statute of limitations has passed for the matter and, if an attorney-client relationship is found, leaves the lawyer in an untenable position.

A recent California ethics opinion provides a useful list of the factors that bear on when an implied-in-fact attorney-client relationship is formed and serves as a guide on how to avoid inadvertently leaving a prospective client with the reasonable impression that you are their lawyer:

- Whether the attorney volunteered ... services to a prospective client.
- Whether the attorney agreed to investigate a case and provide legal advice to a prospective client about the possible merits of the case.
- Whether the attorney previously represented the individual, particularly where the representation occurred over a lengthy period of time in several matters, or occurred without an express agreement or otherwise in circumstances similar to the matter in question.
- Whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice.
- Whether the individual paid fees or other consideration to the attorney in connection with the matter in question.
- Whether the individual consulted the attorney in confidence.
- Whether the individual reasonably believes that he or she is consulting a lawyer in a professional capacity.¹

The best defense, and often the only defense, to a prospective client claiming to be a client when you do not think so is documentation – a letter of nonengagement showing that a matter was clearly declined and that no attorney-client relationship was formed. The nonengagement letter should:

- Thank the prospective client for making the personal contact, calling, or coming into the office.
- Include the date and subject matter of the consultation.
- Provide clearly that representation will not be undertaken.
- Repeat any legal advice or information given -- making sure that it complies with the applicable standard of care.

- Advise that there is always a potential for a statute of limitations or notice requirement problem if the matter is not promptly pursued elsewhere. *Providing specific statute of limitations times should be avoided because of the limited information typically received in a preliminary consultation. If, however, it appears that a limitations period will expire in a short period of time, the declined prospective client should be informed of this concern and urged to seek another lawyer immediately.*
- Advise that other legal advice be sought.
- Avoid giving an exact reason for the declination, why the claim lacks merit, or why other parties are not liable.
- Encourage the person to call again.ⁱⁱ

All documents and any other property left with the lawyer by prospective clients should be returned with the nonengagement letter. In some cases it may be prudent to send the letter by certified mail, return receipt requested – especially if a time limit is close to expiring.

A closely related risk to prospective clients claiming an attorney-client relationship is when a casual contact involves a legal question. This can occur on social occasions, on the street, by e-mail, and cold phone calls. Occasionally, these casual contacts lead to an assertion that an attorney-client relationship was formed and malpractice committed. “The best practice is to document every casual contact made that involves any discussion of legal questions. It can be short, but should include the date, name of casual contact, gist of what was discussed, and any disclaimers communicated at the time. Many lawyers use a numbered consultation form for this purpose. In many cases it may be necessary to send a letter of nonengagement to make it clear that no attorney-client relationship was formed. This may seem laborious, but it is the proverbial ounce of prevention.”ⁱⁱⁱ Lawyers Mutual has developed a Cold Call/E-Mail/Casual Contact Log consisting of a pad of pre-printed forms for quick and convenient recording of casual contacts. They are available to all Kentucky lawyers by calling Lawyers Mutual at 1-800-800-6101.

◆* Lawyer disengages from a representation in a manner that allows the client to claim that the representation was never terminated.

A lawyer’s worst malpractice nightmare is to have a client and not know it. This can happen when a client, after a lawyer thinks he has withdrawn from representation, claims still to be a client. Of course, terrible things have happened to the matter since the lawyer believed the representation to be over. Again proper documentation is the answer. Withdrawal should be a clean break – a clear-cut decision with the client’s agreement in a written letter of disengagement. Use a disengagement letter that:

- Confirms that the relationship is ending with a brief description of the reasons for withdrawal.
- Provides reasonable notice before withdrawal is final.
- Avoids imprudent comment on the merits of the case.

