

So, How Does It Feel to Get Sued for Legal Malpractice?

by Ronald M. Sandgrund, Esq., InQ.

This is the fifth article series by *The Inquiring Lawyer* addressing a topic that Colorado lawyers may consider often but may not discuss publicly in much depth. The topics in this column are being explored through dialogues involving lawyers, judges, law professors, law students, and law school deans, as well as entrepreneurs, journalists, business leaders, politicians, economists, sociologists, mental health professionals, academics, children, gadflies, and know-it-alls (myself included).

These discussions may tread on matters sometimes considered too highly regarded to be open to criticism, or even simple examination. I take full responsibility for these forays, and I recognize that I may be subject to assessment and criticism myself. (Please be gentle!) If you have an idea for one of these columns, I hope you will share it with me via e-mail at rms.sandgrund@gmail.com.

This month's article is the first of a two-part conversation about the effect of legal malpractice claims on a lawyer's psyche. The second part will print in next month's issue. My thanks to Michael Katz, a Colorado Law 2L, for his help with the dialogue and the thoughtful questions he raised during the editing process. Also, I am grateful to the many dialogue participants willing to go on the record with their forthright observations and comments.

The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for tomorrow which can be done today. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done.

—Abraham Lincoln¹

This two-part article discusses the emotional roller-coaster that lawyers ride when they get sued for malpractice and some of the mistakes they make because of the feelings these claims stir. These emotions not only affect the attorney being sued, but also may create issues among law partners and between supervising and supervised attorneys. We will talk to defense lawyers who have represented attorneys against such claims, plaintiff lawyers who have sued other attorneys, lawyers who have gotten sued, and a psychologist who has counseled lawyers during the ups and downs of such lawsuits. We will examine whether the shame and stigma many

lawyers associate with getting sued for malpractice has lessened over time and how such feelings can impair their judgment in defending such claims.

In addition, we will explore whether women attorneys are significantly less likely to get sued for malpractice and, if so, why. Also, we will talk with lawyers about how eroding-limits (Pac-man[®]) policies affect psyches and litigation strategies as one's protection against potentially crippling money judgments evaporates before their eyes while their defense counsel do all they can to protect their reputation and defend against scurrilous, and not-so-scurrilous, claims. Finally, we will investigate whether lawyers who survive the litigation sausage-maker learn anything new about our legal system—or about themselves.

Note

1. Basler, ed., *The Collected Works of Abraham Lincoln*, vol. II, "Notes for a Law Lecture" at 81 (July 1, 1850).



Ronald M. Sandgrund

Ron Sandgrund, of counsel with the Sullan Construction Defect Group of Burg Simpson Eldredge Hersh Jardine, P.C., has been a trial and appellate attorney since 1982, representing, early in his career, primarily product manufacturers, insurance companies, and small businesses, including real estate developers and builders, and then later, mainly property owners and homeowner associations in construction defect, insurance coverage, and class action disputes. He is a frequent author and lecturer on these topics, as well new attorney practice guides and the practical aspects of being a lawyer, and is an adjunct professor at the University of Colorado School of Law.

Series Participants

**Nancy Cohen**

Nancy Cohen is a partner in the Denver office of Lewis Brisbois Bisgaard & Smith LLP and a member of its Professional Liability Practice. Her practice primarily focuses on representing lawyers in malpractice claims and grievances and provides risk management advice to lawyers and law firms. She also defends health-care and other professionals concerning licensure issues and malpractice claims. Over the course of her career, she has handled a variety of matters, including commercial litigation, contract disputes, and personal injury matters. She has a Colorado state and federal practice, including trial and appellate matters. Cohen is the 2016–17 Denver Bar Association president.

**Kevin C. Flesch**

Kevin Flesch, a principal in FleschLaw, advocates for those who have been the victims of unjust injuries in Colorado. He combines his extensive trial experience and knowledge of personal injury law with a personal commitment to his clients' welfare and fair treatment. Flesch is a graduate of the University of Wisconsin, La Crosse, and the William Mitchell College of Law. He is admitted to practice in all Colorado state courts and the U.S. District Court for the District of Colorado, the U.S. Court of Appeals for the Tenth Circuit, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit.

**Cecelia Fleischner**

Cecelia (Cindy) Fleischner is a civil trial lawyer with over 30 years of courtroom experience. She has tried numerous legal malpractice, discipline/grievance, wrongful death, products liability, premises liability, and other personal injury lawsuits in Colorado's federal and state courts. She now specializes in defending attorneys in discipline and legal malpractice matters. She is a founding shareholder of McConnell Fleischner Houghtaling, LLC, and frequently lectures on legal ethics, professional liability law, and civil litigation. She is a graduate of Lafayette College and the University of Denver Sturm College of Law. She has been on the adjunct faculty at DU Law, where she taught basic trial practice and advanced trial practice.

**Paul Gordon**

Paul Gordon, founding member of Gordon & Melun LLC, is a Denver-based attorney who focuses on plaintiff legal malpractice claims. He also helps attorneys resolve professional disputes with clients and colleagues, defends attorneys who have been sued or grieved, and has served as an expert witness in legal malpractice cases. His mission is to aggressively and successfully represent clients, while at the same time treating all attorneys with the appropriate decorum. Gordon also handles personal injury and commercial litigation.

