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Safeguards Against Legal Malpractice Liability As Claims Rise

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As 2020 continues to bring unexpected challenges to the legal sector and beyond, history suggests that we will see a surge in legal malpractice claims against attorneys. Understanding the reasons behind malpractice trends and adapting your habits and practice accordingly can help minimize your malpractice liability exposure.

According to an annual survey by insurance broker Ames & Gough, the magnitude and number of legal malpractice claims in the U.S. had already increased significantly in 2019. Now with COVID-19 resulting in a severe economic slowdown and remote work conditions across the country, business interruption is on the rise, as are novel challenges for clients and lawyers alike.

Each of the following factors individually, and especially in combination, is likely to increase the risk of malpractice litigation.

Recession History

Following the 2008 recession, legal malpractice claims in the U.S. spiked. Historically, when an economic slowdown is accompanied by decreased demand and high economic volatility — as we are experiencing currently — the number of legal malpractice claims rises.

Changes to Legal Landscape

Laws, regulations and rules of court are rapidly changing in response to the pandemic. These changes create opportunity for errors that may serve as the basis for malpractice claims.

Throughout the pandemic, several courts have changed their filing processes, and it is fair to say that keeping track of changes to deadlines is a messy process at best. Counsel who do not closely monitor these procedural changes may inadvertently fail to submit court documents properly and timely, resulting in missed deadlines.

Remote Work

A shift to remote work has disrupted the day-to-day practices of firms across the country, and lawyers have been forced to change the way they communicate with clients and colleagues. These changes could result in inadvertent divulgence of confidential client information, inadequate communication with clients, missed deadlines or miscommunication among colleagues regarding assigned tasks and deadlines — all of which could lead to a malpractice claim.

Tightening Client Budgets

Economic disruption often leads to shrinking legal budgets. You may find clients pushing you to do more with less in terms of time spent on research or filings. This budget pressure may result in inadvertently missing legal issues or forgoing arguments that could have benefited the client in hindsight.

Assigned Claims

Recessions often lead to increased sales of distressed assets and corporate structuring. The assignment of legal malpractice claims, which may be pursued by the successor entity, often accompanies these changes.

While some states generally prohibit the assignment of malpractice claims against lawyers, others, including California, allow assignment when the claim is transferred as part of a commercial transaction that includes other assets and liabilities, as opposed to a stand-alone transaction for the claim itself. As a result of increased corporate restructuring and distressed asset transfers combined with the economic slowdown, there may be an increase in companies pursuing assigned legal malpractice claims.

Conflicts of Interest

Another danger of increased corporate restructuring is heightened difficulty determining whether legal representation would result in a conflict of interest. Conflicts of interest, either actual or perceived, are consistently the most commonly alleged error in malpractice claims. As companies change in shape and scope, it is not always easy to know whether one corporation may be adverse to another such that a conflict would result, which might lead to an increase in malpractice claims based on actual or perceived conflicts of interest.

Contract Scrutiny

Because of extreme economic uncertainty and unforeseen, or unforeseeable, circumstances, individuals and corporations alike may attempt to avoid contractual performance. Heightened scrutiny of contract terms and conditions to determine whether performance is excused may be accompanied by an increase in malpractice claims against attorneys who originally drafted the agreements.

Expanding Client Base

The economic challenges of the pandemic may encourage lawyers and law firms to accept clients they might previously have declined. These clients may work in industries outside the scope of the lawyers' general practice areas — and thus be more likely to encounter legal challenges unfamiliar to the lawyers — or may operate in more questionable ethical or legal territory than a lawyer's long-standing client base.

While the above challenges that are likely to lead to an increase in malpractice claims are largely beyond our control, there are steps that firms and individual attorneys can take to protect themselves and limit their malpractice liability, including the following.

1. Document advice given and decisions reached.

It can be tempting, particularly in harried and uncertain times, to have a phone call and then implement whatever decision comes out of that call without ever documenting the issue discussed, advice given or decision reached. In a landscape where there could be turnover in corporate ownership, it makes sense to lay out the issues carefully, including the risks and benefits of any given approach, to make sure that someone reviewing the file months or years later can recreate the thinking.

