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## CivilLITIGATION

# Attorney's duty to plan extends further than you think

In a recent tragic and somewhat unlucky case, attorneys are reminded of the significant responsibility we accept when we are retained by clients. The case is a great reminder to make clear in the written retainer agreement the exact scope of the representation, and then to have a system in place, with checks and balances, to prepare for upcoming duties and deadlines in case unexpected and disruptive issues arise.

The first case was a proposed wrongful death action, which in New York has a two-year statute of limitations to file the complaint. The family first retained an attorney, Mr. A., to bring the action. Unfortunately, it appears from the record that Mr. A. did little or nothing during his time as lead counsel on the matter. (It is remarkable how often attorney malpractice and misconduct cases involve an initial attorney in difficulty, which then ensnares the subsequent attorney as well. Extra care must be taken when taking over a file from another attorney.)

After 18 months, the family of the deceased hired a second attorney, Mr. B., to take over the case, and the retainer agreement limited Mr. A. to a communication role only. The record does not describe Mr. A.'s communication role, but does note that Mr. A. was convicted of immigration and visa fraud just after Mr. B. was retained, and then was sentenced to prison shortly before the statute of limitations ran, suggesting that Mr. A. was of little assistance.

For his part, once he was retained, Mr. B. did implore the Surrogate's Court to issue letters of limited administration by noting that the statute of limitations was expiring soon and that Mr. A. had done nothing on the file. Those limited letters of administration then were issued with about a month to go before the statute of limitations would expire. Sadly though, Mr. B. was ill with cancer and died a few weeks later without getting the complaint filed and, therefore, the statute of limitations did run out 11 days later.

After the family sued Mr. A. and the estate of Mr. B, Mr. B.'s estate quite logically presented Mr. B.'s death certificate to the court and argued that there should be no finding of malpractice

as Mr. B. died before the statute of limitations ran out. Both the New York State Supreme Court and the Appellate Division disagreed, however, finding that sufficient evidence existed to present a material issue of genuine fact of whether Mr. B.'s cancer was such that sudden death was a foreseeable risk for which he should have prepared to protect the client's interests.

Specifically, the courts noted that Mr. B. was associated with three other attorneys who could have made sure the complaint was filed on time before or after Mr. B.'s death. The courts also held that because so little time remained between Mr. B.'s death and the running of the statute of limitations, it was not feasible for the family to engage subsequent counsel in order to get the complaint filed on time. Finally, it was significant to the courts that the client had not been notified of the statute of limitations expiration before it ran.

Attorneys are also at risk of malpractice liability based on the scope of their representation, even where the task at issue might not be considered by the attorney to be legal work. For example, an attorney drafting a contract for a client may be asked at a later date for a numerical calculation related to the

same agreement. In that instance, the retainer agreement between counsel and client is crucial to establishing the scope of the attorney's duties.

Certainly the attorney should take great care at any time to be accurate in any advice or calculation provided to a client, but if for some reason the attorney believes a communication to a client is not part of the attorney-client relationship, such provision must be included in the signed retainer agreement.

As always, it is the proactive planning and well-reasoned procedures of an attorney's practice that give him or her the best chance of avoiding misunderstanding and malpractice.

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