Risk Management For Lawyers--Good Beginnings Make For Happy Endings

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Axioms Of Risk Management

In the world of attorney malpractice three axioms of risk management are 1) Don't mess up; 2) Don't sue to collect your fees, and 3) Good beginnings make for happy endings.

The first of these is clearly a matter of wishful thinking. The practice of law is art, not science. An attorney who insists that he or she does not make mistakes is well practiced in the art of self delusion if not the law. Even the most well intentioned, well disciplined lawyers make mistakes. Fortunately, most mistakes do not actually harm the client and thus are not malpractice.[1] Given this reality it would be presumptuous in the extreme for this or any other article to presume to advise how to avoid **all** mistakes.

The second axiom is the functional equivalent of an 'urban myth' among malpractice professionals: *An action to collect fees will invariably result in a counter-claim of malpractice*. As with other urban myths, objective proof of this axiom is hard to acquire but anecdotal evidence suggests there is some truth to it.

The third of these axioms is the topic of this article. *Good beginnings make for happy endings*. This is a catchy over-simplification of the notion that taking proper care at the start of an attorney-client relationship may[2] save an attorney (and potential malpractice defendant) much grief when that relationship ends.

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[1] The expression "no harm, no foul" applies to legal malpractice much as it applies to basketball. Damages are a requisite element of the cause of action for legal malpractice. A mistake, no matter how egregious, that *doesn't'* t cause actual harm to the client is not malpractice. See *Jackson v. Johnson*, (1992) 5 Cal.App.4th 1350 at 1355; *Thompson v. Halvonik*, (1995) 36 Cal.App.4th 657, 661 at 661; see also *McDonald v. John P. Scripps Newspaper*, (1989) 210 Cal.App.3d 100 at 104. "[W]ithout 'actual damage or loss' there is no tort." Per *Jackson v. Johnson*, supra, at 355:

> The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized does not suffice. . . .

[2] That's "may" not "will." Strict adherence to the ideas suggested herein will not guarantee a happy ending to every attorney-client relationship.

Why Beginnings Matter

A legal malpractice claim, by definition, does not arise until the end of the attorney-client relationship.[3] It may therefore seem counter-intuitive to suggest that considerations to which a lawyer should give thought even before the attorney client relationship begins, when deciding to take on a new client or engagement, may help ensure a happy ending for both the lawyer and the client. All attorney-client relationships eventually end. Proper attention to details at the beginning of that relationship will help make that eventual end easier. Although some of the considerations discussed below seem commonsensical, they are often overlooked by experienced attorneys in their zeal to assume a novel cause. Even the most seasoned veteran would be well advised to step back, take a breather, and consider each of the following points before determining that a particular case is a good one to take.

Know Your Limits

When initially interviewing a potential new client, your most important task is *listening*. It is necessary to understand the facts and the nature of the matter presented by the potential client to assess whether he or she "has a case."[4] Of even greater importance is understanding the potential client's goals and expectations of your legal services. A lawyer has an ethical duty to provide *competent* representation.[5] On the practical side of things, an attorney who does not have the competence or ability to achieve the client's realistic goals is not going to have a happy client when his legal concern reaches an endpoint. These unhappy clients are precisely the type of clients that tend to file malpractice actions against their attorneys.

Try To Know The Potential Client

Even if the attorney is competent to undertake the representation, the attorney may wish to think twice about accepting the case if the potential client's goals are unreasonable. For example, a client whose primary goal is to exact revenge on a biblical scale may be particularly

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[3] This statement is true in two different senses: Being sued by your client necessarily creates a conflict of interest that would effectively end an attorney-client relationship that was not already ended. Additionally, many states toll the running of the statute of limitations for legal malpractice while the attorney continues to represent the client. California's *Code of Civil Procedure* Section 340.6 is typical. In relevant part it provides:

...the period [for commencement of legal action] shall be tolled during the time that...The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omissions occurred;

[4] Being litigators themselves the authors habitually speak herein in terms of "taking a case" rather than "undertaking an engagement to provide legal services." Despite this habit of speech, the discussion herein applies to any undertaking to supply any type of legal service.

[5] Rule 1.1 of the ABA Model Rules of Professional Conduct provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

difficult for the attorney to control and may be impossible for the attorney to please. It is not a great leap to conclude that generally, such a client is more likely than not to be displeased with the result of the attorney's representation regardless of the outcome. If at all possible, an attorney willing to take on such a difficult client should make every effort to counsel (and document in writing) the client from the beginning of the engagement regarding realistic results that the attorney is likely to able to obtain on his or her behalf.

