

BUSINESS

Lawyer vs. Lawyer becoming common corporate strategy

By Leon Lazaroff

Tribune national correspondent

NEW YORK-Lawyers once sued just about everyone-but other lawyers.

"It just wasn't done much-but that certainly has changed," said Ben Hill III, a Tampa-based attorney who chairs the American Bar Association's committee on legal malpractice.

Now big law firms, which generate huge fees representing large corporations, have become prime targets for malpractice claims.

One of the biggest such cases recently involved Chicago lawyer Myron Cherry, representing health-care company Ventas

Inc., taking on the prestigious New York law firm of Sullivan & Cromwell.

In late October, Louisville-based Ventas disclosed that its former counsel, Sullivan & Cromwell, agreed to pay \$25.5 million to avoid trial in a 3-year-old malpractice suit alleging conflict of interest.

In an investor conference call a day after the settlement was made public, Debra Cafaro, Ventas' chairman and chief executive, would only say that the settlement "agreement includes confidentiality provisions, and, therefore, we cannot elaborate on our statement or answer your questions."

H. Rodgin Cohen, chairman of

Sullivan & Cromwell, said he would not comment on the settlement, but contends that law firms are especially vulnerable to malpractice claims because dissatisfied clients take advantage of firms' eagerness to avoid potential damage to their reputations.

"There is a special vulnerability of having someone stand up in court for weeks or months and saying you are guilty of malpractice," Cohen said. "I would hope that most clients, the vast majority, would not look to the courts for a remedy for every perceived ill."

While the Ventas-Sullivan &

PLEASE SEE **LAWYERS**, PAGE 11



Tribune photo by Bonnie Trafelet

Chicago lawyer Myron Cherry, who won a \$25.5 million legal malpractice settlement, says companies today are more likely to sue a large law firm, even one with which it had a long relationship.

LAWYERS: Malpractice claims rising, survey shows

CONTINUED FROM PAGE 1

Cromwell malpractice settlement was not the largest payment ever received by a law firm's former client, it fell well atop the highest category of payments cited in an April American Bar Association study.

That survey of legal malpractice cases brought between 2000 and 2003 showed that the number of payments for more than \$2 million had increased to 19, compared with 10 recorded between 1996 and 1999. Payments included both out-of-court settlements and courtroom verdicts. Personal-injury cases comprised the largest number of legal malpractice claims, followed by cases involving family and estate law, and corporate transactions such as bankruptcy.

The fallout from high-profile corporate corruption cases, most notably Enron Corp. and WorldCom Inc., has placed greater scrutiny on executives to justify their actions, said Cherry.

Five or 10 years ago, Cherry said, corporate clients were unlikely to sue a large firm, especially one with which it had a long relationship.

"Now, shareholders are demanding that executives serve them," Cherry said. "Corporations, therefore, have a fiduciary responsibility to shareholders, and that could mean evaluating whether they have a claim against their own law firm."¹¹

In the Ventas case, the health-care company charged that it ran into severe financial problems specifically because of "incompetent and negligent" ad-

vice it received from Sullivan & Cromwell stemming from the company's 1998 spinoff of its hospitals and nursing home operations.

In 2002 Ventas sued Sullivan & Cromwell for \$186 million, alleging that it engaged in a conflict of interest by representing both Ventas, which became a real estate investment trust, and the spun-off health-care company, Kindred Healthcare.

After Sullivan & Cromwell repeatedly petitioned to have the case thrown out, a judge last year set a trial date. The settlement occurred several months before the trial was to begin.

The American Bar Association also revealed that claims against firms with more than 100 attorneys had more than tripled between the two time periods it studied.

'Quicker to sue lawyers'

"People are more cynical, they're quicker to sue lawyers and they think in larger dollar numbers than they ever had," said Thomas Browne, general counsel at Hinshaw & Culbertson, a Chicago firm that often represents lawyers in malpractice suits.

Browne, who has represented lawyers for more than 25 years, said that until three years ago he had never been involved in a settlement for more than \$1 million. Since then, he added, four of his legal malpractice cases have ended in settlements exceeding \$1 million.

Browne and others point to corporate scandals and the 2002 Sarbanes-Oxley Act, which overhauled corporate governance rules, for making law firms more answerable to their clients' actions.

"When a big scandal occurs, the trend now is for board directors to see whether some big law firm handling its legal work may be to blame," said Stephen van Wert, an executive at Brown & Brown Inc., a Daytona Beach, Fla., insurance intermediary that offers legal malpractice coverage. "There's more scrutiny being placed on law firms."

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At the same time, law firms usually want to minimize the time and money spent in a courtroom proceeding.

For that reason, "95 percent" of claims against law firms are settled before trial, van Wert estimated.

To lessen the chance of claims, Edward Zulkey, general counsel of Chicago firm Baker & McKenzie, said he spends more time speaking and lecturing internally-especially to younger lawyers-among the firm's 3,500 attorneys.

Zulkey said he emphasizes choosing clients carefully, documenting a client's instructions and taking care that a case does not conflict with the firm's other responsibilities.

Nationally, more law firms are designating a partner to serve as a general counsel to handle malpractice issues. A June 2005 study by Altman Weil Inc., a legal consultant based in Newtown Square, Pa., showed that 69 percent of the country's largest 200 law firms had designated such a general counsel, up from 63 percent in 2004.

Susan Paris Koniak, a Boston University School of Law professor, argues that the threat of legal malpractice suits is mostly a good thing. She said they force law firms, especially larger firms, to behave ethically.

"When you're talking about these very large and powerful law firms, that's the only deterrent there is," said Koniak. "Too often, discipline boards shy away from really going after the big firms."

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When lawyers get sued

Some examples of law firm malpractice cases:

- In April, a Los Angeles jury ordered Chicago law firm Seyfarth Shaw to pay Tae Bo creator Billy Blanks \$29 million for fraud and negligence in mishandling his legal matters. Seyfarth Shaw appealed.
- In May, a Texas state judge ordered Houston

law firm Baker Botts and Wells Fargo Bank to pay \$65.5 million for breaching fiduciary duties relating to estate-planning for a wealthy widow.

~ In September, Chicago firm Kirkland & Ellis agreed to pay \$5.2 million to absolve it from any potential future litigation stemming from the collapse of Enron Corp.