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Dibble Dabble Double Trouble: Mitigating the Risks of Dabbling In Your Law Practice

What is the Problem with Dabbling?

The Merriam Webster Dictionary defines "dabble" as "to work or involve oneself superficially or intermittently especially in a secondary activity or interest."[1] In a legal context, "dabbling" – or practicing in areas outside of your comfort zone, on a sporadic basis, in a field in which you have relatively little experience – is fraught with inherent risks.

A "dabbler," by definition, presents a practice risk where the attorney has not invested the time nor the regular engagement to achieve competence in a particular area of law. "I know enough about X to be dangerous" is a mantra frequently repeated in jest, and yet it is no laughing matter. On the contrary, providing less than competent legal representation is problematic for not just the attorney but their clients, the courts, and the legal system. Dabbling to the point of incompetency also may lead, not surprisingly, to possible disciplinary violations and legal malpractice actions. In fact, the 2020 American Bar Association [ABA] Profile of Legal Malpractice Claims (2016-2019 Claims) reports that nearly 52 percent of all legal malpractice claims involve "substantive errors," including a failure to know or apply the law, failure to know or calculate deadlines, inadequate discovery, and errors in procedure strategy.[2] The report further finds that more than 60 percent of all legal malpractice claims involve an area of the law in which the subject attorney works less than 20 percent of the time and attorneys who practice in a single area of the law account for less than seven percent of all legal malpractice claims.[3]

Although lawyers certainly have broad discretion to practice in all fields of the law (with limited exceptions), as time goes on and their careers evolve, most lawyers tend to develop some areas of specialization. The era of the true "general practice" lawyer, or one who is reasonably competent enough to take on any subject matter regardless of novelty, is an anachronism. According to the ABA's National Lawyer Population Survey, there are over 1.3 million licensed attorneys in the United States.[4] While theoretically possible for each of these lawyers to take on every client who walks through the door in any and all subject matters (subject to jurisdictional Rules of Professional Conduct and licensing restrictions), the fact remains that such an "open door, no limits" policy is not prudent. The law is vast, constantly changing, and it is unreasonable to expect any one lawyer to keep up to date on every development.

By honing in on one or two practice areas, attorneys establish more focused training and skills. They also become more efficient at the provision of services required in that specific practice area and are able to identify challenges or navigate complications more readily than their generalist counterparts because they have developed expertise in a given subject area. Lastly, those who consistently deal with the same types of matters naturally are more likely to develop a reputation in a community for being the "go-to" attorney in one particular practice area, which assists in new client development while further cementing the experience of the specialist over a "true" general practitioner.

1 https://www.merriam-webster.com/dictionary/dabble
2 2020 ABA Profile of Legal Malpractice Claims: 2016-2019, https://www.americanbar.org/news/abanews/aba-news-archives/2020/09/aba-releases-data-study-analyzing-trends-in-legal-malpractice-cl/?login
3 *Id.*
4 2022 ABA National Attorney Population Survey, https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf

To Dabble or Not to Dabble

Lawyers dabble in unfamiliar practice areas for a variety of reasons. The law is a business, and a lawyer can, of course, be motivated to take on a "new kind of matter" (for them) purely for economic reasons. For example, a lawyer who provides business services for a corporate client may be asked for help with a trademark. Although the lawyer expects no other trademark work from this client – and may have never done any such work previously – it is a revenue generating activity for the lawyer and a convenience or a "one stop shop" for the client.

Sometimes dabbling arises from a desire to help purely for personal instead of pecuniary reasons. Who hasn't received a request for legal advice from a family member or friend? For example, that uncle who needs help with a traffic ticket, or that friend who is contemplating divorce, or that parent who needs assistance in preparing a will. It is difficult to say "no" to Mom and Dad. Further, sometimes dabbling is the manner by which a new admittee to the bar determines his/her/their future practice area, or a way to satisfy certain referral sources, or may be used for marketing purposes, i.e., "we are a full-service firm."

