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MAY IT PLEASE the CLIENT

WHEN A BUSINESS RELIES ON AN ATTORNEY TO STEER IT THROUGH A LEGAL MATTER, THE STAKES ARE OFTEN HIGH. BUT IF THE ATTORNEY FAILS TO DO THE JOB, THE COST TO THE BUSINESS CAN BE STRATOSPHERIC.

BY **DAN CALABRESE** // ILLUSTRATED TYPE BY **JOEL FELIX**

IF A BUSINESS HAS TO SUE A CLIENT, the company's legal team steps in to take action. But what happens when a business suffers from their lawyer's failure to properly represent them? There is a course of action available, yet – even if the company wins – the cost of pursuing the case, not to mention the time involved, can make it nearly impossible to recover what was lost.

In Michigan, the legal system offers various mechanisms to discipline lawyers who are guilty of ethical violations or professional misconduct. They include the Michigan Attorney Discipline Board, the Attorney Grievance Commission, and the Michigan State Bar's Ethics and Professional Responsibility Committee. When found guilty of a serious enough offense, attorneys can face suspension or even disbarment.

But failing to effectively represent a client in a single case will almost never lead to professional disciplinary action. "There is a difference between legal malpractice and misconduct," says Miles Hurwitz, a partner with Hurwitz & Gantz in Dearborn Heights who regularly represents plaintiffs in legal malpractice cases.

A pattern of legal malpractice might get an attorney hauled in front of the Discipline Board, as could a clear act of theft (the client gives the attorney money to use in closing a deal, and the attorney "borrows" it for some other use), but a malpractice judgment alone is rarely cause for discipline.

So what can bring about a malpractice judgment?

Hurwitz, who has been practicing law since 1961, has pretty much seen it all. That includes lawyers who failed to respond to a complaint by the prescribed time and stuck their clients with a default judgment. It also involves lawyers who cost their clients money because they didn't act before the statute of limitations expired, or they failed to file documentation required to properly secure collateral on a major purchase.

"I represented a very wealthy man who hired a lawyer to draft a trust for him, and the lawyer told him that the trust would help him avoid taxes," Hurwitz says. "But it wasn't drafted correctly and the client was still responsible for the

taxes. (The client) had put stock investments in this trust, but although the client thought he was giving it away, it was drafted in a way that he still had the right to the income and the IRS made him pay the tax."

A lawyer's error, however, does not automatically entitle the business client to a malpractice judgment. Hurwitz explains that to prove legal malpractice, the client must be able to establish each of four elements: 1) The lawyer had a specific duty to the client; 2) The lawyer breached that duty; 3) The breach of that duty led to the client's damages; and 4) That the damages actually occurred, and the extent of those damages.

These four elements are important because they allow a court to distinguish legal malpractice from merely bad service. If a lawyer has a habit of not returning phone calls, it doesn't necessarily cause damage. But if the failure to return a call breached a duty to the client and caused a specific harm, it could be the basis for a successful malpractice claim. How is the client to distinguish between the attorney's bad service and the breach of a professional duty?

"It's easy to develop checklists to set an alarm, to make sure they get an alert when something is due." – HARVEY R. HELLER

It all comes down to what Hurwitz calls the "standard of practice," the violation of which typically has to be proven by expert testimony. If an expert witness in a malpractice case can show an attorney did not follow established standards of practice, it can be a crucial element of a plaintiff's winning strategy.

"Let's say you're selling parts for automobiles and you're being sued, and the claim is that you sold a defective wheel housing that has a crack in it," Hurwitz says. "Well, I'm supposed to represent you, and I'm supposed to determine whether there is a defective wheel housing. But the other side tells me it is defective and, as a result, someone got killed, and I tell you to pay him a couple hundred thousand dollars for the death."

Is that a violation of standard practice? Yes, Hurwitz says, because the standard of practice required the defense attorney to locate an expert witness to examine the wheel housing and provide an opinion as to whether it was defective. Failure to retain a wheel expert meant the lawyer did not follow the required practice standard, because in this example, an expert was necessary to support the defense that there was no wheel defect. Without an expert, he cost his client a sizeable sum of money.

In another case, a dispute between the owner of a technology company and his law firm, both located in Grand Rapids, serves as a good illustration of how a simple business transaction can lead to a malpractice judgment. In the early 1980s, Roger Schiefler, owner of Synergis Technologies Group Corp., decided to add Jay Groendyke as a 50 percent partner. His legal counsel advised him that such a split would naturally result in a deadlock when the two partners disagreed.

