



# That 'Oh No!' Moment: Malpractice Claims Errors and How to Avoid the Same Fate

INDEX

PREVENTING MALPRACTICE CLAIMS

I MADE A MISTAKE. WHAT NOW?

# Preventing and Dealing with Malpractice Claims

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### I Made a Mistake. What Now?

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## Preventing Malpractice Claims

Solos and small-firm attorneys are particularly vulnerable to charges of legal malpractice. According to the American Bar Association, most malpractice lawsuits are filed against lawyers in firms with one to five attorneys. Without the information technology departments, big administrative budgets and large support staffs that large firms may have at their disposal, solos and small firms must be proactive in avoiding common malpractice traps. We will review some of the more common legal malpractice traps that we at Lawyers Mutual encounter in our handling of claims.

### I. Litigation – Missed Deadlines

Litigation errors consistently show up among the top causes of malpractice claims reported to Lawyers Mutual each year. In 2010, errors arising out of litigation accounted for 36% of all claims reported. In the vast majority of cases, the statute of limitation on the client's case expired and there was nothing left to do but assess the damages. Here's a look at a few of the common problems and suggestions to make your office safer.

#### 1) Failing to Maintain a Comprehensive Calendaring/Docket Control System

Lawyers miss deadlines for a variety of reasons, but the most common is the lack of a good calendaring and docket control system. The brand of case management and calendaring system is not as important as assuring that the necessary events are entered and executed. The basis of a well-designed docket system is the use of a central system, i.e., one controlled by someone who is not the person responsible for meeting the deadlines. There is double security when responsibility for compliance rests with both the lawyer or staff person responsible for meeting time limitations **and** with the person responsible for the central system. Having the person responsible for the central system verify compliance is critical in achieving a well-designed system. Both the person responsible for the central system and the person responsible for meeting the deadline should verify compliance with important deadlines. Lawyers Mutual handles numerous claims every year resulting from missed deadlines caused by the one person in charge of docket control being sick or otherwise away from the office when the deadline passes, so make sure this important responsibility is delegated to a back-up person for emergency situations.

#### 2) Waiting Until the Last Minute to File the Complaint

One of the biggest mistakes we see at Lawyers Mutual is the lawyer filing complaints at the eleventh hour – on the eve of the statute of limitation deadline. Although the lawyer believes he is within the “safety zone” because the limitation period has not yet expired, filing at the last minute is often a risky practice. In many cases, the plaintiff's lawyer may be unable to perfect service of the summons and must file an alias and pluries summons to keep the action alive. Sometimes the lawyer and/or his support staff forget to calendar the date the original summons expires. As a result, the action is barred because the statute of limitation expires before the summons is renewed.

Other times, the lawyer inadvertently names the wrong defendant, and the opposing party files a motion to dismiss on that basis. If the complaint is filed at the last minute, the lawyer has little or no time left to investigate and determine the name of the proper party before the deadline passes. For these reasons, we strongly encourage plaintiffs' attorneys to file the complaint well in advance of the statute of limitation deadline. Filing early will give you more time to fix mistakes such as improper service or naming the wrong party. Hopefully, this extra time will give you an opportunity to correct mistakes before a malpractice claim develops.

### 3) Failing to Know the Correct Statute of Limitation

Sometimes, even with proper docket control systems, the lawyer fails to determine the correct statute of limitation applicable to the case. For example, the limitation period in North Carolina for bringing an action for personal injuries resulting from an automobile accident is three years, but the limitation period is shorter in other jurisdictions. You should always verify the statute applicable to such actions, especially those that arise outside of North Carolina.

**For additional information on setting up a calendaring and docketing system, visit our website found at [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) and click on "client services/risk management resources/risk management handouts." You will also find a North Carolina Statute of Limitation Index there.**

## II. Real Property Errors

Real property errors breed the largest number of malpractice claims reported to Lawyers Mutual. In 2010, real property claims comprised about 42% of all claims reported to Lawyers Mutual.

### 1) Failure to Properly Cancel an Equity Line of Credit

The most common preventable real estate error we see at Lawyers Mutual involves the failure to properly cancel an equity line of credit after a house has been sold. For example, in many cases the buyer purchases a home that is subject to an equity line of credit that was acquired by the seller. The closing attorney presents a pay-off check to the lender with oral instructions to cancel the equity line of credit and the deed of trust. In some cases the lender fails to cancel the deed of trust per the attorney's instructions, and the seller continues to use the line of credit attached to the home he sold. The innocent buyer and his lender, who thought they had a first lien mortgage, are eventually threatened with foreclosure proceedings when the seller fails to make the payments on the equity loan. See, e.g., Raintree Realty and Constr., Inc. v. Kasey, 116 N.C. App. 340, 447 S.E.2d 823 (1994), aff'd, 341 N.C. 195, 459 S.E.2d 273 (1995). The equity line lender is not required to cancel the deed of trust securing the line of credit unless (1) the balance of all outstanding amounts secured by the mortgage or deed of trust is zero, and (2) the borrower (seller) has made a request that the lender cancel the deed of trust by means of "written entry upon the security instrument showing payment and satisfaction." Id. at 342, 447 S.E.2d at 825. In the absence of written notice from the seller to the seller's lender, there is no tangible evidence that such a request was ever made. The buyer, buyer's lender or the title insurer will look to the closing attorney to cover the loss.

