GETTING SUED IS FOR Dummies

Practical Steps for Staying Out of the Line of Fire

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I. INTRODUCTION

The practice of law is fraught with pitfalls. Between deadlines, conflicts of interest, changing caselaw, difficult opposing counsel and the occasional unscrupulous client whose version of the facts does not quite match up with the evidence, traps for the unwary are everywhere. Couple this with statistics that predict every attorney will face at least one malpractice claim over the course of his or her career and even potentially more bar complaints and one begins to assume that facing the wrong side of a lawsuit is inevitable. It is easy to assume that it is not a matter of "if" one gets sued, rather, just a matter of "when." However, this does not have to be the case. There are a number of measures that can be taken to prevent a claim from ever occurring and to protect one's self in the event that a claim is threatened or brought. Granted, even the most careful, conscientious and claim-paranoid lawyer can still be faced with a charge that he or she has committed malpractice, but a public lawsuit is not always the natural conclusion.

This paper outlines practical steps that can be taken to avoid a claim for malpractice in the first place, to safeguard against risk both to reputation and financial well-being as well as to manage a claim before a suit is ever filed. As members of a profession as opposed to merely a commercial enterprise, these steps serve dual interests, safeguarding not only the attorney but clients as well.

A. The Legal Biz is not Business as Usual

The relationship between an attorney and client is unique. It is not a typical business relationship. Unlike other business enterprises where the parties bear mere contractual obligations to one another and operate at arms length, the attorney/client relationship is far different. The Supreme Court of Georgia, as the governing body charged with the "duty to regulate the practice of law" has described the practice of law as a "profession" and "a calling" not merely a business enterprise. Further, in exercising its duty to regulate the profession, the Supreme Court has sought to assure the public that the practice of law

> will be a professional service and not simply a commercial enterprise. The primary distinction is that a profession is a calling which demands adherence to the public interest as the foremost obligation of the practitioner.

Aflac, Inc. v. Williams, 264 Ga. 351, 352-53 (1994) *citing* First Bank & Co. v. Zagoria, 250 Ga. 844, 845 (1983). Further, "as an officer of the court, the lawyer's obligation to the courts and the public is as significant as the obligation to the clients." *Id*. The Georgia Supreme Court has further elaborated:

> The relationship between a lawyer and client is a special one of trust that entitles the client to the attorney's fidelity. See Ryan v. Thomas, 261 Ga. 661, 662 (1991); Freeman v. Bigham, 65 Ga.580, 589 (1880). This 'unique' relationship is 'founded in the principle upon the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney.' Demov, Morris, Levin & Shein v. Glantz, 53 NY2d 553 (1981). To force all attorney-client agreements into the conventional status of commercial

> contracts ignores the special fiduciary relationship created when an attorney represents a client. Fox & Co. v. Purdon, 44 Ohio St. 3d 69 (1989). *Id.*

The Supreme Court regulates the practice of law in the "public's interest" not as relationships between commercial parties. *Id.* As a result, the safeguards and disclosure requirements that may be available to a typical business enterprise vis-a-vis its customers may be viewed with heightened scrutiny in the attorney/client relationship. Consequently, disclosure and transparency requirements to the clients are heightened as compared to a typical business or customer relationship. Because the attorney/client relationship and duties that exist as between the attorney and client are unique, the manner in which an attorney seeks to protect himself against a possible claim from a client is likewise, unique. The recognition that the parties are not equal business partners, and that the duty owed by an attorney to his client is comparatively heightened, is central to the determination of how attorneys should fulfill their obligations to their clients while safeguarding themselves against a claim should one arise. The following steps will aid in providing error prevention and other safeguards which operate to the benefit of client and attorney alike.

