ETHICAL ISSUES IN TRANSITIONING TO A BUSINESS TORTS PRACTICE

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> I am beaten. Defeated. I concede. I am ready to consult, and if necessary to take a ride, to pay the freight on the Feinberg express to the la-la land of the surrogate courts . . . . The ultimate cop-out—I will hire another lawyer to service my client.
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> —STEVE MARTINI, COMPELLING EVIDENCE (Putnam 1992)

I. Introduction

When you have a client in your office with a business torts case, your client is a very lucky person. You have been doing garden variety personal injury tort trials for years. You have tried dozens and dozens of jury trials. You have got to the point in your career where when trial dates are approaching you no longer feel like you are trapped in a canoe on the Niagara River, nearing the falls. You enjoy your time in the courtroom. You like juries. The courtroom is your home.

By contrast, the business interests that have hurt your client and his or her business have hired an immense, well-heeled, expensive law firm with offices in New York, Washington, Los Angeles, London, Brussels, Paris, Belgrade and everywhere. They have former partners who are now federal appellate judges. Their Web site exudes confidence and competence.

Why should your client feel lucky when it is you against this megalith?

It is because your opponents are litigators. You are a trial lawyer.

This firm has partners in its litigation department who have never picked a jury.

You have an enormous natural advantage over your opponent, because you are the one in the courtroom who knows how to persuade a jury. You are the one who knows how to make the bad jurors reveal themselves in voir dire. You are the one who knows how to wake up sleepy juror number seven and captivate her with your storytelling. You are the one who knows how to empower a group of ordinary people into deliverers of full justice.

Probably the best and most ironic aspect of all of this is that until the jury returns its verdict, your opponent will not

realize any of this. You will be consistently underestimated until the end. It will mean they will make mistake after mistake in trial, giving you opportunity after opportunity to capitalize on these mistakes.

Transitioning to business torts is probably the most logical thing a trial lawyer can do. The market is screaming for capable trial lawyers to handle these cases. It is a perfect hedge against tort reform, since businesses will never lobby for legislation to curb their own rights. Moreover, it can be an extremely lucrative area of the law. While a jury might refuse to make a poor family "rich" to compensate the family for a personal injury or death, the same jury would not hesitate to award enormous sums to companies harmed by other companies.

However, there are practice concerns involved with taking on business torts cases. Some of them, including the ones involving legal ethics, merit discussion.

II. The Main Concern: Competent Representation

First, start with Rule 1.1 of the Model Rules of Professional Conduct.

> **Rule 1.1. Competence**
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> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> **Comment**
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> **Legal Knowledge and Skill**
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> [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
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> [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also

be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impracticable. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c)

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

MODEL RULES OF PROF'L CONDUCT R. 1.1 (West 2006)

III. Sample Disciplinary Cases Involving Incompetent Representation

The vast majority of reported disciplinary cases resulting in sanctions in this area demonstrate a combination of incompetence with other aggravating factors, typically mismanagement of client funds, dishonesty with clients, and misrepresentations to the court or the investigating disciplinary offices. Confronted with such combinations, the tribunals seldom treat inexperience and unfamiliarity with the area of law being practiced as a mitigating factor.

For example, *Lawyer Disciplinary Bd. v. Wheaton*,[1] the court held that an attorney's misconduct over the course of

five years, which resulted in 31 violations of the rules of professional conduct, warranted annulment of his law license:

> While this Court agrees that Mr. Wheaton was inexperienced in the practice of law, it is not persuaded that his inexperience justifies his behavior. Mr. Wheaton made it a practice to misrepresent facts to his clients, to a bankruptcy trustee, to the bankruptcy court, and to counsel for the ODC. While his inexperience in the practice of law is a mitigating factor, it does not justify his dishonest behavior, and further, does not justify its duration for the substantial time period in question.

Id.

Similarly, in *The Florida Bar v. Springer*,[2] it was held that disbarment was warranted, as sanction for attorney's multiple instances of misconduct, repeated in six matters in which attorney represented an individual or a condominium association of which the individual was president, in failing to provide competent representation, failing to act with reasonable diligence, failing to keep client reasonably informed, and lying to clients about the status of their matters.

> Here, Springer did more than just venture ill-prepared into a new area of the law. He simply totally failed to perform, or
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> incompetently performed, the basic tasks of his profession which he accepted and agreed to complete.

873 So. 2d at 322 (Lewis, J., concurring).

In re Valinoti [3] echoed the same theme:

> Respondent seeks to ameliorate the nature and extent of his misconduct by arguing that he committed his misconduct shortly after his admission to the bar and when he had little experience in immigration law. We reject respondent's argument. It is when an attorney is newly licensed or when an attorney begins to practice in a new area of the law that he should take the proper steps necessary to learn the governing law, rules, and regulations in that area of practice.