An attorney considering taking on a new client should also inquire into the relationship the client has had with other attorneys in the past. The prospective client's thoughts about past attorneys and why a new attorney is being sought can often provide insight into what a new attorney's relationship may be like with the prospective new client. An indication from the client that he has had only short-term relationships with counsel or that the client has had numerous other attorneys in the past may suggest that the client is often dissatisfied with the results that other attorneys have obtained. This might raise a question of whether the prospective client is going to be one that the attorney will be able to please. Specifically, such a history may indicate that the client typically has unrealistic expectations of his or her attorneys or that the client was so unmanageable that previous attorneys have declined to *represent* him or her in other matters. Conversely, a prior long-term attorney-client relationship may suggest that the client has previously been pleased with the performance of legal professionals and thus, may be less likely to jump on a malpractice action if his or her goals are not fully realized. An additional benefit of exploring the client 's prior legal representation is that if the attorney knows prior counsel, it may be helpful in assessing what style of legal practice and file handling the client is comfortable with, and whether the prospective attorney's own approach is likely to satisfy the client.

Similarly, it may be advantageous for an attorney to explore the prospective client's feelings about relationships he has had with other *professionals*, such as tax advisors or accountants. The client's attitudes towards th*e*se professionals may indicate whether he or she has a generally favorable view of professionals, how willing the client is to work with them, and how likely that prospective client is to cooperate in the future. Additionally, the attorney interviewing the prospective client may also get a sense of whether the client might begrudge the payment of fees for professional services, especially when such services may not necessarily bear evidence of tangible value.

An attorney should also consider a prospective client's sophistication in assessing whether agreeing to represent that new client. For example, a client's education level, business experience may affect his or her perceptions about the facts and situations underlying a dispute. If the attorney suspects that the agitated person sitting on the other side of the desk may not fully understand the social issues or business considerations underlying the matter for which he or she is seeking counsel, the attorney may begin to wonder whether or not the melodrama being unfolded bears a close resemblance to the actual facts. In such situations, a legal professional would be well-advised to exercise some of his or her better deposition tactics to ferret out what may have actually occurred. In addition to eliminating a no-winner before investing a significant amount of time and effort in pointless legal maneuvers, the attorney may also be hedging against the danger of acquiring a client whose lack of sophistication or understanding may contribute to irrational or unrealistic expectations.

The prospective client should also be asked about his or her legal history and familiarity with the legal system. If the client indicates that he or she has great familiarity because of personal involvement in numerous lawsuits in the past, it may cause the attorney to consider whether this potential client is particularly litigious, and consequently, whether this client is likely to make a mountain out of a molehill. Excessive litigation as a plaintiff may also suggest that the client is particularly vindictive. Such a quality does not tend to be favorable to an attorney seeking to avoid a potential malpractice claim.

Another factor that may be of significance when determining whether to take on a new client is whether that client has any problematic dependency issues, such alcoholism, drug abuse, or excessive gambling. Such problems do not, of course, disqualify the potential client from the right to quality legal representation but they are legitimate factors to be assessed by an attorney who is attempted to determine whether or not he or she chooses to represent this particular client. Such issues may suggest that the attorney will encounter difficulty in managing the client or in relying on the client to follow through on certain instructions that the attorney may need to give throughout the period of representation. For instance, if these issues inhibit the client' s ability to appear for noticed depositions, to timely respond to discovery requests or produce documents, the attorney may be in for a hard time in shepherding the matter through to its conclusion. Other factors which may indicate that there may be problems for the attorney in relying on the client are whether that client has a history of legal or financial problems and whether divorces or paternity issues have come up with undue frequency. If the attorney is not convinced of the client's reliability, the attorney may be subjecting himself to future problems in the management of the client or the risk that the client will not whole-heartedly meet his obligation to pay for the attorney's professional fees and costs.

An attorney should also evaluate the personality of the potential client and whether his or her own personality is likely to come into conflict with that of the potential client. Such a conflict, if sufficiently grave, can lead to a compromise of the attorney-client relationship, potentially compelling the attorney to withdraw from representation at some time in the future.[6] Even if a dramatic rift does not seem in the likely, a personality conflict may lead to a situation where the attorney becomes effectively unable to convince the client to follow important instructions. It should go without saying that such important advise or instructions should be memorialized in a writing. If the client fails to do as instructed and as a result, suffers an unwanted legal consequence, such writing will be an important piece of evidence in defense of the a malpractice action from the dissatisfied client that could arise from this situation.

