

How to Avoid a Malpractice Suit

By Barb Cotton*

Although not strictly related to marketing, I have run across several articles which discuss how to avoid a malpractice suit which I thought would be interesting to all of the AWL members, and I would like to share them with you.

Christopher G. Hoge is a legal malpractice attorney in the United States, and he gave a lecture sharing how he would avoid a legal malpractice suit.¹ Mr. Hoge suggests:

- **Treat every piece of paper in your file as if it were to be scrutinized by a plaintiff's legal malpractice lawyer.**

Mr. Hoge notes that the rules of discovery can allow total access to every paper you have, including notes on thought impressions, strategy, assessment of clients and witnesses – everything. When you are practicing you should always have this in mind and practice defensively. “You should be prepared to pay the price of being careful about your note-taking and record-keeping in order to defend against me when I come calling”.

- **Do your utmost to keep your clients satisfied.**

Being a legal machine that produces quality legal work is simply not enough, and you must always keep the client's satisfaction in mind. A client who is in a positive relationship with you will be less likely to sue. Clients want to be included in the legal process and receive value for their money – you should therefore evaluate the benefits that the clients will be receiving as a result of your services when you are assessing what fee you are going to be charged. “A dissatisfied client is often the genesis of a malpractice complaint.”

- **Be careful about written documentation in your files.**

File maintenance is absolutely critical. “Print out those emails, both outgoing and in-coming, punch two holes in them, and keep them in the client's file. I try very hard to keep things chronologically, most recent on top, clipped into the file. Pleadings in one file, expert reports in another,

notes and correspondence in a third, etc. I want to be able to reconstruct what I was doing and thinking at any given time in the case. And remember – somewhere down the line somebody else may be reading each one of those papers, with a view towards using them as evidence against you.”

- **Be very careful about keeping your calendar.**

Missed deadlines account for a considerable amount of legal malpractice claims. Whether you keep your calendar electronically or in a paper version, it is critical that you write down every deadline, event and due date. Equally critical is to make sure you are looking at your calendar every day – at least twice a day. A good practice is to review your week ahead on late Friday afternoon, just before you leave the office, or perhaps on Sunday night, just before you begin your business week, and get a full understanding of what the week ahead entails. In case of computer crashes, be sure to print off a paper version of your electronic calendar on a frequent basis.

- **Talk to other lawyers about your difficult cases.**

It is always a good idea to talk to a knowledgeable colleague about difficult cases in order to help you get a better understanding. If you are in a larger law firm, seek out a partner or associate in the same practice area, and have a discussion of the matter. If you are a solo or small practitioner, use mentor services offered, or network internally within the Canadian Bar Association to find a lawyer you can discuss these matters with. “Use this time to gather new ideas and get a better sense of the case from a colleague whom you respect.”

- **“Don’t promise the moon to the client in order to get that initial retainer, when the best he or she realistically can hope for is a little asteroid.”**

It is important to manage the expectations of a client. If an objective assessment leads to the conclusion that the client could not achieve what they anticipate, be frank with the client and help them to settle for the best he or she can get and forget about it. “I think there are a lot of painful scenarios in my career, but the worst is having to tell a client why his sure-thing case has gone down the tubes.”

- **Don’t charge clients unreasonable fees, and do pay attention to cost-benefit.**

Be aware of what is the general going rate for the services you are providing, and don't go outside those bounds. "If the client has run up a large fee and gotten a lousy result, give him or her a break on the fee (while making it very clear that the discount is not in any manner intended as an apology for substandard performance – bad things happen to good lawyers and deserving clients, and your bill should reflect that fact)."

- **Don't sue your client for fees unless you are confident of your services.**

"Malpractice defense lawyers will tell you that a lawsuit on an unpaid bill is the quickest way to draw a claim. The client's in court anyway; why shouldn't he or she counterclaim? What's to lose? Remember, the best defense is good offense, and all that." At a minimum, make sure that the fee you are suing for exceeds your malpractice insurance deductible.

- **"Don't agree to represent a client who fails to pass your "smell test"."**

Sometimes you just have a gut feeling in the initial interview that this client is going to be trouble – perhaps they have unrealistic demands, an excessive need for "hand-holding", or a story that rings false. Avoid the future grief, and decline to act for the client.

- **"Do unto your client as you would have your client do unto you."**

"If your attitude towards the client is that his or her pockets are deep and you have set your rate to suit, then you are a walking malpractice target. Clients don't like lawyers who take advantage, seem arrogant, forget to follow through with promises, or are unconcerned with their problems. Conversely, clients love lawyers who seem to really care about them and their concerns and can actually do something tangible to help. It may be an obvious point, but it is a fact that clients are less prone to sue lawyers they like."

Jay Foonberg, a prominent attorney advising on law practice management in the United States, offers the following advice:²

- **Keep clients in the loop.**

Make sure that you paper your clients with copies of all case-related documents and emails in order that they are fully aware of the progress being made in your file.

- **Have a lawyer or staff member review open files at least once every sixty days.**

This is important to verify that work is progressing. Then contact the client regardless of the progress to keep them updated as to what is happening.

- **“Do not let the sun set on a non-returned phone call.”**

It is well documented that the number one complaint of clients with respect to their lawyers is the failure to return phone calls, which they perceive as a lack of respect.

Just some tips to keep in mind in order to run a “safe” practice – hope you have enjoyed them.

***Barb Cotton is the principal of Bottom Line Research & Communications in Calgary, Alberta, which helps solo, small and specialized practitioners on a contract basis with their legal research needs, including the preparation of research memoranda, briefs and factums, or just a quick search and a reporting letter with cases. Barb can be reached at (403) 240-3142, cell (403) 852-3462, fax (403) 242-5756, email barb@bottomlineresearch.ca and her website is at www.bottomlineresearch.ca.**

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ENDNOTES

¹ Christopher G. Hoge, “Preventing Legal Malpractice”

<<http://www.dcbart.org/inside_the_bar/departments/lawyer_practice_assistance_program/mal>>

² As quoted in Patrick Fuller, “Six Guidelines to Retain Top Clients”

<<<http://www.lfmi.com/publications/new/pub507.cfmm>>>