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lpl Advisory

A newsletter from The ABA Standing Committee on Lawyers' Professional Liability

Mark Your Calendar

September 11-13, 2002

Special Programming - A full 1 ½ days of programming

The Trial of a Legal Malpractice Action

Fall National Legal Malpractice Conference
Fairmont Hotel
Chicago, IL

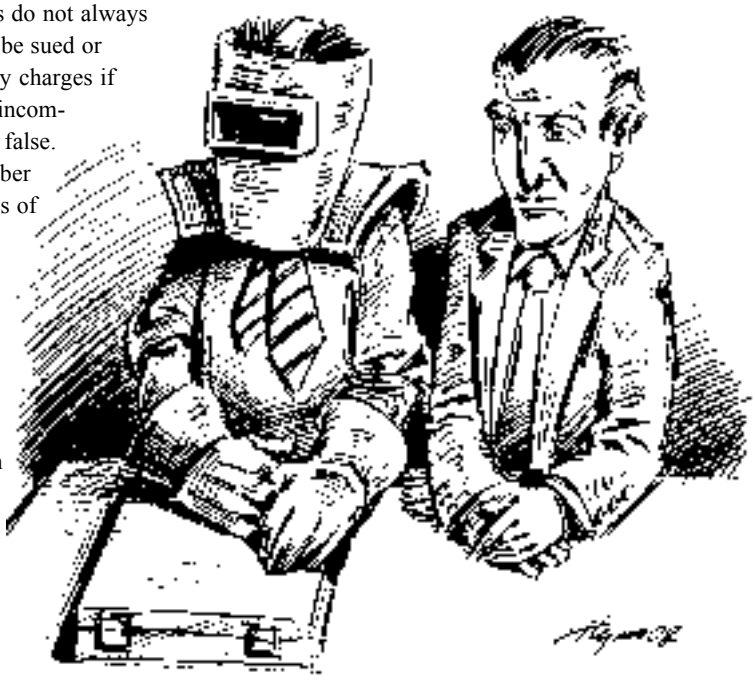
Suing the Mouthpiece: Speaking for your clients comes with risk

by David A. Grossbaum

There is a reason that lawyers are referred to as "mouthpieces." It is a big part of our jobs to speak for our clients. We do it in court, we do it at the bargaining table, and we do it in documents. What lawyers do not always realize is that they might be sued or brought up on disciplinary charges if the message they bear is incomplete, inaccurate, or even false. There are a growing number of cases where these types of claims are being brought.

In a case involving a business transaction, the client was an office supply retailer who planned to renovate space to use as a store. The plaintiff construction company agreed to do the work, but wanted assurances that it would be paid. The lawyer for the retailer wrote a letter saying that the client had enough money to pay for the work. When the retailer did not pay, the lawyer was sued for misrepresentation. The appellate court refused to dismiss, finding that the letter did not contain the usual disclaimers such as "according to our client" or "our client tells us." *Kirkland Constr. Co. v. Choate, Hall & Stewart*, 39 Mass. App. Ct. 559, 658 N.E. 2d 699 (1996). Moreover, the Complaint alleged that the letter did more than just relay information, and that the lawyer knew that the information was false, or at least misleading.

Even in the pitched battle of partisan litigation, lawyers are being sued for transmitting false or misleading information from their clients during discovery and settlement. In *Fire Insurance Exchange v. Bell*, 643 N.E. 2d 310 (Ind. 1994), the defense attorney gave the plaintiff's attorney incorrect information about the defendant's limits of insurance, even though he had been told the correct limits. His argument that it was unreasonable for opposing counsel to rely on his representations as to coverage was rejected by the court, which instead



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Defending Liberty
Pursuing Justice

Speaking for Your Client

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adopted a rule that plaintiff's counsel do not have to verify the truthfulness of representations made by defense counsel. The Second Circuit Court of Appeals found that such a misrepresentation was actionable, even though the client himself re-affirmed the erroneous coverage limits, and did not think it was sufficient mitigation that the plaintiff learned of the misrepresentation before the settlement agreement was finalized and could have rescinded it. *Slotkin v. Citizens Casualty Company of New York*, 614 F. 2d 301 (2nd Cir.1980).