There is nothing per se inappropriate with dabbling – so long as the lawyer delivers competent legal representation. Rule 1.1 of the ABA Model Rules of Professional Conduct states, "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[5] As the Comments to Rule 1.1 explain, a newly-licensed attorney can provide just as competent of a legal representation as a more seasoned practitioner – the less experienced lawyer may, however, be required to put in a great deal more time investing in learning the underlying subject matter (which the seasoned attorney knows by heart). While the newbie attorney may need to learn the area of practice, they must do so on the attorney's own time and expense – not the client's.[6]

In addition, there are certain practice areas where dabbling is more dangerous or where there is "crossover," meaning that one or more areas of practice overlap within the specific facts presented by the client. For example, intellectual property [IP] legal matters encompass multiple, discrete, and specialized practice areas, i.e., patent, trademark, copyright and trade secret law. Attorneys who regularly advise clients on corporate, business and similar types of practice areas are often times likely to come across a client who also needs IP assistance, e.g., a corporate client wants to protect its name and brand from trademark poacher, or it has created original works that qualify for copyright protection, or inventions it wishes to protect.

Cases of dabbling in patent law are less likely to occur than in other areas of IP for the simple reason that attorneys and clients alike recognize that patent services are both technically and legally complex, unlike many other areas of law, and often are too far outside of their area of practice.

Trademarks and copyright applications, however, present differently. At first blush, these types of matters may appear relatively simple, requiring nothing more than filling out a governmental, pre-printed form, answering a few questions, checking some boxes, paying a fee, and filing. In fact, because many applicants are *pro se*, the government provides a great deal of content on the U.S. Patent & Trademark Office [USPTO] and Copyright Office websites to help the public navigate the trademark or copyright application process. With all of this information available, it may not seem unreasonable for the non-IP lawyer to conclude that he/she/they could handle the representation. However, the true complexities often do not become apparent until the application is examined and the Office issues a lengthy office action with multiple unexpected rejections. The dabblers may soon find themselves dabbled over their heads – and lost in a situation where they are no longer competent to handle the matter.

Another item to consider when dabbling in IP practice is the dabblers" often unexpected exposure to ethics claims by both the USPTO as well as their own state bars, through a process known as "reciprocal discipline." An attorney who appears before the USPTO is subject to discipline by at least two different authorities: (1) the USPTO's Office of Enrollment and Discipline; and, (2) the state bar (or bars) in which the attorney is admitted. An attorney who receives public discipline from the USPTO may downplay the importance of that decision and believe that the attorney may continue to practice outside of the USPTO. Unfortunately, that belief fails to account for the fact that each disciplinary jurisdiction in the United States gives full faith and credit to the disciplinary decisions of every other authority, and it is a violation of the rules of professional conduct in any state for an attorney to be disciplined by another jurisdiction. Thus, a license suspension from the USPTO will not only result in the loss of the attorney's ability to practice before the agency, it could also result in a suspension of their state law license. When an attorney is disciplined by the USPTO, that attorney must report the discipline to each jurisdiction in which the attorney is licensed. See 37 CFR §11.24. Consequently, a suspension or exclusion from practice before the USPTO, which initially only prevents the lawyer from practicing at the agency, likely will also impact the individual's state bar license. A state court could impose the same license suspension as the USPTO, or it may deviate from that sanction. In other words, someone whose "dabbling" at the USPTO resulted in agency-imposed discipline, such as a suspension, may very well find themselves unable to practice law in any jurisdiction.

5 Rule 1.1 of the ABA Model Rules of Professional Conduct.
6 Comment [2] to Rule 1.1 of the ABA Model Rules of Professional Conduct.

Another area of practice that may pose significant problems for the "dabbling" attorney is wills, estates and trusts. Estate planning is governed by statute, administrative rules, and case precedent, and documents can be crafted for all sorts of purposes, e.g., transfer or protection of assets, income, tax savings, etc. Very rarely does the "simple will" exist, and often times, knowing what specific vehicle to utilize requires certain and specific knowledge of tax law that is comprehensive and changes frequently.

Immigration law is another area where dabbling is becoming more frequent. Immigration law is very technical and deadline driven. Changes to immigration regulations, executive orders, policies, and procedures occur rapidly. To further complicate this area of practice, errors and omissions in immigration practice can have severe implications for the client. For example, if a mistake, such as a blown deadline or an error in choice of procedures, is made, a client with an otherwise clear-cut case can be forced to start the process over or worse, face deportation.

