

FIVE WAYS TO AVOID A LEGAL MALPRACTICE CLAIM

Timothy J Halloran

William Munoz

Janet Everson

I. DEFINE YOUR ROLE

National statistics show that legal malpractice claims arise out of every area of the practice of law. Many claims arise from matters involving conflicting interests among jointly represented clients or between client and counsel. Misunderstandings between client and counsel can be limited simply by defining your role at the outset of the representation.

Business and Professions Code section 6148 governs the requirement for counsel to put in writing a fee agreement when the services to be rendered will exceed \$1,000 in fees. Section 6148 requires a written statement of the basis for the compensation and the general nature of the services to be rendered. Failure to abide by the terms of this statute makes the fee agreement voidable by the client, allowing the attorney to only collect a reasonable fee. (Bus. & Prof. Code, § 6148(c)).

Of note, Section 6148 does not apply to corporate clients. There is no statutory authority requiring attorneys to create written fee agreements when they are employed by a corporation. But putting all fee agreements in writing is the first step toward avoiding a malpractice claim. Fee agreements are an invaluable tool used to define your role and the role of your client(s).

Relationships to look out for include the following:

- A. Two parties on opposite sides of one transaction want you to represent them both
- B. One partner to a partnership wants to have actions performed on behalf of the partnership without the involvement of the other partner
- C. Two parties to a proposed agreement want you to act as a scrivener only
- D. Multiple individuals want you to represent them jointly

Evaluating whether to accept representation requires an evaluation of conflicts. The fiduciary relationship between attorney and client makes it improper for an attorney to act contrary to, or to assume a position inconsistent with, the interest of his present or former client. *Johnson v. Haberman & Kassoy* (1988) 201 Cal. App. 3d 1468, 1475; *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1087.

You may represent two or more clients with potential conflicts of interest only after you have fully disclosed the potential conflicts to the clients and you have obtained the informed, written consent of the clients to the joint representation. Cal. Rules of Prof. Conduct, Rules 3-300 and 3-310.

Identifying who your client is and what services are to be performed is critical to avoiding malpractice. Existence of an attorney-client relationship which gives rise to a duty of care to a client is created by an agreement, a contract. *Budd v. Nixon* (1971) 6 Cal.3d 195, 200. Since the attorney-client relationship is contractual in nature, it may be limited by the parties, including the scope of the duty owed to the client by the attorney. *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684. It is not unethical for an attorney to limit his or her potential liability for legal malpractice by contractually limiting the scope of the representation or the duration of the representation. Cal. Rules of Prof. Conduct, Rule 3-400 A, *Nichols v. Keller* (supra) at 1684.

In your written fee agreement, set forth the scope of the work that you have agreed to undertake and for whom the services will be performed. This will expressly place the client on notice of the attorney's obligations and duties and to whom the lawyer is not providing representation.

II. MAKE A GOOD RECORD.

A common problem in connection with attorney disputes with their clients concerns the client who wishes to do everything on the cheap, i.e., doesn't want you to spend the money to work the case up appropriately. Oftentimes, in the event of a bad ending in a case, i.e. a loss or a settlement that isn't as beneficial to the client as expected, the attorney will be faced with the situation of trying to defend his or her conduct with the absence of records detailing what work was done, or detailing what work wasn't done.

The idea is to document when the client doesn't want the work done in a fashion that will confirm why the work isn't being done. Remember, communicating with your client and confirming what the client does or doesn't want to do isn't just good business practice, it is required under the Rules of Professional Conduct. Business and Professions Code section 6148 requires that these service contracts describe the rate and basis for calculation of billing as well as clarification of the work to be done. Business and Professions Code section 6068m states that the duty of the attorney includes the duty to, "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

This is particularly important in connection with settlement and settlement discussions. Rules of Professional Conduct 3-500 require that the client be reasonably informed about significant developments, and significant documents. Rule 3-510 requires communications with the client of all terms and conditions of any settlement offer, and Rules of Professional Conduct note under 3-510 requires oral communications of settlement also to be permitted.

Situations you may avoid if you communicate in writing:

A. During settlement negotiations, your client insists that the value of the case is exactly what it would be if he won at trial.

This client typically refuses to negotiate unless a significant amount of money is offered, or a significant amount of money is presented despite the attempt of a mediator or a judge, the client will not take attorney's advice.

In this circumstance, it is imperative that the lawyer set forth in writing confirming the clients intransigent attitude and the explanation of the risks and the recommendations for why a case would want to be settled in the area suggested.

B. A defiant defendant refuses to consider that the case has any potential exposure to him

Again, a letter should be sent confirming that the expenses and exposure in the case are significant enough to seriously consider settlement as an alternative.

