

NOTES FROM THE TRENCHES

Some Observations On The Evolving Law
of Legal Malpractice Claims

by: Joseph F. Cunningham

It is, of course, a truism that Americans demand quick, "simple" solutions to national problems; in the jargon of the media, the "quick fix." It has seemed to me of late that we lawyers in coming to grips with the geometric explosion of litigation directed at attorneys, a phenomenon that gives no sign of abating, are perhaps too quick to accept the variety of strategies we hear and read daily as appropriate to employ in avoidance of anticipated claims by unhappy clients. As example, a number of jurisdiction through local and state Bar Associations, regularly hold seminars on how to take precautionary steps to avoid the all too common malpractice law suit.* Likewise, our Bar journals and bulletins frequently feature articles on claims avoidance. Insurance carriers for attorneys more and more insist on detailed itemization of in-house methodologies to preclude potential litigation aimed at their insureds. Indeed, a cottage industry has arisen of attorneys and consultants whose expertise is advertised as counseling law firms in steps to be taken in limiting exposure to this modern litigation malady threatening all practitioners. At the bottom or essence of all this counselling, advice and well-intentioned guidance is invariably the same premise

*Eg. Virginia Lawyer, Vol. 39, No. 9, 3/91, p.41.

-- better communication with every client will avoid much of the problems now encountered by so many of our brethren.

Now, it is hardly my purpose to denigrate or belittle all these efforts at improvement in case handling and client interaction. But as someone who has represented a significant number of attorneys facing malpractice allegations, I have great reservations as to the efficacy of many of the easy cures we are continually urged to adopt. Particularly does it seem a canard to suggest that improved attorney-client communication will have a pronounced impact on those claims that we see with greater and greater frequency. The reason, I submit, is that in this age of litigation, the unhappy client sues his lawyer more and more as a matter of course. Sound startling? My experience in case after case is that, today more often than not, this is precisely the course frequently followed by those who want to believe they were done wrong by their lawyer.

It is also really very common for a disgruntled client to shop his or her prospective suit to lawyer after lawyer until one is found who agrees that the former attorney breached the applicable standard of care. Some plaintiffs, to my personal knowledge, have spoken to dozens of attorneys searching for the knight errant who will see things their way as to the real or imagined perfidy of their former counsel. Sad to say, there is also too often the successor counsel who with 20/20 vision after-the-fact, suggests steps that predecessor counsel might have taken which could have led to a different result and the client's happiness. The next

move is obvious; and it is to the court room. Again, experience suggests that this unpleasant result occurs in many cases where the attorney has not only well communicated with the ultimately disaffected client but, in some instances, to a degree that would put to shame the efforts of most of us who believe we carefully heed the urging of our betters to "let the client know what's going on."

While my practice reflects dozens of such cases, most are unreported. Some, however, are and they are instructive. Take, for example, Waldman v. Levine, 544 A.2d 683 (D.C. App. 1988). There, a D.C. Court of Appeals panel affirmed a jury verdict against two attorneys who, with the consent of their client in open court and on the record, settled her medical malpractice case. Unfortunately, the settlement figure was well below the expectations of the client, despite frequent warnings to her by the defendant attorneys that her case was of uncertain merit. The day after settlement, approved by not one but two Superior Court Judges, the client hired a new attorney to set aside the settlement; discharged her former counsel (effectively tying their hands as to any action to set aside the now supposedly unsatisfactory settlement); and claimed negligence by the original lawyers in accepting a "low ball" offer. Sound like "sour grapes" and a clearly meritless claim? A trial court agreed but another panel of the appellate court found otherwise, concluding issues of fact as to the attorneys' communications with the client were appropriate for resolution by a jury. Swann v. Waldman, 465 A.2d

844 (D.C. App. 1983). The case then proceeded to trial and a jury having heard testimony as to the defendants' adherence to the applicable standard of care by two of the more highly esteemed practitioners in the District, Ken Mundy and Jeremiah Collins, disregarded such evidence, in intermittent periods of wakefulness, and found for the plaintiff. The Court of Appeals then affirmed in an opinion that remarkably has escaped commentary. Among other unusual rulings, this panel found that: a) the jury permissibly determined it was improper for the defendant attorneys to not contact a certain medical expert in a particular field when they had in fact contacted a number of other medical experts in appropriate, related fields and found but one that supported plaintiff's position;** b) it was likewise improper not to call an economist expert despite the defendant determination that an economist would hurt rather than help the client's case; and c) the failure of successor counsel to seek to set aside the subsequently challenged settlement, as promised to the dismissed attorneys, was of no consequence as the original attorneys' conduct was still the proximate cause of plaintiff's loss.

