

So, How Does It Feel to Get Sued for Legal Malpractice? (Part 2)

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 second of a two-part conversation about the effect of legal malpractice claims on a lawyer's psyche. 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.

He who represents himself has a fool for a client.
—attributed to Abraham Lincoln¹

Experience is simply the name we give our mistakes.
—Oscar Wilde²

There is no better than adversity. Every defeat, every heartbreak, every loss, contains its own seed, its own lesson on how to improve your performance the next time.
—Malcolm X³

This two-part article discusses the emotional roller coaster that lawyers ride when they get sued for malpractice. We spoke to defense lawyers who have represented attorneys against such claims, plaintiff lawyers who have sued other attorneys hundreds of times, defendant lawyers who have been sued, and a psychologist who has counseled lawyers during the ups and downs of such litigation. In Part 1, we saw how these emotions not only can affect the attorney being sued, but also may create issues among law partners and between supervising and supervised attorneys.

In this Part 2, we examine whether the shame and stigma many lawyers associate with getting sued for malpractice affects them as

client and witness in their own cases, and how it can impair their judgment in defending such claims. We explore whether women attorneys are significantly less likely to get sued for malpractice and, if so, why that might be true. We talk about how eroding-limits (Pac-man[®]) policies can affect lawyers as they watch their protection against a potentially crippling money judgment evaporate before their eyes while their defense counsel does all they can to protect their reputation and defend against scurrilous, and not-so-scurrilous, claims. Finally, we find out whether lawyers who survive the sausage-maker of litigation learn anything new about our legal system—or themselves.

Notes

1. See, e.g., Keyes, *The Quote Verifier: Who Said What, Where, and When* 128 (St. Martin's Griffin 2006).
2. See Atkins and Simpson, *Managing Project Risk* 242 (John Wiley and Sons, Inc. 2008).
3. See Price, ed., *The Most Inspiring Things Ever Said* 85 (National Book Network 2017).



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 2: Takeaways from Being Sued You Will Probably Get Sued



InQ: According to experienced professional liability defense counsel, relying on ABA and liability carrier statistics, lawyers will typically experience one legal malpractice claim and two ethics grievances during their careers.¹ In my efforts to interview lawyers who have been sued for malpractice, not one who lost or settled the claim agreed to talk to me on the record, presumably because they did not want to publicize the assault on their reputation or relive the experience. One purpose of this article is to destigmatize being sued for legal malpractice. This can assist lawyers by lessening the emotional toll such claims bring to bear, and making lawyers better clients to their lawyers and better witnesses for their own cause. It may also encourage lawyers to more readily own up to their mistakes and prompt them to carry adequate insurance to better protect themselves and their clients.

InQ: Paul, when you were in law school, before you got your first clerking job or first employment in a law firm, what was your impression of legal malpractice?



Paul: I don't think I had any conception of it at all. If I considered the question, I might have thought, "You would have to be an idiot to commit an ethics violation." And today, having defended lawyers and what not, I would say the rules of ethics are so complex, and the shades of grey so big, I think, "If you haven't committed an ethics violation, you're not trying hard enough!"

InQ: Nancy, has there been a change in the willingness of lawyers to sue other lawyers?



Nancy Cohen: When I think back to the '80s, lawyers were hesitant to sue other lawyers.



Michael Mihm: Still are.

InQ: Cindy, you had mentioned earlier that you think there are more legal malpractice cases being filed, and my reaction was that there are more lawyers, so there's probably more litigation. But it seems there are even more cases than one would expect based simply on the increasing number of lawyers. Is something else going on?



Cindy Fleischer: I think so. In the '80s and the '90s, there was a different way of practice and a different training pattern for lawyers. After I graduated in 1984, I had mentors, so when I went to trial or handled a case, they watched me. I was allowed to take risks and I was allowed to make mistakes, but I wasn't allowed to make fatal mistakes. Since then, we now do more work with computers. And there's much less mentoring and less of a tradition of bringing people up through the ranks. Some young lawyers think they don't need to take things step by step. And, due to economic pressures, both new lawyers and experienced lawyers are getting into practice areas for which they aren't well-prepared. Also, back in the '70s and into the '80s, even if you committed malpractice, your clients were more willing to forgive. Today, I think the media teaches people, our clients and the general public, to understand that they have additional rights and maybe they can and should pursue them.

