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LITIGATION

Effective Client Reporting: A Lawyer's Best Friend

Editor's note: This article describes hypothetical scenarios.

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Special to the Legal

Keeping your clients informed through effective reporting is the Golden Rule of malpractice risk management. Clients do not like bad results, but their willingness to live with a bad result, without suing you over it, is a product of their expectations. Effective reporting is your single best means of managing your clients' expectations, and hence, your exposure to malpractice claims.

Disappointing jury verdicts and failed transactions are not exclusively caused by attorney error. The uninformed client, however, may not see it that way. Malpractice often results from a client's uncontrolled expectations. While experienced lawyers are aware of the risks and uncertainty of the judicial process, the uninformed client is not. Absent timely and clear communication between lawyer and client, the client is left to create his own reality, which may never be achieved.

All too often, a client suffers from apparent amnesia after lengthy conversations. All too often, something is lost in translation between client and attorney. It is this uninformed, detached client who is more likely to turn on his lawyer when something goes awry because he was not aware of the risks. Effective written communication between attorney and client is the safety net to avoid dire consequences.

CASE STUDIES

The following case studies reflect those instances that are seemingly benign, but resulted in legal malpractice lawsuits due to an attorney's failure to properly communicate with his client.

THE INITIAL REPORT

You are retained to defend the interests of the president of a small investment company in a suit sounding in breach of contract, breach of fiduciary duty and conspiracy. Your client orchestrated the removal of a junior board member because of a perceived poor work performance. The ousted shareholder now alleges in his suit against his former employer and president that the termination was a violation of the company's corporate bylaws and was done in bad faith.

After evaluating the underlying facts and allegations, you conclude that the tort claims should be dismissed under the "gist of the action doctrine." You are so confident that this theory will result in the dismissal of these claims that you do not address the potential consequences and damages that could result from the tort claims in your initial written report to your client.

One year later, the court has denied your client's preliminary objections and subsequently your client's motion for summary judgment. As a result, the tort counts remain at the time of trial. Following trial, a jury finds that your client breached his fiduciary duty and awards considerable damages.

Your enraged client claims that he was never properly informed of the potential risks posed by the tort claims. Moreover, he suggests that you failed to take appropriate steps to defend these claims. According to your client, had he been informed of the possibility that the tort claims could eventually be in the hands of the jury, he would have negotiated a settlement months earlier. A malpractice suit follows.

- **Analysis:** In all likelihood, a well-developed, detailed initial report would have helped to prevent a malpractice suit. Good practice calls for an initial report discussing all pending counts and defenses, the relevant law, and an analysis of potential damages against your client.

Despite confidence in a "gist of the action" defense, the lawyer should have addressed all possible scenarios so the client was in a position to make educated decisions regarding case strategy.

DOCUMENTING CONVERSATIONS WITH CLIENTS, 1.0

You have been retained by a longtime client, a banking institution, to document a loan transaction between the bank and a local hardware store seeking to expand by opening a new store. At the request of the bank, you draft and circulate to all parties the loan documents, which include standard personal guaranties to be executed by the owners of the hardware store. You learn from the prospective borrowers, however, that they refuse to execute any personal guaranties. After some negotiations between the parties, it is your understanding that the personal guaranties are to be removed from the loan documents and you prepare a revised set of materials for execution.

Months later the hardware store expansion proves to be a bust and the store defaults on the loan. In a declaratory judgment action initiated by the bank, the court determines that the individual owners of the store cannot

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be held personally liable to the bank because the executed loan documents lack personal guaranties. Next, your longtime client claims that it was not aware that the personal guaranties had been omitted from the loan documents and sues you for malpractice.

• **Analysis:** In this scenario a writing from lawyer to client, whether by e-mail or formal report, confirming that the loan documents had been altered could have avoided this outcome. It would appear that the lawyer assumed that his client was in the loop, when in fact the client was unaware of the legal ramifications of the revised loan documents. Although the client had an opportunity to read the loan documents prior to execution, it is the lawyer on the line because he did not take the precaution of confirming his understanding in writing to the client.

DOCUMENTING CONVERSATIONS WITH CLIENTS, 2.0

You represent a plaintiff who files suit against his former father-in-law alleging breach of a partnership agreement. In the suit, your client alleges that he and the father of his ex-wife entered into an agreement to equally split any profit derived from "flipping" real estate. Your client located and managed the real estate while his former father-in-law provided the capital. When your client engaged in an extramarital affair and the marriage fell apart, his former father-in-law refused to provide him with the profits associated with several flipped properties.

