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PROFESSIONAL RESPONSIBILITY

Ethical traps for young lawyers

By April A. Otterberg

Lawyers in any practice area or at any stage of their careers can be targets of legal malpractice claims. As a young lawyer, you might think you are even more vulnerable. After all, if you've been practicing law for any length of time, you've probably come to realize how much you need to do on a daily basis that you just didn't learn in law school.

But young lawyers are at no greater risk for malpractice claims than the rest of us. And young lawyers may be more likely than more senior lawyers to ask their colleagues for help when they are unsure what to do. But one thing above all gives a young lawyer an edge: At the early stages of your career, you can establish good habits that can help minimize the risk of a claim (or its severity) throughout your legal career. Here are seven tips for doing so.

1. Read and follow the rules.

The first tip is basic and obvious: read the rules — whatever rules govern your practice or the task you're performing. That means the rules of professional conduct (which apply to all of us), but it also means court or arbitration rules, rules established through statute or contract, and your firm or legal department's internal rules. A surprising number of claims — malpractice, sanctions, or bar discipline — arise or are complicated by a simple failure to know and follow the rules. Think about the claim or discipline possibilities if you don't know the rules for filing notices of appeal, calculating the statute of limitations, citing binding authority to the court, or maintaining client confidences.

2. Open and close matter files appropriately.

One of the first things I look for in defending any legal malpractice case is the engagement letter. A good engagement letter identifies the client, what the lawyer is being hired to do, any limitations on the scope of a lawyer's work, and any other terms of the engagement, such as fee arrangements. A good engagement letter can be your first line of defense against a malpractice claim from a nonclient, or a claim from a client who "forgets" that he hired the lawyer for one transaction and not another. A good engagement letter also is a matter of good client relations: It helps confirm that both the lawyer and client are on the same page about what the lawyer will — and will not — do on behalf of the client, helping to avoid later misunderstandings.

Also important, however, is closing the file when a matter is complete. In some jurisdictions, including in some circumstances in California, the statute of limitations on a malpractice claim is tolled if the lawyer continues to represent the client on the matter in which the malpractice was allegedly committed. A short letter to confirm the end of the particular matter (and potentially the hope of future business), even if the lawyer represents the client on other matters, can help counter this possibility. The letter might say, "As you know, the *Smith* matter has now concluded, and we are closing our file in this case. It has been our privilege to represent you in this important matter, and we hope that you will consider us for any legal needs you may have in the future."

3. Double-check everything.

Year after year, what appear to be simple mistakes by lawyers give rise to a large number of malpractice claims. The lawyer mis-calendars the deadline for fil-



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ing the patent application, instructs a paralegal to file the UCC financing statement in the wrong jurisdiction, or omits a word in a lengthy contract with the effect of rendering an entire provision ambiguous. Mistakes are almost inevitable, but the goal is minimizing the likelihood of mistakes. Many mistakes, if caught at the right time, can be fixed before they change outcomes and cause harm.

The lesson? Double-check everything. Set up a system where two people check and confirm filing deadlines before anything is calendared. Empower paralegals to issue-spot and ask questions, such as whether it makes sense to file a UCC statement in Alaska. Print out the contract and read it in hard copy before it is executed. And if you find a mistake, don't sit on it — fix it if you can, or consult a more senior attorney (or your law firm's general counsel or loss prevention partner) for advice.

4. Communicate, and put it in writing.

One of our most important duties as lawyers is to communicate with our clients. After all, we're counselors and advisers, not just advocates. But there are times in almost every representation when the communication is best made (or confirmed) in writing. In particular, key client decisions, or restrictions or limitations on the scope of your representation, can generate claims down the road if a client conveniently "forgets" the conversation. For example, after you advise the client of the pros and cons on an issue, he decides not to seek costly discovery of a third party. Later, the client loses the case and claims you're responsible because you didn't subpoena key evidence from the third party. A simple note to the client at the time of his decision not only could have prevented that claim, but also could have given him one final opportunity to think through his decision and confirm that he understood the next steps in the representation.

5. Ask questions, and seek supervision.

As a young lawyer, it's tempting to try to prove you know what you're doing by executing tasks with minimal supervision and avoiding questions. Whatever short-term benefits that provides, it can have long-term consequences if you shy away from asking about key issues or refuse to ask for help or supervision when you need it. Although the more senior lawyers in your office have a duty to supervise you appropriately, you also are obligated to provide competent representation to your clients. See California Rule of Professional Conduct 3-110.

This may mean asking a colleague to point you in the right direction if you don't know the first thing

about registering a business in California, but it could also mean letting your supervising lawyers know if you're having trouble keeping up with your workload. Young lawyers as well as more experienced lawyers can fall prey to client demands and busy schedules, causing them to neglect client matters — or even worse, attempt to cover up the neglect. Avoid those situations to begin with by being honest with your colleagues when you need help. Remember, the client's interests are more important than your ego.

6. Delegate, but supervise.

If you're lucky enough to work in an office with experienced support staff, it's tempting to delegate more and more work to those staff members. Many tasks in a law practice are routine or ministerial, such as sending out letters, running to court with a filing, or drafting certificates of service. Whatever the task, it's still your job to supervise the nonlawyers you work with (and, as you get more senior, the younger attorneys who work with you). Think about the headaches you'll have when you show up in court on an emergency motion, but the court kicks it a week because your assistant forgot to serve the motion on opposing counsel. Or the explaining you'd need to do if a paralegal inadvertently sent a letter to Client A when it really should have been sent to Client B. The point? Delegate where appropriate, but properly instruct, supervise, and follow up with those to whom you delegate.

7. Screen your clients.

For those of us in private practice, the law is, at its core, a business. And it's tempting to represent any client who walks in the door, especially when we're judged on the business we bring in to our firms. But even if you're excited about the presence of a living, breathing client at your door, pause to ask yourself not just if you could represent the client but whether you should. For example, is the prospective client asking you to draft a will, even though your only knowledge of probate law is the single class you had in law school? Or is the prospective client asking for help drafting disclosures for an investment fund, but cagey when you ask basic questions about the investment fund's practices?

Don't let the prospect of new business lead you to dabble in an area of law you're not competent to practice, and don't check your instincts at the door when a prospective client's business seems too good to be true. Screen your clients now to avoid claims later.

Many of these tips for avoiding malpractice claims may seem like common sense, and to some extent, they are. But they're also tips for managing client relationships professionally and in a way that enhances client service, communication, and understanding. And that's something all lawyers — young and the young at heart — should embrace.

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