Not to overstate the risk here, many courts have barred suits against opposing counsel based on statements made in litigation; there is such a thing as the litigation privilege. It generally protects a lawyer from liability for statements on behalf of a client made in, or related to, litigation. *White v. Bayless*, 32 S.W.2d 271 (Tex. Ct. App. 2000); *O'Keefe v. Kompa*, 84 Cal. App. 4th 130 (Cal. Ct. App. 2000); *United States v. Rockland Trust Co*, 860 F.Supp. 895 (D. Mass. 1994). There is much to recommend such a rule because lawyers who sign document responses, and serve their client's interrogatory answers, for example, do not generally have a duty to or an ability to know if their clients are telling the truth. The privilege even protects a lawyer who allegedly made fraudulent statements, not because such conduct is to be condoned, but because allowing opposing counsel to sue each other in collateral litigation wreaks havoc with the litigation process and will serve to chill zealous advocacy.

California has embodied the litigation privilege in a statute, protecting statements made in judicial or quasi-judicial proceedings by litigants, or other authorized participants, to achieve the objects of the litigation and having some connection with the litigation. Cal. Civil Code §47(b). The statute specifically excludes from this immunity any statements "made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies."

The litigation privilege has also been used to bar claims based on alleged unfair use of "hardball" or sharp litigation tactics, an acknowledgement that the system is an adversarial one within bounds set by the ethical rules. Nonetheless, one court has recognized a tort of malicious defense where an attorney allegedly created false evidence while acting as defense counsel, and then gave false testimony advancing this evidence. It must be shown that the defense attorney acted without probable cause or without any credible basis to support the defense, knowing that the defense lacked merit, but using the defense nonetheless to harass, annoy or injure, or delay or increase the cost of litigation. *Aranson v. Schroeder*, 671 A. 2d 1023 (N.H. 1995). Such a claim can only be brought if the prior case in which the conduct occurred was terminated in favor of the party bringing the malicious defense action.

A few Courts have refused to allow actions against attorneys because they view these transgressions as being better handled by the disciplinary authorities and court-ordered sanctions. *Baxt v. Liloia*, 155 N.J. 190, 714 A. 2d 271 (1998); *Phipps v. Union Electric Company*, 25 S.W. 3d 679 (Mo. Ct. App. 2000). The threat of these consequences is sufficient to deter litigation misconduct.

Regardless of the outcome, the filing of such a claim will always compromise, and in most cases preclude, the attorney from continuing to represent his client, which could lead to a claim by the client for the costs of educating a new attorney. In addition, claims alleging fraud are not usually subject to indemnity from a malpractice insurer, and the carrier may not have to provide a defense. Disciplinary actions and sanctions are rarely covered by these policies, and can carry severe consequences.

There is nothing that lawyers can do to make themselves bullet-proof from such claims. Nonetheless we can do a few things to avoid the avoidable: 1)if you are acting as a conduit of information for your client, be sure to make this absolutely clear in writing, by using phrases such as "my client informs me that"; 2) let the client write the letter if it is not a legal opinion and does not otherwise need to be written by the lawyer for some other strategic purpose; 3) use verified complaints and answers (where the client swears to the truth of the allegations) where permitted; 4) in litigation, confine the client's disclosures to interrogatory answers signed by the client himself; rather than through letters from you; 5) when it is unavoidable that you provide information from your client, make sure you have a good paper trail showing that you asked your client for the information, are relying on them to make a complete disclosure, and that you are not undertaking an independent investigation; and 6) most important of all, choose your clients wisely.

David Grossbaum *is a partner at the Boston law firm of Cetrulo & Capone, LLP. David chairs the ABA Tort and Insurance Practice Professionals', Officers' and Directors' Liability Committee.*

Law Student Wins 2002 Levit Essay Contest

Sakura Mizuno a third-year law student at South Texas College of Law is the winner of the 2002 Levit Essay Competition. The award is named for the late Bert W. Levit, distinguished co-founder of the San Francisco law firm of Long & Levit LLP.

