Avoid Practice Pitfalls And Decrease Your Legal Malpractice Risk

By Amy J. Coco, Esq.

Most lawyers understand that if they make a substantive legal error, the client may make a legal malpractice claim against them. But claims frequently arise because lawyers failed to appreciate the pitfalls inherent in managing the client relationship. Legal malpractice claims invariably cause lawyers expense, effort and stress. Lawyers can take some basic steps to avoid some of the most common practice pitfalls and minimize the risk of a claim or at least maximize their ability to defend themselves if a claim does arise. Avoiding these pitfalls can go a long way to minimize the likelihood of dealing with the stress, expense and effort.

Pitfalls in Client and Case Selection

Lawyers face a major pitfall by trying to help every client who comes in the door. Resist the temptation to represent every client who walks in the door (or calls on the phone or emails). Regardless of the merits of any particular case, some clients are better served by other lawyers. Develop a sense of those clients that you are comfortable representing and who will be comfortable with you. Matching the client type and temperament and case type to your own skill set and temperament reduces the risk of the unhappy client. Unhappy clients are often the ones making claims against lawyers.

Don’t represent everyone who knocks on your door or emails you. And keep in mind that frequently those emails are not even real clients.

Do give careful consideration to the personality match of the client and the lawyer.

Do be extra cautious when you are replacing previous counsel. Perhaps prior counsel was in fact doing bad work or was simply not the right type and temperament for the client. Frequently in those circumstances, though, the client may simply have expectations which could not be satisfied by the legal system.

Do avoid conflicts of interest. Memory or instinct alone are not sufficient. Have a system in place to check names of those involved in the case before signing the client up. No less than seven rules in the Rules of Professional Conduct deal with conflicts of interest. See Rules 1.7 – 1.12 and new Rule 5.8, which is a non-waivable conflict rule. Consult the

Continued on page 3
Avoid Practice Pitfalls
Continued from page 1

Rules and comments if there is any question about whether a conflict exists.

> Do avoid the client who cannot afford to lose, particularly in a domestic relations matter. If a client’s situation is so desperate that his or her life will be over if they are unable to obtain custody, win the alimony petition, or receive a fair equitable distribution, any dissatisfaction with the result is likely to be transferred to a dissatisfaction with counsel. Dissatisfied clients are the ones who file lawsuits against their lawyers. Although all domestic relations matters have a substantial emotional component, be cautious as that emotion can give rise to claims against the lawyer.

> Do be cautious about representing clients who insist it is not about the money, it is about the principle of the matter. They are more likely to be dissatisfied by the outcome in a civil litigation matter because it is difficult to compensate principles.

> Don’t take a case you don’t have the time or resources to handle.

> Don’t dive in unknown waters. When a lawyer is unfamiliar with the area of law, he or she is more likely to make substantive errors and/or procedural errors, and these errors frequently result in claims. If you do not understand and are not familiar with the legal issues involved in the matter, you have choices:

- Hit the books. But recognize that the client is likely not going to be willing to pay for your education.
- Get help from knowledgeable counsel or a mentor.

- Refer the matter to someone who is able to handle it.
- Decline or terminate the representation.

> Do send non-engagement letters or communications to those potential clients when you do not take the case. This is particularly important if a statute of limitations applies or some deadline looms. Courts have sometimes allowed the question of the existence of an attorney client relationship to be decided by the client’s state of mind. If you have not undertaken representation, it is a good idea to set forth the same in writing. See Rule of Professional Conduct, Rule 1.16.

Pitfalls in Client Communications - Engagement/Disengagement/Fees

Avoid failing to document your retention, advice and termination of the relationship. A lawyer would never advise his or her client to go into a business relationship without a clear understanding of the agreement. Every attorney-client relationship should begin with a well-drafted engagement agreement, not simply to comply with ethical requirements, but also to reduce the risk of claims and increase the likelihood of getting paid.

> Do have a specific discussion with your client laying out clearly for both lawyer and client what services the lawyer will provide and the manner in which the lawyer will proceed in the representation.