**It is the responsibility of the closing attorney to obtain a letter from the seller requesting that all deeds of trust be cancelled at the time of closing.**

Recently, we have seen situations in which attorneys hand-deliver pay-off checks to the local branch of the lender (usually to a bank teller rather than the loan department) without providing a cancellation letter. A cancellation letter should be presented to the lender along with the check. In addition, because a cancellation letter can disappear from the lender's file, **we suggest taking two copies of the letter to the lender and asking the party receiving the check to sign one copy for the attorney's file.**

2) **Disbursement of Uncollected Funds**

Attorneys who conduct real estate closings must be extremely cautious when disbursing the proceeds of a real estate transaction from funds deposited in the attorney trust account. The Good Funds Settlement Act, Chapter 45A of the North Carolina General Statutes, states the general rule that the closing attorney is prohibited from disbursing funds deposited in the attorney trust account until those funds have been collected. See N.C. Gen. Stat. § 45A-4 (1999). Notwithstanding the general rule, the Act sets out certain exceptions under which the attorney may disburse uncollected funds in reliance upon the deposit of provisionally credited funds. For example, the Act permits the disbursement of uncollected funds if the check is drawn on the escrow account of a licensed real estate broker or is issued by a lender who is approved by the U.S. Department of Housing and Urban Development "HUD."

In ethics opinion RPC 191, the North Carolina State Bar concludes that failure to comply with the Good Funds Settlement Act constitutes professional misconduct, whether or not the funds are eventually collected. The real danger arises in those cases where the closing attorney disburses in reliance on provisional credit in compliance with The Good Funds Settlement Act, and later learns that the lender has stopped payment on the check or the check has been dishonored.

For example, some years ago Lawyers Mutual received reports that Island Mortgage Company, a HUD approved lender, had stopped payment on a mortgage check after it had been deposited in the attorney's trust account. Unfortunately, the closing attorney had already disbursed the funds as allowed by the Good Funds Settlement Act. The State Bar mandates that under these circumstances the closing attorney must personally pay the amount of the failed deposit by either using personal funds or by obtaining sufficient credit to cover the shortfall in the trust account. The attorney may not use the trust account funds of other clients to cover the deposit. Failure to cover the lost funds constitutes professional misconduct.

**It is the position of Lawyers Mutual that a closing attorney should never disburse uncollected funds, even if it is permissible under The Good Funds Settlement Act. The attorney should demand wired funds or a cashier's check prior to making any disbursements from the trust account.**

3) **Failure to Comply with Lien Waiver Requirements**

Lawyers Mutual has received several claims involving real estate attorneys who failed to comply with lien waiver and affidavit requirements imposed by title insurance companies. Recently, several title companies changed their standard lien waiver

provisions to require a “long form” lien waiver and affidavit (including certifications by all suppliers of materials or services to the property) instead of the “short form” lien waiver commonly used in the past.

Where a long form lien waiver is required by the title insurance commitment but not executed at closing, the final title policy will include an exception stating that the title company assumes no liability for unfiled Mechanic’s or materialmen’s liens. Title insurance companies have also revised the terms of their Insured Closing Protection Letter (ICL) to reflect this new lien waiver requirement. The ICL may now include an exclusion relieving the title company of any liability for losses arising out of Mechanics’ or materialmen’s liens unless coverage is also provided under the title policy. Although the ICL generally provides coverage to owners and lenders for errors made by the attorney in connection with closing, if the attorney’s error is a failure to submit the proper lien waiver and affidavit, there will be no coverage under the title policy or the ICL. If claims of lien are later filed against the property and not covered by the title insurance policy, the owner and lender may look to the closing attorney to resolve these claims.

**A closing attorney should carefully review the terms of the title insurance commitment regarding lien waiver requirements and should confirm that the proper form is used. Visit our website at [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) to read the May 2010 newsletter article “Failure to Comply with Lien Waiver Requirements.”**

### **III. Family Law – Substantive Errors**

In 2010, about 4% of all claims reported to Lawyers Mutual originated as a family law matter. The most common errors pertain to (1) a failure to preserve equitable distribution and/or alimony claims prior to the entry of a divorce judgment; (2) errors related to the division of retirement benefits; and (3) acting as “scrivener” preparing transaction paperwork that both parties will use to consummate their agreement.