**Dave Hersh**

Dave Hersh, a partner with Burg Simpson Eldredge Hersh & Jardine, P.C., is a civil trial lawyer practicing in state and federal courts throughout the United States since 1984. He focuses on complex commercial and personal injury cases, including legal malpractice. Admitted before the Supreme Courts of the United States, Colorado, and Wyoming, and various federal courts, he has tried well over 100 civil jury trials to verdict. He and his wife are empty nesters who enjoy traveling the world to ride their bicycles and scuba dive.

**Michael Mihm**

Michael (Mick) Mihm is a trial attorney with Ogborn Mihm, LLP, where he focuses on legal malpractice and business litigation. He is the editor of *Lawyers' Professional Liability in Colorado* (CLE in Colorado, Inc. 2015), a two-volume, 1,500-page treatise on legal ethics and lawyers' professional liability. He also authored or co-wrote a number of the book's chapters, and he updates the treatise each year. Mihm is the immediate past president of the Colorado Trial Lawyers Association, the largest specialty bar organization in Colorado.

**John Palmeri**

John Palmeri is co-managing partner of the Denver office of Gordon & Rees. He handles complex civil litigation, including legal malpractice. Palmeri has tried dozens of cases to jury verdict and has argued a number of precedent setting appeals. He is a member of the American College of Trial Lawyers and the American Board of Trial Advocates.

**David Stevens**

Dr. David Stevens is a practicing psychoanalyst and clinical psychologist. He is certified in the practice of psychoanalysis and has been appointed as a training and supervising analyst by the American Psychoanalytic Association. He is interested in the pragmatic application of psychoanalytic ideas to clinical circumstances. He enjoys providing clinical consultations, case supervision, and psychotherapy to patients of all ages. Dr. Stevens has been involved in teaching psychotherapy to psychology interns and psychiatric residents and psychoanalysis to psychoanalytic candidates. Much of this teaching is done within the Department of Psychiatry at the University of Colorado Health Sciences Center, where he is an associate clinical professor. He is also on the teaching faculty of the University of New Mexico Health Sciences Center. He co-authored *Neurodynamics of Personality* (Guilford Press 2000).

Part 1: The Three Vs and the Six Stages of Grief When the Bomb Drops



InQ: From my discussions, I got the sense that the great majority of lawyers feel like a bomb has dropped on their heads when suit papers are served. John, you've defended a lot of lawyers who've been sued—what have you seen regarding the emotional journey lawyers embark on when they are sued for malpractice?



John Palmeri: I call it the 3 Vs: vindication, vindictiveness, and victory. The vindicated lawyer wants to see the malpractice claim dismissed and receive acknowledgement that he or she is the best lawyer in the world. The vindictive lawyer wants to see opposing counsel beat into the ground, or even better, brought up on ethics charges. The victorious lawyer wants to see the claim resolved fairly and quickly.

InQ: Dave, as someone who has handled both sides of legal malpractice claims, have you seen any patterns emerge in how lawyers react to being sued for malpractice?



David Hersh: Some lawyers are unrepentant until they are forced to pay money. They are arrogant and will never admit error. They may have underlying emotional issues. Some are crushed by their error, and they tend to go through the stages of mourning. I have seen a few lawyers quit practicing due to a loss of confidence in their abilities.

InQ: Mick, you've done tons of both legal mal defense and plaintiff's work—how do lawyers react in the wake of a legal mal claim?



Michael Mihm: I liken it to the stages of grief. The defendant lawyer initially reacts with anger and denial. Part of that reaction is wrapped up in how we are trained as professionals: we go to law school, we are torn down during that mental boot camp, and then we're rebuilt as new people who are lawyers. Being a lawyer becomes part of our identity; it becomes who we are. If we run a stop sign and we hurt someone and we are sued, we might be very unhappy about that lawsuit, but it doesn't go to the core of who we are as human beings. However, when we are sued for malpractice, it goes to the core of how we see ourselves as professionals, for most people.

InQ: What happens after the anger and denial stage?

Michael: A lawyer often needs to transition to the resignation and acceptance stages of grief before the case can be settled. How long it takes before a lawyer gets there depends on the individual, and often depends on how confident the person is as a lawyer. What I've observed is that if the lawyer is insecure about his or her abilities, the person will fight even if it is clear that he or she committed malpractice. It may take that person longer than it should to come to that resignation and acceptance stage. On the other hand, if the defendant lawyer is confident in his or her abilities, and it is clear that the lawyer committed malpractice, my observation is that the person often seems to have the internal resources to say, "I screwed up. I have to hold myself accountable. That's why I've got malpractice insurance. Let's get this resolved." At that point, we can get the case settled. Confident lawyers will get to that resignation and acceptance stage faster than perhaps less confident or qualified lawyers. Of course, all this varies from individual to individual.

InQ: Nancy and Cindy—you are two very seasoned and distinguished legal mal defense lawyers. What common patterns have you observed as far as how lawyers react to being sued for legal malpractice?



