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## Law Practice, Podcasts and the Court of Public Opinion

With the wide proliferation of podcasts, allegations of legal malpractice have overlapped with mainstream entertainment. Transcending the traditional role of providing competent legal representation, some attorneys are now judged in public forum discussions, which may include the dissemination and discussion of confidential client files. In hindsight, the court of public opinion examines and determines what should have happened over the course of a client representation. As a result, the attorney may be persecuted in the court of public opinion, unable to explain or defend actions and decisions.

In this publication, we will discuss legal malpractice allegations asserted in a criminal matter that was revealed to the world by such podcasts as *Serial*<sup>1</sup> and *Undisclosed*<sup>2</sup>. The case involved the murder of high school student, Hae Min Lee. Her ex-boyfriend, Adnan Syed, was charged and convicted of her murder. This article will not address allegations of police and prosecutorial misconduct or witness tampering.

Numerous remarks and criticisms ensued pertaining to how defense counsel conducted themselves or decisions that were made over the course of the criminal defense representation. Often overlooked, however, was the client's confidence in his trial attorney's abilities, as well as the attention and support provided as they prepared for trial.<sup>3</sup> Following his conviction and upon becoming aware of deficiencies in his representation, however, his perspective changed. Obviously, it is impossible to accurately predict what will occur in a trial or over the course of a representation. In this article, we are simply looking at some of the asserted errors and attempting to learn from them.

### Allegations of Error

#### Clerical Error on Charging Documents and Missing Documents

One of the first allegations of error in this criminal matter was asserted against initial counsel for the criminal defendant. The charging documents before the judge at the bail hearing, which were not prepared by defense counsel, listed the defendant's age as 18, rather than the correct age of 17. In retrospect, this has been identified by some as a critical error because a minor charged in a capital case should have been eligible for bail. Had the defendant been released on bail and able to work with his attorneys, would things have gone differently?

Additional concerns related to documents were the cell phone records of the defendant that were provided by the prosecution to defense counsel only days before the first trial. During the course of the trial, the prosecution based its case, in part, on these records by trying to identify the location of the defendant using incoming call data. Years after the conviction, it was discovered that a fax coversheet accompanying the records indicated that those incoming calls were not reliable with respect to revealing a location. Therefore, the prosecution's use of these records was based upon inaccurate information. Notwithstanding allegations that the cell phone records were corrupted, decades later whether this error represented an oversight by defense counsel or an intentional act of the prosecution remains unknown.

<sup>1</sup> <https://serialpodcast.org/>

<sup>2</sup> <https://undisclosed-podcast.com/>

<sup>3</sup> Chaudry, Rabia. *Adnan's Story: The Search for Trust and Justice After Serial*. First edition. New York, NY, St. Martin's Press, 2016.

As this case demonstrates, the importance of paperwork in a client representation cannot be minimized. All attorneys and support staff should be conversant with the most critical details in a client representation.<sup>4</sup> At a minimum, details should be compiled for such elements as: the correct age of a defendant in a criminal matter; the correct legal description of the property in a real estate transaction; all relevant financial information in divorce proceedings; medical records that establish the injury in a personal injury matter. Irrespective of the area of practice, all those who work on the matter must understand relevant critical information, as well as how it should be verified and documented over the course of the client representation.

Attorneys should not assume that support staff know and appreciate what is most important in the client representation – especially when attorneys are pursuing a new area of practice. All involved should be educated and allowed to ask questions and seek clarification to avoid oversights and errors that may be detrimental to the client.

Risk Control Resource: [\*Are You Ready to Commit? Client Intake and Proper Client Selection\*](#)

#### **Failure to Investigate Alibi and Interview Alibi Witnesses**

All client representations require some form of investigation. Attorneys must confirm that the information being provided by a client is correct and complete.<sup>5</sup> In a criminal matter, one of the most important investigations is the verification of an alibi and interviewing an alibi witness. In this case, allegations abound that defense counsel failed to properly investigate whether or not the defendant was with another student at the time the crime was allegedly committed. When asked by her client about the alibi witness, the attorney allegedly told her client that the alibi witness had been mistaken about the date of the encounter and was not helpful to the defense.<sup>6</sup> Years later, that same alibi witness testified that she had never been contacted by a member of the defense team regarding her interaction with the defendant on the day of the crime.<sup>7</sup> Part of that investigation also would have included whether or not the library where the defendant and alibi witness met had cameras that would have recorded their interaction.

Client files must document all tactical discussions, decisions, and investigations. While impossible to document everything in a client representation, critical decisions must be memorialized. In this criminal matter, the client file should have revealed what steps were taken to investigate whether the defendant was with the alibi witness at the time in question, and whether or not the library had cameras, sign in logs and other alibi witnesses. Decades following the trial during post-conviction proceedings, the actions of defense counsel as they related to the alibi witness investigation, or lack thereof, remained the focus, as counsel and the court questioned whether the decisions were tactical or constituted malpractice.

Nevertheless, all those working on a client matter must understand what is tactical and must document accordingly. For real estate transactions – offers, acceptance and counteroffers must be documented. For a personal injury matter – offer of settlement must be conveyed to the client and the client's decision to accept, reject or counteroffer must be memorialized. Attorneys should assess what is critical information within their practice and confirm that nonlawyer staff are aware of the importance.