#### **1) Failing to Preserve Equitable Distribution and/or Alimony Claims Prior to Entry of Divorce Judgment**

In North Carolina, all equitable distribution and alimony claims must be pled prior to the entry of a divorce judgment. See N.C. Gen. Stat. § 50-11. Failure to “specifically apply for equitable distribution prior to a judgment of absolute divorce will destroy the statutory right to equitable distribution.” Lockamy v. Lockamy, 111 N.C. App. 260, 261, 432 S.E.2d 176, 177 (1993). In Lockamy, the Court of Appeals held that neither the husband nor wife asserted valid claims for equitable distribution prior to the entry of divorce. The wife attempted to preserve her right to equitable distribution by alleging in her initial complaint, “that the plaintiff anticipates that an action for an absolute divorce and equitable distribution shall be filed when it is appropriate to do so.” Id. at 261, 432 S.E.2d at 177. No action for equitable distribution was ever filed, and the court held that the language referring to

equitable distribution in the plaintiff's complaint was insufficient to assert jurisdiction over the subject matter. See Id. at 260, 432 S.E.2d at 176.

In Lockamy, both the husband and wife lost their rights to seek equitable distribution of their marital estate because neither asserted a claim for such relief prior to the entry of divorce. In some cases, however, one party, the husband for example, asserts a claim for equitable distribution and the wife, through her attorney, fails to specifically assert a counterclaim for equitable distribution. The husband or wife's attorney then drafts the divorce judgment and requests that the court retain jurisdiction over "all pending claims for equitable distribution." The wife's attorney may mistakenly assume that her client's right to equitable distribution is protected by the divorce judgment. Unfortunately, if the husband voluntarily dismisses his pending equitable distribution claim following the entry of the divorce judgment, the wife's right to receive equitable distribution of the marital estate is forever barred. The wife is then entitled to seek recovery of the lost marital assets by filing a malpractice claim against her attorney.

**In a divorce proceeding, the attorney must carefully review the pleadings and the divorce judgment to determine whether the client's claims for equitable distribution and/or alimony have been preserved prior to the entry of divorce.**

2) Failing to Investigate and/or Protect Retirement and Other Benefits

Family law practitioners are often sued for failure to investigate and/or protect retirement or other benefits to which their clients may have been entitled. For example, several claims reported to Lawyers Mutual involve an attorney failing to properly file a qualified domestic relations order "QDRO" protecting the client's interest in a retirement account. In these cases, a separation agreement or equitable distribution order may specifically provide for a distribution from one party's retirement account. Sometimes the attorney forgets to draft the required QDRO or simply neglects to follow all the specific requirements necessary to give it legal effect. For example, in Sippe v. Sippe, 101 N.C. App. 194, 398 S.E.2d 895 (1990), cert. denied, 329 N.C. 271, 407 S.E.2d 840 (1991), the Court of Appeals held that a QDRO entered by the court was nevertheless ineffective because it had not been approved by the pension administrator as required by the Employee Retirement Security Act of 1974 "ERISA."

In one claim handled by Lawyers Mutual, the parties agreed, pursuant to a consent judgment, to distribute half of the husband's pension plan to the wife upon his impending retirement. The consent judgment also provided that the wife would continue to be named the sole surviving pension plan beneficiary. The attorney representing the wife had a duty to protect the wife's interest in the pension plan by filing a QDRO and by notifying the husband's employer

of the restriction with respect to the survivor beneficiary status. Unfortunately, the wife's attorney did nothing to protect her client's interests. As a result the husband was free to change the beneficiary of this retirement income to his new wife's name, which he did immediately upon remarriage. He died shortly after his remarriage and retirement, and the first wife lost all rights to the benefits she had bargained for through her attorney. The wife's attorney was on the hook for her clients lost benefits.

**Family law practitioners must be careful to identify all available retirement benefits and to take all necessary steps to protect their client's interest in those benefits.**

- 3) Acting as "scrivener" preparing transaction paperwork that both parties will use to consummate their agreement.