InQ: Do you also believe there is a lessening of resistance on the part of lawyers to sue other lawyers?

Cindy: Absolutely.

Lawyer as Client and Witness

InQ: How about the lawyer as client: Nightmare? Dream come true? Something in between?



John Palmeri: I think lawyer-clients tend to fall into three categories. First, those who become very involved in their defense. Second, those who simply "check out," and do not want to know what is going on—they just want it to be over. Third, and these are the ones who make me a better lawyer, are like any good client: they are simply good people. Many are very sophisticated and helpful, and they add value to motions and other papers that you run by them. They want to do the right thing in light of the law and the facts, and they want to help me do my job as best I can without getting in the way.

InQ: Dr. Stevens, when you've offered counseling to lawyers who are involved in a legal malpractice claim, have they mentioned their relationship to the lawyer who was representing them or described the dynamic to you?



Dr. Stevens: I have limited experience in this particular domain, but I would say there's a tendency to have deep skepticism that their lawyers are actually doing a good enough job representing them, which makes them anxious.

InQ: John, how about the lawyer as witness?

John: I'd say they tend to fall more into the extremes. They are usually good witnesses. But I've seen some very good lawyers turn into poor witnesses.

InQ: David, what observations do you have on the lawyer as client?



David Hersh: Often, whatever behaviors preceded the claim are echoed in their conduct during the lawsuit. Some are very helpful to the defense, marshalling witnesses, facts, and documents, and plainly telegraphing their communications. However, sometimes they can begin to over-manage their cases and create difficulties. Others are less helpful—they tend to say dumb things and need extra education and extra preparation. Some put their head in the sand and wish it all away.

InQ: How about their testifying skills?

David: The good ones make great witnesses. They present well, are well-spoken, and are humble. Some, however, are arrogant. When doing plaintiff's work, I *love* the arrogant lawyer. It is often easy to use their ego against them, especially if they show a lack of humility in front of the jury. I love pushing their buttons. I've spoken to some jurors after a legal malpractice case who told me they felt like the lawyer-witness was talking down to them, while also seeming to hide things. Lawyers have a smaller "Marcus Welby" effect on jurors than doctors have in medical malpractice cases. They aren't held in as high esteem. Transactional lawyers typically have less knowledge and experience regarding litigation. They carry a lot of incorrect assumptions about how the trial process works that need to be corrected. They often are not effective witnesses.

InQ: Mick, what is your perspective on the lawyer as client-witness?

Michael: I think it depends a great deal on the individual. Lawyers can be excellent or terrible witnesses, and you take each one as you find them. When I did defense work, we spent a lot of time working with our clients, preparing them very systematically. Some made good witnesses, some didn't. At one point, about 60% of my clients on the plaintiff's side had law degrees. They may never have practiced, but they were lawyers. Nearly all of our expert witnesses are lawyers, except for damages experts. So we're putting lawyers on the witness stand all the time, even as plaintiff's legal malpractice counsel. We have spent a lot of time figuring out the lawyers' problems as witnesses and preparing them to testify.

Nancy: I like representing lawyers because generally I find it to be very collaborative. They understand what you are trying to do. I think that you can train most lawyers to be better witnesses. However, you can't break down their ego to the point they don't appear confident, but there's a fine line between a witness appearing confident and coming across as arrogant. Of course, there are others who say, "I've screwed up." I have to tell them, "Don't blame yourself so much. Step back a little bit." Many lawyers have a strong ego; you can't control that part of them. If it comes across too harshly, the fact finder may be tough on them. I would actually prefer to be in front of a jury because I find that arbitrators can be tougher on lawyers than jurors.

Michael: I think there's a lot of second guessing or Monday morning quarterbacking that goes on with judges presiding over bench trials or lawyers presiding over arbitrations that maybe wouldn't happen with jurors.

InQ: Cindy, what about the "lawyer-as-client"? Specifically, what is it like preparing them to testify in a deposition or trial? Are they good or bad witnesses by and large?

