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Quandaries and Quagmires: The standard of care vs. risk management

By: Charles Lundberg March 12, 2019

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A recent opportunity to testify as an expert witness in a big legal malpractice trial inspired this question: "How is the standard of care for legal malpractice related to or affected by risk management and claim avoidance strategies that lawyers / law firms can and should adopt?"

The standard of care

Focus first on precisely what the malpractice jury is asked to decide:

Ultimately the jury will answer "yes" or "no" to this special verdict question: "Was the lawyer negligent?" The jury will be told, through instructions and expert testimony, that this question means, "Did the lawyer breach or fall short of the applicable standard of care?"

The typical pattern jury instruction for a legal malpractice case defines the lawyer's standard of care in terms of what other lawyers in the community would do. See MN CIV JIG 80.55: DUTY OF ATTORNEY —

Standards of professional practice for an attorney: "An attorney must use the same degree of skill and learning that a practitioner would use who is in good standing, in a similar practice and in similar circumstances."

Note that this is not a particularly exacting standard; it certainly does not require perfect A + work by the lawyer. Rather, the lawyer must do average, competent work — perhaps a C or C + grade level.[1]

Note also that the instruction says exactly nothing about how the standard of care applies to the specific type of legal matter before the jury (a real estate deal, a sale of corporate assets, personal injury litigation, etc.) That subject is reserved exclusively for expert witness testimony. More on that later.

'Risk management/claim avoidance strategies'

Now, distinguish the legal standard of care from the related subject of risk management and claim avoidance strategies. When I first started practicing law in the early 1980s, I began noticing articles and CLE programs about "how to avoid being sued for malpractice," "Top 10 ways to limit your exposure to malpractice claims," etc. Eventually, I started writing and speaking on this topic myself. Now, it's become my primary professional focus.

Over half of the 20 or so columns I've written in this space over the past three-plus years have addressed this precise topic — advice to law firms about risk management and how to minimize malpractice exposure. And virtually all the CLE programs I've presented or attended over the past two decades have focused on this topic.

So, here is the critical question: To what extent — if at all — do such risk management principles or strategies inform or become part of the malpractice standard of care?

This question was squarely presented in two different ways in my recent trial experience as a legal malpractice expert witness.

First example: Consider this principle, phrased in the form of risk management advice to a law firm.

"Because of the risks inherent in joint representation, the firm's new business committee should carefully consider whether to approve any proposed joint representation, even where the conflict rules would expressly allow it."

Today, in 2019, it's becoming increasingly clear that this is a very sensible approach for law firms to consider. I identified this principle two years ago as a then "breaking new risk management development."[2]

> **Joint representation conflicts**
> When a lawyer represents multiple clients in a single matter, it can raise some serious and difficult problems of conflict of interest, confidentiality, and other professional responsibility issues. When is consent ever sufficiently "informed" in this context? And what happens when things fall apart down the road—do you necessarily have to withdraw from representing both clients? The Comments to Rule 1.7 go on at length about the especially problematic aspects of "common representation." Some experts are now counseling firms that, simply as a matter of risk management, certain joint representations should not be entertained at all (even where the rules would allow it). Conflicts are now the single leading cause of legal malpractice claims, per some recent insurer surveys, and claims arising out of joint representations are often the most dangerous and hardest to defend.

A couple of months later, a blue-ribbon panel of the leading conflicts experts in the country did a deep dive into the serious risks posed by joint representations, and recommended essentially the same course, as a matter of risk management. [3] The panel said sometimes lawyers should not take a joint representation even if technically they could. "Even if there is a robust joint representation letter, the representation exposes the lawyer to the hindsight argument that a reasonable lawyer should have known he could not represent these two clients equally," reported the ABA on the panel's conclusion.

In my recent legal malpractice trial, the Plaintiff's expert witness suggested that this principle — "Don't undertake joint representations, even where the rules would allow it" — was part of the legal standard of care. I disagreed, testifying that this was instead a risk management technique that some law firms – primarily large law firms – had recently adopted. I suggested that this was in fact an example of doing more than the standard of care (or the ethics rules) required, as a strategy to avoid future claims.

Second example: I was cross-examined at the trial by Plaintiff's counsel from a risk management article I had written for Minnesota Lawyer fifteen years ago, "Minimizing ethics and malpractice problems," [4] where I had stressed the importance of memorializing significant communications with the client in writing:

> Information about the client's matter should be communicated frequently and regularly. And it should almost always be in writing.
>
> Whenever you have oral communications with the client, dictate a short memorandum or confirming letter. Make this a habit of your daily routine. Put everything in writing.

This related to a significant issue in the case — certain alleged oral communications had not been confirmed in writing. On cross, counsel wanted me to acknowledge that my 2004 comments were part of the legal standard of care. I disagreed, testifying that, here again, this recommendation was not part of the standard of care at all, but rather a risk management technique — more than the standard of care required — that lawyers were well-advised to follow simply as a CYA matter, to protect themselves from potential claims.

So, who knows what the jury made of all this in our malpractice trial? But one might wonder whether, after enough time has elapsed, risk management principles like this might eventually be adopted by enough lawyers in a particular practice area as to become part of the legal standard of care.

For example, in estate planning, for at least a decade (and probably much longer), it has been basic risk management advice that when you represent a husband and wife, you should advise both clients of the limits of confidentiality in such a joint relationship (i.e., there is no confidentiality inter se). And you should do it in writing, at the outset of the representation, in the engagement agreement.

So, would a failure to so advise one of the clients be deemed a breach of the standard of care now observed by competent estate planning lawyers in this community? I wouldn't bet against it.

And there any number of other risk management strategies that, over time, might well be considered to have become part of the standard of care in given area of practice.

To get there, the malpractice plaintiff would have to provide affirmative testimony, by a qualified expert in that practice area, to the effect that this principle had been so broadly adopted by other lawyers who practice in that area (even C+ or B- lawyers) that it had become part of the standard of care observed by attorneys in good standing under similar circumstances.

There are obviously many questions that such testimony would evoke on cross-examination: When did that risk management principle become part of the standard of care? Was it before the 2010 transaction involved in this case? And how do you even know that – did you take a survey?

In the end, however, one wants to say, intuitively, that maybe a gradual rise, over time, in the standard of care observed by attorneys makes sense. That would arguably be a good thing, not only for clients, but for the health of the profession as well.

Footnotes

1. The "in good standing" requirement, for example, isn't a very high bar — that's actually a term of art that means "not currently under suspension or disbarment".

2. *See* Lundberg, *Why Your Firm Needs an Ethics Partner. Now.*, Bench & Bar of Minnesota (Dec. 2016) http://lundberglegalethics.com/wp-content/uploads/2019/04/1216-ethics-partner.pdf

3. *See The Increasing Danger of Conflicts of Interest*, 33 Law. Man. Prof. Conduct 246 (2017) http://lundberglegalethics.com/wp-content/uploads/2017/05/ABA-BNA-Report-of-April-21-2017-LPL-Conflicts-program.pdf

4. Lundberg, *Minimizing ethics and malpractice problems*, *Minn. Lawyer*, (July 26, 2004) http://lundberglegalethics.com/wp-content/uploads/2017/11/minimizing-ethics-and-malpractice-problems.pdf

Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now teaches at the University of Minnesota Law School and consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics (www.lundberglegalethics.com).