A lawyer can be sued by a non-client for professional negligence. This happens often. Likely the most common example is the claim made by a title insurance company or lender against an attorney who provided a mistaken title opinion or erroneous title search. However, it is not at all uncommon for claimants to contend that they were represented by defendant attorneys, who in turn would wholeheartedly assert that they only represented other persons and not the claimant. The dilemma for lawyers arises from the fact that the existence and scope of an attorney-client relationship may be implied. The beginning of the relationship can be fuzzy if steps are not taken to clarify any possible misunderstandings. The relationship of attorney and client may arise where the circumstances and conduct of the attorney and others make it reasonable for the putative client to believe that an attorney-client relationship exists. The key focus will be on whether the attorney by her conduct could appear to a reasonable person to be acting as a counsel for the putative client. The formation of an attorney-client relationship does not require a formal oral or written agreement or payment of a fee. Gratuitous advice can establish the relationship.

The most typical danger arises when an attorney who represents one party has undertaken the role of scrivener and will prepare transaction paperwork that both parties will use to consummate their deal. The other party has not hired counsel. North Carolina appellate courts have issued opinions stating that the evidence about the conduct of the attorney/scrivener gave rise to a jury issue as to whether the conduct created a reasonable belief that an attorney/client relationship existed. If you represent one party to a transaction, whether a real estate deal or a settlement of a domestic law matter, do not act like the attorney for the other party who has not hired counsel. Do not give him advice. Rather, tell him in writing that you do not represent him and that your work and input will be solely for the protection and benefit of your client. Tell him to get a lawyer.



The boundary between scrivener and advisor is difficult to maintain, particularly where the negotiations continue during the draft process. Assistance given to one party and not the other spawns “conflict of interest” accusations when things do not go as envisioned by a party. Pre-nuptial agreements become problematic when one party later discovers that the other party had more assets than he knew about when entering into the agreement. Experience shows that the unhappy party will claim that the lawyer was supposed to reveal to him all assets to his knowledge or advise the party to take steps to find out all of his future bride’s assets. Stated simply, it is the lawyer who often gets blamed if the deal does not turn out as envisioned by the unhappy party. Do not be surprised if the unhappy party claims that the lawyer should have advised him at a minimum to hire personal counsel.

Marriage involves two people (and the end of marriage involves three or more). Often, the lawyer is asked to prepare separation agreements and pre-nuptial agreement for the spouses. Conflict of interest and fiduciary duty issues abound in this area. Malpractice claims arise. If you venture into this arena, you must make your role abundantly clear and in writing. If you are only to be a scrivener, then your job is merely to put on paper what has been agreed upon and you must stick to that role. You must describe your limited role to the spouses and make clear in writing to them that you do not represent as an advocate either one of them and inform them that they should consider separate counsel. If in fact you do represent one party only, then you need to make it crystal clear to the other spouse that you will actively represent and assist your client only and that anything you do by way of drafting documents will only be with approval of your client and for his protection. Also, make sure that separation agreements are properly executed regardless of your capacity.

Often, lawyers are approached by newlyweds, flush with passion, wanting to discuss a pre-nuptial agreement because the passion has not gone completely to their heads. Again, make clear whom you represent and the consequences on your loyalty that follows from that fact. Attempting to assist the couple jointly by suggesting provisions to put in the agreement is fraught with dangers. If the union of love rips apart and a provision that you suggested is problematic for one ex-lover, then a claim is likely if your role was left unclear. Hopefully, the marriage will have lasted more than four years and any claim will be barred by the four-year repose period in G.S. § 1-15 (c).

In fact, any lawyer involved in representing a party to any transactional matter, a contract, a lease, a merger, whatever, is very well advised to send a letter to the other party stating plainly who is his/her client, telling that party that he/she does not represent the party, and that he/she will only protect the interest of his/her client. One might go so far as to suggest that this be done even if the other party has counsel. We have heard of situations where a court determined that there was a genuine issue of fact whether the other

party, represented by counsel to review the proposed transaction, had a reasonable belief that the lawyer representing the other side represented that party, too. In short, if the deal goes badly, then the nooses are first fitted for the lawyers.

#### **IV. Poor Client Relations**

The attorney-client relationship is the most important aspect of any engagement. Unfortunately, this is probably one of the areas most ignored by attorneys and staff. Maintaining good attorney-client relations can help prevent malpractice claims. A client who feels satisfied that you have used your best efforts will be more understanding and willing to forgive if you commit an error.

Dissatisfied clients complain that their lawyer never explained the legal process or billing system, did not return phone calls, did not attend to their case in a timely manner, failed to keep them informed and failed to involve them in important decisions affecting their case. Unhappy clients are most likely to blame their lawyer when the case turns out badly. Listen to your clients. Strive to make them feel comfortable and important. Never be condescending. A lawyer with a good “bedside manner” is much less likely to be sued than a curt, discourteous, or distant one. It is expensive, time consuming, and stressful to defend a malpractice suit – even if it has no merit.