Finally, an attorney should consider how the client's personality might effect a judge, jurors or other parties to the litigation or transaction. A difficult personality could effect the potential client's ability to realize his or her goals. If the attorney concludes that those goals are not attainable, he or she is most certainly setting him- or herself up for an unhappy ending. Moreover, if the client 's attitude is particularly obnoxious, an attorney may be well-advised to consider whether that client's personality and reputation could adversely impact the lawyer's reputation or that of his or her practice. In the long run, it may prove more cost-effective to turn

[6] *See,* California Rules of Professional Conduct, Rule 3-700; Estate of Falco v. Decker (1987) 188 Cal.App.3d 1004, 233 Cal.Rptr. 807.

away a single prospective client than to assume the risk of alienating other existing or future clients.

Realistically Assess Potential Conflicts of Interest

The Rules of Conduct in force in every jurisdiction limit (in varying degrees) an attorney from undertaking representation of one client that is directly adverse to the interest of another current of former client.[7] This is not news nor is it our intention to review these rules herein. While most prudent attorneys already have some system for conflict checking, many do not have conflict checking procedures that relate to non-clients. Some recent cases suggest that attorneys should check for *personal interest* conflicts in addition to the standard client conflict check.[8] The performance of such checks, although difficult and subjective, may help avoid a sticky situation down the road if the parties can agree from the beginning to waive the conflict.

Checking for conflicts is the easy part. The harder, but far more important thing to do is to have the courage to refuse a potentially lucrative engagement because of an unresolvable conflict. With the possible exception of a few fortunate dilettantes, attorneys practice law to earn their living. This leads to a not unnatural reluctance to recognize potential conflicts of interest which might require an attorney to turn away business. Do not be swayed by this reluctance. In the long run an attorney's financial and emotional well being, as well as ethical responsibility, are best served by recognizing and dealing with potential conflicts of interest up front.

Define The Scope Of Representation/Scope of Risk You Are Undertaking

Like it or not, every engagement undertaken as an attorney carries with it some risk of a malpractice claim. A prudent attorney should consider the scope of such risk as part of determining whether to accept a given engagement. In order to do this accurately the scope of the engagement must first be realistically defined and memorialized in writing in the retention agreement. An attorney should consider whether the potential engagement could expose he or she to liability to person other than the current potential client? For example, the intended beneficiaries of a will if that will is later determined to have been improperly drafted? Or investors in a corporate entity who allege a failure to exercise proper care in the handling of certain corporate legal matters or securities transactions? If such an action were brought, to what the range of damages might the attorney be exposed? In these post *Sarbanes-Oxley*[9] days such

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[7] See for example ABA Model Rule For Professional Conduct 1.7, 1.8, 1.9, 1.10 & 1.11 or California Rules of Professional Conduct 3-300 and 3-310.

[8] *E.g.,* DCH Health Services Corp. v. Waite (4th Dist. 2002) 95 Cal.App.4th 829, 115 Cal.Rptr.2d 847 (concerning whether an attorney's marital relationship could be the basis for a disqualification). While the disqualification in this instance was reversed on appeal, the result may not always be so favorable.

[9] The applicability of the Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act of 2002 to the legal protection has been the subject of much discussion within and without the profession. The authors do not intend to participate in this discussion other than to suggest that the prudent practitioner be aware of it and of the potential liabilities which it presents.

concerns are not trivial. In assessing such a risk, the attorney should consider both whether he or she has sufficient insurance coverage, and whether there would be any other parties with whom the attorney would likely share liability.

Will You Get Paid?

Finally, as mercenary as it may seem, attorneys do want to be paid for their services. Therefore, an attorney should consider whether the potential client is likely to be able to actually pay for professional services rendered. Additionally, an perhaps not as obviously, an attorney should consider whether he or she will be able to wait until the conclusion of the legal matter to collect payment for legal services. Clients have brought malpractice claims in the past alleging that their attorneys have hastily resolved legal matters simply for the purpose of becoming entitled to collect their professional fees

Accepting the Client: Put it in Writing!

