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3 Things Legal Malpractice Attys Should Never Tell Clients

By Y. Peter Kang

Law360, Los Angeles (June 7, 2016, 6:48 PM ET) -- Legal malpractice attorneys are a special breed of counsel as they often defend lawyers being sued with their livelihood and good names at stake. With that in mind, legal malpractice specialists told Law360 how to avoid using certain phrases so as not to disturb an otherwise-healthy attorney-client relationship, particularly when that client is also a lawyer.

"I can't talk right now."

Most lawyers have a lot on their plate and are forced to juggle a multitude of matters. But delaying communication with a client facing a legal malpractice suit is a quick way to make a difficult time even harder for them, according to Wendy Chang, a legal malpractice specialist and partner with Hinshaw & Culbertson LLP.

Exhibiting a sensitivity and timeliness to a lawyer feeling the pressure of the case is a way to keep that attorney-client relationship healthy.

"Anytime someone gets sued, it raises anxiety, but when lawyers get sued, there is a direct challenge to something they've done, and that's a distressing thing in any circumstances," she said. "They are looking for someone to guide them in an anxiety-driven process, and simply talking them through that and offering some preliminary thoughts in the substance of their case goes a long way in making a difficult process easier."

Delaying communications can sometimes make a client antsy, which can lead them to having second thoughts about their representation, Chang said.

"Clients call you for a reason, and if you don't respond to that anxiety level from the get-go, the client has got to wonder how responsible you'll be in handling the case," she said.

It's also important for malpractice attorneys to show a bit more sensitivity to clients who are lawyers themselves and often want to be more involved in the decision-making process since their reputations and livelihoods are at stake, according to Jason Fellner, a Murphy Pearson Bradley & Feeney PC shareholder and legal malpractice specialist.

"Lawyer-clients are more in tune with the process and the strategy so I usually include my clients in those type of conversations and invite discussion with them in ways in which they can think as a lawyer," he said. "Most have experience in the underlying subject matter, and that can prove to be helpful."

"I'll try to not take up too much of your time."

Working on a malpractice case often requires reconstructing events and memories that took place several years prior so trying to assuage a busy attorney's concerns about taking time away from his demanding practice would be a disservice, according to Pamela Phillips, chairwoman of Arnold & Porter LLP's attorney liability practice group.

"In most legal malpractice cases, you are really trying to help the lawyer remember details and nuances and circumstances that may not be 100 percent memorialized," she said. "You have to throw yourself years into the past and re-create the time, place and circumstances that the client is complaining about. That takes time."

Before she begins prepping a malpractice defendant for a deposition, Phillips makes sure to let her client know right away that they should be prepared to carve out significant chunks of time to fill in the gaps of memory that didn't get put down on paper.

"I would cushion it and say, 'Look, I know you are extremely busy with an active practice, but I'm going to have to ask you to sit down and talk to me because we have a lot of work to do,' " she said. "You have to get them ready and mentally prepared, re-creating what the lawyer was thinking and doing and what the client said that he isn't coming clean about now."

It's harder to tear some attorneys away from their respective practices than others, said Phillips, who noted that she has never gone into a deposition feeling that her client was unprepared.

"I work around their schedules and demand to make it happen," she said.

Sometimes, lawyers don't understand the reality of being a defendant and may think they are well-versed in the case and don't need deposition prep, said Merri Baldwin, a Rogers Joseph O'Donnell PC shareholder and co-chair of the firm's attorney liability and conduct practice group.

"It's ultimately the lawyer's defense, and if the [malpractice] defense lawyer is feeling she's not getting client cooperation in a significant way, I think there certainly is an obligation to inform the client who is refusing to cooperate," she said. "If it got to a serious point, then ultimately the lawyer may have to withdraw because of the lawyer's lack of cooperation."

"You really screwed up."

Informing an attorney of the myriad ways in which he or she messed up an underlying case and how difficult it will be to defend undermines the client's confidence and may belie the actual chances of victory, malpractice specialists say.

"There is a challenge in representing lawyers because they are typically experts in what they've been sued in, and the challenge may be to help them understand potential weaknesses in their case without undermining their morale," Phillips said.

A lack of confidence going into a deposition is kryptonite for an attorney being sued for malpractice since they might waver on the correctness of the advice they gave or the course of action they chose, she said.

Using a hypothetical example of a lawyer being sued for malpractice when a securities fraud defendant refuses to settle in the face of nearly insurmountable odds and later loses, Phillips said it serves no purpose to tell your client he or she screwed up by not putting the client's unwillingness to settle in writing.

"It creates the mindset that the case is not defendable," she said. "In fact, what the defense side should do is build up the lawyer's confidence and help him remember the specific circumstances in which he gave the client advice that the client says was not given."

A lawyer can make any number of mistakes that don't necessarily constitute legal malpractice, said Scott B. Garner, an Umberg Zipser LLP partner who focuses on professional liability and ethics counseling. But to prove malpractice, "you have to prove not only negligence but causation and damages, which are the hardest thing for clients to prove," he said.

Chang agreed, saying that although the most egregious cases should be settled quickly, the majority of malpractice cases are defensible on some level.

"Legal malpractice has a lot of moving parts to it, and a lot of cases will fail on causation," she said. "Even if the breach is really bad, you don't want to tell the client they are in a lot of trouble."

The causation issues will develop as the case develops, Chang said, and sometimes, the causation defenses end up being completely dispositive. So attorneys would be wise to stay positive for their clients and assure them that they'll work through the case together.

"A good thing to tell your client would be, 'I understand that this is a difficult process, and I know it's easier said than done, but try not to think about it too much, and let us do our job and help you through this."

--Editing by Christine Chun and Patricia K. Cole.

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