Nancy Cohen: Whether they're being sued for legal malpractice or have a grievance lodged against them, I have seen similar reactions: "How can I be sued? Why am I being sued? I didn't do anything wrong. I represented this person properly." The attorney feels attacked professionally because most lawyers are wrapped up in being a lawyer. And so when you get sued and somebody says, "Hey, you didn't do a good job on this, you didn't meet the standard of care, or you breached your fiduciary duty," lawyers get upset. The initial reaction is indignant, upset, and angry. And that stays there for a very long time. After a while, the lawyer starts to look at the case more objectively and what was or was not done.

InQ: For those lawyers who end up seeing their claims go to trial or an arbitration hearing, do you see any change in their emotional mind-set?

Nancy: I do see a change in the mind-set. It often depends on whether the lawyer is a trial lawyer or transactional lawyer. I think that if you're a trial lawyer you understand the process, but less so for a transactional lawyer. I have found that lawyers act like lawyers rather than witnesses who have personal knowledge about a situation. I try to help them communicate more effectively about what they did and why.



InQ: Cindy, your thoughts?

Cindy Fleischer: I think there is an initial stun and insult to the lawyer's ego. I don't mean ego in a bad way. I got sued once. Eventually, I got out of the lawsuit, but the arc was, in a sense, self-punishing: "What could I have done? How could I better see this coming? What are the red flags I need to pay attention to?" It was eye opening for me. Not that I did anything wrong. But, I'm much more careful now. *Much* more careful.

InQ: What emotions do your clients feel after that initial shock?

Cindy: I think that many question their competency. They have fears about their law license. There are all these concerns, professional, emotional, personal: "What do I tell my wife? What do I tell my kids? What do I tell my family? Will friends and relatives hear about this? Is it going to be publicized? Do I want the case to have limited access?" There are so many feelings and concerns, and a lot of times—I don't care if you're the biggest firm lawyer or you're a solo—so many lawyers feel that 20, 30, 40 years of hard work is down the drain, and people don't appreciate them. And I understand that feeling.

InQ: Do any clients weather the shock better?

Cindy: Occasionally, very occasionally, there are lawyers who come in that just could not care less, and they can be big problems. Those who come in and are stunned, they're emotionally invested in mustering a defense. But those who come in and say, "I don't really care, you take care of it." That's much harder. Inevitably, you can see in their file that they didn't care. And it can be a challenge to represent a client who doesn't care. I would say 50% of the lawyers come in and say, "I blew it. I blew it for one reason or another, and let's take care of it."

InQ: And the other 50%?

Cindy: The other 50%, you have to walk them through, not necessarily the law, but you have to walk them through the claim's causation aspect, so that they might see they are not liable. As far as the emotional arc, I think many lawyers confront a claim where the facts are controverted or there's a dispute about causation, and a lot of times they'll say, "We're going to take this to the bitter end. We're going to fight fight fight fight fight." Ok, that's the client's decision, and I am going to try to prepare the case that way, which is "go go go go go." But, when many of those same lawyers get close to trial, they don't want to proceed. For you and me and others who have gone to trial a lot, you get the stomach, but a lot of lawyers are not confident enough to go to trial. If you end up trying the case, and you win, of course the client is very happy, but many also think, "Of course. It never could have turned out any other way," and sometimes, "Why did it cost that much?" So, maybe that's the challenge I like—when you win it's expected.

InQ: Paul, as primarily a plaintiff malpractice counsel, what is your impression of how lawyers react when they're sued?



Paul Gordon: Usually what I see is a grieving process; I can watch the stages develop: anger or denial, bargaining, and then acceptance—I'd say 9 out of 10 lawyers respond this way. Often, the anger stage gets superimposed on me. Some lawyers get to a point where they're able to be both objective and unhappy about the lawsuit—it's still a sore wound.

InQ: Dr. Stevens, you've treated lawyers over the years in your practice—how do they describe their fears of being sued?



Dr. Stevens: I think it is fair to characterize it as free-floating concern. For example, they may have been informed by a colleague who got sued, so that the real possibility of being sued makes them start to think, "Whoa, that could happen to me. You know, I'd better be careful."

InQ: What differences do you see between lawyers who are troubled by this free-floating anxiety versus those who are actually sued for malpractice or grieved for an alleged ethical violation?

Dr. Stevens: In the cases that I've evaluated where there are lawsuits involved, there's a much noisier set of internal reactions that the attorneys have had. A much more painful set of reactions. Sometimes, it only takes one lawsuit, even a lawsuit that has a positive outcome or is ultimately dismissed, to get professionals to become preoccupied in a way that does not help their work. There's an old story about Minnesota Fats, the pool player, who used to say to his opponent just before a match, "Huh? So that's how you hold your elbow?" You know, the remark is made to add a kind of hitch to the person's get-along, so that they're thinking about something that had been reduced to habit—something that had been fully procedural. That's how I see people who are anxious about being sued; it's just not helpful. It tends to distance them from a standard operating procedure and make them second guess in ways that typically does not help performance.

InQ: Have you observed any commonality in the responses of lawyers to being sued for malpractice?

Dr. Stevens: In the cases I've seen, there's an opening phase of something like indignity, a sense of being falsely accused, that yields to something more like a great deal of anxiety, and a feeling of being out of control. The analogy here is that doctors often make the worst patients. And definitely, in the few cases I've seen, lawyers can make the worst clients because of their need to control things.

