

A Three Point Short Course in Preventing Legal Malpractice. By Leonard Bucklin

You would think that lawyers would learn! Almost without exception, the most common grievances filed every year against attorneys are allegations of:

Neglect,¹

Failure to communicate, and

Improper withdrawal or termination of representation.

Self-protection against these types of malpractice claims is not difficult. Let's review, and look at a few practical tips.

1. Neglect: the different worlds in which we think we live. We all tend to make decisions based on the world in which we think we live — which may not be the world in which the client and other lawyers live. One lawyer's "reasonable diligence and promptness" is another lawyer's "sloth, conscious disregard, and untimely responsiveness." As a result of the different worlds in which we think we live, the ABA's Model Rule on the subject is wimpy and ineffectual as a teaching device:

"A lawyer shall act with reasonable diligence and promptness in representing a client." *Client-Lawyer Relationship, Rule 1.3 Diligence*

Your choices. If you want to avoid unhappy clients, you have two choices. One, handle the matter as the client expects it to be handled. Two, if you think the client's world is unrealistic, it is up to you to educate the client on what is going to be the diligence and promptness you are going to render. Either (one) go into the client's world to judge your "diligence and promptness" or (two) educate the client on your world of "diligence and promptness."

Either choice you make involves understanding the client's world. Educating your client to your world is the pathway that commonly is urged by attorneys in attorney advice articles. Unfortunately, that pathway doesn't work well to prevent malpractice claims. That is because you cannot be a good educator of what your world is unless you understand the client's value system and the way the client thinks. To educate your client to your world you must understand the client's world. Just as in arguing to a jury, it is hopeless to argue for result "A" if the juror's value system is set on result "Anti-A". If you need to understand the client's values, why not use their world to judge your "diligence and promptness"? Certainly understanding your client is of long term benefit to your future employment by present clients. Do the following two simple exercises for entering your clients' world. They will show you how to consciously take actions that will prevent charges that you have been "neglectful" (i.e., full of neglect)?

Exercise # 1. If you had a dread disease, would you consider a medical doctor acting

¹ E.g., In September, 2005, the Profile of Legal Malpractice Claims conducted by the American Bar Association revealed that calendar/deadline related errors continued to be the leading cause of legal malpractice claims (as also shown in the 1996-1999 ABA Profile of Legal Malpractice Claims Study). About 17% percent of all malpractice claims were due to not knowing or not properly responding to the legislated or court rules deadlines.

with your speed and client-focus to be a doctor treating your dread disease with "reasonable diligence and promptness? The next time you open a file (paper or on the computer) take a moment to consider the world that specific client lives in, with only one legal matter to think about. To your client, his/her legal matter is a dread disease, to be avoided or cured. Patients understand that the doctor has other patients, and cannot treat or work on "my disease" disease each and day — but patients want initial choices and treatment to start quickly, and patients want assurances that their dread disease is being treated and not ignored. Translate that medical "client's world" over to your legal business practices. Work accordingly: the result will be that you will make some initial choices and take some initial action quickly, and every couple of weeks you will work on the matter or do something to assure your client that he/she has not been forgotten by you. (E.g., something as simple as sending an information copy of documents sent or received, or a phone call from your secretary asking for a small bit of information, can give that assurance that the he/she has not been forgotten.)

Exercise # 2. Think about the most strict judge in your district. Not good old Judge Jones, who grants extensions of time without anyone asking for them. Think about that Judge Corliss whom the chief judge assigned to come into your district with the assigned job of getting the trial calendar whittled down. Judge Corliss — he is the judge who gave you sixty seconds in a motion hearing to state your point and then dismissed your motion as "improvidently filed" because you failed to follow the rule on page margins. That Judge Corliss lives in a different world than you do. There, have you dredged up a mental picture of that judge? Good. Keep your Judge Corliss in mind. Now, when you have finished reading this article, open one of your client files (a paper folder or a computer file). Really, try it: open one of your client files right now. Stop, take a moment, ask yourself if you are acting with the "reasonable diligence and promptness in representing a client," your Judge Corliss would expect. For example, is there a case in which you should tell your client to preserve electronic evidence? What would Judge Corliss think about what you have done to date?

Using the alternative "worlds" in the Exercises suggested above can provide focus to your self-education and what you do on individual cases, and to avoid client claims of neglect.

2. Failure to communicate: communicate to be a lawyer that clients rush to hire. The ABA's Model Rule on communication is not a good teaching tool. By its length the Model Rule has prevented lawyers from focusing on *the Rule's three most critical items*. Those three items are all that is needed in 99% of real world practice. These following three subitems should be thoughtfully studied by every lawyer (that's you), with a few moments' reflection on exemplar cases he/she is presently handling.

"(a) A lawyer shall: . . .

[#1]keep the client reasonably informed about the status of the matter;

[#2]promptly comply with reasonable requests for information; and . . .