At a bench trial, you assert one legal theory: breach of a partnership agreement. You consider and discuss with your client potential avenues of recovery, including equitable principles, but opt to exclusively pursue the breach claim for strategic reasons, namely to simplify the claim. The court holds that no formal agreement was in place and that the business relationship was contingent upon your client's faithfulness, and hence marriage, to his daughter. In a published opinion, the court suggests that a claim of "quantum meruit" may have dramatically affected the outcome.

In preparation for the defense of your legal malpractice case, you recall several conversations with your former client in which you discussed alternate legal theories including "quantum meruit" but chose, with client's agreement, to simplify the issues. Additionally, you recall lengthy conversations in which you discussed this very topic with your client but cannot locate a single document, even an e-mail, evidencing this conversation.

• **Analysis:** Understandably, some attorneys are reluctant to pepper their client with letters that serve for little other purpose than confirming earlier conversations. However, discussions involving case strategy or "big picture" developments should always garner some follow-up to confirm that the lawyer and client are in agreement. In the above scenario, a brief e-mail confirming that the lawyer was authorized to proceed exclusively with a *partnership* theory could mean the difference between victory and defeat in a malpractice action.

THE BOTCHED SETTLEMENT

You represent the wife in a contentious divorce action. After months of discovery and emotional testimony, your client expresses her interest in reaching a resolution and moving on with her life. Your client provides authorization to negotiate settlement, and instructs you that her first priority is ownership of the vacation home. At the bargaining table, with the goal of retaining the vacation home for your client, you make certain concessions including relinquishing all rights to alimony.

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Upon learning that the vacation home is hers, your client eagerly signs all paperwork effectively settling the divorce proceedings. Only later, however, does your client learn that she is no longer entitled to alimony and files suit against you for failure to advise her of material settlement terms before reaching an agreement.

• **Analysis:** It would appear that the client in this example was so blinded by the prospect of securing the vacation home that she did not sufficiently contemplate the remaining terms of the settlement agreement. Here, it is the lawyer's responsibility to review the settlement terms with client prior to execution. Perhaps the most effective means to review settlement terms is through a brief report identifying the material terms of the agreement and the potential affect on your client. This strategy will protect both attorney and client.

LESSONS LEARNED

Each of the foregoing examples resulted in well-intentioned, respected attorneys finding themselves as defendants in legal malpractice suits. Of course, the common thread between each of these scenarios is the attorney's failure to properly document conversations or report important aspects of the case or transaction.

Clearly some blame can be attributed to the clients, who arguably failed to exercise common sense. In the foregoing case studies, it would be reasonable to expect different outcomes had the client or the court behaved differently. It would be fair to assume:

• That the president of an investment company is aware of the risks and uncertainty of trial.

• A banking institution reads and understands its loan documents before execution.

• A contract would be deemed void because of an extra-marital affair.

• That a soon-to-be divorcee would only execute a settlement agreement if she was comfortable with its terms.

But the careful lawyer must not assume and cannot take anything for granted. In each case, the client or the court did not behave as their lawyer expected. The well-drafted, timely report is the lawyers' defense to the unexpected.

Lawyers, in a sense, pilot clients to their selected destination. We select the equipment, chart the course, and even decide if it is safe for takeoff. However, unlike general air-travel, the client has every right and expectation to be actively involved in all of these decisions. Most clients are happy to leave major decisions to the professionals so long as they are aware of each option and understand that any decision was made after evaluating all of the available alternatives. Accordingly, when there is some turbulence along the way, and there always is, the properly informed client will have difficulty pointing the finger at counsel.

It is important to maintain a comfortable balance between zero communication and such constant reporting that the client is overwhelmed. The risk imposed by constant reporting is that the client ignores all written communication and remains uninformed. To strike that balance, consider routine quarterly reporting or reporting key developments to keep the client informed. After a period of relative inactivity in a matter, let the client know that there is little, or even nothing, to report. Follow up important telephone or in-person conversations in writing, usually e-mail is fine. These simple reporting techniques will instill in the client confidence and trust and may be your key to avoiding or, at the very least, defending a legal malpractice lawsuit. •