They know a lot, but they are not able to really, understandably, distance themselves from the set of facts relevant to the case. I think there's a feeling of helplessness, and then of an unfolding circumstance, and then a gathering of information by those around them. What that looks like to me is that it creates a certain kind of horrifying feeling of exposure, and a dread of being misunderstood.

InQ: How does a lawyer's ego hold up over time following the strain of a malpractice claim?

Dr. Stevens: I've certainly encountered anxieties in terms of how might a person come to be regarded if a suit is brought against them and whether others will look at them differently. To bear up under the representation of oneself as having fallen below some standard or having done something wrong, even if it's a completely overstated or a non-nuanced point of view, is difficult. A person's self-esteem is often highly implicated with how they are regarded in terms of the work they do. There's no quick fix to that. It really involves somebody being able to come to bear with the fact that others may see him or her in ways that are painful. Somehow, ultimately, we have our own internal arbiter of, "Is this a fair critique? Is it unfair? Do we agree? Disagree?" If there's validity to it, do we do something with it and try to learn from it? But, that's a tough one—it involves whether a person has the wherewithal to both hear what is being said without just blowing it off, yet also maintain self-regard. People vary a lot in that kind of thing.

In Their Shoes—Kevin Flesch

InQ: Kevin, you were one of the few lawyers willing to relive for our readers the experience of getting sued for legal malpractice—two others backed out after agreeing initially to be interviewed. I can certainly understand the reluctance of many lawyers to relive the experience, to re-publicize the lawsuit. I'm sure the fact you won in both the trial court and in the Colorado Supreme Court—interrupted by an unsatisfying stop in the Court of Appeals—made it easier for you to talk with me. Still, that must have been some emotional roller-coaster. Can you draw us a thumbnail sketch of what happened?



Kevin Flesch: The district attorney had filed charges against my client, who was an Arapahoe County sheriff's department jail nurse. The issue was whether she had changed certain records relating to what medications she had given the inmates. The district attorney had evidence suggesting that she had, and changing the record was a felony. So, she was charged with a felony when her employer asked her to come in and give a statement. When we arrived for the interview, we first learned that the sheriff's regulations would not allow me in the room when the department questioned her. So, it was a very rushed and disjointed conversation between us. The client was in the waiting area saying, "What do I do?" I immediately had to give her legal advice related to that. She had this felony pending; she didn't want to lose her job; but, at the same time, she knows that if she is convicted of this felony she will lose her job. She was pretty conflicted and upset. She refused to submit to the interview at that time. I eventually got the criminal case dismissed. And then things started to brew on her end. Yes, I got the criminal case dismissed, but now she wants her job back.

InQ: Did you have a sense at that time that she might take legal action against you?

Kevin: I never had that impression.

InQ: When did you first have a concrete indication that she was going to sue you?

Kevin: I think her lawyer sent a demand, I reviewed it with my law partner at the time, and I thought the firm didn't do anything wrong under the circumstances. It was probably several months before she eventually filed suit, seeking more than \$100,000 in damages.

InQ: How did you feel when you realized you were going to get sued?

Kevin: I had some fear. The unknown is always difficult. And, for as much as I deal with it for clients on a regular basis, I didn't really fully appreciate it until I was the one with the bulls-eye. So, obviously I was very concerned. *What do I do? Do I put my malpractice carrier on notice? Is this a real claim? How should I proceed? What do I need to do in preserving everything I may need for the case?* There was just a bunch of things that ran through my head including, "These are my interests at stake now, I need to protect myself." There was also the fear of, "Did I really screw this up?"—anxiety about where is this going. Finally, I got around to thinking, "How do I defend myself?" At that point, I started planning for down the road.

InQ: What was your law partner's reaction, and what sort of dynamic developed between you two over time?

Kevin: We were running a really busy practice at the time, trying to build something. Truthfully, I don't remember anything really standing out about being concerned about the claim. Sure, we'd have to deal with it, but there was nothing like, "Oh my gosh this is the end of the world."

InQ: When did you put a malpractice carrier on notice?

Kevin: Unfortunately there was a gap in coverage because our firm had undergone some changes. Wes Hoyt and I ended up handling the claim ourselves.

InQ: Did that concern you, representing yourself, and not having an outside, objective attorney handling the matter?

Kevin: Wes and I looked at and evaluated the claim early on. We felt it was defensible, and we made the decision to handle it ourselves. But we did eventually get an outside expert witness.

InQ: From an emotional standpoint, what did it feel like to prepare for your deposition and be subject to cross-examination?

Kevin: I wasn't sure where opposing counsel was going to go with his examination. I had defended a number of depositions before, but actually being a witness is very different than defending one. Although the facts were pretty clear cut, there was a lot of anxiety about making sure I said the right thing, and not saying too much. Of course, these are all the things one talks to witnesses about before their depositions—I suddenly have a lot of empathy for the folks that we depose on a regular basis. This is, in fact, a very traumatic experience for a person to have to go through.

InQ: How did you feel toward plaintiff's counsel?

Kevin: Frankly, as the case progressed, he and I did not get along very well. We were never friendly to each other.

InQ: In light of this friction, did you think it might be good to bring in separate counsel to represent you who wouldn't have those same feelings, feelings that might influence how you managed the case?

Kevin: Wes and I had conversations about that, and, after some time, Wes took on a more significant role in communicating with opposing counsel.

