Supplement to the Los Angeles and San Francisco
Daily Journal
MARCH 6, 2024

TOP Professional Responsibility LAWYERS·2024

HOW LAWYERS CAN PROTECT THEMSELVES FROM CLAIMS ARISING OUT OF THEIR CLIENTS' KNOWING DECISIONS

By Kevin S. Rosen and Matthew S. Kahn

Lawyers and law firms rightly defend themselves against such claims. Courts "deny recovery where ... the client already knew the problems with the deal, or where the client's own misconduct or misjudgment caused the problems." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 ["Courts are properly cautious about making attorneys guarantors of their clients' faulty business judgment," quotations and citation omitted].) However, the relevant client decisions often happened several years or more in the past—and in many cases, no one memorialized the decisions or why and how they were made. The transaction or litigation swept on without a contemporaneous record of what, in hindsight, turned out to be a critical moment. As a result, these cases can turn into expensive, drawn-out finger-pointing contests between client and lawyer that can't be resolved short of a trial or arbitration hearing.

In many of these cases, the lawyers recall clearly that their clients, not them, made the decisions at the center of the case. But for several reasons, the lawyers didn't contemporaneously memorialize those decisions. Sometimes, they didn't feel they had time in the heat of the moment. Other times, they didn't want to bill their client for unnecessarily summarizing a meeting or phone call in writing. Or, most often, the lawyers feared upsetting their clients with "CYA" memos or emails.

This outcome is avoidable. In our experience defending against these kinds of claims, we have found that lawyers can effectively memorialize key client decisions and discussions without risking client ire and in doing so help protect against later claims. For example, we have successfully defended several cases in which client decisions were evidenced by contemporaneous handwritten notes of meetings, which the lawyers kept after the representation ended. In other cases we have won, the lawyers wrote internal law firm emails or memos "to file" memorializing key decisions and who made them, without billing their clients for the time—but still protected themselves and their firms down the road. Other instances

include recording detailed time entries reflecting important discussions, as well as simple emails with clients not couched in obvious CYA-type terms.

The value of such contemporaneous evidence in defending against legal malpractice and breach of fiduciary duty claims cannot be overstated. A lawyer's testimony, standing alone, is often attacked as an after-the-fact fabrication to save his or her skin. Contemporaneous memorializations refute such assertions and corroborate the lawyer's testimony. These documents also can refresh faded recollections and can undermine contrary testimony by former-client witnesses.

It can seem obvious in hindsight that lawyers should take these and other steps. In fact, it can seem so obvious that the absence of such memorializations can be used against lawyers. If the client really made that decision, a reasonable factfinder may ask, why wasn't that fact reflected anywhere at the time? Or, the absence of contemporaneous documentation or work product can adversely affect certain defenses beyond proof, such as the judgmental immunity doctrine. But in our fast-paced lives and practices, lawyers can either forget to make time for this important step, or else simply avoid it out of concern for upsetting clients, the lifeblood of a law practice.

As Benjamin Franklin famously advised fire-threatened Philadelphians in 1736, an ounce of prevention is worth a pound of cure. Lawyers should be mindful of the benefits these simple steps—taking and maintaining notes, sending emails and memos to file, simple emails to the client, and related options—can have in defending against future claims. We have assisted many law firm offices of general counsel in incorporating these concepts in risk management trainings and would encourage all firms to do the same.

Kevin S. Rosen *and* **Matthew S. Kahn** *are both partners at Gibson, Dunn & Crutcher LLP.*