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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Malpractice Landscape Is Becoming Riskier For BigLaw

By **Gerald Klein and Amy Nguyen** (February 11, 2020, 2:50 PM EST)

Gerald Klein

Amy Nguyen

While it used to be taboo for large companies to sue their lawyers — even when the lawyers made horrible mistakes costing companies substantial sums of money — that taboo is disappearing.

Insurance broker and risk management consultant Ames & Gough's ninth annual survey of leading lawyers' professional liability insurance companies[1] revealed an increase in new malpractice claims brought against law firms, with the largest number of claims stemming from four practice areas: business transactions, trust and estates, corporate and securities, and real estate.

Increasingly, general counsel have concluded it is appropriate to sue high-priced law firms who make mistakes and have rightly determined they have a fiduciary obligation to clients to pursue these claims. With hourly rates at large firms often exceeding $1,000, clients have every right to expect to get what they paid for. In this coming decade, the trend of clients demanding law firm accountability will increase.

What is legal malpractice?

Legal malpractice comes in many flavors. It arises from failure to provide advice when a reasonable attorney would have done so, providing bad legal advice, and poor execution of legal services.

To prevail in a legal malpractice action in most jurisdictions, a plaintiff must prove there was an attorney-client relationship, the attorney fell below the standard of care, the client would have obtained a better result if the attorney acted as a reasonably careful attorney, and damages. When a company experiences a catastrophic result at trial or from a failed business transaction, the company will likely look to see if legal malpractice played a role.

Proving malpractice often comes down to two things: (1) what is in the attorney's file; and (2) what is not in the file. Juries, and even many arbitrators, expect attorneys to document their advice.

After all, attorneys invented the so-called cover-your-ass letter. When an attorney accused of malpractice tells jurors about a warning given to the client about a possible outcome but there is no

documentation of this advice, juries are understandably skeptical about whether the attorney gave the advice.

Large law firms may have fewer capable trial attorneys, leading to greater incidents of legal malpractice.

Because jury trials are becoming rarer, there are fewer attorneys capable of trying big cases. General counsel often wrongly assume every trial attorney from a large law firm has substantial trial experience. This is where perception and reality diverge. Even at the largest firms, only a handful of attorneys have gained much trial experience.

When browsing through prominent BigLaw websites, very few (if any) of the listed trial attorneys are members of organizations like the American Board of Trial Advocates and the American College of Trial Lawyers. Additionally, only a few promote more than one or two trial results.

Attorneys who lack trial expertise probably do not know how to try complicated cases. Consequently, inexperienced attorneys sometimes find themselves first-chairing trials out of their league.

Without the experience of the fast pace of trial, these attorneys fail to develop simple themes that connect with juries, fail to make evidentiary objections, and generally do not know how to preserve the trial record for an appeal. Getting straight A's at Harvard University and being editor of the law review does not mean an attorney is qualified to try a sophisticated, high-stakes case before a jury.

The only way to get good at trying cases is to try them. Because the practice of law is a business, not just a profession, attorneys focused on securing the client may be reluctant to admit they lack the skill set to try complicated cases, hoping the case will settle. In many such cases, the trial outcome is predictably poor.

Corporate clients are scrutinizing law firm bills for overbilling.

Based on cases we have handled, it is not uncommon for clients to complain about overbilling by law firms of all sizes. In one case our firm handled, a jury's verdict that Lewis Brisbois Bisgaard & Smith LLP generated fraudulent bills became a front-page story in the Los Angeles Daily Journal.[2]

Clients allege: (1) hours padding; (2) task padding; and (3) charging improperly for costs that were not incurred.

Hours padding is the most common overbilling abuse. It consists of billing for time not actually worked (i.e., working 10 minutes on a project and billing an hour). ALM Media Properties LLC observed in January 2019 that billing expectations are indeed problematic, pointing at legal consultancy Altman Weil Inc.'s "Law Firms in Transition" survey. According to the survey, 48.8% of firms failed to meet their annual targets for billable hours in 2017. The resulting pressure to bill more is inarguably real, according to ALM.[3]

However, hours padding does not always take the form of intentional theft. Sometimes, supervisors do not adequately manage associates' time, making it hard to detect redundancy. Two associates may each be working on the same project without knowing the other is doing it, resulting in unnecessary bills.