> Do confirm your discussion with a written engagement agreement.

> Do identify clearly whose interests you represent, especially in the case of multiple parties or overlapping interests. Identify the client in the engagement agreement to avoid misunderstandings later. For example, if you are representing a corporation in a lawsuit or a transaction, your agreement should state that you are representing the corporation’s interests and not the individual shareholders’ interests, which can sometimes diverge.

> Do identify the lawyers and other professionals who will work on the file in order to avoid misunderstandings later.

> Do give serious consideration to whether and how you’ve represented any of the involved parties in the past. Make sure that those prior representations are disclosed in writing and any potential conflicts are waived before the representation begins.

> Do give serious consideration, when representing multiple parties, to whether they have interests which may diverge and make clear the circumstances under which you may or may not continue to represent some of the parties if their interests diverge during the representation. Make sure you advise in writing that anything one party shares will be shared with the other and you cannot keep information confidential from the other client in a multiple client representation.

> Do include a description of the scope of the work you are undertaking. Be specific. If you are not undertaking a particular part of the work, you should expressly and explicitly say so. If there is a limitation on service, it should be explicitly set forth in writing to avoid a dispute later. For example, if you are taking the car accident case, but not the UIM claim, worker’s compensation matter or social security disability matter, you should so state. If you are giving estate planning advice, you may wish

Continued on page 4
Avoid Practice Pitfalls

Continued from page 4

to advise that your advice is meant to achieve their estate planning goals and will not consider their interests in marital property or domestic disputes that may arise later. If you are giving business advice, but not tax advice, say so.

Do identify the client’s goals and define success at the outset.

Don’t guarantee success. In fact, do advise the client that lawyers cannot guarantee an outcome or success. You should advise that outcome or extent of the services often depends on the other side's actions or on the court.

Do make sure the client understands that, except where you are charging a flat fee, you cannot guarantee a maximum fee because you cannot control the other side’s actions or the court’s requirements. You do not want a good faith estimate of fees to become a contractual obligation.

Do include a provision regarding the lawyer's right to withdraw from representation and the manner in which the lawyer’s compensation will be determined if there is a withdrawal.

Do use retainers to minimize fee problems. In most cases, but particularly in the domestic relations area, using a replenishing or “evergreen” retainer may reduce disputes. Many lawyers get into difficulty in fee disputes with clients, not because they did not use a retainer at the beginning of the relationship, but simply because they did not keep track of billing issues. You should have a clear understanding with your client that you will withdraw from representation if they do not meet their financial obligations.

Don’t make a bad situation worse, when the client fails to keep up his or her end of the bargain, do withdraw.

Do bill your client regularly. If you wait until a substantial amount of work is done or until the end of the matter, and send one large bill, the client is more likely to be unhappy and balk at paying your fees.

Don’t sue your client for fees. There are really only two answers to a suit for fees: 1) I don’t have the money (which means you are likely not collecting); or 2) You did something wrong (which means you are likely paying your deductible to a defense lawyer to defend a legal malpractice counterclaim). Either answer frequently ends up in a losing situation for the firm given the time and effort that will be needed to prosecute the claim which could be spent on other endeavors.

Do advise your client on the procedures you will use to achieve confidentiality, particularly if documents and client information are stored in the cloud or transmitted via the internet.

Do warn the client of the risks inherent with email and cell phone communications if the client elects to communicate that way, and make sure the client understands what you can and cannot control. For instance, if the client is sending you email via their work email address, there is a chance that those emails are not confidential.

Do advise the client if you do not meet the professional liability insurance requirements of Pa.R.C.P. Rule 1.4.

Do include a provision regarding ownership of the client file materials and the retention/destruction of the file. See PBA Ethics and Professional Responsibility Formal Opinion 2007-100.

Don’t charge a contingent fee in a divorce matter (or in a criminal case). Rules of Professional Conduct, Rule 1.5(d).