InQ: How did it feel to give up your work file? I know that if someone looked at my old files for a number of clients where I

made internal notes regarding their perceived lack of credibility, it would be uncomfortable for me to have to disclose that sort of information, even though it is also prudent for me to document my thinking,

Kevin: You never have a perfect file. There are always inadequacies, especially with someone scrutinizing the work that you've done. Our main concerns were: Had we done everything that we needed to in preserving the file, and was the file adequate? I think everybody has that same feeling; I certainly did. But ethically, and during the discovery process, you have to give it up.

InQ: So let's fast-forward to after you obtained summary judgment in the trial court and you are now in the Court of Appeals, and all the briefs have been filed and you are waiting for a ruling. What was your emotional state?

Kevin: I thought we stood on solid ground and that the district court judge didn't abuse his discretion in dismissing the claims. So, we were feeling pretty good, but you never know. And then, obviously, we got an adverse ruling in the Court of Appeals. And I felt they got it wrong.

InQ: Were you angry with panel? Were you sad?

Kevin: The decision threw us back into this unknown, anxious "What's going to happen? Where is this all going?" sort of feeling. We thought we had good grounds for Supreme Court review, and that even if we didn't prevail, that the Court of Appeals had limited the claims, and that we would still be okay at trial.

InQ: So, happily, the Supreme Court eventually grants certiorari. How did it feel when you first read its opinion?

Kevin: When the opinion issued, we got it in the mail—opinions weren't electronically distributed at the time.

InQ: So the envelope arrives in your mail—

Kevin: Yes, it's like the Oscars. So I opened it up, and I was like, "Oh boy, is this going to be a good day or a bad day?" Luckily, in this particular case, Justice Bender had written the opinion, and as soon as I saw that I thought—knowing he had the criminal defense background—we were probably going to be in pretty good shape. I went to the end of the ruling to see what the final opinion was, and then I read the details.

InQ: What stands out most from that moment?

Kevin: Just a sense of relief. Not really happy or sad, just glad that it's done.

In Their Shoes—Paul Gordon

InQ: Paul, you shared with me that you have been sued for legal malpractice. What did that feel like?

Paul: Not surprisingly, I felt angry and disappointed. I was not at all angry at opposing counsel; I had great respect for them and still do. I remember being in a meeting when the sheriff knocked on the door and I said come in. You know, when the sheriff is here they're either going to take you away or give you something, right? And I remember feeling—disbelief is not the right word—it's more like a powerful belief that: "Here this guy goes. He's going to do it again." My former client was acting just as he had when he had been my client, directing his anger and disappointment at another person because couldn't accept how things worked out.

InQ: Tell me about your emotional state during your deposition, and then during your trial testimony.

Paul: When I was being prepared, it was a weird thing. I knew the case up and down, so it was not that I needed a lengthy preparation, but I didn't get a lengthy preparation, so I was kind of surprised. I think it was like half an hour, and then the other 30 minutes was chit-chatting.

InQ: When you had that sense of, let's say, disappointment, that your prep session for deposition only lasted 30 minutes, what stopped you from saying to your lawyer, "Shouldn't we be working a little harder on this? Or longer?"

Paul: Well, it was important to me to trust my lawyer. It was hard to trust my lawyer, but he turned out to be the guy for the job. But, it was hard to let go of control, and yet at the same time I was self-aware. I was like, "Okay, he thinks I only need 30 minutes of prep. It's his case—who am I to criticize him?" I very much didn't want to micromanage my own lawyer. Over time, I did develop the sense that the lawsuit was out of my control, that I couldn't dictate events. I couldn't make the guy stop suing me. I couldn't make the insurance company make the case go away. I couldn't make my defense attorney do exactly what I thought ought to be done. So, at some point, I learned to accept that it's almost like I was a guest in my own lawsuit!

InQ: What a great description!

Paul: I remember being in mediation, and I had the sense that nobody was listening to me. I recall the mediator talking to the insurance adjusters, and they were arguing back and forth over whether I had done anything wrong, and I'm like, "I'm standing right here!"

InQ: What was your emotional state while being examined in trial?

Paul: I know this will sound weird, but it was fun. I was on the witness stand for 11 hours. All they did was ask me questions that I knew the answers to, and if I didn't know the answer I said, "I don't know." But, still, I had a sense that things were so utterly beyond my control. And I couldn't believe how long I was on the stand.

InQ: At some point during those 11 hours, did the other lawyer really start to bear in on you, start to become very aggressive and very pointed in the questioning? Maybe sarcastic, the way some lawyers get? Do you recall that and did that make you uncomfortable?

Paul: He did do that, but none of his questions surprised me, except for one. There was a piece of evidence that I had missed in the underlying case. But, before trial, I had prepared myself to think: "Maintain your composure. If you've screwed something up, you've screwed something up." And he did hand me a document, and as I was reading it I realized that I had missed a meaningful piece of evidence. But in terms of him attacking me, I guess if this is what you do for a living, you can't be surprised by being cross-examined. Plus, I testify as an expert quite a bit, so I'm used to being attacked.

InQ: Did you go through the stages of grief you previously mentioned, during the case and through trial?