Sakura is the fifth winner of the Levit Essay Contest and she receives a cash prize of $5,000 and an all-expense paid trip to the Spring 2002 National Legal Malpractice Conference in Charleston.

The annual award competition, open to law students and young lawyers, is co-sponsored by the ABA Standing Committee on Lawyers' Professional Liability and San Francisco firm of Long & Levit LLP.

New Study Shows Recovery Saves Dollars

by Ira Zarov and Barbara S. Fishleder

The humanitarian reasons for state bar's and others to fund attorney assistance programs for attorneys who suffer from alcohol or drug dependency have always been self-evident. The emotional and physical damage that untreated alcohol and drug dependency does to individuals, families, and colleagues is just too devastating to ignore. But the other fundamental rationale for assistance programs—that they simultaneously save dollars and protect the public—has been an assumption previously unsupported by concrete data. Now, a newly-released study by the Oregon Attorney Assistance Program (OAAP) provides convincing evidence that getting lawyers into recovery saves dollars as well as lives—and protects the public. The OAAP, funded by the Oregon State Bar Professional Liability Fund, provides a broad range of services to attorneys including assistance with alcoholism and chemical dependency.

The OAAP study, completed in 2001, involved 55 recovering lawyers who were in private practice for five years before their sobriety dates and five years after their sobriety dates, a ten year period in all. The first portion of the study compared the incidence of malpractice claims for each of the five year-year periods, while a second portion looked at discipline complaints.

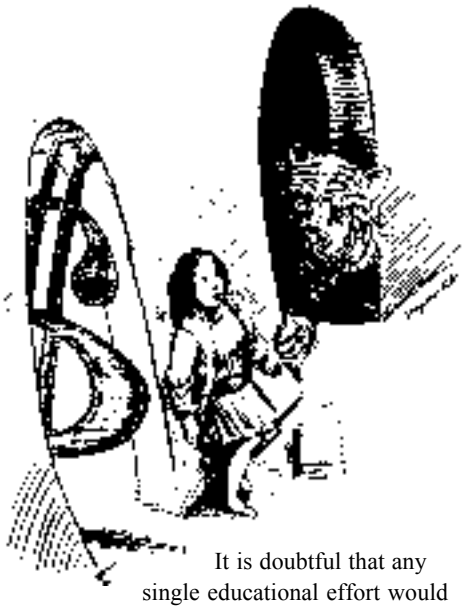
During the five years before sobriety, these lawyers had 83 malpractice claims filed against them. The number dropped dramatically—to 21 claims—in the five years after sobriety. This represents a 30 percent annual malpractice rate before sobriety, and an 8 percent rate after sobriety. The same lawyers had 76 discipline complaints during the five years before sobriety and 20 discipline complaints during the five years after sobriety. This represents a 28 percent annual discipline complaint rate before sobriety, and a 7 percent discipline complaint rate after sobriety.

The study shows that malpractice and discipline complaint rates for lawyers before recovery are nearly four times greater than lawyers in recovery. In addition, applying Oregon's average malpractice cost per claim ($16,500) to claims made against the 55 lawyers in the study, the reduced incidence of malpractice resulted in a savings of approximately $200,000 per year—attributable to just 55 lawyers in recovery! The costs to the Oregon State Bar disciplinary process are less quantifiable, but it is obvious that sobriety brings savings that follow from the reduction in discipline matters in need of prosecution.

Lawyers in recovery also have lower malpractice and discipline complaint rates than the general population of lawyers. In Oregon, the current annual malpractice claim rate for lawyers in private practice is 13.5 percent, compared to the 8 percent for lawyers in recovery; the current annual discipline complaint rate for Oregon lawyers is 9 percent, compared to 7 percent for lawyers in recovery.