Foster good client relations by putting the terms of your employment agreement in writing. Define carefully the scope of engagement. If you are handling only a part of the whole case, state specifically what you are obligations you are undertaking and even more importantly what obligations you are not undertaking. Lawyers Mutual handles many claims every year in which the client contends the lawyer failed to do this or that and the lawyer’s defense is that he was not engaged to do this or that.

The above discussion begs the question whether a lawyer should undertake to do only one piece of the legal pie. We call this the “unbundling of legal services.” This has become increasingly popular in recent years and many commentators applaud the practice. One cannot deny, however, that the risk of being the target of a legal malpractice claim increases if you choose to assume responsibility for only a part of the case and lose control over other matters that if done incorrectly or untimely, can be fatal to the case. That is unless the lawyer is careful to outline in writing what he is assuming responsibility for and what he is not.

In addition to outlining the scope of the representation, describe to your client the objectives and risks involved in pursuing the matter. If the result is not what you and your client had hoped for, it will be helpful to be able to show that you explained the risks of an adverse result early on.

Have your client sign the engagement letter. Give the client time to review the terms of the engagement and explain anything the client does not understand. You do not want to hear later that the client did not understand what he was signing, or was rushed into signing it.

Don't ever lie to a client for any reason. You will have no credibility if a claim is ever brought against you.

Be careful not to create unrealistic expectations for the client. Legal malpractice claims inevitably result from actions that were not initially successful in the eyes of the client. Optimistic lawyers often invite the potential for legal malpractice claims. This frequently occurs during the initial client intake consultation. During client intake, the lawyer's desire to get the business leads him to opine optimistically as to the value of the case in terms that the client wants to hear. This can come back to haunt even the most experienced lawyer. Lawyers are advised to respond to the frequently asked question "What's the case worth?" with nothing but the most conservative estimate, all the while couching that estimate in the reality that all cases proceed differently and anything can happen.

Keep the client informed of the status of his case by showering him with paperwork. Send the client a copy of all meaningful correspondence, including memoranda, pleadings, and briefs. If the case is dormant, send the client a letter explaining why there is no activity. Return all phone calls promptly, at least within twenty-four hours. Be on time for meetings and keep a neat office environment. Protect client confidentiality and train your staff to do the same.

Don't procrastinate. Delay is usually found in every legal malpractice claim. Moreover, while it sounds simplistic and perhaps unattainable, do not leave any file in your office unattended. It is the neglected file, more than any other, that probably needs your attention and that may result in a subsequent legal malpractice claim.

Above all else, choose your clients wisely. Lawyers should look at their client-screening policies and decide if they need to say "no" more often to potential clients. According to the ABA, ineffective client screening is one of the major causes of legal malpractice claims. By declining to represent a "high-risk client" – one who is most likely to sue you and will never be satisfied with your hard work and effort - you could be avoiding a potential lawsuit in the future. "Red Flags" to look for are clients who have been rejected by other lawyers, or who have fired other lawyers in the case; clients who have unrealistic expectations; uncontrollable anger; or clients who have made claims against prior attorneys or other professionals. The general background of the client, financial condition, history of personal legal problems and business background of the client may also be relevant areas of inquiry when evaluating a potential client. Learn to trust your gut about potential clients.

Sometimes good client relations involve knowing when to terminate the attorney-client relationship. Lawyers sometimes think they are not free to fire a client. A wise lawyer once said, “Unless he had missed something, the practice of law is not involuntary servitude.” Indeed, it is not. If the representation is becoming unsatisfactory for either party, consider terminating the representation. You may have to seek permission from the court if you are attorney of record in the case, and you cannot prejudice your client by abandoning him, but in many cases, ending the attorney-client relationship is the thing to do to avoid a claim down the road. Just remember to do it courteously and document the withdrawal properly. Another wise lawyer once said, “The happiest day of my life was when I learned how to fire a client.” If your client requests their file or documents in their file, give it to him, but do not forget to keep a copy for yourself. At Lawyers Mutual, we occasionally have to request a copy of our insured’s file from the plaintiff because our insured has simply turned over his file to the client without keeping a copy. At worst, that is embarrassing. Finally, when you provide your client with his file, get a receipt noting the date and time and it was transferred to the client and stating that no further action will be taken by the lawyer on behalf of the client in the case.