Don’t try to limit your professional liability to your client in advance or settle a claim with a client.

Do confirm client discussions and instructions in writing. If the client has dictated specific instructions or limitations or controls on the work to be performed, those should be staled.

Continued on page 5
Avoid Practice Pitfalls
Continued from page 4

➤ **Don’t** promise what you cannot deliver. Manage your client’s expectations early on. Clients are always happier when you get them more than what they were expecting but are rarely happy when their expectations are not met.

➤ **Do** use a termination letter. When you choose to, or must, terminate an ongoing representation, you should prepare a disengagement letter. See Rule of Professional Conduct, Rule 1.16 which, *inter alia*, places burdens upon lawyers to take reasonable steps to mitigate the consequences of a voluntary or involuntary termination upon the client.

Pitfalls in Case Management and Client Relations - Timeliness, Diligence and Competence

Manage your clients’ expectations and their matters. And do be nice, even to that “difficult to manage” client. Recognize that the core of many legal malpractice cases is the dissatisfied client who feels that the lawyer did not pay attention to his or her legal matter. Clients sometimes bring suit because they believe they have not been treated very professionally by the lawyer.

➤ **Do** return phone calls.

➤ **Do** prepare the client for possible bad results. **Don’t** fall into the trap of believing that withholding bad information from the client will prevent a lawsuit. Instead, it frequently brings a fraud count added to the Complaint.

➤ **Do** keep the client advised. Clients should be kept up to date on the status of matters. A client is much more inclined to accept an unfavorable result if he or she has been kept advised of the proceedings and has been provided an appropriate analysis (warning) of the possibility of unfavorable results. Avoid creating or maintaining unreasonable client expectations.

➤ **Do** send clients copies of everything. This not only keeps the client up to date but builds an appreciation of the value of the lawyer’s services.

➤ **Do** make timely filings. A substantial percentage of claims result from a failure to file court papers or other documents in a timely fashion. Lawyers should use both a diary/calendar system and a docket system to ensure that matters within their responsibility are handled in a timely manner.

➤ **Don’t** file court papers that lack support in law and fact. See Pa.R.C.P Rule 1023.1

➤ **Do** educate yourself about technology. The Rules of Professional Conduct require that lawyers “keep abreast of changes in the law and its practice including the benefits and risks associated with relevant technology...” The essence of this rule is that you must have an understanding of technologies associated with the profession. In order to be competent, you must be able to advise your clients about their use of social media and you must understand what digital evidence might be available to help prove or defend a case. See PBA Ethics and Professional Responsibility Formal Opinion 2014-300.

➤ **Do** keep client information confidential. While the premise is simple, in this day and age, it may no longer be easy. Rule 1.6 requires the lawyer to keep any information related to the representation of the client confidential. This is much broader than the attorney-client privilege.

Your duties require you to take care to keep all information related to the representation of the client confidential (this includes even information that is public record). For example, if you are communicating with your clients electronically, you need to take care to make sure the information is communicated confidentially. This may include warning not communicating with clients via non-secure technology, or warning clients not to communicate with you on computers where they don’t have an expectation of privacy — like a work email account. Depending on the sensitivity of the information, it may also mean you should be encrypting your communications. If you use online storage for client information, you need to make sure it’s considered secure. All cloud storage companies are not necessarily recommended for storage of confidential information.

Amy is a shareholder in the firm of Weinheimer, Haber & Coco, P.C. She focuses her practice on professional liability claims defense, particularly with respect to lawyers, insurance agents and real estate professionals and counsels lawyers in Professional Responsibility and Professional Ethics matters. Amy actively participates in the Allegheny County and Pennsylvania Bar Associations, including serving on the PBA House of Delegates, Executive Council of the Commission on Women in the Profession, the Professional Liability Committee, and the PBA Legal Ethics & Professional Responsibility Committee as well as chairing the ACBA Professional Ethics Committee and the Lawyer Professional Liability Insurance. She also teaches Business Law at the University of Pittsburgh Katz School of Business.