The Oregon study is consistent with other studies looking at related questions. For example, an Illinois study indicated that 40-70% of discipline cases involved chemically dependent or mentally ill practitioners. A study of the Client Protection Fund cases in Louisiana found that 80% of their cases involved chemical dependency or gambling. A similar study in Oregon found that 80% of the Client Security Fund cases involved chemical dependency, gambling, or mental health issues.

In view of the effectiveness of attorney assistance programs as reflected in the recent OAAP study, it is important that state bar organizations and companies involved in loss prevention develop approaches to alcohol and chemical dependency problems that take advantage of the benefits assistance programs offer. One obvious step to take is for bar organizations to help in making the extent of the problem, and the benefits of treatment, know within the legal community. Consistent with that goal, it would be farsighted to grant CLE credits to programs that provide information about alcohol and chemical dependency and the attorney assistance programs available to address the issues.



It is doubtful that any single educational effort would be more likely to assure the competency of attorneys than one that helped impaired attorneys seek treatment. Diversion programs for impaired lawyers who are subject to the disciplinary process, as already operated by some states, might also be effective in facilitating long-term solutions to problems that follow alcohol or chemical dependency.

It is clear from the OAAP study that alcohol and chemical dependency is a root cause of both malpractice and discipline complaints and that the accompanying costs are great. A State of Washington study found that the prevalence rate of alcohol and chemical dependency among attorneys is 18 percent. The new OAAP study buttresses this finding and makes action imperative. The costs to the bar in lost dollars because of malpractice claims and discipline claims, and in the loss of favorable public opinion and reputation because of ethical violations, are far too high.

The identity of all study subjects have been kept confidential and are known only to OAAP counselors.

__Ira Zarov__ is the CEO of the Oregon State Bar Professional Liability Fund. __Barbara S. Fishleder__ is the program director for the Oregon Attorney Assistance Program and the director of loss prevention for the Professional Liability Fund.

LPL Advisory is a bi-annual newsletter published by the American Bar Association Standing Committee on Lawyers' Professional Liability for the news and information exchange needs of the lawyers' professional liability community.

Message From the Chair

On behalf of the ABA Standing Committee on Lawyers' Professional Liability, I want to welcome you to the Spring 2002 National Legal Malpractice Conference in beautiful and historical Charleston.The Committee and the conference speakers have put together an excellent program that I know you will find educational and useful.

I also want to take this opportunity to encourage those of you, who have not already done so, to become an Associate Member of the National Legal Malpractice Data Center. Membership entitles you to substantial savings on the regular conference attendance rates. Three types of membership are available to meet your personal and organizational needs. Please stop by the registration desk for additional information and an enrollment form.

I am pleased to announce that Sakura Mizuno, a third-year law student, is the winner of the 2002 Levit Essay contest. Sakura is a student at South Texas College of Law. Her winning essay addressed the issues of whether punitive damages, sought by a plaintiff in the underlying action may be recovered in a subsequent negligence action against plaintiff's lawyer and whether the collectibility of plaintiff's lost claim is an issue for the malpractice case. Sakura's essay was judged to be the best of the twenty-six submissions received this year. She is attending the conference in Charleston and I ask that you congratulate her on her achievement. We also thank the firm of Long & Levit for the $5,000 cash prize that is awarded annually to the winning entrant for this competition. This continues to be one of the most generous contributions to any ABA essay competition.

Finally, I ask you to mark your calendars for the Fall conference which will be held at the Fairmont Hotel in Chicago on September 11-13, 2002. The Conference will feature the Trial of a Legal Malpractice Action in front of a live jury. You will have an opportunity to watch a trial and the jury's reaction to it. This promises to be an excellent program that you won't want to miss. I look forward to seeing you there.

—Ed Mendrzycki

Staff Changes at Committee

We welcome Jane Nosbisch to her new role as staff counsel for the ABA Standing Committee on Lawyers' Professional Liability. Jane is well acquainted with the work of the Committee having served for five years as our assistant staff director.

Glenn Fischer is coming on-board as the newly appointed assistant staff counsel for the Committee. He comes to us from an eight-year litigation practice in insurance defense, worker's compensation and tort claims.

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