**For more information on unbundling legal services and client relations, visit our website found at [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) and click on “client services/risk management resources/risk management handouts.”**

## **V. Inadequate Documentation**

Many malpractice claims against lawyers can be avoided or quickly resolved through careful documentation. Lawyers Mutual processes numerous claims each year where the client and attorney have different recollections about either the scope of the representation or the content of a conversation. Remember that if an event is not made a part of the written file, an argument can be made later by the client that it never happened. When the client says the lawyer told him one thing and the lawyer says another, the only available options are to try the case or reach a settlement. If we try the case, we run the risk that the jury will believe that the attorney is lying to cover up his negligence. The attorney may be right, but without adequate documentation to support his version of events, it is usually less costly to go ahead and settle a claim than to defend the lawyer’s integrity. Keep copious notes. An attorney who extensively documents client communications and events related to the matter provides himself with substantial evidence in defense of his competence, but he also does much to avoid a legal malpractice claim in the first place. In addition, use certified mail, faxes, registered mail or overnight delivery services when it is necessary to document important decisions in the case.

- 1) Failure to Use Engagement, Disengagement, and Nonengagement Letters

All too often attorneys enter into an agreement to represent a client without documenting in writing the scope of the representation. In these cases, a misunderstanding may later arise between the client and the attorney as to what matters the attorney agreed to undertake.

In other cases the attorney concludes service to the client but fails to send the client a disengagement letter documenting the termination of the attorney-client relationship. Representation may cease, for example, because the client informs the attorney that he has insufficient resources to continue the matter. Unfortunately, if the attorney fails to send the client a letter memorializing this understanding, the client may later allege that the attorney failed to follow up on the case before the expiration of the statute of limitation.

**The disengagement letter provides powerful evidence of the date the attorney-client relationship terminated. If a legal malpractice claim is later filed, this evidence is important for purposes of establishing the date the statute of limitation began to run.**

Whenever an attorney declines to represent a prospective client or when a prospective client decides he does not want to pursue the matter further, it is important for the attorney to send the client a nonengagement letter documenting the fact that an attorney-client relationship does not exist. This letter will protect the attorney in the future if the prospective client brings suit alleging that the attorney was supposed to be handling the case and neglected to do so.

**For more information on client engagement, nonengagement, and disengagement letters, visit our website found at [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) and click on “client services/risk management resources/risk management handouts.”**

## 2) Failure to Document the Client’s Instructions

Another error attorneys commonly make is failing to document all advice given to the client. For example, in one malpractice claim a real estate lawyer discovered the day before closing a transaction that an easement ran through the property his client intended to purchase. The lawyer notified the client that an easement existed and warned that the easement owner could build a road through the property. The client told the lawyer not to worry about it because no path or road existed on the property. The client wanted to go ahead and make the purchase despite the warning, so, at the client’s request, the lawyer went ahead and closed the transaction. Sure enough, sometime later the easement owner decided to build a road running right through the property. The client then pointed the finger at his lawyer, alleging that he never informed him that an easement existed on the property.

The lawyer had nothing but his word to support his assertion that he had in fact told the client about the easement. A dated letter sent to the client, with receipt acknowledged, could have avoided the headache and cost of a malpractice claim.

Don't settle or agree to settle a client's case without specific authority from the client. Document the authority to settle. One of the most common mistakes we see at Lawyers Mutual is lawyers substituting their own judgment for their client's on decisions that are wholly the clients to make (with the lawyer's assistance, of course). In other words, don't forget whose case it is! Whether or not to settle, and for how much, is the client's decision to make. A lawyer should discuss with his client whether to take a voluntary dismissal and should document that authority. It is a good idea to have the client sign the voluntary dismissal. Although the line between tactical decisions for the lawyer and proprietary decisions for the client may be gray, the lawyer should consult the client on all significant matters. Moreover, important discussions should be memorialized in writing for the client's understanding and to record the lawyer's compliance. Lawyers Mutual receives a number of claims every year from claimants asserting that their lawyer took actions in their case that they, the clients, did not authorize.

**The attorney should document all conversations with the client and opposing counsel. Written documentation is powerful evidence that can be used to defend or resolve allegations of legal malpractice.**

## **VI. Conflicts of Interest and Conflicts of Matter**

An attorney may not serve two masters. Claims arising out of conflicts represent an increasing area of malpractice. If a conflict of interest or matter exists before an attorney undertakes representation or develops after representation commences, the attorney must respectively decline or withdraw from representation. Every attorney should be familiar with Rules 1.7, 1.8, 1.9, and 1.10 of the Revised Rules of Professional Conduct. If you are unsure whether a conflict exists, you should contact the State Bar and request their advice.

**It is imperative for every law office to maintain a good conflicts system and for all staff and members of the firm to utilize it.**

A conflict of interest arises when there is a chance of influence on the attorney-client relationship that may affect the attorney's (1) duty of loyalty to the client, (2) duty to render independent judgment to the client, or (3) duty to protect the client's interests.

Conflicts are most likely to result in a malpractice claim when the attorney (1) represents more than one person on the same matter; (2) has a personal interest, other than professional fees, in the matter she is handling on behalf of the client; (3) represents one client against another client; or (4) represents one client against a former client. To identify and avoid conflict situations, every law office should have a conflict checking system, whether it is manual or computerized.