Various jurisdictions have different requirements with respect to requiring written retainer agreements.[10] Quite apart from such requirements a written retainer agreement is advisable as disputes frequently arise over a misunderstanding of the fees to which the attorney is entitled as well as over misunderstandings about the scope of responsibilities that attorney has assumed. A written agreement can drastically limit the attorney's exposure to liability when such disputes arise.[11] Although many lawyers are accustomed to using engagement letters when they decide to take on a client, to a large extent, the engagement letters are used to merely describe the fee to be charged. A savvy lawyer seeking a happy ending, on the other hand, will also include detail concerning the scope of the attorney's representation, the end point of that representation, identification of the client, and other important terms of the engagement.

An engagement letter should clearly and specifically identify the client. Although this may seem an obvious issue at first, consider the case of a corporate client. With such clients, it is not uncommon for the officers and directors of the corporation to assume that they are automatically personal clients of the attorney as well. Any confusion that might arise along these lines can easily be dissipated through a clear statement that the corporation is the client and specifying that the officers and directors of the corporation are not. As this example illustrates, it is important for an attorney not only to identify the client, but also to carefully think about additional parties that the attorney may specifically wish to exclude as a client.

Another common malpractice issue that often arises comes about when there is more than one client that the attorney could be representing in a matter. Many malpractice actions are

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[10] For example see California Business & Professions Code § 6147 and 6148 which collectively set forth the requirement that contingent fee agreements and other fee agreements covering legal services the value of which exceeds $1000 must be in writing.

[11] Portsmouth Redevelopment & Housing Authority v. BMI Apartments Associates (E.D. VA. 1994) 851 F.Supp.775; *see also* Nathaniel Fincher Hansford, *What Amounts To A Contract To Pay Legal Fees? When Is A Document A Valid Contract To Pay Legal Fees?* (1999/2000) 24 J. Legal Prof. 423.

brought by clients who allege that a potential conflict of interest was never brought to their attention, in violation of the attorney' s ethical duties. The engagement letter gives the attorney an opportunity to set forth the understanding that the attorney is representing multiple clients and that potential conflicts of interest may arise. It can also be helpful to communicate in writing certain tricky legal issues that may be important, depending on the clients' relationship with each other. For example, when multiple clients are represented by a single attorney, the attorney may wish to advise them that one client's waiver of a privilege or confidentiality may result in the waiver of the privilege or confidentiality for the other clients. Alerting clients to this potential may not only help an attorney to avoid a malpractice action when a privilege is inadvertently waived by one client, but it may also help both the attorney and his or her clients avoid making the mistake in the first place.

If a potential conflict of interest exists between multiple clients, the attorney should disclose this fact from the very outset. Fortunately, the engagement letter is just about as "from the outset" as one can get, and the savvy attorney will take advantage of the opportunity to disclose that potential conflict in writing, seek a waiver of the potential conflict in the written engagement letter and advice that the prospective clients to discuss the conflict with independent counsel of their own choosing.

The attorney's engagement letter should also include a precise description of the subject matter of the representation and the scope of the attorney's duties with respect to such representation. Such a description can help clarify whether the attorney is assuming responsibility for ongoing representation in unrelated matters, and whether the attorney is expected to perform specific tasks which otherwise might be performed by other parties such as recording property transactions or obtaining certain business licenses. Another benefit of defining the scope of attorney's representation is that it allows the attorney to express his or her understanding of the client's goals. A word to the wise here–to avoid defending claims that the attorney should have kept the client from making poor business decisions avoid describing the scope of work to be performed with broad platitudes like "provide general business advise."

The retainer agreement should specify significant costs that are likely to be incurred in performing the requested legal services such as expert witness fees, filing costs, investigative costs, and costs incurred in performing computerized legal research. This helps the prospective client understand any financial limitations that may be placed on the attorney by the client's budget. It can also help the client understand the amount of work that will be required in order to obtain the ends that the client desires. Finally, a clear provision in the engagement letter for the client's payment of the expected costs and fees may obviate a later dispute over whether the attorney should be directly responsible for the payment of the enumerated costs and fees, or whether the client is expected to provide a draft for payment personally.[12]

If delegating certain responsibilities to other parties such as paralegals or other attorneys during the course of an engagement is anticipated the retention agreement should say so. This helps avoid an allegation by the client at a later date that he or she expected a given attorney to