Compare In re *Boykins*,[4] in which an attorney handled an estate incompetently in several respects, including improperly charging fees, failing to note a conflict of interest, failing to advise the client properly of the client's rights, and other instances of incompetence. In mitigation, the court noted that none of the offenses involved dishonesty, and that all of the errors stemmed from inexperience in handling estates. The court sanctioned him with a stayed 30-day suspension and probation for one year.

IV. Solution: Continuing Legal Education in the New Area

The single largest factor keeping highly skilled personal injury trial lawyers out of business torts is the reluctance to enter into a new area of law with which they are unfamiliar. They start out hindered by the inertia of already being successful in the realm of injury cases. They know from experience that delving into new areas can be painful and expensive.

They are fearful of losing, being sued, and violating the ethical rules. They have read astonishing opinions from federal judges invoking Rule 11 sanctions.[5]

However, the easiest solution to all of this is that everyone is already subject to mandatory continuing legal education requirements. Instead of dozing through trial advocacy courses—courses we could be teaching ourselves—why not attend courses about how to try business loss cases?

This is not a new idea. In fact, disciplinary cases around the country involving failures of competence repeatedly involve legal education as part of the solution.

The Florida Bar v. Cosnow[6] is a good demonstration of this. There the Supreme Court of Florida affirmed the disciplinary referee's condition of reinstatement that the attorney must "(2) refrain from representing clients in any areas of law that are not currently included in his caseload until he completes a minimum of thirty hours of approved continuing legal education courses in the new area . . . ."

Similarly, *In re Boykins*, *supra*, conditioned the respondent attorney's one-year probation on, among other things:

> (1) that Respondent not undertake any client representation in matters that he is not competent to handle; (2) that Respondent enroll in and complete at least two continuing legal education courses (six hours), one of which must be in professional responsibility and the second in probate administration, as soon as practical during the probation period; (3) that Respondent provide written certification to Bar Counsel and the Board that he has completed such courses . . . .[7]

In addition, there are well-handled treatises on virtually every area of business torts readily available, ranging from RICO business fraud to the misappropriation of intellectual property. ATLA's monthly mailings routinely include ATLA's *Law Reporter*,[8] which include commercial litigation case summaries, and members of ATLA's Business Torts Section get quarterly newsletters with valuable practice pointers.

V. Solution: Engaging Specialized Attorneys for Your Trial Team

Finally, in direct contradiction of the sentiments expressed by Steve Martini, quoted above, it makes a great deal of sense to involve specialists in the type of substantive law you are delving into. For example, if you represent a company that has been thrown into bankruptcy because of the wrongful conduct of the defendant, you may need to retain a bankruptcy lawyer to help you navigate the rules and procedures of bankruptcy court practice. If the case is a lender liability matter, it may make sense to add a former banking lawyer to your trial team, so as not to leave out potentially devastating theories of liability of which you may not have been aware.

Consulting with other lawyers has been one of the highest traditions of the bar. As a result, it is not surprising that failure to do so when necessary has been found to be an ethical violation of RPC 1.1.[9] In addition, requirements to do so have been incorporated into remedial orders in disciplinary cases. For example, *In re Boykins*, *supra* also conditioned a lawyer's probation on a proviso "that, in the event that issues arise in an existing representation that involve unanticipated areas of expertise, as to which Respondent doubts his competency, he shall consult with, and seek advice

from a member of the D.C. Bar with experience in such new area . . . ."[10]

VI. Conclusion

Counsel should not be afraid to take business tort cases merely because it is a new area of substantive law for them. The value experienced trial lawyers can add to these cases is immeasurable and far outweighs the barriers to entry.

Endnotes

[1]216 W.Va. 673, 610 S.E.2d 8 (2004).

[2]873 So. 2d 317, (Fla. 2004).

[3]2002 WL 31907316 (Cal. Bar Ct. 2002).

[4]748 A.2d 413 (D.C. 2000).

[5]Clement v. Public Service Elec. and Gas Co., 198 F.R.D. 634 (D.N.J. 2001).

[6]797 So.2d 1255, 1258 (Fla. 2001).

[7]748 A.2d at 414 (D.C. 2000).

[8]ATLA *Law Reporters* are also available online at www.atla.org/Publications/Tier3/LawReporter.aspx.

[9]People v. Pernell, 86 P.3d 429 (Colo. 2004).

[10]748 A.2d at 414 (D.C. 2000).