AVOIDING COMMUNICATION BASED CLAIMS

Claims against litigation lawyers often involve allegations of communication errors. Here are some steps that lawyers can take to avoid such claims right out of the gate – at the outset of their retainers.

When we attribute a claim to a communication problem, what exactly do we mean? Here are some examples:

1. a) failure to warn clients that they were likely to lose a motion, trial or appeal;
2. b) failure to warn clients that they could face an adverse costs order if they lose;
3. c) misunderstandings regarding the scope of the retainer (for example, misunderstandings about which claim(s) the lawyer was retained to bring, which parties to name as plaintiffs or defendants, etc.);
4. d) failure to seek and/or follow client instructions; and
5. e) failure to warn clients about the applicable limitation period (this becomes a problem if a client ceases to retain a lawyer and then misses a limitation period).

Clients who bring communication-based claims often seek reimbursement of their legal fees in addition to compensation for their other losses. Claims for reimbursement of legal fees are not covered by most professional liability policies.

One of the first steps a lawyer can take towards avoiding communication-based claims is requiring clients to sign a written retainer agreement. Such agreements can help to clearly establish the identity of the client(s), the scope of the retainer, and the identities of the parties who are to be named in any lawsuit. The retainer agreement should specify any unusual or noteworthy limitations to the retainer.

For example, if the clients only want to commence one of two possible lawsuits, the retainer agreement should confirm this. By requiring clients to sign detailed retainer agreements, lawyers reduce the potential for misunderstandings.

Another good risk management practice is to explain the litigation process to clients and to provide the information that clients may need to adequately assess litigation-related risks. For example, lawyers should consider advising clients who are thinking about commencing a lawsuit that:

1. litigation is slow;
2. litigation is expensive;
3. they could lose, no matter how strong the case appears to be at the outset;

4. costs may be awarded against them and these awards can require payment of tens or hundreds of thousands of dollars;
5. once they commence a lawsuit or a motion, they may not be able to abandon it without paying costs to the other side, even if they change their mind quickly;
6. even if they win at trial, the judgment may not be enforceable;
7. any damages that are recovered may be taxable;
8. they have the option at any time to try to settle the case; and
9. if they are going to commence a claim, they must do so before the expiry of the applicable limitation period.

The delivery of this advice should be confirmed in writing. For even greater safety, lawyers should consider providing further warnings prior to taking significant steps, like bringing motions or proceeding to trial.

Although a failure to provide the above-mentioned information and warnings does not constitute negligence in all circumstances, the protection afforded by doing so is worth the time if a claim is avoided. By providing clients with the information that they need to assess litigation-related risks, lawyers not only ensure that they are meeting the applicable standard of care, but they also reduce the likelihood that their clients will be surprised by an adverse outcome.

Clients whose expectations have been adequately managed are less likely to turn on their lawyers (rightly or wrongly) than those who are taken by surprise.

Although this article focuses on steps that can be taken at an early stage, good communication practices should be maintained throughout the course of a retainer. Among other steps, lawyers should document significant communications and instructions (for example, settlement instructions received from the client) on an ongoing basis. While lawyers cannot prevent every malpractice claim, the steps outlined above can reduce the likelihood of a claim and put the lawyer into a better position if a claim is made.