Right or wrong, this apocalyptic opinion surely deserves more, or at least some, discussion by interested legal professionals, academic or otherwise. Moreover, it suggests the altered playing field in this jurisdiction faced by active practitioners whereby heretofore accepted modes of attorney conduct become negligent by

** Compare, Ornoff v. Kuhn, 549 A.2d 728 (D.C. App. 1988) for the opposite result by a different D.C. Court of Appeal's panel.

judicial fiat. And while Waldman may be the extreme, trial courts here as well as in Maryland and Virginia are not reluctant to permit review of questions relating to an attorney's earlier exercise of discretion in case handling by a trier of fact despite written agreement by the client that he or she was satisfied with the result at the time. Heretofore, these professional judgment decisions as to how best to handle a case had been considered not to be actionable after-the-fact. Merselman, Attorney Malpractice: Law and Procedure, Sec. 2:1, p. 15, ft.nt. 21. Yet the line between discretionary undertakings involving an attorney's application of choices or a tactics, and actionable wrongdoing has become totally blurred - - and wrongly so when the client has once admitted his or her acceptance of the bargain struck.

Many examples of this fuzziness in judicial thinking as to what conduct by an attorney, once approved by a client, should be actionable can be found in the field of family law. A recent case in the Superior Court presented yet another settlement of record that the client subsequently concluded could have benefited her to a greater extent than she and her attorney once believed satisfactory.^{***} The usual round of lawyer-shopping then proceeded until the client found an attorney willing to sue her former counsel. The liability theory, simply put, was that the client's former husband might have been forced to offer more to the wife had it been demanded. A clearly specious theory you say? Not to the

^{***}The case is pending and therefore cannot be cited.

Motions Judge who, without explanation, directed the case proceed to trial. It seems a fair guess that a random sampling of family law practitioners in the Washington metropolitan area would result in a frequent repetition of this scenario, wherein the agreed to resolution of divorce proceedings erupts thereafter in threats of suit by the subsequently dissatisfied ex-spouse, and often litigation.

Even more disquieting is the reluctance of some D.C. trial courts, especially in light of Waldman, to allow the client who has once agreed to terms in settlement of a dispute, whether a domestic matter or otherwise, to then attempt to persuade a jury to let the ex-client do better against her former lawyer. Were attorneys viewed as saints or archbishops, too many of our profession would nonetheless be at risk under this "Monday morning quarterback" application of the law. It should come as no surprise then that lawyers, being a frankly unloved segment of society, face far graver problems under this new legal trend in judging their conduct. Lincoln once advised fellow lawyers wisely:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser--in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man.

In the midst of a former client's lawsuit attacking his judgment, if not professional integrity in settling a case, a defendant attorney might perceive his position in having so acted as being not that of the "good" man but rather the "stupid" man. And the

irony is that in a time when alternate dispute resolution techniques are stressed in this jurisdiction and settlements given high administrative priority, an attorney's risk in so proceeding has accelerated.

Variants on this theme may be found in recent cases in our sister states of Maryland and Virginia. In the former, a trial court last year threw out a claim by a client against not one but two of her former attorneys that alleged they should have not permitted her to sign a settlement document reflecting a very favorable resolution of a personal injury suit resulting in thousands of dollars in her pocket, despite the absence of any disfigurement, and slight, if any, permanency. The reason for the claim? The plaintiff subsequently decided she had a viable law suit against a third-party and ostensibly her release of the original tort-feasors precluded this course. Never mind that Maryland law does not view general releases as having such draconian consequences. Morgan v. Cohen, 209 Md. 304, 523 A.2d 1003 (1987). The Motions Judge had no trouble ordering this case dismissed as a matter of law but a panel of the Court of Special Appeals reversed in an unreported opinion. Walsh v. Foley, No. 145, Sept. Term 1990, 10/19/90. It sent the case back on the basis that the lower court had failed to articulate the reason for its grant of summary judgment. More significant to this inquiry, the appellate court turned a deaf ear to the argument that a client should not be allowed to go behind a settlement, agreed to in writing, simply because the passage of time suggests better