B. STEP 1: PLAN FOR THE WORST, HOPE FOR THE BEST – Get good insurance that will actually cover for a loss.

Although one may not drive a car or motorcycle without liability insurance, lawyers are not required to maintain errors and omissions insurance to protect against loss. The number of attorneys who voluntarily elect not to carry liability insurance or who carry insufficient coverage amounts is significant. It is estimated that only 60% of attorneys nationwide carry such insurance, and only two states (Oregon and Nevada) require practicing attorneys to maintain legal malpractice coverage. There are valid

arguments on both sides of the debate as to whether it would be appropriate to require lawyers to maintain a certain level of professional liability insurance, and there is a growing trend among the bar associations of several states in favor of imposing such a requirement. While elaboration on these arguments is beyond the scope of this paper, it is always prudent for an attorney to elect to secure errors and omissions insurance if he is able. In making such an election, there are certain measures one should take to insure that the coverage you believe you are receiving is there when it is needed.

i. *Selecting an Appropriate Policy*

The first issue is finding a policy that covers you when you need it and for an amount that is appropriate for your cases. One factor to consider is whether the policy will be a "self reducing" or "wasting" policy. A self-reducing or wasting policy means that all expenses including attorneys fees incurred in your defense will be deducted from the amount available for a claim. Hence, while many adjusters do not assess a claim and potential settlement payment in terms of the costs for defense involved, as a defendant with a self-reducing policy, it should be top of mind in considering the amount of coverage that will ultimately be available and whether a resolution or continued litigation is the most cost effective alternative. For example, if litigation is continued under a self reducing policy, the settlement dollars left available are that much less and conversely your personal exposure is that much greater in the event that a claim exceeds the remaining value of policy. Hence, if a claim is forthcoming, you should raise questions with your defense counsel as to your individual and firm exposure if an excess verdict is rendered. It is equally important is to determine whether one's policy requires settlement approval from you. If so, this requirement for your approval affords you additional levels of control over the resolution decision. Likewise, when a demand is

made within the limits of the policy and you authorize a payment of the demand, know your remedies in the event that a settlement is not procured. For example, an insurance company's failure to pay on a valid demand within the policy limits may expose it to a bad faith claim by you in the future if the matter results in a verdict in excess of the policy. However, there are a number of procedures which you must follow so as to preserve your claim for bad faith against the insurance carrier in the event that an excess verdict is rendered. While these types of actions put you in an adversarial position with your carrier, they are important to recognize so that you are adequately protecting yourself and the firm's assets. As stated above, such protection also protects your client in the event that an error did occur which caused damages to the client.

ii. *Understanding Your Coverage*

It is also important to understand what is meant by an "aggregate" amount of coverage available; i.e., how much coverage is actually available in any given policy period. Often times if more than one claim occurs within a year, the coverage amount available is merely the amount that remains after previous claims and does not re-set per claim. Hence, a prior claim may reduce the availability of funds for a subsequent claim resulting in a coverage shortfall and personal and firm financial risk. Additionally, understand the exclusions and what is or is not covered. For example, are abusive litigation claims covered or excluded? What are your reporting requirements? Are you required to report a "potential claim" or only those claims that a client has actually asserted? Often times, failure to report a potential claim of which one had reason to know provides fodder for a denial of coverage or, at minimum, a reservation of rights under the policy creating greater personal exposure. While no policy may ever provide for all conceivable scenarios to which you may be exposed, knowing what it does

and does not cover and communicating that to staff and counsel in the firm is an important means by which to limit the ultimate risk to which you may be exposed.

C. STEP 2: YOU CAN'T PLEASE EVERYONE – Conflicts checking and making sure you aren't on both sides at the same time.

The largest total settlement payments for malpractice claims are paid for claims alleging conflicts of interest. While the number of claims alleging conflicts of interests is fewer than other types of claims such as missed deadlines, individually and collectively they garner the largest settlement amounts. In Georgia, the maximum penalty imposed for violating the rules prohibiting conflicts of interest is disbarment. Moreover, the burden of proof as to the damages associated with same usually survives a summary judgment challenge, as a conflict of interest claim is a breach of an attorney's fiduciary duty and thus, is presumed to have proximately caused a damage sufficient to survive summary judgment, even when the amount of the damage is not readily ascertainable. Given these substantial burdens, conflicts of interests should be handled with extra care so as to be avoided whenever possible.