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[12] California Rules of Professional Conduct, rule 4-210, generally prohibits an attorney from agreeing to pay the personal or business expenses of a client.

perform all such legal work personally, and that attorney breached the contract failing to do so. Similarly, California Rules of Professional Conduct provide that a client must consent in writing if the attorney is to split his fees with another attorney or a non-attorney,[13] and must specifically disclose when that other person assumes responsibility for performing certain tasks.[14] The engagement letter allows the attorney to secure such written consent from the outset. Additionally, setting forth the intention to involve other legal professionals may help to avoid billing disputes occasioned by a client's inability to understand the need for multiple legal professionals to coordinate their activities or to perform other tasks that may not produce a tangible result.

As has been mentioned, almost all engagement letters provide terms for the attorney's billing of fees and the client' s payment of such fees. While statutory and case law require that an attorney's fees cannot be either illegal or unconscionable[15], many practitioners realize that there are numerous ways to calculate such fees. For example, fees may accrue on an hourly basis (with or without a cap on the maximum amount charged), a flat fee may be charged for the performance of a particular task, or any one of a host of contingent fee arrangements can be agreed upon. Whatever the arrangement, fee agreements should be in writing,[16] and the terms of such fee agreement cannot be unfair or against public policy[17].

Tying Up Loose Ends Non-Engagement And Disengagement

Though not strictly a matter of good beginnings a brief mention of the role of non-engagement and disengagement letters is in order here. It is good practice for an attorney to send a non-engagement letter to any potential client the attorney declines to represent. Though sending such letters may seem to belabor the obvious it does serve the laudable purpose of preventing malpractice claims by persons or entities which an attorney does not even think of as clients. While the content of these letters will vary depending on the situation, it is often wise for an attorney to specifically mention timing issues which may significantly impact the client's rights or interests. Such timing issues may include the running of any statutes of limitation relevant to any contemplated complaints or cross-complaints, filing deadlines on responsive pleadings, the making of certain time-sensitive tax elections, or filing deadlines for actions against governmental entities.

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[13] *See,* California Rules of Professional Conduct, rules 1-320 and 2-200.

[14] *See,* California Rules of Professional Conduct, rules 3-500; California Business & Professions Code §6068(m).

[15] California Rules of Professional Conduct, rule 4-200(A). This is true even where the attorney never attempts to collect the illegal or unconscionable fees. Dixon v. State Bar (1985) 39 Cal.3d 335, 216 Cal.Rptr. 432.

[16] California Business & Professions Code §§ 6147 and 6148.

[17] *E.g.*, Hall v. Orloff (1st Dist. 1920) 49 Cal.App.745, 194 P. 296; Klein v. Lange (1st Dist. 1928) 91 Cal.App.400, 267 P. 130; Hawk v. State Bar of California (1988) 45 Cal.3d 589; 754 P.2d 1096; 247 Cal.Rptr. 599.

Similarly, once the subject matter of an attorney's engagement has ended, it is a good idea to send a disengagement letter which typically will state that the representation has reached its conclusion, summarize the outcome of the representation, make provisions for the return of the client's documents, set forth the attorney's policy regarding retention of the client's file, and enclose a final billing or statement. The most obvious benefit of such a letter is that it can clear up any misperceptions that a client may have regarding the attorney's ongoing duty to represent his or her interests. Additionally, a disengagement letter can establish a clear date from which the running of a statute of limitation can be calculated.

Conclusion

The above discussion demonstrates that while it may not be possible avoid allegations of malpractice throughout ones career, things done at the beginning of a representation can help protect against such allegations. First among these recommended actions is to *listen, listen, listen!* Get to know a prospective client, come to understand the client's goals, and honestly assess whether or not you can help the client achieve those goals. Second, the consider whether the risks assumed by accepting the client's representation are worth it. Are you likely to get paid for the work to be performed? Will a significant potential liability result? Will the new attorney-client relationship is likely to damages any existing or future relationships?

Once you determine whether or not to accept the new client, put it down in writing. This is especially true where the attorney takes the new client on. In addition to traditional written terms of the representation such as the fees to be charged, remember to identify the client, define the scope of representation, and identify any problem areas that may arise such as potential conflicts of interest.

Finally, once the representation has been concluded, should memorialize that fact and explicitly state your understanding that the attorney-client relationship has been terminated.

Starting out with a good beginning won't guarantee a happy ending but it will help.