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## Special Issues and Topics

### Attorney Malpractice and Preventative Lawyering: Are Attorneys Safer in Large Firms?

SUSAN KORENVAES ROBIN\*

New York's Rogers & Wells opened a San Diego office "that was basically a zero,"<sup>1</sup> until attorney Norman Nouskajian joined the firm. Nouskajian brought a lucrative client to the firm, financier J. David Dominelli of J. David & Co. Within seventeen months, Rogers & Wells had billed approximately \$700,000.00 to Dominelli and J. David & Co. In early 1984, suddenly the tide turned. J. David & Co. plunged into infamy and scandal, dragging Rogers & Wells with it.

J. David & Co. was caught perpetrating a ponzi-like securities scheme which cost investors an estimated \$112 million dollars.<sup>2</sup> After J. David & Co. filed for bankruptcy, disgruntled investors turned to Rogers & Wells for relief. Over 300 suits were filed against Rogers & Wells claiming that the law firm aided and abetted the fraud by helping J. David & Co. circumvent securities laws. Rogers & Wells settled the bulk of the claims for a record \$40 million dollars, but the firm still faces litigation from unsettled cases, appeals, suits by late claimants, and claims that may yet be filed by J. David & Co.'s trustees in bankruptcy.<sup>3</sup> The loss attributable to the adverse publicity generated by the extensive media attention to the Rogers & Wells fiasco cannot even be estimated. Fortunately for large corporate law firms, malpractice claims of such colossal size are rare occurrences.

A recent ABA study showed that out of the 29,227 malpractice claims reported to insurance companies throughout the country between January 1981 and September 1985, only 32.6% resulted in indemnity payment.<sup>4</sup> This ABA study revealed that, of the total mal-

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\* J.D., 1986, University of Miami School of Law. The author would like to thank her beloved husband Bernard for his patience and support throughout these long years of law school. She would also like to thank her mother, Phyllis Shampanier, Esq., for her reliable advice and impeccable integrity—it is a pleasure to follow in her footsteps.

1. The National Law Journal, July 15, 1985, at 8, col. 2.

2. *Id.* at col. 3.

3. The National Law Journal, April 14, 1986, at 1, col. 1.

4. Telephone interview with Sheree Swetin, National Legal Malpractice Data Center

practice claims reported to insurers between 1981 and 1986, the attorneys sued most often were sole practitioners (34.9%) and attorneys who worked in firms with two to five attorneys (43.6%).<sup>5</sup> In total, firms with less than six lawyers defended nearly 80% of the reported malpractice claims. Law firms with more than thirty lawyers defended the fewest number (only 2.2%) of malpractice claims.<sup>6</sup> Despite their enticingly deep pockets, large law firms appear to be the least likely targets of malpractice claims. This article explores why large law firms have the smallest number of recorded malpractice claims, and in doing so, suggests what smaller firms can do to minimize the inherently greater risks that they may face.

### I. WHY LARGE LAW FIRMS ARE SELDOM SUED FOR MALPRACTICE

Large law firms (defined for convenience as firms with more than thirty attorneys) usually handle complex, sophisticated litigation with the inherent possibility of making costly substantive errors. Yet, although the potential for such suits remains great, and the stakes are high enough to inspire unhappy clients to seek remedial action, large law firms are rarely sued. Statistically, the most logical explanation for this apparent insulation from malpractice claims would be that only a small percentage of lawyers practice in large law firms.

A 1984 Florida Bar survey, however, showed that 10.6% of Florida lawyers worked in firms with more than twenty-five attorneys.<sup>7</sup> A 1985 study by The Nebraska State Bar showed that 9% of Nebraska lawyers worked in firms with more than thirty attorneys.<sup>8</sup> A 1984 Tennessee Bar Association report showed that 6% of Tennessee lawyers worked in firms with more than thirty attorneys.<sup>9</sup> The three studies, although informal in nature and therefore of limited reliability, indicate that the low number of claims filed against lawyers in large firms is disproportionate to the number of lawyers that work in such firms. The explanation must lie elsewhere.