The standards to which attorneys should look in carrying out their obligations to avoid conflicts of interest are set forth in the Georgia Rules of Professional Conduct, specifically Rules 1.7, 1.8, and 1.9. Generally speaking, an attorney may not pursue an interest or action which is adverse to his client's interests or incompatible with applying his best skill, zeal and diligence in representing his client. Professional judgment cannot be tainted by compromising interests and loyalties. Clyde Chester Realty Co. v. Stansell, 151 Ga. App. 357, 359, (1979) (quoting Napier v. Adams, 166 Ga. 403, 406 (1928)). Thus, "if an impermissible conflict of interest exists before representation is undertaken the representation should be declined." GRCP 1.7, Comment 1 (2012). Moreover, "the

lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest." *Id.* Utilization of such a procedure will serve to eliminate conflicts problems before they ever arise.

In a situation where a lawyer represents multiple clients, and circumstances exist that might cause some of the clients to question the lawyer's undivided loyalty, the attorney should advise all of the clients of such circumstances. If a client does not believe that the lawyer is committed to undivided loyalty, the lawyer must defer to that client and withdraw from representation. An attorney shall not continue to represent multiple clients if the exercise of independent professional judgment on behalf of one client will be adversely affected by the representation of another client. There should be no compromising interests or compromising loyalties. A lawyer must decline to represent a client or discontinue representation of a client if his professional judgment is or may be compromised by the interests of another client. Allen v. Lefkoff, Duncan, Grimes & Dermer, PC, 265 Ga. 374, 376 (1995).

An attorney has an unambiguous duty of loyalty to each client he represents. Thus, it follows that the attorney has a conflict when he cannot fully represent the client without hurting or harming another client. When an attorney represents two or more clients who have interests that conflict with one another, then the attorney has a conflict, as he cannot give his undivided loyalty to both at the same time. Home Ins. Co. v Wynn, 229 Ga. App. 220, 222 (1997). When the interests of the two separate clients are in conflict with one another, then the attorney also is in conflict. The attorney's fiduciary duty to his clients mandates that he act in the best interests of each one,

necessarily requiring avoidance of conflicts of interest. Fogarty v. State, 270 Ga. 609, 610 (1999); Home Ins. Co. v Wynn, 229 Ga. App. 220, 222 (1997).

Conflict of interest claims provide the potential for an award of punitive damages when the attorney's conduct amounts to that entire want of care which would raise the presumption of conscious indifference to consequences. Peters v. Hyatt Legal Svcs., 220 Ga. App. 398 (1996). In Peters, the defendant attorney represented both the client who had retained him and his wife in an uncontested divorce action without obtaining the informed consent of both parties. *Id.* The Georgia Court of Appeals found that the evidence supported the jury's award of punitive damages, and noted that even a potential conflict of interest is sufficient to raise a jury question as to punitive damages in a legal malpractice case. *Id.* at 401 (citing Read v. Benedict, 200 Ga. App. 4, 6, 406 S.E.2d 488 (1991). Attorneys should also be aware that punitive damages are typically excluded from insurance coverage, so the attorney against whom such damages are awarded is exposed to personal liability even if he possesses errors and omissions coverage. Hence, employing appropriate conflict checking procedures that are performed not merely at the outset of a matter but are continually reviewed will provide additional protection in the event a conflict arises.

D. STEP 3: YOU'RE ONLY AS GOOD AS YOUR LOWEST AND LEAST SUPERVISED EMPLOYEE – Managing associates, associated counsel and paralegals

GRCP 5.1 requires an attorney to adequately supervise all of the activities of those subordinate employees, associate attorneys, and paralegals to insure that the client's interests are best served and in compliance with the Georgia Rules of Professional

Conduct. All supervising attorneys are responsible for the conduct of those individuals whom they supervise.