This can seem overly formal if, for example, outside counsel insists on sending long memos. In our experience, a short email laying out an agenda for a call followed up by an email saying, in effect, "here's where we came out and who is doing what," can serve this goal without creating an unpleasant dynamic.

It also helps to make sure that everyone is on the same page, which is useful in real time given there are so many distractions in people's lives right now. Strong documentation is especially important if a client decides to act contrary to your advice, imposes limits on time that may be spent on a project, or instructs you not to research or pursue an issue.

2. Define the scope of work.

In our experience, there can be a tendency, when things go south, to blame anyone who was at the scene. That unfortunately often includes lawyers. It is difficult for juries to understand, sometimes, that different lawyers specialize in different things, and a skilled plaintiffs attorney can portray the lawyers who were in a room as the last line of defense who should have said something.

To guard against this, ensure that the scope of work is defined carefully in the engagement letter and be alert to mission creep as the engagement letter progresses. While it can seem formal to raise this issue deep into a relationship, in our experience, if this is handled correctly, clients will appreciate the care and attention.

One way to handle it is to flag the task for the client, note that it is outside the scope of the original engagement, and ask whether they would like you to handle the topic. Often clients say yes, in which case you have the additional work, or they say no, in which case you have created a good record to fend off any charge that you were responsible for that area.

3. Be hyperaware of conflicts.

Just because a conflict does not exist at the outset of representation does not mean that a conflict will not arise down the road, especially if the client undergoes corporate restructuring. Someone on the team should be in charge of monitoring for changes in clients' ownership or corporate structure.

Anytime there is a change, this person should map the new structure to identify any new entities — such as subsidiaries and parent companies. Circulating this information through the entire conflicts process will help flag conflicts that arise out of a complex corporate structure that may not be otherwise apparent.

4. Invest in technology.

Good technology can facilitate communication among colleagues, track deadlines and protect sensitive information, thereby reducing the likeliness of conflict errors, missed deadlines and confidentiality issues.

Web-accessible document-sharing portals allow multiple stakeholders to access productions, work files and other key case materials. These platforms avoid duplicating work and version-control issues because colleagues can view changes in real time and are always working with the most up-to-date document.

Web-based telephone systems facilitate seamless communication from anywhere at any time with both internal and external contacts. Many systems offer additional features, like screen sharing, videoconferencing and task management tools that can ease some of the burdens of working from home. Similarly, docketing software can provide redundancies for calendaring functions, though we also recommend having one human on each team be responsible for checking all calendar entries.

5. Keep abreast of changes to court orders and regulations.

Follow updates to court orders regarding appearances, deadlines and filing procedures closely. Most courts post up-to-date orders and even offer webinars, in which they provide detail and answer questions regarding standard court procedures.

It may make sense to designate one person on a team or in a firm to track and disseminate this key information. In our experience, claims arise more frequently in contexts when no one person or group of people bears responsibility for an issue.

6. Review insurance coverage.

Ensure your firm's malpractice insurance addresses your particular practice areas, risks and vulnerabilities. It is particularly important to ensure that there is sufficient coverage to match your firm's practice areas. If your corporate department regularly handles nine-figure mergers and acquisitions, your coverage should reflect that.

7. Vet new clients carefully.

Despite the economic pressures, new clients must be considered carefully. Confirm that the prospective client's needs are a good fit for your skill sets. Consider whether a prospective client has alleged malpractice claims against its prior counsel, faced sanctions for its past conduct in litigation, or displayed questionable business ethics. Turning down a small-dollar engagement now could avoid an expensive liability down the line.

Conclusion

In short, while it is impossible to know exactly what the malpractice landscape will look like in the coming years, we can expect there to be a significant amount of malpractice litigation. And, while the environmental catalysts for a malpractice surge are generally beyond our control, crystal-clear definition of scope, an abundance of regular conflicts checks, and keeping up-to-date on industry challenges and pertinent legislation are the prime safeguards to prevent malpractice and limit practice liability.

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