Duke Nordlinger Stern, an attorney who serves as Professional Liability Risk Manager for ten state bar associations and is a member of the ABA Standing Committee on Lawyers' Professional Liability, confirmed that large firms are sued for malpractice less often than

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(May 1986) (The ABA Standing Committee on Lawyers' Professional Liability formed the National Legal Malpractice Data Center as part of a national malpractice study.).

5. *Id.*

6. *Id.*

7. FLORIDA BAR ASSOCIATION, MEMBERSHIP ATTITUDE SURVEY (1984).

8. 1985 *Membership Survey*, NSBA News, January 1986, at 4.

9. TENNESSEE BAR ASSOCIATION, MEMBERSHIP ATTITUDE SURVEY (1984).

smaller firms. He attributes the disparity to the greater number of clients handled by small firms: "Given the greater number of cases for a small law firm and the type of areas in which they practice, you have a greater probability of something going wrong for more clients. In the case of a large law firm, fewer matters means fewer clients and given the size of them—you don't tend to find much opportunity for things to go wrong."

Julian R. Benjamin of Therrel, Baisden & Meyer, Weiss, who serves as Adjunct Professor of Law at the University of Miami School of Law, suggests two other possible explanations for the disparity. He says, "I think the larger firms are probably better equipped to be more careful 1) because of the fact that they have the personnel to have checks and balances, and 2) they [potential malpractice claims] do not become claims because the bigger firms are responsible enough to recognize the problems and solve them."

Law firms have instituted a large variety of checks and balances including: calendaring systems which provide for monitoring by one or two other persons, time recording systems which reflect who the attorney spoke with and how much time the attorney spent doing what tasks, making sure all documents and opinion letters are reviewed by at least one other attorney before leaving the office, confirming all oral conversations with clients in writing, double teaming, keeping double checklists on statute of limitation expiration dates, and sending copies to the client of all written work.

A small firm may not have sufficient resources to hire an office manager to institute and enforce these preventative systems. In addition, the informality of many small firms may not be conducive to cumbersome time and record keeping procedures. Double teaming and review of opinion letters may be impractical in small firms where only one lawyer is competent to handle a particular case, and impossible for the sole practitioner.

At least one expert rejects the proposition that large law firms are sued less often because they are better organized and have greater support systems. Duke Stern comments: "I am dismayed at the number of large law firms that I go into that have ineffective and antiquated time control systems. The conflicts-alert systems, if there, are not used. . . . The review of opinion letters may be after the fact, but rarely up front where it ought to be." He suggests yet another explanation for the phenomenon: "[C]lients who have more than one legal matter tend to have a more mellowed attitude towards the legal system. To clients who have only one legal matter, which may be the only legal matter in their lifetime, its the most important thing and

they expect, perhaps, impossible things.” The fact that unsophisticated clients “expect impossible things” contributes to the risk of operating a small law firm and may lead to a larger number of suits filed against small firms.

Another explanation for why large firms are sued less often is that large firms, even though they may make as many mistakes as small firms, successfully settle most of the problems before they escalate into lawsuits. The financial resources of a firm may affect the firm’s ability to settle problems before they become claims. A large firm with ample financial resources and a well known reputation for litigation will be in a better negotiating position than a small firm or sole practitioner with limited financial resources. The average deductible under malpractice policies held by large firms is approximately \$50,000.00. That leaves a lot of room for settlement. There is also plenty of incentive to settle. With insurance premiums reaching astronomical levels, cancellations increasing in frequency, and the availability of insurance diminishing, firms with financial clout and a concern for future insurability will make every effort to settle for less than their policy deductibles in order to prevent the filing of formal claims, thereby avoiding premium increases or cancellation. Moreover, a large firm with a reputation for servicing impressive institutional clients will do whatever is necessary to settle the matter before the financial community disseminates such damaging news.

If large firms handle extremely large matters, however, then there may be problems that they cannot resolve for less than their deductible amount. Most small firms will also have enough sense to attempt to settle malpractice problems before they turn into claims. If most cases mishandled by small firms result in relatively small losses to their clients, then small firms should be able to settle as many malpractice problems as do large firms. The settlements should cancel each other out—leaving the statistical disparity insufficiently explained.

