

COVID-19 and Malpractice Claims – Will There Be a Correlation?

By Steve Couch

President and CEO, OBLIC





Coronavirus, aka COVID-19, and the resulting economic aftermath, have created so many challenges that it is difficult to comprehend all of the far-reaching impacts on our profession, much less the world in which we live and practice. Fortunately, stay-at-home orders are gradually being lifted and businesses are slowly being permitted to open, although when life returns to “normal” is a question few, even the experts, can realistically answer.

Just as our society has experienced upheaval at levels not seen in decades, lawyers and law firms have had to wrestle with unprecedented change, learn new ways to practice, with many adapting “on-the-fly” to a work-from-home environment, even with law firms being deemed “essential businesses” in Ohio. This new way of practice means learning how to utilize tools and software perhaps already available within the firm, or implementing technology completely new to lawyers and their staff. Video conferencing through Zoom, Microsoft Teams, Go To Meeting, Skype, Cisco Webex or a myriad of other platforms has become a much more common way of interacting with clients and staff, though telephone calls and emails certainly form the backbone of the communication channel. Accessing client files has become a new process with digital files accessed remotely or taken to home offices. Cyber breaches, always a significant risk, pose an increased risk with a slew of new attacks on the unwary.

Many law firms have seen significant disruption to their day-to-day business model, with some firms wrestling with large drops in revenue as stay-at-home orders have practically meant less legal business being conducted by individuals and businesses. With many courts closed for usual business, some litigation-centric areas of practice have experienced postponements of

trials and hearings meaning, for many lawyers, less billable work. Likewise, transactional practices have been hard hit as economic downturns often put a halt to negotiations or the completion of transactions. Some attorneys have reported that clients drastically impacted by the economic impact have postponed payment of bills for legal services, adding to the economic pressure on law firms.

On the flip side, some firms have seen an increase in business, such as in probate, estate and trust, with an added sense of urgency by some to have wills prepared in this day of extreme uncertainty, or with some clients just finally getting around to legal work they have needed to complete for some time. Insurance coverage attorneys are now back in vogue, with an array of new coverage issues to test given the breadth of business interruption losses and businesses looking to recoup those losses in some way.

All of these changes, many unwelcome, some positive, contribute to a wide array of risks for law firms to recognize, manage, and for the most severe, to avoid. To put things in historical perspective, professional liability insurance carriers and lawyers experienced in defending law firms report that significant economic downturns have quite often been followed by a spike in malpractice claims. This spike was felt in both the frequency of claims and the severity accompanying them. Two common threads that run through this experience are claims caused by attorneys dabbling in unfamiliar areas of practice and claims brought by businesses or individuals looking to shift an economic loss to their professional advisor(s). Given the additional disruption of the closures of courts, attorneys working from home, and vast differences between the current economic downturn and

past events, it is reasonable to expect a higher chance of malpractice claims following this COVID-19 pandemic.

Steps to Mitigate Claims

There is some good news, as knowledge can provide an incredible means to control future outcomes. Armed with an understanding of potential risk, lawyers and their firms can take proactive steps today to manage, mitigate or outright avoid potential malpractice claims. The following are some practical suggestions you and your law firm can take to minimize or avoid risk.

First, manage the day-to-day risk of practicing in a changed environment. While working from home, utilize secure, encrypted VPN access to your law firm network. Control and manage this access to ensure only authorized individuals can log into your law firm network. If bringing files home, maintain confidentiality of the client file from curious eyes around the house. Even when working from home, find a way to supervise the staff and attorneys in your firm and to follow established firm policies and procedures. Be deliberate in communicating regularly with all current clients, especially in this turbulent time. Whether through video conferences, email, or “old school” telephone calls, find the communication method preferred by each client and stay in touch. Clients will feel much more engaged and less likely to blame you for their circumstances. Although the Ohio Legislature recently passed House Bill 197 to toll certain statutes of limitation and discovery deadlines, attention to deadlines and timelines remains vitally important, especially when working in a disrupted manner. The final bit of day-to-day practical advice is to avoid suing clients for unpaid legal fees, as such will almost guarantee a retaliatory malpractice claim.



Second, balance the temptation to take on representation to keep revenue coming through the door against the risk of taking on matters outside your area of expertise. The legal professional liability insurance industry refers to this risk as “dabbling.” The danger, although likely obvious, is not knowing what you don’t know. Many areas of practice require certain knowledge and experience to fully understand the subtleties needed to meet the standard of care. Rule 1.1 of the Ohio Rules of Professional Conduct requires that, “A lawyer shall provide competent representation to a client.” Further, competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.


Comment [1] lists relevant factors for determining whether a lawyer has the requisite knowledge and skill in a particular matter:

- 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
- whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

But if you dare to dabble, note that Comment [2] of the Rule explains that a lawyer can provide adequate representation through necessary study or through association with a lawyer of established competence in this new area of law you wish to undertake.

Finally, it is quite difficult to manage the risk of malpractice claims by clients looking to blame their attorney for a business loss or an outcome the client did not expect. The process

of mitigating this risk begins with careful client selection, continues through constant and thorough communication, and requires managing client expectations throughout the representation. One of the most effective ways of managing client expectations is to give timely and honest evaluations of what can be achieved over the course of the representation. The client needs this feedback early and often, as hearing it just before an important decision is needed can leave the client unprepared to make a tough decision and apt to blame counsel for an unexpected result. The last line of defense is documenting your communications with the client, especially significant issues discussed and decisions made. This is a challenging skill to learn and apply in every representation, but if practiced religiously, with all clients and all matters, it will pay off in a myriad of ways and will deter inevitable second-guessing by clients. Should a malpractice claim be asserted, this sort of documentation will be a vital component to a successful defense.

If attorneys and law firms follow these suggested steps to manage their risks to malpractice claims, there is a reasonable chance COVID-19 and its economic impact will not add insult to injury by inviting malpractice claims at a time when we are trying to get back to “normal.” 

About the Author



Steve Couch is President and CEO of the Ohio Bar Liability Insurance Company (OBLIC), a legal professional liability insurance company founded by the Ohio State Bar Association. He also manages the OSBA Insurance Agency, an agency providing a myriad of insurance solutions to Ohio attorneys.