Under certain circumstances the Revised Rules of Professional Conduct permit an attorney to undertake a matter even though a conflict exists. However, the attorney is required to comply with certain safeguards, which include getting the consent of the parties involved and obtaining a formal written waiver. It is important to note that simply obtaining a client's permission to proceed after disclosure of a conflict may not be sufficient to relieve the attorney of potential disciplinary action or civil liability. Consentability is typically determined by considering whether the interests of the client will be adequately represented if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. Comment [15] to Rule 1.7 of the Revised Rules of Professional Conduct.

In any case, obtaining the client's consent to proceed in spite of a conflict does not always insulate the attorney from a malpractice claim. Although the client initially agrees to the representation, the client may nevertheless later accuse his attorney of treating him unfairly. The client may feel that the lawyer is unable to render independent advice due to the perceived influence caused by the conflict of interest.

**It is advisable to avoid all conflicts, regardless of whether the client consents to the representation after full disclosure. Don't take any case with even the slightest hint of a conflict of interest. Don't become personally involved with a client. This can often lead to conflicts of interest. Never go into business with a client; that is almost always an automatic conflict of interest. Visit our website [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) and click on "client services/risk management resources" and read the article on Conflicts of Interest.**

## **VII. Fee Disputes**

The practice of law is a highly competitive business. It is not uncommon for solo practitioners and attorneys in small law offices to undertake representation for a client on a "pay as you" go basis. Although it is good practice to obtain a trust deposit to cover legal services before they are rendered, many clients simply do not have the resources to pay in advance. Many attorneys would go out of

business if they demanded such deposits from all of their clients. Lawyers need to be explicit with clients about fees. Put everything in writing so there will be no misunderstanding later.

It is inevitable that sometimes a client will fail to pay his bill for legal services in a timely fashion or will simply refuse to pay because he is unhappy with the outcome of his case. In these circumstances, the lawyer may feel his only recourse is to sue the client for the cost of the unpaid services.

**Lawyer beware! A client who is sued for legal fees will often respond by filing a counterclaim for malpractice.** Before you decide to sue a client for fees ask yourself the following questions:

1) **Is the amount collectible?**

You cannot get blood from a turnip, and you cannot get fees from a client who is broke. You might get a judgment against the client, but you will probably also find yourself defending a malpractice suit.

2) **Is the amount substantial?**

Is the amount of money owed significant enough to cover the costs, loss of reputation, time, and aggravation associated with a malpractice suit? If not, you may be better off letting it ride and claiming the tax deduction. NOTE: If your law firm accounting practice is on a cash basis (which many solo and small law firms are), then you don't actually record the fee as income until it is received, so there are no taxes paid, therefore nothing to write off. However, if you operate on an accrual basis, then you have recorded the fee as income and have paid the tax, so there is a benefit to writing those unpaid dollars off.

3) **Did you obtain a good result for the client?**

If not, it is more likely than not that the client will blame you. The jury hearing the malpractice suit might think that you not only failed to do a good job for the client, but that you are greedy as well. As the public becomes increasingly cynical about the legal profession, it is less likely that jurors will sympathize with an unpaid lawyer who sues his client for fees after an unfavorable result.

4) **Has another attorney gone through the file to see if there are any weak links that could lead to a malpractice claim?**

If you are going to take a chance on being sued for malpractice, you will want to be sure that you can argue that the counterclaim for malpractice is without merit. An independent peer review can help



you decide whether the attorney fees are worth pursuing in light of the risk.

If, after answering these questions, you still decide to pursue a lawsuit against your client, you must first comply with Rule 1.5 of the Rules of Professional Conduct regarding the State Bar's program of fee dispute resolution.

### **VIII. Practice Outside of Jurisdiction or Expertise**

It is difficult to turn away a client when you need the business. However, practicing outside your jurisdiction or area of expertise is an easy way to invite a malpractice claim.

#### 1) Out of State Claims

Every year Lawyers Mutual receives numerous claims resulting from a missed statute of limitation in another jurisdiction. What usually happens is that a resident of North Carolina is injured in a car accident in another state and hires a North Carolina attorney to negotiate a settlement with the tortfeasor's insurance carrier. The attorney erroneously applies the North Carolina statute of limitation date to the accident that occurred in another state. The attorney does not realize that although North Carolina has a three-year statute of limitation for personal injury actions, the foreign state only has one year. Settlement is not reached within the applicable statute of limitation period, a lawsuit is never filed, and the client seeks to recover his damages from his attorney.

