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Loss Prevention Tips for Law Firms

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Loss prevention: These are two very important words for today's lawyers and law firms. It used to be that if a lawyer competently performed a client's requested services, even if the underlying litigation or transaction did not turn out favorably, the lawyer was paid and the client accepted the state of affairs. In this day and age, however, far too many clients (and even non-clients) are suing professionals for malpractice not because the professional did anything wrong, but because a deal went bad or the client lost a case.

Lawyers and law firms, perceived deep pockets, are now treated as back-up insurance for these clients. And because plaintiffs' attorneys will take malpractice cases on a contingency fee, and because under current New Jersey law as set forth in Saffer v. Willoughby, the defendant has to pay those legal fees on top of any award, there is absolutely no downside for a plaintiff to bring a baseless lawsuit with the hope of recovering some of the money he expected to receive in the underlying matter by suing the very professionals he hired in the first place.

Because every lawsuit needs to be defended, and most, if not all, law firms have deductibles before insurance kicks in, every lawsuit becomes an expense. Obviously, then, the best defense to a professional malpractice claim is to not get sued. So how does a lawyer or law firm stop these clients from suing in cases where the attorney hasn't done anything wrong and hasn't committed malpractice? This article discusses several loss prevention techniques that hopefully will limit a plaintiff's ability to bring these types of claims.

Client Intake

Loss prevention begins with trying to avoid bad clients, something easier said than done. It is understandable that solo practitioners or attorneys at larger firms who do not have a large book of business may feel the need to bring in any client that knocks on the door. But this short-term approach to practicing may not be the best in the long run. If you can avoid representing even one bad client, and avoid one frivolous (but nonetheless expensive) lawsuit, it is in your best interest. What follows are factors that you should consider before agreeing to represent any client.

(1) Understand the client's resources—is the client balking at even a modest retainer request? Once an existing client, is the client late in paying every bill? Is your account receivable adding up? These are signs that the client may be having financial problems—so what happens when

you decide to terminate your relationship and sue the client for the unpaid legal fees? Often, the client will find a malpractice attorney to file a counterclaim for malpractice.

(2) Is the proposed client changing law firms? If so, you should find out why. Is it because the client stopped paying its bills? Is it because the client wanted to take a position that the law firm was not comfortable with? Did the law firm discover something about the case that the client was not upfront about? One way to determine these answers is to request that any client who is switching firms allows you to speak with outgoing counsel about the substance of the case and about the client. If the client refuses, that is a red flag. Another consideration when bringing on a client mid-stream is whether there are impending deadlines that you will be held to. Is discovery already closed? Is there a month left for discovery and the court has already granted four extensions and will under no circumstances grant another? Is the case trial-ready and, if so, will you have time to prepare? If things go wrong, the outgoing attorney will not be the only one who gets sued even if there is nothing you could have done differently.

Scope of Engagement

New Jersey Rule of Professional Conduct 1.5(b) generally requires attorneys to have a written engagement letter with each client. This should be viewed as an opportunity to protect the lawyer. Be very specific. Your engagement letter should explain exactly what you are being retained to do and what you are not being retained to do—don't just say general corporate work, environmental or litigation. If you are not undertaking the tax analysis of a settlement, say so. If you are only documenting a deal and are not engaging in the underlying negotiations, say so. If you are not analyzing if a client has insurance coverage to defend a claim, say so. When a client decides to sue you, the client may very well embellish the scope of the services you promised. The clearer the scope of the engagement, and the more you disclaim in the engagement letter, the better. See Lerner v. Laufer, 359 N.J. Super. 201,217 (App. Div.), certif. denied, 177 N.J. 223 (2003); RPC 1.2(c).

Paper Your Work

One of the ways you can protect yourself is to document as much as possible your communications with your clients. If you give them legal advice, especially if they reject that advice, and certainly if they reject that advice because they believe your estimated cost is too expensive, send them an email or letter confirming what you advised them to do and how they opted not to pursue that tactic.

It is perfectly understandable that you may be reluctant to do this for two reasons: (1) you may be uncomfortable emailing a client that has rejected your advice and appear to be sending a self-serving email; and (2) the client may get upset that you are billing it for papering your advice. However you must ask yourself, would you rather deal with a little discomfort now or a baseless multi-million dollar malpractice claim that you will need to defend without any writings backing up your position? If you do not advise them in writing and only give them the advice on the

phone they will deny under oath that you ever gave them that advice and your "failure to advise" will be the lynchpin of a malpractice claim. If you are negotiating a deal or engaging in settlement discussions with an adversary, send an email or letter to your adversary with your requested terms. This way you can get a written response and forward it to your client.

Additionally, make sure your client understands the deal and any settlement they enter into. In addition to meeting with the client, you may want to explain it to the client in writing. Plaintiffs' attorneys are, more than ever, claiming that their clients were not properly explained the details and nuances and ramifications of a deal or settlement; they cite to Cottone v. Fox Rothschild, 2014 WL 4287002, in the process. When a judge or jury needs to decide whether a particular provision was explained to the client, and the lawyer is relying on her recollection and testimony that she did so advise the client of a particular paragraph at an in-person meeting, and the client denies the advice was given (even though it was), how is the trier-of-fact supposed to make that determination without written evidence?

Now, while a writing is preferred, it is understandable that not everything you do and say will be in writing to a client; but, to the extent you can memorialize contemporaneously your advice in a memo to file, email to a colleague or even a reference in your time sheet, it is better than having nothing. At the end of the day, if a client is willing to sue you even though you did nothing wrong and he is just upset as to how a deal or litigation ended up, it should not be surprising to you when his recollection becomes hazy or slanted toward his position.

These are only a few loss prevention tips. Unfortunately, in this day and age, an attorney cannot solely focus on providing clients with her best legal judgment and advice, and a mistake-free work product. Attorneys must be vigilant at all times to prepare a clean record of the advice they give, and the client's decisions, in order to protect themselves in case they do get sued.