Cindy: It depends. I've had some great, great lawyer-witnesses. One went through thousands and thousands of pages of documents to get ready for his deposition, prepared timelines, and got to know the file inside and out. He was terrific in his deposition, because there was nothing he didn't know. And because he knew it all, he felt more confident testifying. Now, let me contrast that with another lawyer, who was head of a very big, national firm, who came in and basically said, "I don't remember anything." I think the best client is one who is willing to put the energy into learning the case all over. Of course, there are those clients who think they know best, that they've taken more depositions than I possibly ever could. I probably prep them longer than anybody, over a couple of days, and try to break down the armor. If I can't, it's just the way it is. But that type of attitude, it comes across. And it comes across to a jury too.

InQ: What are you referring to when you say "armor"?

Cindy: I think there is a metaphorical armor that some lawyers put on when they get sued. I try to help them through the litigation process, and they say, "I know, I've done this. You don't have to tell me." Well, yes, I do have to tell you, because you're sitting in that chair and I'm sitting in this chair, and there's a big difference. It's not just good enough to go over the facts. Most lawyer-clients find it helpful to role-play a deposition, and to do so again before trial—to practice cross-examination and direct. Not to script it out, but to take on different demeanors. Because who knows, there are some trial lawyers who can be your best friend in a deposition and your worst enemy at trial. Or the opposite—so that the plaintiff's lawyer attacks the lawyer-client during deposition, provoking the lawyer-client to be hostile toward plaintiff's counsel. Then the

lawyer-client carries this hostility to the trial and testifies with a hostile demeanor, and the jury thinks, "What is wrong with you? You're an idiot—this lawyer is just asking you questions, and you're just being an ass."

InQ: Yes, of course, sneaky ploy number 14 in the trial lawyers' bag of tricks.

Cindy: I think lawyer-clients who understand that they have not been in that deponent's or witness's chair before are the better clients. Sometimes, when I'm defending male clients, they think they need to do the fighting. I say, "No. You're just the witness, you let me do the fighting." Or I have to remind them, "Please, just listen to that question. Do not worry about the next 10 questions down the road, because if you're not listening to the current question, it doesn't matter what happens 10 questions down the road; you will have given them their case with that one bad answer."

InQ: Paul, have you seen differences in how lawyers present themselves as witnesses versus the average person?

Paul: Generally speaking, lawyers make excellent witnesses. They're teachable and they understand the downside of straying from good witness behavior. The one exception is that sometimes lawyers will argue from the witness stand—and if you can get a lawyer to argue while testifying, it almost always works against them.

InQ: What have you found about juror perceptions of lawyers?

Paul: Juries really like lawyers. It's a myth that they don't. We almost always do post-verdict juror interviews, so this conclusion is based on first-hand discussions.

InQ: That's good to hear!

Paul: When you sue a lawyer-defendant, and he or she takes the witness stand, more often than not juries love them. Even when the jury is prone to award money, it's almost as if the jury empathizes with the lawyer. It's a rare day when they hate the lawyer. And the reason for that is if the lawyer is "hateable," the case settles. So when we go to trial, we're dealing with a likeable defendant in the first place. I believe that as a profession, we're a little bit over-sensitive to this idea that everybody hates us. The truth is that people still admire lawyers, and if you put a lawyer on the witness stand, they're interesting, and they're very good at talking. So, good news, juries like lawyers.

InQ: Have you learned from your discussions with jurors whether they felt a heightened sense of responsibility because the lawyer's professional reputation was on the line, and that it might be affected by an adverse verdict?

Paul: I've heard various jurors say they were concerned about the reputation of the defendants; I've never heard them say that that feeling was different because the defendant was a lawyer. So, my sense is that if a juror wants to give a defense verdict, they might begin to rationalize that by saying, "Well, I don't want to damage that person's reputation."

InQ: Mick, how have juries viewed lawyers in your cases?

Michael: I don't find that jurors will view lawyers any differently than any other witness. Once they get past the fact that this is a legal malpractice case and the defendant is a lawyer, then it just kind of depends on the facts and the particular lawyer-witness.

InQ: Cindy, what is your sense of juror reactions to lawyers as defendants in legal malpractice cases?

Cindy: I find when I have lost cases, there are definitely reasons, factual reasons, why jurors find against lawyers. But sometimes you hear comments like, "I didn't like him," or "They weren't nice to

their client,” or “They didn’t listen to their client.” That bothers jurors a lot. Then, other times, jurors think it’s just a money grab from plaintiffs against lawyers. I think jurors appreciate the work that lawyers do. I think they don’t appreciate arrogant lawyers. I don’t think they appreciate lawyers who put money over clients.

