New Jersey Law Journal

VOL. CLIII – NO. 4 – INDEX 318 JULY 27, 1998 ESTABLISHED 1878

PROFESSIONAL LIABILITY

Practicing Defensively

Practical Pointers for Avoiding Common Malpractice Traps

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In examining pending legal malpractice cases, one is able to identify common areas of claims and suits, and this examination and analysis enables a practitioner to take preventive steps to, hopefully, avoid being the next defendant.

Though we frequently see malpractice cases stemming from litigation and hearings in adversarial practice areas, the transactional setting is equally fertile ground for malpractice suits — mostly in the area of real estate transactions or other business or commercial transactions. For example, liens and encumbrances not discovered or not removed, liens not perfected and clients not getting what they wanted and reasonably expected in the transaction. With scores of documents in duplicate, numerous issues and tight time frames, such events are ripe for oversight and error.

The author, a partner with De Yoe Heissenbuttel of Wayne, devotes a substantial amount of professional time to the defense of attorneys and other professionals in malpractice matters.

Practicing defensively and intelligently means being organized. Use of checklists and regular follow-up are a couple of necessary ingredients. Regular client communication, explanation and documentation of the same is also necessary. Risks that are obvious or otherwise known by counsel, but not by the client, should be discussed and memorialized. Much like the informed-consent discussion engaged in by doctor and patient, counsel needs to fully explore and explain, particularly to the unsophisticated client. See *Conklin v. Hannoch Weisman*, 145 N.J. 395 (1996).

Particularly in newer areas or transactions with new wrinkles, resort to practice books and form books is certainly time well spent. Lender instructions and title insurance company requirements must be closely followed and complied with. Any questions or problems should be directly addressed to these entities to come to a solution. Ignoring a problem will only defer a problem and invite a claim.

Litigation areas bring with them other and perhaps more extensive and ongoing areas of concern. Claims and suits are rampant in failing to comply with statutes of limitations; some of which are unique to particular types of claims, the fictitious name rule and other deadlines, causing cases to be dismissed.

Reasonably full recoveries not being sought or not being procured when achievable are regularly seen.

Claims and parties not included or fatally split off until later incur the ever developing preclusionary rule of the entire controversy doctrine.

Clients not getting what they wanted and reasonably expected invites further claims.

Reasonable Strategies Immune

However, as a backdrop against which these areas should be considered is a smattering of case law that demonstrates that perfection should never be expected or demanded. Simple reference to the standard jury charge on legal malpractice illustrates this point quite well. New Jersey case law does not make a lawyer liable for an errant exercise in judgment when representing a client so long as the lawyer demonstrates a reasonable knowledge of the law and applies it. See *Cellucci v. Bronstein*, 277 N.J. Super. 506, 523-24 (App. Div. 1994).

Lawyers who pursue reasonable strategies in handling cases cannot be held liable for the failure of the strategies or for any unprofitable outcomes. The law simply demands that attorneys handle their cases with knowledge, skill and diligence, the law does not demand that the lawyer be perfect or infallible nor does it demand that they always secure optimum outcomes for their clients. See *Ziegelheim v. Apollo*, 128 N.J. 250, 267 (1992).

In practicing defensively, one must

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utilize diary, calendar or tickler systems. Particularly as to statutes of limitations, cross-references or multiple diaries is prudent. Communication with clients, documentation of communication and important events and continuing diligence are the hallmark of good defensive practice.

In taking on a new matter, some knowledge of the relevant law is required, though can be acquired, in most instances. Investigation and formulation of a plan or strategy need to be done and should be reflected somewhere in writing in the file. Some level of discovery will be absolutely necessary. Know the other side's position, what their later proofs will be, who their witnesses will be, etc. Usually not everything can be learned by interrogatory or document or deposition. Usually a variety of discovery modes will be necessary.

In addition to communicating with the client, the attorney should entertain and utilize the client's reasonable requests unless they would be damaging to the case. Decisions in these areas should be reduced to writing.

Inexperienced attorneys in the office should not be thrown into difficult events where indelible damage can be done. Experienced and recommended experts should be utilized versus neophytes.

Settlements, aside from being fully explained, are best documented and whenever possible put on the record with the client present. Engagements and declinations should be in writing and properly detailed.

If any engagement or retention is limited in scope, it must say so in a signed writing. Beware of the old adage: "If it's not written, it did not happen."

Also beware of specialized areas where a specialist should be utilized or referred to, e.g., tax, securities, bankruptcy, etc. Do not make promises or give guarantees, and in unliquidated matters, be careful of projecting or inviting reliance on an expected recovery. Think twice before doing a business deal with a client — read the Rules of Professional Conduct provisions on the subject very carefully and follow them.

Though lawyers can't be held liable for the failure of reasonable strategies or for unprofitable outcomes, the better course is to commit the strategies and the clients' expectations to writing, thereby (hopefully) avoiding the malpractice suit altogether.

We have seen claims based upon things as simple as the misspelling of a mortgagor's last name on a mortgage and the failure to properly record a document as well as items as esoteric and arguably judgmental as failing to put in adequate proofs at trial.

Whatever the alleged malpractice may be, adherence to diligence; knowing the basic law; doing the necessary tasks and communicating effectively is more likely to eliminate claims and suits and foster the unfettered practicing of law, not defending the same. ■