Paul: I think I did. I think the bargaining stage was trying to negotiate a solution so I could get on with life, but this client wouldn't take any settlement, which was consistent with his attitude in the underlying case. And then, by the time trial happened, and the 11 days of the jury trial, I was at great peace with the whole thing; I had done everything I could. I did the best I could in rep-

resenting him. I did the best I could in reasonably resolving the case. The insurance company wanted to go to trial and I was at great peace. I even remember the verdict form coming back. I think I was less anxious about that verdict form than when I'm the lawyer in the case. It was the weirdest sensation.

InQ: So you felt comfortable with the probable outcome before the verdict was returned?

Paul: Yes. The jury was out for 90 minutes and said I had done nothing wrong.

InQ: Was there a sense of irony about the lawsuit? That you, who represented so many people in cases against other attorneys, were being sued yourself?

Paul: Actually not. In fact, I've been sued a dozen times, but all but two of those were pro se. And if you think about it, many of the people I represent blame their lawyers for their problems. In only one instance did I agree to a settlement because I screwed up, and that was a sickening feeling. The person was made whole by the settlement, so it's not like I had to feel bad about hurting someone because, in the end, they were taken care of. But I felt like I could have done better. I had not met my own expectations, and that was upsetting.

In Their Shoes—John Palmeri

InQ: John, have you ever been sued?

John: Yes. We obtained a summary judgment against the claim and the summary judgment order was affirmed on appeal.

InQ: And what was your reaction to being sued?

John: Oh, I think there are always some doubts in your heart and worry about others' perception of you. Maybe it's kind of like how it feels going through a "perp" walk in an orange jump suit. Fortunately, my partners were very supportive, which was comforting.

In Their Shoes—Michael Mihm and Nancy Cohen

InQ: Mick, Nancy—have either of you been sued for malpractice, and if so, how has it affected your views on the issues that we've talked about?

Michael: Yes, I've been sued.

InQ: Did you go through the six stages of grief when you got sued?

Michael: You know—and I don't want to comment too much because it's still an active case—but the answer is no. I turned it over to the carrier, who turned it over to very fine defense counsel, and I let them handle it. They filed a successful motion to dismiss. It is a particularly unique set of circumstances with a pro se client who has a difficult life, so while I was irritated, I didn't get too upset about it.

Nancy: Other than a law firm that I was in, I personally have not been sued for something where somebody says, "Hey, you screwed up." But having my partner get sued, I have seen the impact.

InQ: Any advice for lawyers who get sued for legal malpractice?

Michael: Accountability is good for the soul. As a plaintiff's counsel, I love it when defendant-attorneys who have clearly screwed up refuse to acknowledge their error or hold themselves accountable. It makes my job easier. Moreover, that arrogance tends to drive larger plaintiff jury verdicts. On the other hand, I found that the lawyers who I respect the most are those who say, "Yeah, I screwed up, I need to hold myself accountable, I need to hold my firm accountable, let's resolve this, let's protect the client and move

on." That attitude of accountability usually takes the sting out of a malpractice claim, makes the case much easier to resolve and, if the case goes to trial, tends to minimize the jury verdict.

The Firm Partners' Reaction

InQ: What have you observed as far as the dynamics between partners after one gets sued for malpractice?

David: I've seen firms break up following those kinds of claims. The lawyers often deny that the claim was the reason, but I think it often is. The claim creates a strain on the personal and business relationship; sometimes it constitutes an additional strain on an already challenged relationship. It's like a divorce: they stay together for the sake for the kids (i.e., getting past the claim), but once the kids are out of the picture, they split up. I have seen this most often occur among transactional attorneys, perhaps because they are less used to the rigors and uncertainties of litigation.

InQ: Nancy what have you observed as far as the dynamics within the law firm partnership when one partner is sued?

Nancy: I've represented lawyers from small, medium, and large firms, and I have not seen that to be an issue.

Michael: I've seen it become an issue, but it all depends on the firm's culture. If the firm culture doesn't embrace much internal loyalty, then you'll hear other partners complaining, "Why is he exposing the firm, why did he do this? He exposed us to this potential liability." However, my experience is that whatever the backbiting, ultimately the law firm will circle the wagons. Regardless of whatever bickering is going on internally, or what the other partners may think privately, the firm will present a united front to the outside world.

InQ: Cindy, how do the dynamics play out when a partner is sued and he or she has to deal with their law partners?

Cindy: It depends on the firm. In some firms, I've seen people end up leaving. In situations like that, there is a breakdown in the relationship. Sometimes the sued partner feels shame and embarrassment. However, there are also many times where there is a lot of "rallying around." Obviously, the rallying around is really good, but that's just the emotional part—there's the financial part, too.

InQ: Can you expand on that?

Cindy: Firms have deductibles running from \$500 dollars to as much as millions of dollars. These are out-of-pocket monies that need to be paid. Where that payment comes from depends on how the firm is structured and how the principals share their money. In some firms, it's not the fact of getting sued, it is the financial impact of it, that can drive a wedge in relationships. Those dollars can be eye-opening to the lawyer who is sued and the firm principals. I've seen some very productive lawyers, big rain makers, who've thought to themselves, "You're not supportive, I'm leaving." They may make the decision afterward, but it can be traced back to how the firm handled the claim. I've had law firms break up right on the cusp of trial, as well as right after trial. The non-sued partners, sometimes rightly or wrongly, have some feelings sometimes of being let down, thinking, "You weren't careful enough." or "You got us into this." But, even if some law firm principals have that feeling, a lot of them are able to overcome it and be supportive of their partner.