Hours padding is often difficult to prove, especially when law firms engage in block billing (i.e., when

numerous tasks are grouped together and billed as a single block time entry). Often, a time entry may seem innocuous, such as revising a pleading.

However, scrutiny of the bills from month to month may reveal that a simple pleading was revised a dozen times. Ultimately, the only way to reveal hours padding is to look at the work performed and calculate how much time a reasonable attorney would have spent on it. While there is a great deal of flexibility in determining whether hours padding occurred, there will be instances where the only explanation for high fees is hours padding.

Task padding is akin to hours padding. A task may be appropriate, but it should have been performed by a junior attorney or paralegal. Sometimes attorneys perform unnecessary services. It is usually easier to detect task padding than it is to detect hours padding.

Additionally, there is nothing wrong with seeking reimbursement for telephone charges, copy costs, out-of-plan computer services, etc., if the methodology is reasonable. But cost reimbursement should not create a profit center.

For example, Westlaw provides law firms with retail pricing for Westlaw searches, which no one really pays for. Virtually every substantial law firm has an unlimited database for which they pay a flat monthly fee. While it is arguably appropriate to charge something for the use of these services, using unrealistic retail pricing is not appropriate. Yet those charges can amount to tens of thousands of dollars, and perhaps more, in a big case.

Clients should consider preserving their right to a jury trial in attorney-client disputes.

One place where law firms usually have the upper hand in the attorney-client relationship is the attorney-client engagement agreement. Many attorneys, and even large corporate clients, pay little attention to the terms of their fee agreements.

Each party tends to look at the fee agreement as standard boilerplate. But fee agreements vary widely.

Clients often fail to recognize the only time to negotiate terms is before they sign the agreement, which almost always favors attorneys. Unless engagement provisions violate an ethical rule or are unconscionable, courts will usually enforce them, even if they are one-sided.

Among things general counsel should consider before signing a fee agreement are the following: (1) who will work on the file; (2) what are the hourly rates; (3) what costs will be added to the bill and how are those costs calculated; and (4) will disputes be subject to arbitration?

The decision of whether to arbitrate requires consideration. While arbitration provisions in sophisticated contract disputes may be a no-brainer, the same cannot be said in a legal malpractice dispute.

Most clients — even large corporations — do not want to arbitrate disputes with attorneys because the arbitration process is almost always stacked in favor of the attorneys. With rare exceptions, arbitrators are either attorneys or former attorneys (e.g., retired judges). As attorneys or former attorneys who experienced problem clients, the arbitration process sometimes begins with an unofficial presumption the client is at fault.

In contrast, juries are more likely to hold attorneys to high standards of performance, especially when

they hear about staggering hourly rates. Jurors may be puzzled as to why attorneys tout themselves as experts in a field yet spend so much time researching law they claim to know. Jurors are sometimes stunned by how much time is spent preparing a 15-page document. And when jurors see how many millions of dollars have been charged for what can only be classified as a mediocre outcome, they want to know what went wrong.

To a much greater extent, lawyers and judges are more forgiving of a law firm's performance. They know doing quality work takes time. They recognize issues may be more complicated than meet the eye. They tend to trust lawyers more than the general public and are skeptical that lawyers would lie, cheat or steal. Accordingly, clients will almost always find a jury trial is a friendlier forum than an arbitration.

Conclusion

Attorneys are no longer the sacred cows they once were. As hourly rates and legal fees climb to staggering levels, companies are demanding accountability.

More than ever, clients are more willing to sue big law firms for legal malpractice and overbilling. As we move through the coming decade, this trend will become more commonplace.

Gerald Klein is a partner and a founder at Klein & Wilson. He previously served as chair of the Orange County Bar Association business litigation section.

Amy Nguyen is an associate at Klein & Wilson.

[1] https://www.amesgough.com/sites/default/files/A%26G%20News%20Release%20-%202019%20LPLI%20Claims%20Survey%20-%205-30-19.pdf.

[2] https://www.kleinandwilson.com/Publications/Lewis-Brisbois-Ordered-to-Pay-6-Million-for-Overbilling.shtml.

[3] https://www.law.com/njlawjournal/2019/01/18/lawyers-caught-overbilling-the-billable-hour-shares-the-blame/.