opportunity in targeting former counsel. The appellate court's questionable response to this seemingly sound premise was that an attorney who successfully survives the time, expense and emotional costs of a trial always has the weapon of sanctions to punish the ex-client for bringing frivolous lawsuits. But is this much of a remedy when no reported case in Maryland has ever allowed the recovery of sanctions?

In Virginia, experience and the reported cases present less ominous risks for the practicing attorney in facing clients anxious to improve their position at their former lawyer's expense. But one recent decision in a Northern Virginia trial court does suggest the potential for a fairly heightened level of review of an attorney's conduct. See, Virginia Lawyers Weekly, 5/7/90. There a settlement attorney, representing developers' and at the developers expense, handled the closing on some dozens of condominium purchases. The buyers attending these settlements made no inquiries of the settlement attorney as to his role. They neither undertook to retain his services nor did they make any payment to him for his work. They signed off on all settlement documents he presented to them and he made no representations to them as to the condition of the property. Nonetheless, when it appeared that the condominium units purchased did not include amenities allegedly promised by the developers, included in the forthcoming lawsuit was the settlement attorney. His fault was in supposedly failing to alert these non-client plaintiffs to his clients' potential failures to provide the ostensibly promised

amenities, or to insure that these non-clients had the means of so informing themselves of such project deficiencies through public offering documents. A motions judge concluded that this state of facts presented triable issues precluding dismissal of the claim against the settlement attorney despite the conflict of interest such attorney would face in disclosing to non-clients the potential shortcomings of his developer clients. As no appellate court in Virginia has ever passed on such reasoning, it will be premature to assume it would become controlling law in the Commonwealth. Nonetheless, rulings of this nature that greatly expand the rights of both clients and non-clients to sue an attorney despite apparent satisfactory resolution of civil transactions and disputes, portend a fertile field of professional disharmony and possible mischief in times to come.

It should not be this way. The lawyer is not and cannot be the indemnitor who guarantees a perfect, optimum satisfaction of every disputant's needs. The standard to judge his/her conduct ought not be unrealistically molded by subsequent reevaluation or some other attorney's second guess. In an imperfect world, documents of agreement, particularly those involving court imprimatur, should be the final statement of the parties as to acceptable results. The lure of an attorney's relatively deeper pockets, or those of his professional liability insurer, should be tempered by judicial insistence that a person be held accountable to the terms and conditions in an agreement once found acceptable.

None of this commentary is to suggest that the highest levels of accountability should not be imposed upon attorneys in practice, or that the lawyer who does not know the law; misses a statutory period of limitations; fails to respond to his/her client's wishes; or commits a variety of errors giving rise to client prejudice, should not be made to pay the appropriate penalty. Rather, after some close observation, it is all too clear there is a manifest tendency by a number of courts to globally view any negligence claim against an attorney as always raising a triable issue of fact. The time has come for reassessment, based upon the simple concept of fairness. Settlements once made, unless grossly inadequate, should not give rise to subsequent claims against the involved attorney(s). Written documents, subscribed by the parties, should be given controlling weight as to the intentions and satisfaction of the signatories to the bargain struck. The might-have-beens and maybes that the perfect attorney could possibly have accomplished ought not be the criterion for judging his/her conduct when a motion to dismiss the ex-client's lawsuit is made. Sanctions for bringing the frivolous lawsuit are a poor substitute for judicial even-handedness in dismissing them prior to the expensive and arduous course of a malpractice trial -- where too often the dice may be loaded against an attorney defendant based upon image alone. Rather the solution is to be found in a judicial temperament, molded by common sense, that promptly puts an end to malpractice claims by ex-clients and third-parties when their bases are belied by settlement documents and other evidence

showing prior contentment with professional services rendered. I submit this is the foremost "simple" solution to bringing order out of the chaos of the malpractice litigation explosion.

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