InQ: I know that in the small firm I worked in for over 30 years, the philosophy was that we are a true partnership in the sense that we stand together and we'll die together. There never really was any blame to push around. The question was simply how do we solve problems, and how do we solve them economically, either

for our clients or for our firm. It was a pleasure and a blessing working with people like that. But I could see from friends' experiences, and from looking at other firms, that people have different mind-sets. And that sometimes dollars can dictate everything.

Cindy: Legal malpractice claims implicate dollars, emotions, and reputation—the three things lawyers find most important.

Partner–Associate Tensions

InQ: David, what have you observed as far as the dynamics between a veteran attorney overseeing a newer attorney when a claim arises for work for which they had some shared responsibility?

David: Often, the associates think they are being watched and are being backed up more closely than is really occurring. Conversely, the partner often delegates more responsibility to, and has more confidence in, the associate than they should in light of the associate's lack of experience. The partner wants to let the associate run with a case, maybe to build the associate's confidence and to help develop his or her autonomy, while coincidentally reducing the partner's workload. But it may be premature for the partner to do so, and the partner may be abdicating a supervisory responsibility he or she must own. This can create conflict and/or blaming once the claim arises.

InQ: Mick, what about the dynamic between the supervising attorney and the attorney being supervised? Is that a point of friction in these kinds of lawsuits? Do junior attorneys say, "I was constantly under the supervision of the more experienced attorney. Everything was being reviewed. I relied on them to catch my mistakes." Do senior attorneys embrace that view and respond, "Yep, that's my ultimate responsibility." Or, do they say, "I can't micro-manage things. This lawyer made a mistake on something that I just wasn't responsible for." How does that dynamic reveal itself?

Michael: It depends on the circumstances. Consider two situations: first, where the younger or less experienced lawyer wasn't sufficiently competent, and the second, where the older or senior lawyer wasn't sufficiently supervising. You run into that dynamic, and you can get a lot of finger pointing. As plaintiff's counsel, it

works to my client's advantage if I can get the defendants pointing the finger at each other. Often what happens is that the junior lawyer simply wasn't doing what they were supposed to be doing, wasn't following through on the systems properly, and the senior person was too busy, wasn't paying attention, and didn't catch the problem until it was too late. The senior lawyer was relying appropriately on the junior person to do the work and protect the client, but it is still the senior lawyer's responsibility when the junior lawyer didn't do the job. That situation can cause some serious friction between the senior and junior lawyer, and may even end some careers in a particular law firm.

InQ: Nancy, have you observed this dynamic as well?

Nancy: I have not seen much of that, but I think it goes back to the issue of, "What is the culture at the law firm?" You know, if the culture in the law firm is everybody is on their own, then if you make a mistake it's your fault, and then you're going to have that dynamic. But if you have a culture where everybody looks at what was going on, and takes a step back and a deep breath, it doesn't have to be career-ending for the junior lawyer.

Michael: I agree, I think it depends a lot on the firm culture. If the associate screwed up badly, and it was under a partner's supervision, what you'll see in the best cultures is the partner will say, "Look, mistakes happen. That's why we have malpractice insurance. Let's get this resolved. Don't do it again." The case is resolved and everyone moves on. And there are no ramifications for the associate, because who among us has not screwed up from time to time? I mean, if you're practicing law and you're human, you're going to screw up. You hope to catch it and mitigate those problems for the client, but it's just a part of life. We're not perfect. The best cultures within law firms are the ones where they say, "It's going to be ok, let's learn from our mistakes and move on."

InQ: Cindy, what have you seen when the junior lawyer is looking at the senior lawyer and thinking, "You should have figured this out, you're the one with the knowledge and experience," and the senior lawyer is thinking, "I trusted you to deal with these details, and you didn't deal with them properly and broke that trust."

Cindy: Coincidentally, I saw that dynamic play out just recently. I met with a new lawyer–client and really enjoyed him. He's very smart. Yet, even though he thinks the junior lawyer should have paid greater attention to the matter that is the subject of grievance, and even though the junior lawyer does not work for him anymore—they parted amicably, and not over this issue—the senior lawyer thinks the junior lawyer is great and is totally protective of him. In seaman's parlance, the older attorney's perspective was, "I am captain of the ship. My firm, my responsibility. We cannot blame it on him because, ultimately, it is my responsibility. Sure, he should have paid attention to it, but you know what, so should I. And I am not going to abdicate my responsibility to put it off on someone junior than me."

InQ: There is a lot to be admired in an attitude like that.

Cindy: Yes, particularly in the eyes of the Office of Attorney Regulation. That is the best attitude to have because the Rules of Professional Conduct say that it is the senior lawyer's responsibility. Still, there are some lawyers who try to adopt that attitude, but feel unfairly accused because of what someone else has done. Of course, those are the hardest people to accommodate. Unless the two lawyers reach a meeting of the minds on this responsibility question, sooner or later they're going to disagree, and they're going to part ways. And then everything's going to blow

up. If a senior lawyer comes in saying, “It’s not my problem, I didn’t do it, it was their responsibility,” counsel is constrained to educate them why it is their responsibility. Often, they are embarrassed by this fact, and it’s hard for them to deal with it. It’s not all one big happy family. Conversely, there are times when a junior person needs to step up, and when they do so, it can make a happy family. Sometimes the senior lawyer just wants to hear the junior lawyer say face-to-face, “I’m really sorry.” Just like the clients want to hear: “I’m really sorry I messed this up.”