InQ: Mick, I’ve heard that in medical malpractice cases, jurors often give the benefit of the doubt to the doctor, because they are a very esteemed class in our society. In contrast, there’s sort of the stereotype that lawyers are not esteemed by our society. Is that what lawyers face on the defense side when they walk in front of a jury?

Michael: I think it’s more of an even playing field in legal malpractice than in medical malpractice litigation. In a medical malpractice case, I think nationwide the statistics are that if a good plaintiff’s lawyer carefully selects the case, and retains nationally known expert witnesses who say that it is clear that the defendant doctor committed malpractice, the plaintiff’s lawyer will still lose 7 out of 10 cases at trial. In Colorado I think it’s closer to 9 out of 10. That’s not true in legal malpractice. I think it’s more of a 50/50 thing.

InQ: I know that I have, from time to time, documented in my file that a particular client may be perceived by others as lacking credibility, perhaps even as lying. I’m sure other lawyers do that as well. How do those kinds of notes play in front of a jury?

Paul: I’m not so sure that’s a piece of evidence that plays against the lawyer in front of the jury.

InQ: Might some jurors perceive that lawyers need to be fighters for their clients, that they need to be 100% behind the client, and if a lawyer is expressing reservations about a client, some jurors might think the lawyer is not doing his or her job, not really being a loyal soldier, not trusting the client?

Paul: I think jurors tend to see lawyers as not necessarily being a “yes man” or “yes woman” to the client and fighting for them regardless of the blemishes in the case, but to be more even-handed. They recognize that the lawyer’s job is to evaluate the evidence, which includes the client’s credibility. I think juries look at stuff like that and say, “That’s what I would expect a lawyer to do.”

InQ: I’d like to focus on one particular type of client. Suppose you’re defending a litigator in a legal malpractice case, and he or she is a very good lawyer, careful and competent. How controlling, if at all, do they become regarding the defense of their case? How intrusive do they become in your management of their defense, if at all?

Nancy: Well, you know they will be calling and they will be questioning, “Why are you doing this? Why are you doing that?” I don’t find that to be a problem. Now, if somebody comes in and says, “I want to do X, Y, and Z,” and I think it’s really a bad idea, I have no problem saying to the client, “We’re not going to do this, and this is why.” And we’ll dialogue about it, we’ll have a conversation, maybe even more than one conversation.

Michael: I have to echo what Nancy said. I still occasionally represent law firms. There are some people who are very demanding, who have very high standards, and who are excellent trial lawyers in their own right. I listen to those folks, because they often have insights that I wouldn’t have and substance to contribute to the case. Ultimately, however, it has to be my professional judgment. I’m not hesitant about gently going upside their heads and saying, “We’re not going to do it that way.” Usually the lawyer will say, “You’re right, we’re not going to do it that way.” But I make a point of listening to my client-lawyer and taking into account what they

have to say. Where we run into problems—at least I did when I was a defense attorney—is when I had a client who is a mediocre lawyer but thinks that he’s an excellent lawyer. Those people can be harder to manage because they don’t know what they’re doing, and their judgment is not something that we can rely on. They also tend to be the more difficult people. Fortunately, those types of lawyers are relatively rare. My experience has been that the better the lawyer, the more likely the lawyer is to listen to his or her attorney.

InQ: Cindy, we’ve talked a little bit about what it’s like to be trying a case and to have a trial lawyer as your client sitting next to you. I sometimes co-chaired trials with my partner Scott in some of our bigger cases, and obviously only one of us could be lead trial counsel. I knew Scott to be a very gifted lawyer and I was happy to let him be lead counsel, and to limit myself to motions argument and handling a few witnesses. But the one thing I knew drove him crazy was all the sticky notes that I shoved onto his yellow legal pad every five minutes during trial. From experience, I knew that maybe he’d find 1 out of 10 meaningful and helpful—but the other nine-tenths was just noise that drove him a little crazy. However, being long-time partners and friends, we got through it with minimal bloodshed.

