

Do You Know Your Limits?

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According to the most recent ABA/NABRICO national legal malpractice data study, one of every 10 legal malpractice claims is caused by a lawyer's failure to know or properly apply the law. Surprisingly, malpractice claims are usually made against lawyers who have been practicing for at least 10 years. How do experienced lawyers make substantive mistakes? In most cases, they err by venturing too far from their established areas of competency. When that happens, even experienced lawyers miss critical elements of the law. The following examples illustrate the consequences.

The Dabbler. Lawyer Brown has been in practice 10 years. While she concentrates in personal injury and employment law litigation, Brown feels compelled to take the occasional divorce case for economic reasons. And besides, Brown reasons, "Anyone can do a simple divorce."

Lawyer Brown agrees to represent Client in her divorce. Part of the settlement is that Client will obtain title to the marital residence, which the couple has owned for 30 years. Client informs Brown that after the divorce she intends to sell the home, move to Arizona, and start a new life. As soon as the divorce is final, Client sells the home and discovers that she is personally responsible for a whopping capital gains tax generated by the sale. Client sues Brown, who didn't take into consideration the tax consequences of the sale in negotiating the divorce.

The General Practitioner. Lawyer Smith has maintained a general solo practice for 30 years. Smith prides himself on being a "full service firm." In other words, Smith feels competent to handle any legal matter that arises. After all, he has followed this philoso-



***It's important
to learn the limits
of your competency –
and what to do
when you
reach them.***

phy for 30 years and never been sued for legal malpractice...until now.

Lawyer Smith agrees to represent Client in the sale of his asphalt business, Asphalt Co. Client forgets to mention to Smith that several years earlier Client executed an indemnity agreement with Bond Company under which Client is personally liable for any defaults by Asphalt Co. In exchange for the indemnity, Bond Company regularly issues performance bonds for the projects undertaken by Asphalt Co.

Because Lawyer Smith has never represented a construction-related company, he doesn't think to ask Client about indemnity agreements. As a result, nothing in the buy-sell agreement addresses this point. Client, on the other hand, assumes that the sale will extinguish all of his liability with respect to Asphalt Co. After the closing,

Bond Company continues to issue bonds for new projects undertaken by Asphalt Co. Bond Company is not advised of the change in ownership. New Owner defaults on one of the contracts and Bond Company is obligated to pay out \$75,000. Bond Company then pursues Client under the terms of the indemnity agreement. Client in turn sues Lawyer Smith for failing to terminate Client's liability to the Bond Company as part of the terms of the sale.

The "Specialist." Lawyer Jones concentrates her practice in workers' compensation and plaintiff's tort litigation. She is hired by Client to represent him regarding injuries he sustained while operating a punch press at work. In addition to filing a workers' compensation claim, Lawyer Jones files a products liability action against the manufacturer of the punch press. The manufacturer subsequently files for bankruptcy. Rather than engage co-counsel to assist her in the bankruptcy aspects of the case, Jones continues to handle the matter on her own. As a result, Jones fails to make a timely claim in the bankruptcy case on Client's behalf. Client hires a new lawyer and sues Jones for legal malpractice.

The Client Pleaser. Lawyer White's suburban practice is driven primarily by the needs of his clients because he finds it impossible to say no. White has never felt comfortable with tax issues and therefore has shied away from wills and estates. He is approached by a couple whom he represented a few years before in a small personal injury matter. Clients ask Lawyer White to prepare their wills.

White initially tries to decline the engagement but eventually capitulates when the couple insists they simply wouldn't trust any other lawyer in

town. Before agreeing to represent Clients, White asks Clients whether their taxable estate is worth more than \$650,000. "Oh no," state the couple. "Our home is only worth about \$200,000." Clients erroneously believe that their life insurance policies and IRA accounts are exempt from estate taxes and therefore don't mention these assets to White. Based upon their verbal response, Lawyer White never bothers to have Clients fill out a form detailing their assets. White has Clients execute simple wills. After the death of one of the Clients, Lawyer White is sued when it becomes apparent that trust documents could have reduced the estate taxes.

Don't let it happen to you

Each of the lawyers mentioned above was a decent, hard-working, and experienced practitioner. But they failed to appreciate when they were outside their areas of competence. *Remember, if you don't know enough to ask the right question, you will never come up with the right answer.* To avoid a similar fate, consider the following:

1. *Recognize that you cannot be all things to all people.* The law is too com-

plex and changes too quickly today for anyone to assume they can do it all — even after many years. You have to place boundaries on the legal work you will accept. Make a list of the areas of the law you feel competent in and stick to them.

2. *Don't practice outside your competency for friends, relatives, or long-time clients.* In the long run, you serve neither your client nor yourself when you take a matter beyond your knowledge. And don't think that your friends or relatives won't sue you. They will — we have the claims to prove it.

3. *Watch out for the curve ball.* Even "specialists" must recognize when a matter is leading them down an unfamiliar path. At that point, it's time to ask for assistance.

4. When in doubt, *talk the matter over with a colleague who is more proficient in the area.* First, you will need to develop a network with other lawyers. Active participation in a bar organization is an excellent way to network and find out who concentrates in the areas in which you need advice.

5. *Give a little, get a lot.* The best way to build those networks is to be gener-

ous with your time. In my experience, lawyers are more than willing to help a colleague if they know that the courtesy will be returned. And it might just help us all feel a little better about the practice of law.

6. To develop expertise in a new area, *try co-counseling with a more experienced lawyer* until you feel secure enough to handle things on your own. If you do co-counsel, make sure the client approves of the relationship and put the fee-sharing arrangement in writing. CLE seminars can also be valuable (though they are no substitute for working with a seasoned lawyer). Learn which periodicals and resources the "specialists" in a given field find most valuable and subscribe to them.

7. *Stay out of foreign jurisdictions.* It is difficult enough to keep current with the law in your own jurisdiction.

8. *Develop detailed checklists.* All lawyers should have checklists for every legal matter they undertake, whether it's a divorce, a residential real estate closing, a personal injury claim, or the sale of a small business. Checklists not only enumerate tasks, they can highlight important legal issues.