Lawyers Who Sue Other Lawyers

InQ: Paul, about how many legal malpractice claims have you brought in your 24-year career?

Paul: Between 300 and 500.

InQ: While you’ve been involved in legal malpractice lawsuits, has it always been as a plaintiff’s attorney, or have you done some defense of malpractice claims as well?

Paul: I have a couple defense cases even now. Lawyers will hire me to defend them when they don’t have insurance.

InQ: What motivated you to sue lawyers as part of your practice?

Paul: After I started getting into legal malpractice work, it became apparent that there was a great deal of public service associated with this; that people weren’t doing a lot of this work but it needed to be done; and that it was important for the integrity of the profession that someone do it, yet it was very unpleasant, unpopular work.

InQ: Since the majority of your practice involves plaintiff’s legal malpractice claims, has that resulted in any ostracization by the bar? Do you feel that it’s hard for lawyers to get close to you professionally because of what you do?

Paul: That became a private, ongoing joke: no one was inviting me to the Christmas party, so why worry about it? I think the truth is that some lawyers very much appreciate it, very much understand it, and are willing to help. But there is a sort of thin blue line. Many lawyers don’t want to be known as someone who participates in legal malpractice. And then you get a small leftover of lawyers who probably hate my guts forever.

InQ: Do you have trouble finding experts from the Denver legal community on standard of care?

Paul: It’s very difficult to find a local expert to testify against a local firm, but not necessarily for the reasons you’d think. It’s more they just have conflicts, they know everyone.

InQ: Mick, you originally handled the defense of legal malpractice claims, but now do almost exclusively plaintiff’s work, correct?

Michael: Yes. In the mid-1990s I was the chair of the CBA’s Professional Liability Insurance Committee. My partner Liz Starrs and I had a large share of the legal malpractice defense work in Colorado. I made the switch to the plaintiff’s side in about 2003.

InQ: After you switched sides, and were no longer an active member of the defense bar, have you been ostracized by the defense bar in any palpable way?

Michael: Generally no, but yes in some ways. When it became clear that I was switching sides it was a very interesting reaction. A number of people were very cool about it, “Hey, great, congratu-

lations, we wish you well.” A very few of the defense lawyers were very overtly hostile, to the point of they just didn’t want to talk to me. It was as if I had betrayed the club or betrayed the tribe. I’ve now been working on the plaintiff’s side for 13 years, so I think those negative feelings have mostly dissipated.

InQ: Cindy, are lawyers who bring malpractice claims no longer as fearful of being ostracized or blacklisted in the community?

Cindy: For some, yes. For some others, I don’t think so. I think there still is a loyalty factor. Certainly, there are many lawyers who have no hesitation in suing other lawyers—God bless them, it keeps me employed! There is also a select group of lawyers who understand that you can handle these matters with a delicacy where, maybe, a frank discussion with the other side is your first step, and only if that doesn’t work does one go down the litigation road. I think it comes down to some who are more imaginative and can see different ways of getting it done, and others who just want to sue.

Conclusion

I remember thinking while in law school that only the worst lawyers got sued for legal malpractice. Later, during my first few years as an associate, I felt like I was bullet-proof, because lawyers I highly respected and admired reviewed all my work-product. But, eventually, as I took lead responsibility on cases, the possibility, if not inevitability, of the numbers catching up with me loomed. And, as the cases I handled grew from tens of thousands, to hundreds of thousands, to millions, to tens of millions of dollars in size, the malpractice shadow darkened.

Fortunately, I have not been sued for legal malpractice, although I was threatened once by a lawyer who had represented an adverse party, and who then contacted my firm’s client ex parte after the litigation concluded as a part of an effort to bring a lawsuit against us. Our firm ended up receiving about \$70,000 in attorney fees as a result, and the other attorney was publicly censured. Despite these circumstances, I still managed to go through the six stages of grief after I got that lawyer’s demand letter, and it took more than two years to be fully validated. In the midst of it all, my law partner said to me that he couldn’t imagine there being a well-founded claim given how obsessively detail-oriented and cautious an attorney I was (a nice way to say I am a control freak)—a trait that drove him up the wall from time to time during our 30+ year partnership, but one that served our firm well in responding to this claim.

In this Part 1, lawyers on both sides of the legal malpractice equation identified the common, powerful emotional reactions lawyers have to being sued for legal malpractice. Those emotions run deep, flow from our very core as people and professionals, and can easily spill over into our relationships with our family, friends, coworkers, and law partners. Part 2 will explore what lawyers have learned about our legal system (and legal malpractice coverage) when the shoe is on the other foot and they become the target of a lawsuit. Are they good clients? Malleable witnesses? Are the flaws in our court system magnified in their eyes? Are the premium dollars saved in purchasing eroding limits (Pac-man®) policies worth it? Also, do women attorneys get sued less often and, if so, why? The answers may surprise you. ■