To avoid a deadlock, Schiefler and Groendyke decided to add a third member to the company's board of directors — CFO Roger Orchard. They took this action in 1996 by signing a shareholder resolution adding Orchard to the board that had been prepared by the company's law firm. What Schiefler eventually discovered was that the addition of a third director made it possible for Groendyke and Orchard to force him out of the company. In 2001, the pair voted to terminate Schiefler. That move set in motion a buy-sell agreement, signed in 1996, which compelled Schiefler to sell his share of the company upon termination.

In short order, Schiefler sued the law firm. He claimed he would never have agreed to add Orchard to the board if he had realized it could result in his termination. He had assumed that his 50 percent ownership stake in the company would protect him from such an event, and blamed his lawyers for failing to advise him otherwise.

Though a trial court dismissed Schiefler's claim, the Michigan Court of Appeals reversed the lower court's decision based on the longstanding attorney/client relationship between Schiefler and the defendant law firm. The appellate court concluded the firm had regularly given Schiefler advice about how business decisions of the company would affect him personally, and as a result, it was reasonable for him to expect the law firm to warn him about the risks to his individual interests, once a third director was added to the board.

Harvey R. Heller, an attorney with Maddin Houser in Southfield who specializes in legal malpractice defense and was not involved in the Synergis case (but has studied it), says there was too much ambiguity in the definition of the law firm's role. "Since (the law firm) did personal legal work for Schiefler, there was a lawyer/client relationship between that family as well as the entity and (the law firm)," Heller says. "That created the burden, the problem, and the duty. They should have said to him, 'There's a problem here. Somebody needs separate counsel, and here are the issues.'"

The environment for legal malpractice has undergone a transformation in recent years, Heller says. The top claims used to be against personal injury attorneys, but that has changed. Now it is malpractice cases against real estate and business attorneys that usually generate the highest claims.

When Heller started practicing in the 1980s, he says it was common for personal injury attorneys to get hit with malpractice claims because they failed to file a document on time or erred on some other procedural matter. That is less common now. "The plaintiff's bar, to their credit, has been able to take advantage of all the wonderful electronic software that is out there so they don't miss deadlines," Heller says. "It's easy to develop checklists to set an alarm, to make sure they get an alert when something is due."

As the number of business malpractice cases increases, business attorneys have to learn new, more sophisticated forms of risk management to protect themselves. That includes the formation of in-firm practice groups to share experiences and best practices, and the hiring of risk management professionals who audit a firm for malpractice vulnerabilities. Malpractice insurers may offer lower premiums to attorneys who attend specific seminars.

"Business transactions were historically a safe area of legal practice that didn't have many malpractice claims associated with them," Heller says. "Why is that? I've always felt the anwser is that you can make a host of mistakes in a business transaction, but if a buyer pays and nobody discovers them, the transaction goes through. And the reason for that is that oftentimes you have an inappropriate security for the seller, but the buyer pays the debt."

In other words, as long as the deal gets done and the seller is paid, dealmakers never cared too much about the legal particulars. However that is changing, in part because of economic conditions. Given the volume of money changing hands these days, even a mistake that affects

a deal by a matter of 1 percent or 2 percent can present serious problems for a business client.

Michael Ashcraft, a partner at Plunkett Cooney in Bloomfield Hills who works extensively on legal malpractice cases, says businesses that know their lawyers well often run into trouble. The reason is the parties have worked together for so long, they can mistakenly conclude it is no longer necessary to clearly spell out terms of engagements.

"They don't contemplate, out of the gate, that there can be some misunderstanding — and for that reason, these things happen," Ashcraft says. "Sometimes lawyers are engaged by very sophisticated businesspeople, and the lawyers simply say, 'This is a very sophisticated client, so I don't have to spell it out with as much detail as I would an unsophisticated client.' In today's business world, you can't have that mindset anymore."

Lawyers who merely dabble in business cases are more likely to get caught up in a malpractice entanglement than those who specialize in them, Heller says. He cites statistics showing that 70 percent of all claims arising out of business transactions involve lawyers who devote less than 5 percent of their practice to business.

