WHEN THE GOING GETS TOUGH, THE TOUGH GET A LAWYER

Professional Liability as a Practice

James Marion

America's most famous litigator, Abraham Lincoln, is often credited for the axiom, "He who represents himself has a fool for a client." The statement refers to the phenomenon of the bold-but-delusional lay defendant, convinced of their serendipitous ability to win a case pro per. But the barred attorney would also do well to heed this sage advice. This is particularly true when it comes to questions of professional liability and alleged attorney misconduct.

Attorneys emerge from law school trained in the ways of legal ethics and professional responsibility. In forty-eight out of fifty states, admission to the bar requires passing the Multistate Professional Responsibility Examination, and in California the topic is even a looming essay question on the bar exam itself. Given this fact, one might be excused from presuming that the seasoned practitioner, accused of error or misconduct, is tempted to dabble in self-defense. Surely, the navigation of basic fee disputes with disgruntled clients is not beyond the pale, time providing. But ask just about any attorney once burned, and that illusion quickly flies out the window.

"The practice of law is not an exact science," explains Russell Roeca of Roeca Haas Montes de Oca, 2009 president of The Bar Association of San Francisco, "it's a *practice*." And as with any specialization, practice makes perfect. This could doubly be said of professional liability, an area of law that is essential to success, but is only understood peripherally by most attorneys.

For Roeca, one in a cadre of specialists found in firms around the Bay Area, this fact creates a niche that defines careers. "The accepted rule of thumb is that the average lawyer can expect to be accused of malpractice at least three times in the lifespan of their practice," says Roeca. "I'd say that's pretty accurate."

Asked about that same figure, Kendra Basner, Hinshaw & Culbertson, agrees. "That's the *average*, and it's even true of California, which has some of the strongest lawyer protections in the country . . . I'm not even sure that number would cover fee disputes. [There] you have clients who are unhappy with the results of their case, for whatever reason . . . they decide not to pay. The attorney then sues to collect, but the client becomes aware that insurance is involved, imagines a quick payout, and is quick to countersue for malpractice, whether it's real or perceived . . . the countersuit becomes the outlet for that initial dissatisfaction."

For those attorneys who have yet to experience an adverse encounter with a client, fear not, that sinking feeling in your gut is normal. But it should also serve a cautionary function. In the case of a large firm, there is typically a procedure in place to handle clients' claims against attorneys, and typically one or several in-house specialists equipped to handle disputes. No lawyer wants to find themselves "on the wrong side of the *v.*," but in these settings the cost to defend against malpractice is factored into the budget, and specialists like Roeca and Basner are often hired by firms to consult on ethics and best practices to help mitigate those expenses.

The situation is necessarily different for small firms and solo practices, where the time and money required to handle a liability claim, not to mention the inevitable bump in insurance premiums, can be disastrous for the bottom line. And while pride and resourcefulness may tempt some attorneys in this situation to bootstrap their defense, this is a widely ill-advised approach. Better to suppress the rage, swallow the ego, and call the experts.

"At first there's a tendency to act like an attacked animal," Roeca jokes when describing the hypothetical accused attorney, "but this is an education process, even with lawyers, and most come around quickly once they understand it's all about dollars and cents." When asked about the attitude of most attorneys during that first consultation, Basner explains that "lawyers are often humbled to be in this position in the first place . . . they're happy to let me take over the case."

Paven Malhotra, Keker Van Nest & Peters, with experience litigating malpractice suits on behalf of firms, describes it another way. "In the instance where a [liability] case makes it to trial, you're facing a scenario where you need to convince a jury that a certain standard of care was met . . . to most juries, the expectation is that lawyers are supposed to be experts." A standard that high is already tough to meet, and the chances of doing so are no doubt diminished in a pro per scenario.

Then there are the fundamental tricks of the trade, obvious to veterans of this area of practice but overlooked by other attorneys. One twist, universally noted, involves fee disputes and varying statutes of limitations. Specifically, California Code of Civil Procedure section 340.6 limits malpractice claims against attorneys to one year after the client discovers (or should reasonably have discovered) a wrongful act or omission. Conversely, the state's statute of limitations for breach of a written contract (for example, your handy attorney-client fee agreement) is a whopping four years. Accordingly, the attorney looking to collect from that stingy, disgruntled client can easily avoid a knee-jerk countersuit. All you need is a little patience.

Of course, exercising such restraint can be easier said than done, and while attorneys should always inquire about this and similar issues before deciding to go to the mat with a client, their energy is likely better spent on education and

implementing best practices to decrease the likelihood of dispute in the first place.

PREVENTIVE MEASURES

Knowing and following a few basic tenets should go a long way to minimizing the risk of a malpractice suit. Much of what you need to remember is plain common sense: vet your clients fully and avoid conflicts of interest, draft clear fee agreements, manage expectations, do your due diligence, and know the black letter law. It also helps to have a good sense of your sphere of operations. California and Maine are the only states that have not adopted the American Bar Association's (ABA) Model Code or Model Rules. While some of California's rules are clearly ABA-inspired, the state still maintains its own particular regime when it comes to attorney conduct. For instance, of all the states, California has a notoriously stringent bar for maintaining confidentiality—the single discretionary exception being to prevent the *imminent* death or great bodily harm of an individual.

If this is all just now coming back to you from the distant primordial haze of your bar prep courses, it probably wouldn't hurt to review California Business and Professions Code section 6068 (the statutory duties of an attorney), the California Rules of Professional Conduct, as well as a number of related court rulings addressing professional responsibility.

All this is not to say that the ABA guidelines should be ignored. As an example, the comments accompanying Model Rule 1.1 regarding attorney competence state that "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology* [emphasis added]." In this day and age, pitfalls stemming from society's reliance on information technology and social media are myriad, and the legal profession is far from immune. The risk also spans generations, with some older practitioners remaining ignorant to essential technological innovations and millennial attorneys taking the drawbacks of twenty-four-hour connectivity through social media for granted.

The State Bar of California has not been hesitant to weigh in on this topic. In Formal Opinion 2015-193 the committee concluded that "a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters . . . absent curative assistance . . . even where the attorney may otherwise be highly experienced." The opinion allows that attorneys should be permitted to contract out e-discovery duties. However, this necessitates enough working knowledge of the process to be conscious of one's own inability to negotiate it without assistance. In short, since any case these days potentially involves e-discovery, there is no longer room to dismiss it as some arcane specialization without infringing the duty of competence. Even in the instance where these responsibilities are rightly delegated, practitioners must still be aware not to delegate supervision of the process, including the requirement to maintain client confidentiality.

As with e-discovery, the world of social media is increasingly essential for attorneys and simultaneously fraught with risk. On one end, social media can be a ripe source of crucial evidence, and attorneys need to be familiar with its landscape. But social media is a double-edged sword, and on the other end overuse by attorneys (or clients) can ruin a case, and in egregious scenarios can even lead to contempt of court findings and violations of protective orders.

Cautious and aware as one may be, there will still come a time when a lawyer needs a lawyer. While this may sound like the setup to some well-worn "How many lawyers does it take . . ." quip, Russ Roeca doesn't see it that way. "Lawyers are typically great clients . . . they're experts in their own fields, and I've learned a lot and benefited while representing them by letting them be who they are . . . by letting them help me to help them." In an age of liability and litigiousness, the concept of reciprocal deference has an encouraging ring.

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