Bankruptcy and collections matters present yet another area where the "dabbler" may encounter problems due to their lack of experience. Typically, the client has waited until the last possible minute to file and request legal assistance. The short time frame to file coupled with the sheer volume of information that must be gathered, processed and analyzed is difficult enough for the attorney who routinely practices in this area. For the novice – someone trying to learn how to do it "on the fly" – dabbling may be overwhelming. In addition, the Bankruptcy Code changes frequently and keeping abreast of these changes may be difficult. Similarly, frequent changes in the Fair Debt Collect Act and various state Consumer Acts are highly technical, involve fee-shifting statutes and even the most minuscule technical violation may result in large penalties for the client.

Lastly, while family law/domestic relations may seem simple at first glance, unexpected complexities (transfer of assets that become taxable events, retirement accounts, etc.) may arise that complicate matters for the dabbler. While there may be such a thing as a "simple" divorce, for the dabbler, the complexities of the law leave little room for error, and even the easiest of family law cases can turn into an ethical or malpractice nightmare.

Best Practices to Avoid or Mitigate the Risk of Dabbling

So how can attorneys avoid or mitigate the risk of dabbling? The following best practices may be instrumental in this regard:

- **Just Say No.** Sometimes the best client is the one you never had. Turning down a potential client or a continued client relationship on a new matter requires discipline, and you may feel badly that you are not there for your client. Don't be. You are doing no service to your client by handling a matter in which you feel you may not have the competency. Do not make it personal, and have a candid conversation that you simply lack the time, experience or resources to handle the case and that alternate counsel, on this issue, would be better suited to handle the matter. Along those same lines, do not accept a case to accommodate a friend or relative. At the end of the day, it is not about you, it is about the client. If IP is not your area, then have an honest discussion about the limitations on your practice. It is okay to decline a request for legal services. Good clients will appreciate your honesty and will come to you when they have a legal need that is in your area of comfort.
- **Know the Rules.** Ensure that you know and understand the competence rule in your jurisdiction. Remember that most jurisdictional versions of ABA Model Rule 1.1 require sufficient "knowledge, skill, thoroughness and preparation" before taking on the matter.
- **Educate Yourself and Engage in Self-Study.** As described above, attorneys have an ethical obligation to apply the skill needed for competent representation in whatever area they practice. If you have never handled an employment discrimination case before, you may not know what discovery to conduct or even where or if you can file the initial claim. Dabbling attorneys are expected to educate themselves on the relevant law, rules, and procedures. Attend CLEs, align yourself with a more experienced mentor, and join a bar association section. There are vast resources available to help you acquire the necessary skills and achieve competence. However, before taking on the client and engaging in self-study, recognize that in most situations, you will not be able to bill the client for your time and expense in getting up to speed.
- **Partner with Experienced Co-Counsel.** You do not necessarily have to decline the case or refer the client elsewhere. You can bring in an experienced attorney or consultant to help. Find and partner with an attorney who is more experienced than you in the field and is willing to either take the lead or at least provide you with needed support. If the client is expecting you to be doing the work, you should have a discussion about your co-counseling arrangement and ensure the client consents.[7]

7 See CNA Article, *"Money for Nothing? Best Practices for Referral and Fee Splitting Agreements."*

- **Add an Experienced Lawyer to Your Firm.** If the practice area is one where you would like to expand, recruit and retain a lawyer who can bring the expertise from the start.
- **Perception is Everything.** Be mindful that your inexperience in the practice area might hurt your client. Opposing counsel will perform due diligence, check you out, and learn about your reputation and background. If you are dabbling, and present as new to the area of practice, they may try to leverage your perceived inexperience. Experienced lawyers will pick up on your lack of experience and may try to intimidate you or, worse yet, leverage any lack of competency into a more favorable settlement or resolution for their client.
- **Withdraw if Necessary.** It may be that you took on the representation of your current client with the best of intentions, but as the matter progressed, it became apparent you were out of your depth. If the issues are beyond your level of competency, and you are unable or unwilling to either put the additional time in to obtain competency or to engage with co-counsel, then withdrawal would most likely be warranted and possibly required. Rule 1.16(a)(1) of the ABA Model Rules of Professional Conduct requires that an attorney withdraw from the representation if continued representation of the current client will result in a violation of the Rules or other law.[8]

Conclusion

Dabbling in areas of the law that are different or relatively new presents a unique opportunity to expand your practice. However, it comes with an increased risk for disciplinary and legal malpractice complaints if not prepared. Before jumping in, be willing to commit to the substantial time and resources necessary to comply with ABA Model Rule 1.1.

8 See Rule 1.16(a)(1) of the ABA Model Rules of Professional Conduct.

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