Cindy: I’ve had lots of yellow stickies, in cases I’ve won and lost, and I do save them. The client gets to control a lot of things, but ultimately I’m trial counsel and the trial is on me. Most times lawyer-clients are pretty willing to accept the guidance of their lawyers and their recommendations and opinions. If they won’t, maybe they’re not a good fit. That’s why when you pick a lawyer, you need to make sure you fit with that lawyer. I am not the lawyer for everyone. You’re not the lawyer for everyone either. I think it’s really important to recognize that fact, that we’re not widgets.

Feelings about the Judicial System

InQ: Nancy, from the standpoint of your lawyer-clients, how does their perspective on the legal system change after they’ve been through the litigation wringer?

Nancy: It often depends on whether they win or lose. When they lose, especially transactional lawyers, it goes to the core of who they are. Often, they are extremely upset, but they typically get through it. If the process was really nasty and drawn out, they may be extremely upset. I’ve had clients who have bounced back, but it’s very emotional, because then you have somebody else who has said, you know, “What this plaintiff has said is correct, you screwed up.”

InQ: When they lose, do they recognize that they did fall below the standard of care and learn from this experience?

Nancy: Some do, some don’t.

Michael: When I was on the defense side, and the lawyer recognized at the outset he or she made a mistake in some meaningful way, we’d generally get those cases settled before trial. From my perspective now as plaintiff’s counsel, it appears to me that it is often very traumatic for those lawyers who stubbornly maintain that they did nothing wrong to roll the dice, go to trial, and lose. Usually, they’re pretty arrogant about the claim, but then they lose the case and lose face. Losing often causes controversy in their lives and firms, and I think it can be quite shattering.

InQ: Paul, did living through a lawsuit and a trial as a defendant change your view of the judicial system?

Paul: Yes, in a couple of ways. I sat for 11 days and watched other people try a case, and they were very different from the kind

of lawyer I was. I realized there was so much spread in style, that a lot of the stuff that I was anxious about, like, “Am I doing this the right way?” well, it’s not that easy to say that there’s a right way and a wrong way, so why should I worry so much? So, it actually relaxed me as a trial lawyer. The business of being a guest in my own case was dumbfounding. I got a better appreciation for the difference between truth and inference. I knew what really happened, but I could see right before my eyes opposing counsel arguing for certain inferences to be drawn from evidence, yet those inferences were not what happened! Now, the jury didn’t buy his arguments, but I could respect what was going on as I watched it.

InQ: So, the other lawyer was arguing for an alternate reality, yet you’ve lived the actual reality, and that reality was wired into your memory and your emotional state. Yet the other lawyer is taking the same objective facts, as lawyers will do, and spinning them. And you’re thinking, “Wow, there’s another reality out there that somebody might accept as true.”

Paul: Exactly! And his argument is the argument I would have made if I was in his shoes! And, I have to admit, I wanted to hate opposing counsel, but I actually kind of liked him and I thought he did a good job.

InQ: Did your view of judges change based on you being a party, versus you being an advocate, in the courtroom?

Paul: This particular judge did a really good job. Now, I could imagine being in a case where I’m watching the judge and thinking, “Oh my God, that judge has a lot of influence over the admission of the evidence.”

InQ: Kevin, in Part 1 you shared your experience of being sued for malpractice. Any lessons learned from that?



Kevin: Well, it did incentivize me to ensure I have insurance coverage in place! And I’ve been covered continuously since then. And generally, if I can get a policy where the defense costs are outside the limit, that’s what I’m always going to do, even if it’s a little bit more money, and it always is, because it makes so much more sense, especially in today’s environment. I mean, you just never know.

InQ: Did your view of our judicial system change at all?

Kevin: No. I’m a real believer in both the jury system and the way we resolve cases. Overall, as much as I didn’t want to go through this process, I thought the system worked well.

InQ: Were you feeling that sanguine about the system after the Court of Appeals issued its opinion reversing the summary judgment you had obtained?

Kevin: (laughing) Probably not, no.

InQ: Cindy, focusing on clients who’ve been through trial, what do you think their view of the judicial system is now that they’ve been through the wringer?

Cindy: I think universally my clients have been less agitated about jurors and more agitated about judges, especially judges who allow their personal feelings to wash over into the proceedings. I think most lawyers still have faith in the jury system.

InQ: Dr. Stevens, what is your sense of how lawyers react, and what do they experience internally, at the conclusion of the legal process?