"They may be dabbling in business transactions, especially in states like Michigan where there has been a lot of tort reform, and they're reaching out and saying, 'I can handle this,'" Heller says. "The next thing you know, they discover they're not as accustomed to it as they are to other (types of) cases." When a case goes wrong, clients often go after their lawyers with a very specific damage amount in mind.

"The highest amount of claims comes from preparation and filing of documents," Heller says. "If you don't file a mortgage, if you don't file a Uniform Commercial Code document, and the seller lost their security for the buyer to pay them, it's very easy to figure out what the damages are. If I agree to sell you my business and you give me a mortgage on your home that's worth $100,000 to secure my right to be paid, but my lawyer doesn't record the mortgage and the house is worth $100,000, I've lost $100,000. That's easily calculable."

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— MARTHA D. MOORE

The trickier cases involve disputes over what the lawyer's job was supposed to be in the first place. When a client expects extensive counsel on business matters, and the lawyers think their job is merely to document a transaction, it can lead to a dispute. Often, the dispute could have been avoided with a clearly worded engagement letter that spelled out the exact expectations of the law firm and the client.

The potential for conflict between a client and a lawyer is especially high when the attorney understands his or her role to be limited to that of a "scrivener" — a person who merely writes the legal documents as the client directs, and files them when necessary, but does not, in theory assist the client with its investigation, strategy, or decision making.

"I see this most often in cases where a business or a businessperson brings an opportunity to a lawyer and says to the lawyer, 'This is a project or an investment or a business that we want to get into; we want you to handle that for us,' " Ashcraft says. "Now, where the problem arises is this: what does that mean? A lot of times, the businesspeople say, 'We've already done our due diligence, and we just need you to document and close this transaction for us,' and the lawyer does just that — documents and closes the transaction. Eighteen months later, the wheels come off the cart, the business opportunity collapses, and the client comes back to the lawyers and says, 'I thought you were doing due diligence.' "

In a case that was ultimately settled for "a significant amount of money," Ashcraft defended an attorney who was asked to act as a scrivener on the sale of an Internet-based business. Within six months of the closing, it was determined the Internet company's assets were not as they had been represented. "It wasn't even close," Ashcraft says. "The client then came back to the lawyer and said, 'Why didn't you check this out and tell me this was not a viable business opportunity?' "

Ashcraft's client maintained he was retained solely to act as a scrivener, and therefore he wasn't liable for problems relating to incorrect information or poorly executed due diligence. But because there was no documentation of the terms of the engagement, the case became complicated and messy and, ultimately, Ashcraft's client paid a lot to settle it.

Another factor leading to heightened legal malpractice claims may be the economy. Donald Campbell, a malpractice defense attorney at Collins Einhorn in Southfield, says that in current economic conditions, businesses that had hoped to make bank through litigation — and failed — might turn around and sue their lawyers to try to recover what they expected to receive in the original case.

Attorneys often encourage their clients' optimism for that big payout. "Lawyers have to be careful about the expectations they create," Campbell says. "There's very little dampening down of a person's spirit for litigation once they get involved."

Even though businesses may win a judgment against an attorney who is truly negligent, it takes a lot more than a single legal malpractice case to subject an attorney to professional discipline — especially among those who mainly handle business cases. Martha D. Moore, chairwoman of the Attorney Grievance Commission, says it's rare for a case involving a business client to come before the commission.

"Most business clients are represented by law firms, and usually if there's a problem with the law firm, the lawyer will step in and fix the problem," Moore says. "Most of our complaints are about sole petitioners (rather than businesses.)"

Moore, who has written extensively about ethical issues in the legal profession, cites a number of emerging legal issues that, if not properly handled by attorneys, could put business clients in jeopardy. One is the presence of "metadata" in electronic document files, which refers to the hidden history of changes that accompanies documents e-mailed back and forth between lawyers and their clients. Many attorneys might not realize that the history of edits and comments, preserved by default in Microsoft Word documents, could inadvertently be given to the opposing side when documents are conveyed.

"The other side can go in and get the track-changes key and read the conversation with the client," Moore says. "I've talked to lawyers about that. You need to scrub it." Software programs are now available to assist lawyers with the process alone.

Perhaps surprisingly, the failure to keep up on document-sharing trends is a form of malpractice all its own. And as people in both the business world and the legal profession find out on a daily basis, that's a danger you can never be too careful to avoid. db