In this instance, a written explanation for the attorney's advice may help lead the client to a reasoned response to the recommendations. It also provides for the client to make an informed decision about significant events in the case. For you, such a writing presents a deterrent to a future malpractice action by setting up a defense that you kept your client fully informed of the significant details of the case.

III. MAKE A CLEAN, AND CLEAR, BREAK

You've come to the point where the client refuses to listen to you, or isn't paying the bill, or is asking you to advocate a position which is not in compliance with Rule 3200, i.e., the client wants you to present a claim or a defense in litigation that's not warranted under existing law, or is asking you to conduct a defense or assert a litigation position which is, in your opinion, lacking in probable cause.

A. Send A Termination Letter

Sending the client a letter terminating the representation acts to stop any claim of continued representation and triggers the accrual of the statute of limitations in most situations.

California Code of Civil Procedure section 340.6 states,

“An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services, shall be commenced within one year after the plaintiff discovers or through the use of reasonable diligence should have discovered the facts constituting the wrongful act or omission.... In no event shall the time for commencement of legal action exceed four years, except that the period shall be tolled during the time that any of the following exist...(2) the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.”

If the attorney-client relationship is breaking down, a very straightforward termination letter starts the statute of limitations running leaving the client with one year in which to bring a lawsuit against you.

The attorney-client relationship can also terminate when the task has been completed. *Panattoni v. Superior Court* (1989) 203 Cal.App.3d 1092. In those circumstances an attorney should still send a letter terminating the representation and advising that the work has been completed.

Unfortunately, the courts have been pretty clear on the fact that termination isn't really termination until and unless it is terminated by operation of law, withdrawal, discharge, or the mutual consent and agreement of the parties. (*Hensley v. Caietti* (1983) 13 Cal.App.4th 1165, 1170.) Hence, move to withdraw from the representation as well.

B. When You Withdraw, What You Should Do

The Rules of Professional Conduct 3700(a)(2) prevents an attorney from withdrawing until the attorney has taken "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, and complying with applicable laws and rules."

This means that if a client is going to represent him or herself, and is not substituting in new counsel, important dates and timelines will all need to be set forth in writing to the client, even if you have to file a motion to withdraw as counsel of record. If there is outstanding discovery needing responses, extensions should be obtained if at all possible to allow the new attorney or self-represented client to timely respond.

The attorney is responsible for providing the client all files connected with the client's case upon reasonable request. California Rules of Professional Conduct 3-700(d)(1). When a client requests a file, it is the attorney's responsibility to provide the original, unless the client agrees to a copy.

It is absolutely imperative from a risk management viewpoint for the law firm and the attorney to keep a copy of the file. Never let the entire file go out the door without keeping a copy. This may sound like it's costly, but it is the most important method by which an attorney can protect the interests of him or herself and the law firm.

Once the attorney-client relationship has been terminated, the attorney does not have a duty to represent the client in any other matter. *Branlin v. Belcher* (1977) 67 Cal.App.3d 997.

On occasion an attorney who currently representing a client on a matter is asked by that same client to represent him on another matter. However, the attorney does not have the time or resources to take on this new matter so he farms out the case to a different attorney. In that circumstance, it is also imperative that the attorney confirm in writing that the attorney no longer represents the client in that specific subject matter.

IV. ENFORCE THE TERMS OF YOUR FEE AGREEMENT WITH CAUTION

Your statute of limitations to file an action against a former client for fees that the client has not paid you is longer than the statute under California Code of Civil Procedure section 340.6 for malpractice. Once you have accounts receivable that are aged over six months, general industry

standards are that the value of the aged receivables is less than 50%. Thus, waiting for more than one year after cessation of the attorney-client relationship to institute any demand for or claim for your fees that are owed has no super impact on the value of those receivables

The attorney who has a fee dispute with a client must offer fee arbitration to the client before filing a lawsuit. Assuming the client has declined to arbitrate, it is imperative that you go after the client for these fees more than a year after the termination of the relationship. If you don't wait, you will draw a cross-complaint for malpractice as soon as you sue for your fees.

Once the statute of limitations has run against you for malpractice, the only relief a former client can seek for alleging malpractice, is to reduce the claims against him, and not to seek any money in response. It also saves you the responsibility of having to pay a deductible, which is a substantial portion of what you are owed anyway, having to defend a malpractice action. It also saves the potential problem of having an insurance company, desirous of trying to resolve the case, having you waive all of your fees.

V. COMMUNICATE, COMMUNICATE, COMMUNICATE

More than half of all claims relate to a failure to communicate with your client, whether it is risk to the case or informed consent on other issues. Even if you have to "no charge" your clients on letters to confirm discussions or to outline risk factors, it is the single most important thing you can do to reduce the potential claims against you for malpractice.