Regardless of the area of practice, when a client is dissatisfied with the outcome of a representation, they will look with a critical eye at the moments when tactical decisions were made. The attorney will need to rely on their client file to show that clients were educated on the options, and decisions were made with their knowing consent.<sup>8</sup>

Risk Control Resource: [\*CNA Allied Vendor Program\*](#)

#### **Failure to Supervise Nonlawyer Support Staff**

In the podcast, it was reported that, in some instances, the client met with members of law firm support staff rather than his attorney. Discussions about alibi witnesses and security footage also were discussed and apparently not investigated. Legal support staff meeting with a client must convey all intended communications to the attorney. In this matter, the client discussed contact by the alibi witness and asked that she be contacted.

Support staff are a critical component of any law practice. Depending upon the size of the firm, some non-lawyers may be taking on responsibilities that are better suited for an attorney. When delegating assignments, the supervising attorney should determine the appropriate individual to complete a task related to a client representation.<sup>9</sup>

4 American Bar Association ("ABA") Model Rules of Professional Conduct 1.1: Competence and 5.3: Responsibilities Regarding Nonlawyer Assistance

5 ABA Model Rule of Professional Conduct 1.3: Diligence

6 Chaudry, Rabia. *Adnan's Story: The Search for Trust and Justice After Serial*. First edition. New York, NY, St. Martin's Press, 2016.

7 *Id.* at 178

8 ABA Model Rule of Professional Conduct 1.4: Communications

9 ABA Model Rule of Professional Conduct 5.3: Responsibilities Regarding Nonlawyer Assistance

In the event of a legal malpractice claim, the attorney will seek to establish that there was appropriate supervision of non-lawyer support staff and legal services were rendered by the attorney. When encountering a legal malpractice claim, the law firm's protocols will be relevant. Were assignments given to non-lawyer staff appropriate? Were they properly supervised? Did non-lawyer staff engage in the unauthorized practice of law? Ultimately, supervising attorneys are responsible for ensuring that legal assistants and legal assistance comply with the rules of professional conduct.

Risk Control Resource: [\*Law Firm Support Staff: Recognizing Their Role in Avoiding Legal Malpractice Claims\*](#)

### **Failure to Follow Client Instructions**

The client indicated that prior to his first trial, he asked his attorney whether a plea deal had been offered and was told no.<sup>10</sup> He requested that his attorney contact the prosecutor to see if a plea deal would be offered to him so that he could consider his options. The client file does not reflect that any such inquiry was made to the prosecutor's office.

Within reason, attorneys are expected to follow client instructions, such as extending or accepting a settlement offer, including or excluding a party as a defendant, limiting the geographical limitations of a non-compete agreement. Understandably, not all client instructions may be followed. Especially, those that would violate the rules of professional conduct, involve fraudulent behavior, or serve to harass an individual or entity. In situations in which the client is making a request that is not possible or fails to serve the client's interests, the attorney should take the necessary time to explain why it is not possible.<sup>11</sup> Following up with a memo to the file or letter to the client documenting the discussion are recommended.

Risk Control Resource: [\*Ten Tips to Assist in Avoiding Legal Malpractice Claims\*](#)

### **Failure to Challenge Cell Phone Records Expert**

In what was believed to be a matter of first impression in Maryland, the underlying criminal case used cell phone records to establish the location of the defendant. Defense counsel did not challenge the use of a "cell phone expert" by the prosecution and stipulated to the admission of cell phone records.<sup>12</sup> The failure to do so was later determined to be an error that led to the granting of a new trial.

As the world evolves, the legal profession and attorneys must remain current or seek assistance when encountering technologies they do not understand.<sup>13</sup> In the underlying criminal case, trial counsel probably should have invested in an expert of their own to refute the prosecution's expert. Why this strategy was not pursued at the trial is unknown, but it may have been due to the expense of retaining an expert. Once again, tactical and financial decisions must be discussed with the client and documented in the client file.

Knowing when to seek help appears to be a challenge for many attorneys. However, in order to provide competent representation to clients, attorneys should acknowledge when they need assistance. Whether it is in litigation and the need for experts, or expanding into a new area of practice, guidance is imperative and beneficial to all involved. In the event that a client alleges legal malpractice, it should not appear that the attorney "cut corners" or failed to provide competent representation to the client.

Risk Control Resource: [\*To Error is Human: A Guide for Attorneys on How to Manage Errors\*](#)

### **Mishandling of Money Matters**

Where did the money go? It has been asserted that defense counsel threatened the parents of the defendant with losing their house if they did not pay a large retainer.<sup>14</sup> Other clients of this defense counsel made similar allegations of mishandling or outright theft of their funds. Multiple parties were partially reimbursed by the state for approximately \$250,000.<sup>15</sup> Eventually, multiple client complaints and allegations of mishandling funds led to the attorney agreeing to cease her practice of law.