Additionally, attorneys are responsible for the conduct of other attorneys acting as associated counsel. As to associated counsel, "[I]f a lawyer outside the law firm undertakes to share the client's representation, an association of counsel exists." Legal Malpractice, Smith & Mallen, §5.9 – Vicarious Liability, Association. Attorneys can be vicariously liable for wrongs made between associated counsel and can be directly liable for negligent supervision of the associated counsel. Broad v. Conway, 675 F.Supp. 768 (N.Y.N.Y. 1987). By way of example, associated attorneys have been held liable for associate counsel's failure to comply with a discovery order. An attorney was sanctioned in J. M. Cleminshaw Co. v Norwich (1981, D.C. Conn.) 93 FRD 338, 33 FR Serv. 2d 554, because of his associate counsel's failure to timely respond to discovery requests. Pointing fingers at each other, the attorneys attempted to argue that one of them was primarily responsible for failing to adhere to the discovery requests and should be held primarily responsible. The Court held that as associated counsel, they both bore responsibility for the errors. Hence, if your associated counsel misses a deadline or fails to otherwise perform a task, you may be held responsible for their failures and omissions. Further, the various Model Rules require that a supervising attorney bears responsibility for the errors or failures of those within his employ or supervision and with whom he has engaged to assist in the representation of a client. Therefore, supervision of all aspects of the case must be made to insure that the client is adequately protected.

Although it has been argued that recent tort reform statutes relating to joint and several liability may impact apportionment of liability as between joint tortfeasors which would apply to associated counsel scenarios, there remains ample justification for the argument (and thus, risk) that joint and several liability remains and apportionment is not an issue until it is demonstrated that a plaintiff bears some culpability. If so, then under the classic joint and several scenario, "[T]he separate and independent acts of negligence of two or more persons or corporations combine naturally and directly to produce a single indivisible injury other than a nuisance...the actors are joint tortfeasors, jointly and severally liable for the full amount of plaintiff's damages." Mitchell v. Gilson, 233 Ga. 453, 454, 211 S.E.2d 744 (1975). The legal concept of "joint tortfeasors" is classically understood to mean those individuals whose "separate and distinct acts of negligence concur to proximately produce an injury." Travelers Indemn. Co. v. Liberty Loan Corp., 140 Ga.App. 458, 461(3), 231 S.E.2d 399 (1976). The law recognizes that such individuals are jointly and severally liable to the injured party for the full amount of his damage and that they have, as among themselves, the right of contribution, which right exists independently of their joint and several liability. O.C.G.A. § 51-12-32. If the combined result is a single and indivisible injury, the liability should be entire. Thus, the true distinction to be made is between injuries which are divisible and those which are indivisible. Phillips v. Tellis, 181 Ga.App. 449, 450, 352 S.E.2d 630 (1987). As it may be unclear whether apportionment will be made, the more prudent course would be to insure that all those engaged in the representation, at any level are adequately supervised.

E. STEP 4: WHEN THE DEW IS OFF THE ROSE OF YOUR CLIENT – Know who your Client is when the Honeymoon is Over.

The nature of a law practice places lawyers and clients together in a rather intimate way, affording them a sacred trust relationship automatically at the outset but long before an actual or more organic relationship has time to form. In essence, lawyers and clients "get married" on the first date and then march into a battle together that will test and strain their relationship that is barely formed. Additionally, once the official attorney/client relationship is formed, the client's interests, by definition, are placed ahead of the attorney and the relationship is not one of equality or partnership. The client is usually unfamiliar with the legal process and not conditioned for the attacks which may be waged against him. Further, these attacks may be very personal or involve otherwise private matters which only exacerbate an already stress-filled circumstance. Couple this with financial pressures and the client's ability to sustain the strain are further weakened. In the event of an adverse outcome, it is not difficult to understand why the attorney is often the first person the client turns to for potential retribution.

The first complaint is usually about the bill. A solid fee agreement that provides for a clear means by which to resolve fee disputes goes a long way to containing a fee dispute as merely a battle over the bill and not a malpractice claim. Insurance carriers often request to know the amount of your firm's outstanding receivables and what actions are taken to collect on same. Insurance carriers know that the quickest way to a malpractice claim is to file suit over your outstanding bill. Learn from their and other's experience and utilize another path to collection. Fee arbitration or some other independent tribunal may be the best alternative.

Expectation setting as to the realistic outcome and timeframe also operates to limit or soothe a client's propensity to pursue a claim. Clients who only hear how great their case is and who fail to have an appreciation for the merit of the opposing side's arguments and other dynamics which may be at play often express dismay that the outcome was not as predicted and then assume that their loss could only have been the result of the incompetence of their lawyer. Telling a client what they need to hear as opposed to what they want to hear, no matter how unwelcome, will at least keep open the possibility that the result was not an error on the attorney's part.