Dr. Stevens: As you might guess, the outcome matters a lot. But you can imagine cases where people really felt like they were trying to do right, but maybe overseers came to question their conduct or decision-making. Yet there was no deliberate effort by the lawyer to deceive or do something wrong. I think there’s often

something like deep disillusionment with the law, a kind of de-idealization of the law.

InQ: What can you offer to lawyers who’ve been through the black hole of a malpractice lawsuit and seen the physics of their legal universe change?

Dr. Stevens: I try to help them realize that a virus has entered their system. That they’ve been practicing for years and it mostly has gone just fine. That history is the best predictor of the future. But, also, if there is something to learn from the experience, learn it and move on. The effect of a claim is often magnified on someone’s emotional state for a longer time than you might expect. Even when they have been vindicated, it’s like being burned—you stay away from the stove for a while. If you assume a basically responsible person is simply trying to do his or her job, and then, suddenly, some authority says, “I’m not sure you’ve done your job. You know, we’re quite skeptical.” This is quite a shock to persons who have been doing their jobs, and trying to do the right thing. It can take quite a lot of digestive effort to settle that down, and not allow it to hijack how a person behaves down the road.

InQ: Kevin, what are your feelings today, having emerged from the black hole of a malpractice claim?

Kevin: My lawsuit comes up from time to time with folks. What I think is interesting about these sorts of things is that we, as lawyers, are trying to help people, and it is important not to be ashamed that a claim has happened. Almost all of us attorneys, if you have a volume of cases, are going to face a claim or two during your career—you’re going to get accused of doing something, and sometimes you’ve done something wrong. The thing that I learned is that you confront it head on, and you figure out what to do about it, and then you resolve it. Unfortunately, I had to go all the way up through the Court of Appeals to the Supreme Court to get that resolution.

Why Are Their Fewer Claims Against Women Lawyers?

InQ: I have heard over and over from legal malpractice defense lawyers that they rarely see women lawyers being sued. These are anecdotal but consistent reports. What is your impression of this contention?

John: I’d have to agree with that observation.

InQ: Why do you think that is—recognizing that we are all shooting from the hip on this issue and bound to be accused of falling into stereotypes?

John: I think many women leave the profession before they reach “first chair” or partner position or are not even given a fair opportunity to fill that chair. I think that a greater proportion of women than men drop out of leadership roles before hitting 40—and my experience is that most claims are brought against lawyers who are 40 or older. Also, for these same reasons, women are less likely to be the primary client contact, and, therefore, are less likely to be a suit target. I have also noticed that often during the dynamic of trial, some women defer to their male partners, while some of the male partners are protective of their female partners. Thus, the male may be perceived as the decision-maker and the more culpable and less sympathetic lawsuit target. Conversely, it has been my experience that women attorneys tend to deal with interpersonal issues differently. Also, women are often held to a tougher standard.

InQ: Cindy, during this dialogue, I’ve spoken to a lawyer who’s handled about 500 plaintiff legal malpractice cases over his career

and he couldn't recall ever suing a female lawyer. Does that comport with your experience? While I haven't been able to collect any hard data on this question, I think the readers would be interested in the anecdotal impressions of experienced legal malpractice counsel like yourself.

Cindy: It's not that female lawyers don't get sued or grieved. But, in my experience, they certainly don't get sued or grieved in the numbers that men do. In my experience, when a woman attorney gets sued for a mistake, it has been attributable many times to substance abuse or depression.² As to why women don't get sued as often, I have a couple of thoughts. First, I think there is a huge drop off in the number of women trial attorneys over time. At about age 40, many women think, "Why am I doing this? Why would I want to be up till 12 or 1 at night, when my significant other is sleeping next to me in the bed, and my daughter is sleeping in her room. Why am I up working? Why do I want to be doing this? I can do a lot of different things in the law." So there's that. And, second, there is still a gender bias, though not as great as when I started. In sum, if you have a significant portion of female trial attorneys who are not staying in trial work, certainly the percentage who are going to get sued drops.

InQ: Any other reasons?

