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Risk Management for the Defense Attorney

Recently, the legal malpractice industry has seen an uptick in claims filed against defense firms. Further, and more troubling, some of these claims are of high severity, resulting in seven figure settlements or verdicts. What is responsible for this new development and how can defense firms guard against it? Please read below for some risk management tips to assist in avoiding or decreasing the odds of drawing such a claim.

The institutional client

Traditionally, defense work supported by institutional clients drew relatively few malpractice claims. Institutional clients were simply not inclined to file malpractice claims against their attorneys. For years, such clients placed a high level of importance on loyal partnerships, and legal mistakes were folded into the cost of doing business. At times, the relationship that the law firm and the client shared spanned years so that the client would hesitate to sue an attorney who was so familiar with their business; in other words, their attorney knew where the bodies were buried.

Now, however, the legal industry, much like the rest of society, has become more transactional in nature. Communications today generally take place behind a computer screen rather than face-to-face. Institutional clients focus on their bottom lines, and relationship building is not as important. Lawyers are now surprised and disappointed to find that some clients are moving their business for marginally less expensive billing rates or cutting their time and/or staffing allowance.

Further, institutional clients now hire employees who are lawyers by trade or maintain their own legal departments to oversee outside counsel. Consequently, they have better access to information than at any other previous time in history and are more inclined to question legal strategy, work and trial results.

Finally, as corporate clients become more inclined to question results, more claims and lawsuits are brought against defense firms. Moreover, even in a tripartite relationship, insurance company clients may now be able to maintain legal malpractice lawsuits even in the absence of strict privity. At this writing, twenty-four states allow such actions under appropriate circumstances while only two states have not permitted them. See e.g., Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270 (S.C. 2019).

For the above reasons, law firms can no longer count on loyalty (or lack of privity) as a guarantee against a malpractice claim or lawsuit. However, proactive risk management can help in avoiding, or at least reducing, the chance of a professional liability claim.

It is still about relationships

At the end of the day, even in our transactional culture, human beings are still making the decisions for their respective institutional employers, including whether to file a malpractice action. We have all likely heard of studies that support the contention that doctors are less likely to be sued if they listen to their patients and treat them with respect and kindness; is there any reason to believe that this finding would not also apply equally to lawyers? If so, communication skills can never be overrated.

Many corporate clients are lawyers themselves. There may be nothing worse for them than to employ counsel who condescends to them or fails to listen to their concerns. Further, the corporate individual who assigns the file generally must follow guidelines that require the escalation of accurate, substantive and timely information at various points throughout the life of the file or assignment. There is almost nothing worse for these individuals than to lack information due to an attorney's lack of responsiveness, inadequate analysis or inability to write with clarity.

Ultimately, an attorney may deliver excellent results, but if the individual to whom that attorney reports is already frustrated or angry due to lack of communication, such results may simply not be enough. Consequently, the lawyer may not receive a second assignment. Further, if the lawyer ever makes a mistake, there may be insufficient goodwill to ward off a claim.

To that end, here are some tips to maintain open lines of communications and to build goodwill:

a. **Decide on a collective win, factor in the necessary time and expense, and then document the plan.** Remember – an attorney's win may differ from a client's win after considering time, expense, and likely consequences. For example, a defense verdict may not be the optimal result if it takes years and a small fortune to ultimately close the file.

b. **Analyze potential trial results as early in the life of the file as possible.** If there are missing pieces of information, identify them. No client wants to be surprised in a trial report by a recommended settlement number or potential verdict analysis never previously discussed. Likewise, no client wants to learn that the settlement value of a claim is a tenth of incurred defense costs.

c. **Never guarantee results.** A client will make the ultimate decision regarding whether to proceed to trial on any given case. The attorney, however, often knows the unpredictable nature of a jury trial. Motions are granted, witnesses fail to appear, juries have preconceived notions of fairness, and judges overrule good objections. While an experienced trial attorney should be able to provide a generally accurate verdict range, the client should also understand that a trial result is never guaranteed.

d. **Be responsive.** Returning telephone calls and reporting in a timely manner can make all the difference to some clients. Consistency can sometimes trump brilliance. Indeed, the second the client picks up the telephone for a status update, it is too late for a timely report. Moreover, if the client calls repeatedly with no return telephone calls, the attorney may have already lost support from that client.

e. **Proactively notify a client if you will be out of the office for any length of time** and use an automatic email reply. While everyone should be able to take a vacation or go on trial, be sure to let your clients know that you are out of the office, and not ignoring them. Provide them information regarding when you will be back in the office and available again to respond.

f. **Provide the client with an alternative contact.** Many partners are transparent about the identity of the associate with the most knowledge on certain files. Other attorneys are more reluctant to encourage client contact with their associates even when (or especially when) the associate is more conversant on certain issues. The client will always figure out who knows the file best; allow them access to good people.

g. **Report to your client after every major development on the file,** especially if the evaluation of the file changes. Ideally, any significant change in the evaluation should be conveyed with a telephone call followed by thoughtful correspondence.

h. **Keep advancing the ball.** No client wants to read a lengthy update with no conclusion or analysis. Rambling deposition summaries with no analysis will really frustrate a client. Add value.

i. **Never be condescending to a client.** Spend some time listening to the client before you start talking. They may know more about an issue or defense than you do right out of the gate. Many clients face the same issues repeatedly – and nationwide. To presume – without confirmation – that you are the smartest man or woman in the room will rub your client the wrong way.

j. **Schedule time to spend with your client.** It is hard to over-emphasize the positive impact that a meaningful face-to-face meeting can have on a relationship. Clients really appreciate the effort, and it is always good to put a name with a face.

k. **Never send a bill without an update.** No client wants to review a bill only to first learn about a substantive motion hearing, deposition or contract review of which they have no knowledge. Billing entries should never surprise a client. Moreover, never send a bill if you owe the client a telephone call. This should be obvious, but attorneys have been known to do it.

l. **Document, document, document.** Defense attorneys who report to corporate clients may be less likely to document files on a routine basis. Indeed, some defense attorneys accept settlement authority or approval to retain experts via telephone calls. Attorneys may also have concern that institutional clients frown upon them "papering the file". Documenting the file, however, need not entail writing endless formal or lengthy letters. A simple email may suffice. Often times, on the other side of a file that has somehow gone wrong, the client will take the position that outside counsel made all strategic decisions. The client may further argue that defense counsel failed to provide sufficient information so that the client was unable to properly evaluate the file. Transparent emails showing the exchange of information and the client's agreement may be key in defending against this strategy.