PRACTICAL WAYS TO REDUCE LEGAL MALPRACTICE CLAIMS

by Dan L. Stanford

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In an era marked by substantial increases in the number of lawsuits brought by disgruntled clients against attorneys, you can find hundreds of articles providing advice to improve your practice, in part, in an effort to avoid malpractice claims. Avoiding conflicts of interest, using both engagement and disengagement letters, creating a good docket and calendar system, promptly responding to all client inquiries and putting everything in writing are just a few of the important suggestions about which you can read. The purpose of this article, however, is to recommend two very important, practical steps you can take which are guaranteed to reduce malpractice claims.

The first practice tip may sometimes be difficult, but it is the most significant way to reduce claims of malpractice: **Never sue a client for unpaid legal fees.** The second suggestion, although easier to accomplish, will also reduce the number of malpractice claims and, at the same time, reduce your exposure when a claim is made: **Remove from your fee agreements any provisions which provide for the recovery of attorneys' fees in case of a dispute.** These two practical recommendations are both important for different reasons.

NEVER SUE A CLIENT FOR FEES

Even in today's climate, only a small percentage of clients actually file legal malpractice claims upon conclusion of representation. However, experience demonstrates that **100% of the clients who are sued for fees by their lawyer will respond with claims ranging from malpractice and overbilling** to spouse beating and public drunkenness. Your lawsuit, however righteous and just, will lead to an ugly and nasty battle which you may not win. After all, any former client with an new lawyer, using perfect 20-20 hindsight, can flyspeck every one of your files and find room for criticism. No cases, even the winners, are handled perfectly. So, each time anger drives you to consider suing your client for unpaid fees, remember you will certainly be met with the response that your incompetence (and perhaps even fraud) precludes the collection of even one more penny.

Obviously, the better advice is this: **Never put yourself or your law firm in a position where you must consider suing a client for unpaid fees.** This recommendation is easy to say, but very difficult to live by. However, if you can do the things necessary to avoid being in the impossible situation of contemplating a fee dispute with a client, you will certainly reduce claims against you. And, you will have a happier and healthier practice.

Among the things to consider to avoid such a no-win position are the following tips:

1. Carefully **screen all new clients.** In addition to analyzing the legal merits of the client's case, consider such mundane issues as the **client's ability to pay**, the **client's creditworthiness** and the client's history of previous relationships with other attorneys.

2. **Always use a written fee agreement** and include in it your ability to "fire your client" under the appropriate circumstances.

3. **Insist on an adequate and realistic retainer** and if the client balks at paying it, refer the client to another attorney you dislike. Then, he or she will get stuck with the bill!

4. **Send regular bills and insist on payment.** Don't get behind in either your billing or your collecting.

5. **Do not work if you are not getting paid.** Before a client's outstanding balance gets very large, inform the client you can only worry about one thing at a time — you can either worry about their matter, or you can worry about getting paid. Again, if the client balks or starts to get behind, move fast to disengage.

Sadly, today's social climate and economy dictate that we sometimes must strive for only "detente" with our clients: I won't sue you, if you won't sue me. Sometimes that is the best for which we can hope. Work hard to avoid being in that unfortunate situation.

ELIMINATE THE ATTORNEY'S FEE PROVISION FROM YOUR FEE AGREEMENTS

If your current engagement letters contain the standard provision for the recovery of attorney's fees and costs in the event of a dispute, take this clause out of all your future fee agreements. Although at first this may seem like strange advice, such provisions work to

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your disadvantage and entirely to the advantage of your clients. And, eliminating this contract term will actually help to reduce malpractice claims.

First, the existence of an attorney's fees clause in a client engagement letter actually encourages claims for malpractice. Such contract provisions are one of the first things for which a legal malpractice lawyer looks. Only with such a clause in your engagement letter will your former client and new lawyer be able to recover attorney's fees from you in the event of success in the malpractice lawsuit. The existence of an attorney's fees clause will result in an additional cause of action for breach of contract and a request for attorney's fees. So, not only do you encourage a client's new lawyer to sue you because he or she may also recover attorney's fees against you, you also increase your exposure. Without such a fee provision, your client cannot sue for attorney's fees and the client's recovery will be reduced by the amount of the new lawyer's fees. Thus, less incentive is provided to sue you.

Second, based on the current state of California law, an attorney's fee provision, in most cases, provides a suing attorney with absolutely no benefit. The California Supreme Court long ago announced the rule that lawyers may not recover fees for services they render for themselves. *City of Long Beach v. Sten* (1929) 206 Cal. 473. So, in most cases when a lawyer represents himself or his law firm against a client in a fee collection matter, the courts will not award additional attorney's fees to the pro se lawyer, even if the engagement letter contains a provision for the recovery of fees and costs. *Id.* at 475. (*But see, Dameshghi v. Texaco Refining & Marketing, Inc.* (1992) 3 Cal.App.4th 1262, 1290-91, in which the Fourth District stretches dicta to avoid the harsh rule and allow fees.)

The case of *Trope v. Katz* (1994) 28 Cal.App.4th 1409, recently accepted for review by the California Supreme Court, aptly illustrates the two main points of this article. Sorrel Trope and Eugene Trope are attorneys who practice law as the firm of Trope and Trope. The firm entered into a written fee agreement to perform legal services for Bertram Katz in his marital dissolution proceeding. One of the provisions of the engagement letter provided for the recovery of attorney's fees and costs. The firm represented Katz from November 1985 until February 1989, and carried an account receivable for services and advances in the amount of $163,652.88. Katz refused to pay. Trope represented itself when it filed suit against Katz for breach of contract to recover the unpaid fees. Katz's answer alleged that he had been overcharged by the firm and he challenged the reasonableness of the fees. Katz also cross-complained for legal malpractice. At trial, the jury found Trope & Trope liable for professional negligence and awarded Katz $118,500 in damages. On the breach of contract claim, the jury found in favor of Trope & Trope and awarded it $163,000.

Thereafter, Trope & Trope sought to fix attorney's fees at $223,385 and costs at $13,743.71, based upon the contract provision. Katz opposed, arguing the firm was not entitled to attorney's fees because it had represented itself and incurred no fees or expenses to other lawyers. *Id.* at 1410-11. Both the trial court and the Second District Court of Appeal agreed and disallowed fees to Trope & Trope. *Id.* at 1419. The Second District reasoned that:

> ***City of Long Beach v. Sten, supra*, 206 Cal. 473, unequivocally holds that a lawyer appearing pro se is not entitled to recover attorney fees for legal services performed on the lawyer's own behalf.**

Trope, supra, at 1412.

Since the California Supreme Court has the *Trope* case under review, it will be important to monitor the court's decision. However, it is doubtful that the basic propositions of *City of Long Beach* will change much. Even if the harsh rule is modified, it remains important that you omit any attorney's fees provisions from your engagement letters. And, it remains even more important for attorneys to avoid having to sue clients for unpaid fees. As the *Trope* case demonstrates, it is a lose-lose situation. ■