Cindy: I think a third thing is, that—and I want to say this in the right way so it's not offensive to any readers—whether by design, or just the way it goes, often even if a woman attorney is in a case with a male attorney, and even if they are partners, there is sometimes an assumption that the male attorney is the leader, and the clients may actually think it's the male attorney who is doing everything, and the male attorney may in some ways assume that "role," and, therefore, he is the one who is the target of the malpractice lawsuit.

InQ: John Palmeri suggested that possibility as well.

Cindy: I also believe that there are many really fine lawyers who have a high IQ and EQ (emotional intelligence), and tenacity, brilliance, and imagination, and who also can relate to clients. However, I think women excel more in that EQ kind of way. So, even if a woman attorney makes a mistake, the client may have more of a personal connection with her than with a male attorney. Clients may be more willing to sue male lawyers because the decision to do so is black and white in their mind, while in the case of a female lawyer, the attorney's reaction may be more like, "I'm going to get you through this, let's talk about this." And—this is a broad generalization—a woman attorney may be more willing to tell the client about a mistake and discuss it with them, while a male attorney may be reluctant to do so because, well it's so horrible for some men, but they may believe that they are expected to be flawless—and they may be unwilling to acknowledge a mistake, and then things could escalate from there.

InQ: Anything else?

Cindy: Well, I don't know if it's just the female lawyers I've defended, because there have been only a few, and I worry that this may sound really sexist, but they have well-organized files. In contrast, I see far more males that have files that are just, you know, boxes of paper, which in this day and age, I'm just like "What?!" It's just been my experience that most files I see from women are really well organized.

InQ: Well, one lawyer with whom I spoke offered the observation that, "Women lawyers are like Ginger Rogers. They have to do everything that male lawyers do, but in high heels and backwards."

Cindy: Exactly.

InQ: Interestingly, a recent study from the Harvard School of Public Health published in the December 19, 2016 *Journal of the American Medical Association (Internal Medicine)* found that elderly hospitalized patients treated by female physicians were less likely to die within 30 days of admission, or to be readmitted within 30 days of discharge, than those cared for by male physicians. The study concluded that if "male physicians could achieve the same outcomes as their female colleagues, there would be 32,000 fewer deaths each year among Medicare patients alone—a number comparable to the annual number of motor vehicle accident deaths nationally."³ It seems that something is going on in the legal and medical professions that deserves further study.

Pac-Man® Policies and the Black Hole

InQ: Have you noticed any difference in how the sued attorney reacts to the lawsuit, depending on whether they are insured or uninsured for the client?

Paul: No, I don't think so. You get the same spectrum of responses.

InQ: How about any differences in how lawyers react to suit depending on whether they have an eroding limits policy—one where the harder or longer their lawyer fights, an eroding limits policy is going to reduce how much indemnity coverage is available to pay the claim?

Paul: Not really. I think lawyers who are sued are more fixated on the idea that they've been accused of a wrong, and that their retained counsel vindicate them. But a Pac-man policy makes a difference in how I prosecute the action, approach settlement, and deal with opposing counsel. It forces me to change my strategy, to become very aggressive about mediation early in the case if we have such a policy.

InQ: Cindy, we've talked about the emotional journey lawyers go through during the course of a claim—does it make a difference to that journey and to the way they think whether they have an eroding limits policy?

Cindy: Yes. It certainly affects their relationship with their counsel. Let's say you have million dollar limits, and it's an eroding policy—I won't even get started on how some firms under-buy coverage, it makes me crazy. With an eroding limits policy, my lawyer clients have to look over my shoulder all the time and ask, "Should you be spending this money? Should you be doing this?" because every dollar erodes their protection, and every dollar that goes to me or goes to costs or experts may be a dollar out of their own pocket. Also, without an eroding policy, I think the carriers have more skin in the game.

InQ: Do you manage the eroding limits case differently?

Cindy: I know I'm supposed to stay away from coverage issues, but I have to tell my clients they have an eroding policy. Often they may say to me, "But I have \$2 million dollars in coverage!" And then I have to tell them, "No, you really don't." And then they will say, "Well, you just mean I have to pay you a deductible?" And I say, "No, it's more complicated than that." An eroding policy can make one sick to his or her stomach if it is a close call between the policy limits versus the provable damages.

InQ: Nancy, I understand that fairly early in your career, while you were a partner in a small law firm, a firm principal, your mentor, was sued for legal malpractice. Were there any unique stressors at the partnership level due to this lawsuit?

