

The Hazard: Practicing Outside Your Area

BY BYRON S. HOLLINS

Even in the face of economic imperatives to the contrary, the ever-growing complexity of the law continues to push lawyers to confine their practices to specialized areas. But the practitioner who ventures outside his or her customary field of expertise is treading on thin malpractice ice.

To be sure, specialist certification has not taken hold within the legal profession to the extent that it has with doctors. Most states have systems formally recognizing specialists. But the duty to refer cases to lawyers with greater expertise predates official certification of specialists, and it is incorporated in professional conduct codes.

"A lawyer shall provide competent representation to a client," states Rule 1.1 (Competence) of the ABA Model Rules of Professional Conduct, which serve as the basis for most binding state rules for lawyers. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Nevertheless, professional conduct rules generally offer no blanket prohibition against lawyers taking matters outside their normal field of competence.

Under Rule 3-110(c) (Failing to Act Competently) of the State Bar of California Rules, for instance, "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating

with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required."

But pursuing that course carries nearly as many risks for a lawyer as barging headlong into a new field without preparation. Remember the adage that a little knowledge is a dangerous thing:

The legal malpractice area is replete with cases involving lawyers who incurred liability by taking on matters outside their customary areas of expertise.

Among the cases that established the general rule is *Horne v. Peckham*, 97 Cal. App. 3d 404 (1979), in which a lawyer who admitted to having no expertise in tax matters was sued for improperly preparing a Clifford Trust.

The California Court of Appeal approved a jury instruction that a general practitioner who is consulted concerning a matter in a specialized area has a duty to refer clients to a specialist or, alternatively, to seek assistance of a specialist. Failure to do either resulted in the lawyer being held to the higher standard of care applied to specialists.

Lawyers can take steps to minimize the risk of malpractice claims stemming from their forays into unfamiliar practice areas:

- Do not take on cases outside your customary area of expertise.
- Refer all cases in a recognized specialty to a recognized specialist.
- If a client refuses to allow



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you to hire a recognized specialist, substitute out of the case, if in litigation, or withdraw from representation.

- If you are unable to withdraw from representation, hire a recognized specialist out of your own pocket.

- If you cannot afford to hire a specialist, immediately immerse yourself in that area and prepare to be held to the expert's standard no matter how much—or little—homework you have done.

Most law firms have five or fewer attorneys and often find themselves constrained economically from rejecting business that is not clearly outside their fields of practice or education.

After all, didn't at least one firm member take a course in family law in school, and weren't criminal law and procedure part of the core curriculum? Such reasoning, amid the press of finances, creates traps for the unwary.

Recognition of your own professional limitations is an important self-assessment tool.

As Benjamin Disraeli stated: "To be conscious that you are ignorant is a great step to knowledge."

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