The "Little" Risks

by Martha Dickie and Jacob Scheick

Most attorneys are aware of the obvious malpractice pitfalls such as conflicts of interest or failing to communicate with a client. However, attorneys often make mistakes in mundane tasks that lead to unforeseen malpractice claims or make otherwise weak claims strong. For instance, daily time entries, casual emails and the unwillingness to say "no" to clients and friends can generate malpractice claims or make such claims harder to defend.

Time entries

Many find recording and billing time among the most tedious tasks required in practicing law. Nonetheless, accurate and descriptive billing is important and not merely because it leads to revenue. Many malpractice suits arise not just because clients are unhappy with the result obtained by their lawyers, but also because they are unhappy with their legal bills. The best defense to a claim that an attorney over-billed is proof of work performed. In turn, the best evidence of work performed is consistent and detailed time entries, specific to the task at hand. Of course, the primary purpose of time entries is to show the client the work an attorney has performed, and in that regard, time entries must clearly articulate the value of such work.

A practical way to check whether your time entries are sufficiently specific is to ask yourself if you could recall the task and its importance upon reading the entry during a deposition or at trial. For instance, instead of an entry reading "Communicate with client," your memory would be more easily refreshed by a time entry reading "Communicate with J. Doe regarding testimony of expert Dr. Smart." And instead of "Attention to transaction," the better entry is "Draft and revise stock purchase agreement and investors' rights agreement, discuss provisions of the same with J. Doe." If you cannot describe the task and its importance to a jury, you have not adequately described the task for your client.

Casual emails

While the failure to communicate with clients is perhaps the most common cause of malpractice suits, reflexively responding to an email can also lead to malpractice liability. Though we all know the dangers of a flippant email, clients' expectations of an immediate response can often

override an otherwise smart lawyer's caution. Each email is potential legal advice that needs to be considered, edited, and if necessary, researched for its legal accuracy. Of course, this standard is nearly impossible to achieve while typing on a handheld device during a business lunch or while you are otherwise occupied. Here are a few rules of thumb to consider when you have the initial reflex to respond instantaneously.

(1) Write an email as if it were a letter you would mail. The point is to slow down, think, and edit your response before pushing send. You would not send out a hard copy letter without proofing it; you should hold emails to the same standard. A jury will.

(2) If you do not have time to draft a thoughtful message but still feel compelled to respond immediately, inform the client that you will follow up. Responses such as, "I will have to take a look at that," are sufficiently non-committal, while acknowledging the client's concern.

(3) Following up, of course, is the most important step whether you respond immediately, or delay your response until the time you can provide a substantive answer. For many, the impulse to respond immediately arises from the fear of forgetting to respond altogether. To avoid the non-response pitfall, take steps when you send the initial non-committal email to ensure you will follow through. Some possible steps include flagging the outgoing message as important or emailing an assistant or colleague and asking for a reminder. Doing this legwork on the front end can save you from a malpractice claim down the line.

Not saying "no"

Lawyers are problem solvers, and so it is sometimes difficult to say "no." However, lawyers can create unforeseen malpractice risks by failing to say "no" when asked for off-the-cuff free legal advice from friends, or by failing to tell a client "no" when the situation warrants.

At social events, friends and acquaintances often ask lawyers for legal advice, and lawyers often freely give it in return—even when they do not fully understand the facts or legal field on which they are opining. Such "friendly" legal advice cannot only offend another lawyer (who has researched the issue and already advised her client), it can also expose the lawyer to malpractice claims. In addition, the advice potentially creates an unnecessary conflict of interest that could limit the lawyer's practice in the future.

An equally troublesome failure to say "no" arises when a client asks a lawyer for advice, and the lawyer, eager to solve the problem, tells the client there is a legal resolution without assessing or informing the client of the legal risks. While it is true that lawyers are paid to solve problems, they are also paid to ascertain and mitigate risks for their clients. Too often lawyers superficially provide the former in exchange for the passing gratitude of their clients and at the expense of the latter. It is important to realize that the best advice to your client is sometimes a simple "no."

Whether it's saying "no," checking your time entry, or examining your emails with greater scrutiny, addressing the "little" risks can help to prevent sizable malpractice claims.

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