MAINTAIN CONSTANT COMMUNICATION WITH THE CLIENT IN WRITING — INCLUDE ALL RELEVANT FACTS EVEN THE BAD ONES

PRACTICE TIPS

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Communicate, communicate and communicate some more. Communication with the client is probably the most important step in the process of avoiding legal malpractice claims. It is also required in general by Rules of Professional Conduct. The obligations of an attorney to communicate facts and circumstances are multifaceted.

Throughout the representation, the attorney must communicate to the client each of the options available to her, as well as the foreseeable consequences and benefits of each such option. For example, California Rule of Professional Conduct 3-500 provides:

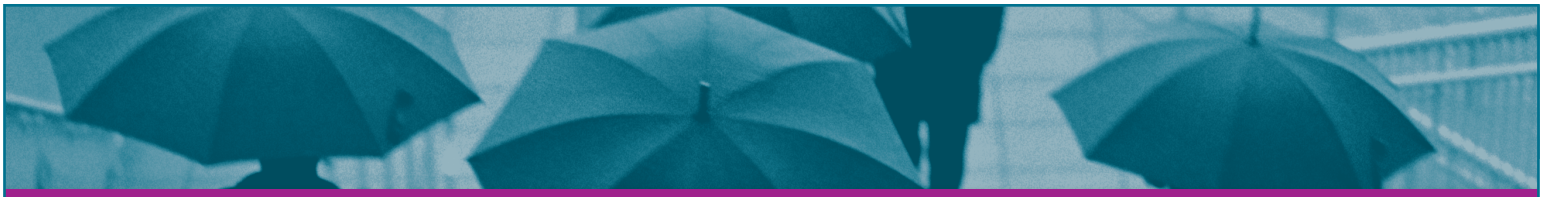
> An attorney "must keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information."

The best way to communicate the legal options to a client, along with the risks and benefits attendant to each option, is in writing. Such a communication is protected by the attorneyclient privilege and can protect the attorney in a future dispute with the client regarding whether the attorney has complied with the Rule of Professional Conduct and the applicable standard of care.

This will help establish in the future that not only was the client advised of the development, but that the client had the necessary information to make her own decisions about what to do as a result.

It is very important that the attorney quickly inform clients of poor results, especially if a result is due to a mistake that the attorney has made. The failure to have a frank discussion with a client about such developments can compound the negligence of an attorney, by taking away options a client might have to misconduct problems for an attorney in addition to malpractice liability. Indeed, when the client contacts the State Bar to complain about the attorney who made a mistake, the State Bar will become much more interested, and discipline will be much more likely (and harsh), if there is an allegation that the attorney attempted to "cover up" the mistake to the detriment of the client.

In the event that mistake cannot be routinely corrected, or such mistake has caused, or may cause, the client some kind of injury, it is imperative that the client not only be told of the mistake, but that the attorney recommend that the client obtain separate counsel to advise the client of her options. The attorney (and firm) who made the mistake has a conflict of interest, and any advice given to the client after the mistake will be viewed by a future judge and jury as being colored by the attorney's (or firm's) own self-interest, and not the best interest of the client.



Ending the Attorney-Client Relationship :

Lastly, a final communication, which should be in writing, and which should accompany or follow the final bill, is a letter closing the file and marking the end of the attorney's engagement. With this letter, the attorney tells the client that the attorney-client relationship for the particular matter is over and also informs the client how long the client's file will be maintained by the firm.

This letter is important for several reasons. First, it puts a written closure on the representation which, at the very least, may start the statute of limitations running on a potential claim. If the case is not over (such as if there is an appeal that may be filed), it puts the client on notice that the attorney is not going to do any further work on a particular matter. If there is something further to be done by the client, the closing letter should inform the client of all potential upcoming deadlines or statutes of limitations in the matter, or any related matter. The letter may also advise the client to seek other legal representation if the client is interested in pursuing other claims or transactions that are no longer part of the attorney's engagement. Finally, the letter should communicate the firm's file retention policy and invite the client to retrieve the file if she wants to maintain it herself. The lawyer or firm should nevertheless retain a complete copy of the file if the original is given to the client!

About the Authors:

Robert Harrison is the regional managing partner of the San Diego office of Wilson Elser Moskowitz Edelman & Dicker LLP. He has extensive experience in civil litigation with emphasis in the defense of professional liability. Bob is a past president of California Defense Counsel, the Association of Southern California Defense Counsel, and the San Diego County Barristers Club. He is a frequent speaker on trial tactics and other legal topics, and has been a presenter/demonstrator on multiple occasions for the ABOTA "Trial by Masters" program. Bob, a retired Captain in the U.S. Naval Reserve, enjoyed the opportunity to serve in command of two Naval Reserve Force ships, USS Pluck (MSO-464) and USS Hepburn (FF-1055), as well as a variety of other assignments during his six years of active duty and 20 years of naval reserve service.

Patrick Kearns is a civil trial lawyer at Wilson Elser Moskowitz Edelman & Dicker LLP. Patrick's practice focuses on the defense of medical, dental, and legal professionals in malpractice suits. He also defends professionals in administrative law matters involving the medical, dental, and pharmaceutical licensing boards of California. Patrick has significant experience defending businesses in a variety of areas including contract and warranty claims, products liability claims and employment issues. He has successfully tried multiple cases to jury verdict and he also has experience in handling and defending appellate matters; having defended appeals in both the California State Courts of Appeal and the U.S. Ninth Circuit Court of Appeals. An active member of the legal community, Patrick frequently speaks to professional groups on issues of legal ethics.