Nancy: It didn't really impact me personally, but I did see firsthand the stress on a very good, well-known lawyer who got sued for legal malpractice. One thing that stands out is that I had never heard of this term, a "Pac-man policy," so it was the first time I had heard of a depleting limits insurance policy. Today, I am not a fan of Pac-man policies. If the insured has a large limits policy, depending on what the claims are, you might not have to worry so much. But if the insured does not have a lot of coverage, you as the lawyer really need to think about how you're going to defend this in a way that makes sense, so that you're not using up all of the policy limits.

InQ: Mick, what is your recommendation to lawyers as far as whether they should purchase an eroding limits policy or not, from a financial and from an emotional standpoint?

Michael: I'd recommend that if you've got the money, even if it's a hardship, buy the endorsement for defense costs outside the limits, and buy sufficient limits to protect you and your clients regardless of what goes wrong.

Nancy: Because I often defend smaller firms, I am surprised at the low limits those firms have. Lawyers don't think that they're going to be sued. Yet the leading authorities say you're going to be sued about three times during your lifetime. What often ends up happening is that lawyers, especially if they've been in a bigger firm and they go out on their own, or are just starting out on their own, say, "I don't really have any money." And that may be true for the lawyer that is starting out. But in 10 years, the lawyer has accumulated a lot more wealth. Yet a lot of lawyers don't seem to think about that, and I don't know why. That may be because as lawyers we don't think about the business of law. So if you're coming from government, or you've come from a big firm and are starting your own practice, or you've just left law school and are hanging your own shingle, it takes a while to think about the business of law.

Michael: I also think there's a moral component. I think every one of us is going to make mistakes from time to time; it's just part of being human. If you're a lawyer, you're going to make mistakes. I think we, as lawyers, have a moral obligation to protect our clients. If our mistakes hurt a client, then we ought to think, "What can we do to protect that client?" Well, one thing that we can do is buy enough insurance to cover the loss.

Conclusion

In Part 1, lawyers on both sides of the legal malpractice equation identified the common, powerful emotional reactions attor-

neys have to being sued for legal malpractice. Those emotions touch our very core, and can affect our family, friends, coworkers and law partners. In this Part 2, we explored what kind of clients and witnesses lawyers make, and what lawyers learn about our legal system—and their legal malpractice coverage—when they are sued. We have learned that it is important to de-stigmatize legal malpractice claims. By doing so, this lessens their emotional toll, reduces internecine stresses among law partners, and between partners and associates. It also makes lawyers better clients and witnesses. And, it allows lawyers to own up to their mistakes.

So what's the takeaway from all this? Sure it hurts, and it may be mightily embarrassing, to get sued. Big deal, you already knew that. Our dialogue participants believe that the most important lessons are these:

First, with few exceptions, we are all going to get sued or grieved at some point in our careers, often without cause, but sometimes because we screwed up.

Second, for most of us, getting sued or grieved will come as a shock and, no matter how careful a lawyer we are, our ego will feel battered and bruised and we may not think straight in the moment.

Third, once we get over the initial shock, we need to calm down, forget about being angry, and start thinking professionally. We need to notify our carrier, develop a good working relationship with our attorney, and be a conscientious and cooperative client.

Finally, and perhaps most important, remember all the good and careful work you've done over the years. But if you made an error that injured your client, take responsibility.

Notes

1. *See generally* Evans et al., "You've Been Sued for Malpractice—Now What?" 45 *The Colorado Lawyer* 77 (Aug. 2016) (citing Mallen and Rhodes, 1 *Legal Malpractice* § 1:1 (Thomson-West 2016) ("Statistically, an attorney will be the subject of three claims over his or her career.")).

2. *Cf.* Rothrock, "Lawyers Who Live in Pain: Mental Health Issues and Lawyer Misconduct," 45 *The Colorado Lawyer* 73 (Aug. 2016) (discussing challenges lawyers who suffer from depression, anxiety, or substance abuse face within the attorney regulatory system).

3. *See* Publius, "Hospitalized Patients Treated by Female Doctors Show Lower Mortality," naked capitalism blog (originally published in *Down With Tyranny!*), www.nakedcapitalism.com/2016/12/hospitalized-patients-treated-by-female-doctors-show-lower-mortality.html. ■