(b) [#3] A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Client-Lawyer Relationship, Rule 1.4 Communication

Notice that those three items are items stressed by J. Harris Morgan and Jay G. Foonberg in their classic *How to Draft Bills Clients Rush to Pay*. Building the

lawyer-client relationship by communication is not only a key in doing the job attorneys are supposed to do, it is also the key to better fees and happier clients.

Become one of those lawyers that clients rush to hire! Right now, get out your list of client matters. Is there any client that you have not communicated with in the last 30 days? Either pick up the phone, or write a short email to the client — before you leave the office tonight.

3. Withdrawal and termination: There are certain times when a lawyer is *required* to withdraw from representing a client. Those instances rarely occur, but law schools spend an inordinate amount of time teaching about those instances (those instances when the lawyer is legally required to withdraw). I will not talk about those here. Instead, let's about the three classes of withdrawals that most often occur in real-world practice. The three classes involve situations when they lawyer is not required to withdraw, but rather wants to withdraw as a matter of his/her option.

Class A. The lawyer has hopelessly neglected the matter,

Class B. The matter is hopeless of success for the client, or

Class C. The lawyer is not being paid, or is not likely to be paid.

Unfortunately, the root cause of the Class A withdrawals should not occur (lawyers should not commit malpractice by neglecting the job entrusted to them). The negligence involved in these “hopeless neglect” withdrawal instances frequently is compounded, because the attorney commonly seeks to disguise his/her own neglect and points to other reasons for withdrawal (in the withdrawal letter or petition).

When a lawyer has neglected the matter, he/she is in a conflict of interest situation with the client.

That last sentence above is important enough to be reread. The neglectful attorney is trying to prevent a malpractice claim against himself, but the client has adverse interests. Specifically, to avoid charges of working in conflict with the client, of intentional wrongdoing, and of fraudulent concealment, the neglectful attorney must tell the client:

- ✓ what the attorney has done that is neglectful, and
- ✓ that the client has an option to seek alternative representation in the matter at hand, and
- ✓ that the client has an option to ask another attorney whether to bring a malpractice claim against the ineffective attorney.

The client may have a right to require the ineffective attorney to continue, or it might be financially advantageous to the client for the ineffective lawyer to straighten out the mess himself. Nevertheless, the neglectful attorney should make a full disclosure Ignoring the need for disclosure and only sending a withdrawal request letter to the client or a petition to the court for permission to withdraw is a form of falling on one's own sword. The next attorney asked by the client to handle the matter from which you have withdrawn will find your neglectful actions, and then a grievance involving fraudulent concealment is on its way to you.

Now let's turn to look at the class B above (success for the client is hopeless, but the client insists on continuing the matter, so you want to withdraw).

Refer to both the *ABA's Model Rule 1.16 Declining Or Terminating Representation*, and to your own state rules any time — repeat, any time — you are even barely thinking about withdrawing from a case. Looking at both the ABA Model Rule and your own state rule will add depth to your analysis of what you can and should do. Usually, you can withdraw **only if withdrawal can be accomplished without material adverse effect on the interests of the client, and if one of the following three items exist:**

The client has used, or is using the lawyer's services to commit a crime or fraud. (Consider phrasing your termination of representation as being because it would be a fraud on the court to continue to pursue it when court rules regard the lawyer's participation and signatures as certifying that the cause is reasonable.)

The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement. (Hence, continued representation would be ineffective because of your own mental conflict with the client's desires.), or

The representation has been rendered unreasonably difficult by the client, (usually because the client fails to communicate with the lawyer or fails to fulfill an obligation to the lawyer regarding the lawyer's services) and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

If the withdrawal is because the client is not paying, take note. Many states, in many instances, will not let a lawyer withdraw simply because he/she is not being paid. It is true that some states, e.g., Texas, provide for withdrawal if "The client fails substantially to fulfill an . . . obligation to pay the lawyer's fee as agreed and the lawyer has given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." But many states do not regard failure to pay fees as a reason for withdrawal unless contractually agreed upon as a cause for withdrawal. Therefore: whatever state or federal district you are in, as a matter of prudence include a clause in the initial attorney-client fee agreement that specifies an option to withdraw for failure to pay fees or costs. Then the failure to pay contractually becomes "an obligation to the lawyer regarding the lawyer's services" for which the court can order contractual termination of services.

Every time you terminate representation:

Take steps to the extent reasonable practical to protect a client's interests;

Always give reasonable notice to the client, allowing time for employment of other counsel,

Always surrender papers and property to which the client is entitled, (even if the law of your state allows you a lien or allows you to keep client's papers, never keep any papers or property where retention will prejudice the client in the subject matter of the representation).

Always refund any advance payments of fee that has not been earned.

Summary. Common courtesy and attention to the job to be done would prevent most

grievances. The American Bar Association's Model Rules of Professional Conduct, and state rules govern those common complaints, and if followed, would prevent the complaints.

This Three Point Short Course in Preventing Legal Malpractice focuses on:

considering that your world of diligence may not be the world in which you will be judged, and working to understand the world in which you will be judged;

communicating with the client; and

withdrawing only with extreme care and consideration of its propriety, and terminating representation only if there protection of the client's interest.

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