- Indicates whether payment is due for fees or expenses.
- Recommends seeking other counsel.
- Explains under what conditions the lawyer will consult with a successor counsel.
- Identifies important deadlines.
- Includes arrangements to transfer client files.
- If appropriate, includes a closing status report.^{iv}

After sending the disengagement letter, carefully follow through on the duty to take necessary actions to protect the client's interest as required by Kentucky Rule of Professional Conduct 1.16 (d) and comply with the representations in the disengagement letter. This avoids a malpractice claim over the manner of withdrawal. Finally, a complete copy of the file should be retained. A client that has been terminated is a risk to make a malpractice claim. The first line of defense is a complete file with a comprehensive disengagement letter.

●* Lawyer represents one party in a business transaction in a way that allows other parties to the transaction to claim he represented them as well.

Nonclient liability is a growing risk for lawyers. Nowhere is the risk more evident than when a lawyer represents one party in a business transaction such as a partnership formation and other parties are not represented. If the partnership fails, the risk that one of those other parties will claim reliance on the represented party's lawyer is significant. Blumberg advises that lawyers document their status by having all parties sign a document showing who the lawyer represented and who was not represented; or by sending a letter with proof of receipt carefully delineating who was represented and who was not; or by including language in the partnership agreement that identifies represented parties and unrepresented parties to the partnership formation. This documentation approach is equally useful in other transaction matters that have a risk of misunderstanding by unrepresented parties. For more on nonclient liability read the KBA *Bench & Bar* article "*Negligence Liability To Nonclients*" available in the Risk Management section on Lawyers Mutual's website at www.lmick.com.

●* Lawyer allows a bad client relationship to develop resulting in a *pro se* spite claim.

We do not know if it is true that all lawyers talk about good client relations, but few do anything about it – but it sure seems that way with the number of avoidable malpractice claims involving bad client relations. This type of claim centers on lawyer competence, client communications, and diligence.irate clients often file bar complaints as well as malpractice claims – a double whammy. Blumberg cites the usual culprits in bad client relations: not returning calls, subjecting clients to long waits at the office, not keeping clients informed, having an arrogant demeanor with clients, and having poor billing practices.

Of course, the best risk management to prevent irate client claims is to consistently treat clients with the utmost courtesy and personal attention. Even with such treatment disappointed clients may spitefully allege lack of competence, diligence and poor client communications. Unfortunately, lawyers facing a frivolous claim of this nature too often find themselves in the awkward position of having a client file with little or no documentation even though they have been thoroughly professional in their practice of the matter. This is especially embarrassing in cases when clients claim malpractice when the real issue is fee avoidance.

From a spite claim risk management perspective it is just as important to document the file in a way that demonstrates clients were well served as it is to show competent legal advice. The file should reflect work effort (good billing practices accomplish this) and time spent with the client in person or on the phone. Always include in the file copies of all documents sent to the client. Many lawyers routinely copy clients with all correspondence and other documents relating to their matter. With modern office technology this is both easy and inexpensive to do and it helps Bar Counsel make short work of a complaint alleging poor communications and lack of diligence.

🔴* **Lawyer's advice is rejected by client, things go sour, and client does not remember ignoring the lawyer's advice.**

A client rejecting legal advice can come up in any representation, but this most often leads to a claim of malpractice in settlement negotiations. It is not unusual for a client to refuse a settlement offer against a lawyer's advice and then after receiving less than the offer at the end of the matter to blame the lawyer for the results. This same client syndrome appears in settlement remorse situations when the client regrets accepting a settlement offer and attempts to increase the proceeds by accusing their lawyer of malpractice.

The risk management rule in these situations is to always document the client's decisions that are contrary to the legal advice given. Blumberg suggests a tactful, uncritical letter to the client that carefully describes the advice given and the client's decision not to heed it. Remember that the rule in Kentucky is that a lawyer must have actual authority to settle a client's matter (Ky. *Clark v. Burden*, 917 S.W.2d 574 (1996)). Accordingly, both settlement authority and rejection of advice to settle should be documented and signed by the client. Often settlement offers come up suddenly just prior to trial, during trial, or at other times when quick action is required and administrative support is limited. Regardless of the circumstances use whatever paper is available, hand-write the client's decision, and have the client sign and date the paper. Following this practice should avoid claims lacking merit and those that are filed are easily and less expensively defended.

