Reducing Risks of Malpractice

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Published: *The Recorder*
August 2013

A significant economic downturn does not just impact individual and corporate financial interests. Professionals in every field have had to adjust to a profound new economic landscape, affecting their clients and their business. Attorneys face a double whammy: As the economy turns downward, there is now a statistically verifiable second wave impact, where lawyers face increased incidence of claims by disgruntled clients. Lawyers are involved in virtually every aspect of society, including litigation and financial transactions, real estate and family law, and commercial enterprises of every sort. Thus, when the economy falters, and clients' deals go bad, or litigation does not achieve the desired outcome, clients turn to their lawyers, laying blame at their feet for the bad deal, lost cases or bad outcome. The economic fallout from the 2007 mortgage crisis has been no different. Since then, the number of claims and lawsuits against lawyers — and the magnitude of those claims — has increased steadily. In this changing dynamic, lawyers must be extra-vigilant in managing their risks. Rather than being victimized by this trend, attorneys should take precautionary measures to shield themselves from such claims as much as possible, while at the same time considering litigation strategies should a deal turn sour and a client threaten to turn its sights on them.

Many attorneys' duties are driven by transactions involving money, financial planning or tax advantaged strategies, and it can be tempting for clients to look to their lawyers as scapegoats in a financially tumultuous climate. Similarly, minor legal errors or oversights that would have otherwise gone unnoticed in a healthier economy are often exposed, leaving attorneys vulnerable to claims that can be time consuming, costly and professionally detrimental.

PREVALENT PRACTICE AREAS SUBJECT TO RISK

While attorneys in nearly every practice area are subject to the perils of a shifting economy, some areas are subject to greater scrutiny. In general, the types of cases that have historically generated the greatest volume of legal malpractice claims are business transactions, and wills, estate and probate work.

Regardless of how the economy is performing, plaintiffs' personal injury is a high-risk practice area, as the business model tends to be high-volume, with some attorneys handling hundreds of cases at a time. A higher number of cases naturally creates a greater risk of malpractice claims. Plaintiffs in personal injury cases also tend to be one-off clients, as opposed to clients with whom the attorney has built a close personal or professional rapport over many years. Additionally, clients with personal injury claims often have unrealistic expectations for recovery on their cases and how quickly they expect to see it. These elements combine to make personal injury one of the riskier practice areas for attorneys.

Real estate cases also make up a large portion of the claims against attorneys in today's economic climate. As a result of the 2007 economic crisis, real estate has catapulted into an area with the highest frequency of claims against lawyers — a consequence of both the record number of real estate deals going sour and the number of lawyers practicing in this area. While the cause of many clients' real estate losses can more realistically be traced back to the readjustment of the housing market, clients nonetheless find it convenient to lay blame on the deal structure or contract wording, leaving attorneys to shoulder the blame.

RISK MANAGEMENT TECHNIQUES FOR MINIMIZING LIABILITY

No matter the type of law an attorney practices, it is wise to adopt certain risk management techniques to minimize exposure. The first step is to assiduously select clients by thoroughly interviewing them and researching their background and litigation history. Have they been to several different law firms? Do they display a pattern of hiring and then firing lawyers? Have they sued other lawyers in the past? Beyond adopting a more selective attitude toward potential clients, another vital aspect of risk management is careful documentation of all communication with clients. This information can prove invaluable if a claim arises. Finally, a strong attorney-client retainer agreement is absolutely a necessary protection for any legal professional.

Ideally, attorney-client retainers should spell out every aspect of the working relationship between the attorney and the client in airtight legal language, beginning with a clear cut definition of who the client is and is not. An attorney retained by a corporate client needs to understand whether he is providing legal counsel for the company itself, or whether they are expected to provide representation for the company's directors, officers, principals, founders or shareholders. The scope of the work that will be provided should be clearly delineated: What exactly will the attorney be doing for the client, and for how long? It's advisable to actually sit down with the client and discuss the terms of the agreement together, to avoid any surprises or communication errors, and to ensure both attorney and client are on the same page.

Another way to minimize the risk of claims is an effective calendaring system to ensure that no deadlines are missed or details overlooked. Because conflicts can lead to lawsuits, attorneys should establish a method of screening for ethical conflicts so they can avoid ensnarement or situations in which they fortuitously end up being adverse to a former client. Above all, communication is key when it comes to keeping clients happy and complaint free. It is important to return emails and phone calls in a timely fashion, and keep clients apprised of the latest developments in their case.

Even with the most careful precautions in place, claims against attorneys happen. If an attorney is being sued for malpractice, there is one great defense working in his favor in the State of California, and that is the fact that the burden of proof falls to the plaintiff. Essentially, the plaintiff has to prove that the other side would have had to agree or capitulate on some terms — that the deal would have turned out in their favor, if its attorney had only taken a different course of action, and that the lawyer made a mistake which caused actual measurable damage to the client. Therefore, an excellent defense strategy may be to depose the other side to the transaction in order to determine whether or not it would have agreed to the deal if certain terms had been different.

INSURANCE IMPLICATIONS OF INCREASED CLAIMS

Finally, what are the consequences of professional liability errors and omissions on the attorney's insurance? Obviously, more claims make it more likely that an attorney's premium structure will be adjusted upward. This means that malpractice claims will likely make it more difficult to secure insurance in the future, and that the insurance rates are likely to be much higher. Just one or two claims over the span of a 25-year career can be enough to result in higher premiums, yet another reason why attorneys should practice careful risk management.

Attorney malpractice lawsuits are an unfortunate — but predictable — consequence of a struggling economic climate. While macroeconomic forces may be beyond individual control, attorneys and law firms can provide a greater degree of insulation by choosing clients with care, explicitly setting forth the terms of that professional relationship and keeping in constant communication with clients through every step of the legal process. Regardless of the current economic climate, the investment of additional care will allow attorneys to maintain a healthy and profitable practice free of costly and time-consuming malpractice claims. ■

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