Lastly, a documented file either in the form of e-mails, letters or memoranda to the file serve to document discussions that seem to fade from client memories. In addition, research files and research memorandum assist in demonstrating issues that were prevalent in the case. Further, billing records demonstrate what actions were taken and the level of interaction with a client. Another easy method for keeping a client informed is simply scanning and emailing filings and opposing counsel correspondence. Form emails advising the client to review the attached eliminate client contentions that they were unaware of events or circumstances. Additionally, advising clients that calls may not be returned immediately given trial schedules or other matters further helps to eliminate frustration and the seeds of discontent.

F. Step 5: The First Step Is Admitting You have a Problem – Denial is never productive.

If a deadline is missed, tell someone in your office. Everyone in your firm has a collective interest in making certain that a potential problem is contained and that the client's interests are protected. The old adage that two heads are better than one is true. Moreover, another person, who is removed from the scenario is more objective and may

be more equipped to rationally address the problem. As set forth at the outset, the relationship with a client is not equal. Attorneys have duties to the client that put the client's interests ahead of the attorney. The natural tendency is to avoid the discussion with the client. However, this only exacerbates the problem. Hiding a missed deadline or other error from the client opens the door to a breach of fiduciary duty claim and potential punitive damages claims. Once an error has been committed, there is also the possibility that you are in a conflict situation with your client as your interests are now divergent. It is usually prudent to notify your insurance carrier as well. Even if the matter never evolves into a claim, the carrier is on notice and will not have the ability to deny coverage if the matter does evolve on the basis that they were not properly or timely notified.

If a claim is made, the best course is not brazen bravado or taunting a suit. Typically a suit can be filed in relative short order and so any hopes that a suit will not be forthcoming is an unwise gamble. Rather, consider entering into a tolling agreement to determine whether a resolution can be reached pre-suit. The tolling agreement provides for all the defenses to be maintained and does not alter the positions of the parties. However, it does allow time for the matter to be more fully investigated and often times for the heightened emotions to subside. A more balanced resolution can often be achieved if time is first allowed to pass and the heat of the frustration is allowed time to cool. This applies equally to both sides. Often times, the attorney is likewise frustrated as to the case which is the subject of the claim. A cooling off period with the client and distraction with other cases can provide a welcome distance and clarity to the situation that cannot be had in the weeks and months immediately following the realization of a problem or claim. In weighing whether to toll or allow the suit to be

filed, one should consider that once a suit is filed, even a complete win and dismissal of the case may not be a full exoneration. Therefore, avoidance of a suit, if possible, should at least be explored and considered. This is not to say that a non-meritorious claim for malpractice should not be defended. On the contrary, it should. However, prevailing may not provide a completely satisfying resolution.

CONCLUSION

Recognize that you are always required to look out for your client's best interests even before your own. If an error occurs, yours interests are likely in conflict and you will need to disclose same to the client so that they may engage another to lookout for their best interests. Unfortunately, your judgment, after you become aware that an error has been committed will be clouded by considerations for you and your firm's well-being, protection and defense against a claim. When this happens, the client's interests are not being attended to properly. Recognize this inherent conflict and take steps to insure that the client is safeguarded by referring to another lawyer and putting your carrier on notice.

Know the bounds of your insurance policy and what is required of you and members of your firm. Openly discuss these issues with associates and partners. Create an atmosphere that encourages attorneys to admit that there is a problem instead of simply keeping it to themselves. Better to disclose early, than to hide or avoid a problem which only makes it worse and potentially exposes you to a breach of fiduciary duty claim and punitive damages. Likewise, make sure that associated counsel are forthcoming and be aware of their activities so that you can inquire as to the status of events that could give rise to possible claims.

Finally, be reasonable. Do not let your fee become a source of a claim. Try to take preventative measures to resolve billing disputes and to quell them from escalating into a full scale malpractice claim. If a claim is made, earnestly explore alternatives to resolution that do not require the filing of a suit. The cooling off period afforded by such alternatives may create added benefits and allow the venom to subside on both sides. Hence, a suit is not inevitable and does not have to be a foregone conclusion if steps are taken to minimize the risk to the extent possible and to explore non-conventional options to resolution.