Conclusion -- Don't Let This Happen to You

An Alaska lawyer found herself entangled with three of Blumberg's issues – questionable engagement, questionable disengagement, and bad client relations. The lawyer interviewed a prospective client by telephone who, while a ship passenger, was injured by a fall from a dock gangway in Juneau. At the time of the interview one year remained before the statute of limitations expired. The lawyer advised the passenger that she would investigate the circumstances and then decide whether to take the case. After investigation, during which the lawyer had no contact with the passenger, she concluded that the case had problems, but there was a colorable claim. Shortly before the statute of limitations was to expire the lawyer sent the passenger a letter with questions about the problems with the case and a contingent fee contract for signature. She received no response to the letter and was unsuccessful in reaching the passenger by phone. In desperation she asked the Alaska Bar Association Ethics Committee whether she ethically may file suit before the statute of limitations expires without the passenger's authorization and a signed engagement letter.

First, the Ethics Committee pointed out the lawyer's problems:

- Careless engagement: It is unclear whether there is or is not an attorney-client relationship in this situation. If there is an attorney-client relationship, was it a limited scope engagement? Did the prospective client understand the lawyer only committed to an initial investigation? Does the passenger think the lawyer will file suit if it is determined the claim has merit?
- Poor client relations – diligence and communication: The lawyer's apparent lack of diligence in investigating the matter resulted in the statute of limitations becoming a serious issue. Poor client communications is shown by the lawyer failing to stay in contact with the passenger during the investigation and sending him a letter close to the expiration of the statute of limitations requiring a quick decision.
- Disengagement dilemma: Terminating the relationship with the passenger without filing suit is problematic for the lawyer because it is not clear what the scope of her undertaking was. But filing suit exposes the passenger to potential costs and fees that he may not wish to risk if the merit of his case is questionable. The situation is further complicated by the lawyer's duty to carry through to completion all matters undertaken for a client. This leads back to the difficulty created by the lawyer's failure to clearly articulate exactly what she agreed to do for the passenger. Finally, she may not withdraw without protecting the interest of the client to include giving reasonable notice of withdrawal.

The Ethics Committee reasoned that there was nothing in the ethics rules precluding the lawyer from filing suit if she reasonably believed that the passenger authorized her to file and is relying on her to do so. Conversely, she may decide that disengagement will not have a material adverse effect on the passenger and terminate the relationship. As a third alternative, if she determines that disengagement is proper, but that the passenger will suffer material adverse effects, she may file suit and then seek withdrawal as counsel

of record from the court. In the final analysis the Ethics Committee concluded that the lawyer must decide for herself which alternative to take.^v

Did the Alaska Bar Association Ethics Committee leave the lawyer twisting in the wind? If so, maybe that was a good call by the Committee – it is hard to feel too sorry for the lawyer. What would you do if you found yourself in such a dilemma? Don't forget the malpractice consequences of your decision. While acting within the guidance of the Ethics Committee should be a good defense to a bar complaint by the passenger, this will not protect the lawyer from a malpractice claim. Of course, the best answer is never to allow yourself to be in the Alaska lawyer's predicament. Applying the risk management practices suggested in this article should go a long way in doing just that – helping you dodge both bullets and blanks.

ⁱ The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2003-161.

ⁱⁱ From "Prospective Clients – Neither Fish Nor Fowl, *The Ethics and Risk Management of Casual Contacts, Cold Calls, and Preliminary Consultations*," *KBA Bench & Bar* – Vol. 67, No. 3, May 2003; available in the Risk Management Section of Lawyers Mutual Insurance Company of Kentucky's website at www.lmick.com.

ⁱⁱⁱ *Ibid*

^{iv} From "How To Fire A Client -- *The Client From Hell, Dog Cases, and Escape Clauses*," *KBA Bench & Bar* – Vol. 65, No. 3, May 2001; available in the Risk Management Section of Lawyers Mutual Insurance Company of Kentucky's website at www.lmick.com.

^v Alaska Bar Association Ethics Opinion 2004-3, 9/13/04.