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Thursday, November 11, 2010

Protect yourself, provide better service

Preventing claims involves more than shielding yourself behind a business structure

By David Lefkowitz, Special to the Daily Report



David Lefkowitz graduated from Columbia University with a bachelor's degree in 1985 and earned his J.D. from Emory University School of Law in 1988. The Lefkowitz Firm LLC represents individuals and corporations in their claims for legal malpractice (legal negligence) and similar claims such as breach of fiduciary duty; misconduct by officers or shareholders in closely held businesses; trustee misconduct; executor misconduct and ethical misconduct by attorneys and other fiduciaries. Lefkowitz frequently is an invited speaker at continuing legal education seminars on the topics of legal malpractice, ethics and professionalism.

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a client seeks a result (revenge, perhaps?) you know going in that you cannot accomplish, you are better off declining the representation.

Some lawyers feel that they should accept a client or a legal matter simply because they have some extra time on their hands. Please don't fall into that trap. A bad decision regarding a new client can cost a lot more than the revenue the client may bring in. You may have but one opportunity to say "no thanks" to a prospective client. Use that opportunity wisely.

Communicate

Remember that time you weren't feeling well, you went to the doctor, and she performed some blood work? Remember how anxious you were to receive the results from the doctor or someone from her office? I submit to you that the legal matter you are handling for your client is just as important to the client as your test results were for you.

Many of us are busy and struggle to find the time to return calls promptly. But clients want to know that you are focusing on their matter and that it is important to you. Returning calls as soon as possible is an important way to let your clients know that you really do care about their issues. It's the functional equivalent of a good bedside manner. Not all clients sue for malpractice when things go wrong. Some choose to forgive. They believe the relationship they have with their attorney is more important than the money they would recover in a suit. Your clients won't go through that balancing process (sue or forgive) if you haven't been treating them well throughout the representation.

I read with interest the excellent article by Randy Evans in the Nov. 3 Daily Report, "LLP's: Make sure you're protected." The article encouraged attorneys practicing in an LLP to structure their partnership properly to protect partners' assets in the event of a claim. This is an important aspect of firm management and risk management. I practice as an LLC for some of the same reasons that large-firm attorneys may want to practice as part of an LLP.

As I read the article, however, it seemed to me that preventing claims (and the resulting potential loss of your assets) involves more than shielding yourself behind a business structure. The same planning and energy that goes into the creation of an LLP can also be applied to substantive risk management at the attorney-client level.

Evans' article provides a list of "five steps that every law firm should take in order to protect its partnership and, more importantly, its partners in advance of any challenges that may come." I would like to provide another five-item list; one that will also help protect attorneys and allow them to provide better service (which, after all, is the very best way to avoid a claim). You probably have given some thought to these items. If so, please consider this a brief refresher.

Choose your clients carefully

In this era of Internet, television, radio, billboard and mail marketing/advertising it seems like the focus is always on how we can find more clients. Lawyers should also focus their attention on which clients they choose to represent. Once a client retains you, it can be difficult to withdraw from the attorney-client relationship. Deadlines may be pending, and withdrawal may harm your client. A judge trying to push his docket may refuse to allow you to withdraw, because it will delay the trial.

If you are representing a client who can no longer pay your invoices, and you can't withdraw, you will wish you had taken a closer look at the client's ability to pay before you agreed to represent him. Some lawyers are shy about asking prospective clients about their financial wherewithal. Consider starting the conversation like this: "Your financial condition is generally none of my business, but I do need to ask you a few questions in the context of this representation." That's a good way to break the ice and ultimately find out of a client can afford to retain your firm.

In addition to determining the financial wherewithal of a prospective client, you should attempt to feel comfortable that you can help the client obtain his goals. If

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Study the law

Have you ever noticed how many medical journals there are? It seems like doctors have so much to read in order to keep up with their area of practice. We need to keep up with the law as well, particularly our specific areas of practice. Twenty three years ago, I was a brand new attorney entering a litigation practice. The late, great lawyer, Tom Magill, had hired me and was helping me learn how to be a lawyer. I will never forget a lesson he taught me: Read the Civil Practice Act from beginning to end at least once a year. What a great lesson that was, and I have always appreciated the advice.

These days, the rules of litigation are changing from year-to-year (actually, month-to-month, as the appellate courts issue opinions interpreting recent legislative changes). If you litigate, you need to keep up with the changes. And, I think, just as importantly, you need to review what you think you already know. The statute of limitations for a loss of consortium claim is four years, right? Yes. But wait, what if the claim arises out of a medical malpractice claim? Then the statute of limitations is two years. This has been the law since 1976. Who knew? You did if you litigate and study the relevant law. (For inquiring minds, it's O.C.G.A. § 9-3-34). Whether you are a litigator, a transactional attorney (what's new in the tax code?) a bankruptcy attorney or you handle intellectual property, you will protect the interests of your client, and by extension, you will protect your own financial interests, by keeping up with the law.

Define the scope of your representation

Under Georgia ethical rules, contingency fee contracts must be in writing. While no other fee arrangements are required to be in writing, I strongly urge all lawyers to set forth the terms of their representation in writing and have the agreement signed by the client. I could spend an hour talking about the do's and don'ts of fee contracts (in fact, I do, in CLEs), but one of the most important aspects of the contract is the portion in which you discuss the scope of the work you will conduct.

Using a personal injury analogy, it is not uncommon for an attorney to put in her contract that she will represent the client "for all claims arising out the incident which occurred on Nov. 5." If the attorney plans to handle the personal injury claim only, she should specify that fact. Otherwise, if a worker's compensation claim, or a disability claim, arises from the incident, the client will have a reasonable expectation that the attorney is handling those claims as well. If a deadline is missed, the client may assert that the attorney should have filed a claim. The attorney will contend that she never agreed to handle anything other than the personal injury claim. Everybody loves lawyers, right? No? Then you don't want to have a he-said/she-said in front of a skeptical jury. Document what you have been engaged to handle. Your client will understand what services he is entitled to, and you will have protected yourself.

Buy insurance

I can read your mind: Here's the self-interested legal malpractice lawyer trying to convince everyone they should have insurance. The unbiased fact is that errors and omissions insurance can protect your personal assets and provide the funds necessary to compensate a client who claims you committed an error. Not only does it help to preserve your personal assets (like an LLP), but rather than (or in addition to) shielding your assets from a client, it provides funds from which a damaged client may recover. It's nice to take care of your clients, don't you agree?

The insurance will also provide you with an attorney to defend a claim. Errors and omissions insurance is not required in Georgia, and it always astonishes me how many lawyers choose to be uninsured, including prominent lawyers in the public eye. The business decision not to carry insurance is, in my view, a cavalier way to practice law.

Some attorneys believe the urban legend that uninsured lawyers won't be sued. This is not true. Some other attorneys believe that insurance is too expensive. Well, insurance is always too expensive ... until you need it. Protect yourself and protect your client; buy insurance. And let me add this: if you are going to have insurance, be sure to communicate honestly with the carrier in the application process and the annual renewal process. If you fail to answer the underwriting questions honestly, you risk waiving coverage for a claim. You also will have a contractual obligation to promptly report errors that could give rise to a claim. Fulfill this requirement, as insurers are quick to challenge coverage for claims that are reported late.

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