A universal challenge for attorneys is handling money matters. Irrespective of the size of the law firm or type of client, the financial expectations of the client representation must be discussed and all questions answered at the outset of a client representation. The Fees and Expenses clause also should be appropriately documented as part of a well-drafted engagement agreement. In addition, attorneys should be alerted to red flags when discussing money with a prospective or current client – taking months to send a retainer check, incredulity at an hourly rate or request for a retainer.

<sup>10</sup> Chaudry, Rabia. *Adnan's Story: The Search for Trust and Justice After Serial*. First edition. New York, NY, St. Martin's Press, 2016.

<sup>11</sup> ABA Model Rule of Professional Conduct 1.4: Communications

<sup>12</sup> Chaudry, Rabia. *Adnan's Story: The Search for Trust and Justice After Serial*. First edition. New York, NY, St. Martin's Press, 2016.

<sup>13</sup> ABA Model Rule of Professional Conduct 1.1: Competence Comment 8

<sup>14</sup> Chaudry, Rabia. *Adnan's Story: The Search for Trust and Justice After Serial*. First edition. New York, NY, St. Martin's Press, 2016.

<sup>15</sup> Id.

As part of the client intake process, attorneys must explain the financial expectations to the client and document how the money will be used. Over the course of the representation, the law firm also must monitor their outstanding invoices and identify the amount from which it would be able to walk away and terminate the representation, if necessary. If it becomes necessary to withdraw from a client representation for non-payment, the attorney must continue to advocate for the client until proper withdrawal is obtained.

Risk Control Resources: *The Lawyers' Toolkit 4.0: A Guide to Managing the Attorney-Client Relationship*; *Billing Blues: Best Business Practices for Fee Collection*

### **Failure to Manage Workload**

Following the death of defense counsel, it was revealed that her workload was untenable. With multiple capital cases and appellate work, her workload was simply too much. As a result, failures crept in to the practice and clients suffered.

In the realm of legal malpractice claims, a common term in the fact pattern is "overwhelmed". Deadlines all fell at the same time and something slipped through the cracks. They thought they could handle the workload, they needed the income, and an unexpected personal or professional challenge arose, which changed the landscape. The same story is written over and over again.

For every size of law firm, an attorney must manage workload and acknowledge when help is needed.<sup>16</sup> For the solo practitioner, there may be times when it is necessary to transfer a file or seek co-counsel to manage their representations. When an attorney is overwhelmed with work, non-lawyer support staff will be in the same position, creating additional vulnerability to legal malpractice. Attorneys must determine how best to manage their workloads but an occasional audit of impending deadlines may assist in avoiding the overwhelm. Working closely with non-lawyer support staff, having effective law practice management protocols, and ensuring that workloads are manageable are all important in avoiding errors.

Risk Control Resource: *Law Firm Outsourcing: Trust But Verify*

### **Health Challenges Related to Allegation of Failure to Provide Competent Representation**

One of the unknowns in life includes health challenges that may arise. In this case, defense counsel openly discussed with the judge during trial that she was diabetic and may require recesses to address the issue. Following her death, it was revealed that she had multiple health issues that required hospitalizations, and she would ask her staff to bring client files to her in the hospital. While one may appreciate and commend the determination to work while in the hospital, it is critical to also recognize when help is needed and an attorney needs to step away from client representations.

There is no requirement that an attorney share their health status with clients. However, attorneys must consider whether or not a health challenge impedes their ability to provide competent representation to their clients.<sup>17</sup> Once it becomes apparent that an attorney is not capable of continuing with a client representation, it should be timely communicated to clients and a plan created for withdrawal and transfer of the client file.

Planning for the unexpected is beneficial to the attorney, clients and families. Attorneys should have a succession plan in place and discuss with clients what would happen if the attorney becomes incapacitated or dies unexpectedly. A provision may be included in an engagement agreement identifying the attorney that would respond for the purpose of notification and client file transfer.

Risk Control Resource: *Expecting the Unexpected: Succession Planning for Lawyers*

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## Conclusion

What has become entertainment for some may also serve as a lesson for attorneys. Although some individuals may assert allegations of legal malpractice in retrospect based upon many unknowns, attorneys may recognize lessons learned in zealously advocating for their clients and documenting, explaining, and executing decisions for clients. Attorneys need not live in fear of having their actions challenged or ridiculed. Rather, it is best to concentrate on the fundamentals of the attorney-client relationship and acting as the advocate under the parameters of a license to practice law.

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Theresa Garthwaite serves as Risk Control Consultant for CNA's Lawyers Professional Services program. She is responsible for the overall assessment, evaluation and delivery of risk control services for complex risk exposures within CNA's Lawyers Professional Liability business. She is responsible for developing risk control content for presentations and publications. She oversees the "In Practice ... with CNA" and "CNA's Professional Counsel" publications. Prior to joining CNA, Theresa worked as an associate in a boutique law firm, specializing primarily in plaintiffs' medical malpractice, catastrophic personal injury and wrongful death matters. She is admitted to practice in Illinois and United States District Court, Northern District of Illinois. Theresa also holds the Commercial Lines Coverage Specialist (CLCS) designation, and is a recipient of the Risk Control Superior Service Award.

## About CNA Professional Counsel

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