## II. CLIENT PROFILES—ARE SMALL FIRM CLIENTS MORE LIKELY TO SUE?

The reason why large law firms are sued less often may also be attributable to the type of clients they serve. In general, large law firms attract sophisticated institutional clients, whereas small law firms attract relatively unsophisticated individual clients. The proliferation of malpractice suits is a manifestation of America’s overwhelming obsession with litigation. Unfortunately for sole practitioners and attorneys in small firms, individual clients are more

susceptible to litigiousness than are institutional clients. Most individuals have an expectation that for every harm suffered, someone else should pay. Victor Levit of San Francisco, an attorney who specializes in lawyer malpractice insurance defense and in educating attorneys on how to prevent malpractice claims, says that the recent rise in malpractice claims "is just a continuation of the consumerism that exists in this country where people believe that the way to solve problems is by filing suit." William Gates of Seattle, member of the ABA Standing Committee on Lawyers' Professional Liability, explains that this "claims-consciousness," started in familiar areas such as automobile and sidewalk accidents, and then spread. He observes, "there is a tremendous acceleration or momentum that gets into a movement of this kind because once somebody sees, for example, a successful products case, and another successful products case, then all of a sudden, one hundred percent of people who are hurt and lawyers who counsel people who are hurt think in terms of the possibility of turning damages from a product into a recovery of some kind."

Certain misapprehensions have also induced clients to turn against their lawyers. First, the pervasiveness of insurance has led clients to mistakenly believe that lawyers do not pay when they lose malpractice suits. They think that because the attorney's insurance pays the claim, the attorney will be unscathed both financially and in reputation.

Second, million dollar judgments, although rare, are always tantalizing because they are so well publicized. Third, television programs like *Night Court* and movies like *The Verdict* and *Justice For All* make the public aware that lawyers too are prone to error. The media has educated the public to some degree on areas of substantive law, making it easier for clients to believe that they can recognize their lawyers' mistakes. The high divorce rate has also made a contribution to claims-consciousness by giving people first hand experience with the court system.

Large corporations engage in too many legal matters to expect to win every case or to expect their attorneys to execute every legal matter to perfection. They operate on a business risk basis. As long as the losses do not substantially affect profits, most corporations will roll with the punches rather than incur the cost of suing. Individuals, on the other hand, may need legal assistance only twice in their lifetimes: to obtain a divorce and to write a will. When they hire an attorney, they expect the attorney's undivided attention and a flawless performance.

Large law firms may simultaneously handle hundreds of matters for their institutional clients. Matters can linger for years. If institutional clients sued their law firms every time one of their officers thought an attorney made a mistake on a matter, they could be changing firms daily. Sophisticated clients, at some point, must discover that the practice of law is not a science nor a perfect art form. When one out of one hundred and fifty matters is handled improperly, it makes economic sense from both the client's and the firm's perspective to settle the case quietly without undue cost and embarrassment. The firm benefits by appeasing the lucrative client and the client benefits by avoiding the cost of suing its former attorneys and having to start over with a new firm.

### III. STAYING ON THE SAME SIDE OF THE "V" AS YOUR CLIENT

Lawsuit hysteria will not dwindle until we refine the public attitude which is its cause. Until then, lawyers must learn to live with the risk of and vulnerability to malpractice. Statistics indicate that an attorney can limit exposure to malpractice claims by working for a large firm. This is not, however, a realistic or desirable alternative for most attorneys. Most large law firms recruit only students in the top ten percent of their class and laterals with outstanding qualifications or connections. For ninety percent of recent graduates and most experienced attorneys, working in a large law firm is not a viable alternative. There is, however, something that all lawyers can do. Lawyers can take their cue from doctors by starting to practice preventative lawyering. Victor Levit, malpractice defense attorney and educator, has compiled a list of preventative steps that all lawyers should take to reduce the risks of being sued for malpractice.<sup>10</sup>

Some lawyers, especially those who have been practicing a long time, may resist this trend toward preventative practice, preferring

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10. Victor Levit composed the following 17-point checklist for preventing legal malpractice:

1. Do not promise or predict any specific outcome or dollar recovery.
2. Before performing any services explain to your client the amount of fees or basis for computing them. Any fee contract between attorney and client arranged after representation has begun may be challenged by the client.
3. Maintain detailed and complete time records for all services rendered, including hours and descriptions of services. When appropriate, bill your client periodically and explain the basis for your charges.
4. Do not ignore your client. Inform the client by periodic status reports. If there are long periods of delay, explain the reason for inactivity. Send copies of pleadings and self-explanatory letters and return telephone calls.
5. Keep your client advised of any serious problems that have developed. Do not minimize risks that may be involved in the legal proceedings. Where there are alternative strategies or options that involve risks, inform your client to

instead to continue to conduct business on the strength of a handshake or the word of a fellow attorney. This attitude, noble though it is, cannot peacefully coexist with the modern law practice. Preventative attorneys will insist that every agreement be confirmed in writing. This attitude will irritate the traditional attorney, who may think that the transcription is unnecessary and merely a way to extract more fees from an unwary client. At times, the traditionalist may be right. The fear of being sued has so deeply affected some modern attorneys that they have entirely obliterated trust from their practice. In the preventative search for every potential loss, no matter how remote, even a promising business deal can collapse. It is particularly frustrating when the preventionist claims to be acting solely to protect his or her client. Sensible lawyers will practice preventative lawyering—not, however, to the extent that it places an undue financial burden on clients and insults the integrity of other lawyers.

#### IV. CONCLUSION

Statistics reveal that former clients are less likely to sue attorneys in large law firms as compared with attorneys who practice in small

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give you recommendations and let the client choose which of the strategies should be allowed.

6. Take no material action that may prejudice your client without express consent. Do not settle the case. Do not agree to judgment and do not release or dismiss the party without your client's consent in any of these situations.

7. Avoid representing parties with conflicting interests, including both parties to a divorce. Disclose any prior representation that may appear to affect the quality or extent of representation. Disclose any personal or adverse interest you may have in the matter being represented.

8. Preserve the client's confidence.

9. Develop a system that will require compliance with all deadlines, statutory limitations, law and motion matters, trial setting dates, and other dates that must be remembered.

10. Confirm all oral instructions or important conversations with your client by letter.

11. Do not talk down to your client. Your general attitude and rapport with your client are vital.

12. Do not overstate the strength of your case.

13. Do not associate other counsel or refer to a specialist without your client's consent.

14. Do not undertake representation in matters beyond your experience or ability without securing assistance or associating other counsel.

15. Do not criticize your client's former lawyer without being fully apprised of all material facts.

16. Do not reveal that you carry malpractice insurance. Retain all your policies, primary and excess, especially those written on an occurrence basis.

17. Do not attempt to defend your own malpractice claims.

firms. One can posit many explanations for this phenomenon. Large law firms, by attracting big money clients and complex cases, usually have fewer clients and cases per lawyer. Their clients tend to be more sophisticated, knowledgeable, and willing to pay the additional costs involved in extensive research and thorough preparation for all matters. This aspect of client sophistication may give rise to fewer malpractice claims. Additionally, sophisticated clients seem less likely than those who are new to legal problems to expect attorneys to perform miraculous feats with absolute perfection. Small law firms and sole practitioners may represent a greater volume and variety of individuals with limited or no funds. Moreover, these firms typically receive cases which cannot produce sufficient results to justify the large fee which would be necessary to support extensive research or preventative lawyering. These factors and untold others may explain why attorneys are safer practicing in large firms—but they do not explain why malpractice suits have become such a menace to the legal practice or what should be done about the problem.

A budding consumerism is the force behind the present litigiousness of the American people. Until “Sue!” is no longer a popular cry in our communities, the number of malpractice claims will continue to rise. Meanwhile, attorneys must take affirmative steps to minimize their malpractice risks. Although prevention is burdensome, preventative lawyering may even improve professional skills. William Gates observes, “Lawyers are . . . being more careful today than they were before [which] is a good thing. . . . [B]ecause of the frequency of malpractice claims, the level of practice has . . . improved some.”

The legal profession must learn to adapt to the growing number of malpractice claims. Over-prevention can be harmful to clients and infuriating to other professionals; under-prevention is unnecessarily risky. Somewhere between blind suspicion and blind faith lies a balance for which it would be worthy to strive.