

Advisor

An update on issues regarding liability protection for the legal profession.



Look Before You Leap The Dangers of Dabbling

Practicing outside your area of expertise – dabbling – is prevalent in boom or bust economies. The motivation may differ: Survival may be the primary motivation in today’s economy as opposed to the windfalls of boom times, but look before you dabble, you may be jumping from the frying pan into the fire. In a poor economy, more people and organizations seek a scapegoat as a means of recovering loss; lawyers are a visible target, and legal malpractice claims often increase.

Whatever the economic climate, Florida Lawyers Mutual’s claims experience makes us acutely aware that practicing outside an attorney’s area of expertise, whether good economic times or bad, without first obtaining the required level of knowledge and experience, often is the underlying cause of a legal malpractice claim.

According to the American Bar Association’s (ABA) latest *Profile of Legal Malpractice Claims* (2008), 46% of claims are the result of substantive errors and omissions such as failure to know/apply the law, failure to know the deadline, failure to understand or anticipate tax, etc., etc.

The forces driving lawyers to take on new practice areas are understandable. “Forty-six percent of the lawyers responding to The Florida Bar’s 2008 Economics and Law Office Management Survey said their practice has worsened due to the economy and 43 percent expect a decrease in profitability. ...” Competition grows by about 2,500 new lawyers every year and, according to the Bar, more people tend to go to law school in poor economic times, further increasing competition.

It may be unreasonable to expect that lawyers will never practice outside their primary expertise. However, the need to thoroughly understand the substantive and procedural laws applicable in any new area cannot be minimized.

Dabbling is one of the most common causes of legal malpractice. You’ll find it on the ABA’s listing: “The Top Ten Malpractice Traps and How to Avoid Them,” in *The Lawyer’s Desk Guide to Preventing Malpractice*. Trap #4, Ineffective Client Screening:

Do you have the expertise necessary to handle the case? Don’t dabble! There is no such thing as a simple will or a cut-and-dried personal injury case. If you are not prepared to handle the difficult cases in a given area of practice, do not accept the seemingly simple things. Often you fail to see where the problems are. Yes, you can develop the expertise given sufficient time, but keep in mind that sufficient time will be far more than meets the eye at first glance and the client will not be willing to pay for your education.

Also see Florida Lawyers Mutual’s list: “A Dozen Legal Malpractice Dangers,” available to insured firms at www.flmic.com

It is very tempting when established clients look to you for representation on all their matters. They do it because they trust you. They may not be aware of the complexity of different areas of the law nor are they aware of the increasing threshold of competence required to be competent. However, it may be in their best interest and yours to refer them to an attorney with experience in their legal matter.



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Dangers of Dabbling *continued from page 1*

Practice Tips and Safeguards:

- Disclosure of lack of expertise does not limit liability for errors and/or omissions. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rules Regulating the Florida Bar: Rule 4-1.1 Competence. See the Rule and Comment on page three of this newsletter.
- Take the time to learn a new practice area so you and your staff are up to speed before you take on clients. Consider the extent and availability of training you and your staff would need to develop new systems and skills in order to deliver the best quality representation. Some experienced bankruptcy attorneys, for instance, advise that it takes from six months to a year to get up to speed on routine personal bankruptcy, longer for anything more complex than routine.
- Mastering a new area may involve associating as counsel an attorney experienced in the practice area and one willing to act as a mentor. Or go back to school – attend seminars given by attorneys specializing in the area.
- Is what you might earn worth the risk inherent in practicing outside your practice area? You cannot bill a client for your staff's and your learning curve. When considering the possible time investment, take into account the extra time you will need to monitor staff assisting you in a new area.
- Working outside your practice area is definitely not a time to scrimp on documentation. There really is never a good time. Documentation

of the attorney-client relationship protects your client to the same extent – if not more than – it protects you. Memorialize and document communications, advice, the scope of representation (what you will not do is just as important as what you will do); billing procedures and payment expectations.

- It may be worthwhile to join a referral network, which gives you the opportunity to refer clients and to have clients referred to you.

In summary, if you're not competent in a practice area, either become competent, associate with someone who is competent, refer it, or decline it in the first place.

Case Examples:

The attorney, described as a "very experienced senior trial attorney with impressive credentials," agreed to defend a driving under the influence case against the son of a man who had done work at the attorney's house. The attorney explained that he had never represented a client in a DUI or in any criminal matter, but assured the client he was a knowledgeable and hard-working attorney and efficient and economic in the use of his time. The attorney won an acquittal for his client, but the fee was \$50,000 for the 227 hours invested. The court found that while there was no question that the attorney and his associates put in the time billed, inexperience did not justify a fee three times higher than the normal fee for a similar matter and that a client should not be expected to pay for the education of a lawyer.

Fordham, Matter of, 668 N.E.2d 816, 423 Mass. 481 (1996)

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Rule 4-1.1 Competence

Rules Regulating the Florida Bar: Rule 4-1.1
Competence:

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

Lawyer shall provide competent representation

Comment to Rule 4-1.1:

“Legal knowledge and skill. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

“A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

“In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client’s interest.

“A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2. [Rule 4-6 Public Service, 4-6.2 Accepting Appointments]

“Thoroughness and preparation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

“Maintaining competence. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.” 🌟

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A jury awarded damages of \$64,983 against an attorney in a legal malpractice case involving the drafting of a trust. The attorney disclosed to the clients, before undertaking representation, that he had no knowledge of tax matters nor any expertise in tax matters; "that if somebody else could figure out what needed to be done, I could draft the documents." The court's jury instruction: "It is the duty of an attorney who is a general practitioner to refer his client to a specialist or recommend the assistance of a specialist if under the circumstances a reasonably careful and skillful practitioner

would do so. If he fails to perform that duty and undertakes to perform professional services without the aid of a specialist, it is his further duty to have the knowledge and skill ordinarily possessed, and exercise the care and skill ordinarily used by specialists in good standing in the same or similar locality and under the same circumstances. A failure to perform any such duty is negligence." The judgment was affirmed on appeal.

Horne v. Peckham, 97 Cal.App.3d 404, 158 Cal.Rptr. 714 (Cal. App. 3 Dist., 1979) 🌴

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