If you choose to undertake a case in a foreign jurisdiction, request an opinion letter from an attorney in that state as to the applicable statute of limitation period. Be sure and docket the proper filing date. If this is done, you will have discharged your due diligence requirement and will be able to shift responsibility to someone else if an error is made. You should expect to pay for the attorney's services. If you feel the claim does not warrant the payment of a fee for receiving this advice, the claim is not worth pursuing.

#### 2) Practicing Outside Area of Expertise

We have all been approached by a family member or friend who would like a little free or low-cost legal assistance. It can be difficult to say, "I'm sorry but I just don't practice in that area, let me refer to you someone who does." The friend or family member may not be able to afford the services of a lawyer or may just feel entitled to have you take care of the matter as a favor. Agreeing to assist someone with a case that is outside of your practice area, even if done for little or no cost, will not relieve you of your duty to use

reasonable care when representing the client. If you are not familiar with workers' compensation, do not agree to handle a claim in that area, even for a friend. If you have never practiced family law, do not let your sister talk you in to handling her divorce. If you have never handled a medical malpractice case, do not take one just because you successfully represented the client with his traffic violation. At least do not attempt to do it alone. When the client loses money because of a mistake you made in handling the case, he is not going to care that it was your first case of that kind or that you were only doing him a favor and did not charge him anything. He is only going to expect you to make good on his losses.

Rule 1.1 of the Professional Rules of Conduct prohibits a lawyer from handling a "legal matter which the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter." **By taking cases you are not competent to handle, you may be exposing yourself to a malpractice suit and professional discipline.** Either refer the potential client to someone else or obtain the client's permission to associate counsel.

## **IX. Breach of Fiduciary Duty to Third Party**

An increasing number of malpractice claims involve a breach of fiduciary duty to a non-client. These cases arise most often in the context of estate planning, but they may arise in any situation where the lawyer has a duty to protect the interests of a third party.

In some cases the client may pressure the lawyer in to doing something that results in a breach of fiduciary duty. Although the client is in charge of making the final decisions about his case, the lawyer has a responsibility to refuse to follow a client's instructions if those instructions will result in the lawyer committing professional misconduct or violating the law.

### 1) Estate Planning

Lawyers Mutual handled a breach of fiduciary claim that had its origins in the insured providing limited legal assistance to a client who appeared to be unable to afford adequate representation. The lawyer met with an elderly client at the residence of one of her relatives. The relative lived in a mobile home with modest accommodations.

The client asked the lawyer to draft a will that would provide her children with some money during their lifetimes, with the remainder ultimately going to the grandchildren. The lawyer explained to the elderly client that she would need to set up a trust that would give the income to the children while

they were alive and leave the corpus to the grandchildren. He told her he could set up this trust for a fee of one thousand dollars. The elderly client said she could not afford such an exorbitant fee and asked the lawyer to just write up something for her so she could prepare her own will. The lawyer and client agreed that he would do this for one hundred dollars, all that the client could apparently afford.

The lawyer proceeded to give the client a few standard trust forms to fill out and told her to put her name on every form and to delete any paragraphs she did not want. The client agreed. When the client later died it was discovered that her estate was worth seven million dollars! The will was submitted to probate, and the clerk of court could not make heads or tails of what the elderly client had intended. The trust that was supposed to be set up for the grandchildren was ineffective, and the assets consequently passed directly to the children. The grandchildren, who had been told by the elderly client of their anticipated fortune, sued the lawyer for their losses.

## 2) Medical Provider Liens

Recent case law makes it clear that an attorney who fails to protect a valid medical lien in accordance with N.C. Gen. Stat. § 44-50 can be held liable for the medical provider's losses. See Triangle Park Chiropractic v. Battaglia, 139 N.C. App. 201, 532 S.E.2d 833 (2000), review denied, 352 N.C. 683, 545 S.E.2d 728 (2000) N.C. Gen. Stat. § 44-50 imposes a duty on attorneys who collect personal injury settlements to protect liens asserted by medical providers. A lien is perfected under N.C. Gen. Stat. § 44-49 when the attorney requests and receives without charge medical records AND a written notice to the attorney of the lien claimed. In cases where the amount demanded for medical services is in dispute, however, the attorney is not compelled to make payment on the claim until the dispute is resolved. See N.C. Gen. Stat. § 44-51. Since this area of the law is particularly complicated, you should take time to familiarize yourself with the relevant statutory sections and case law.

## **X. Inadequate Research and Investigation**

According to the ABA, substantive errors account for 46% of all malpractice claims. Lawyers are sued for malpractice because they (1) failed to know or properly apply the law, (2) failed to know or ascertain deadlines, or (3) conducted inadequate discovery or investigation. There is no substitute for careful and comprehensive legal research. The state of the law is constantly in flux and every lawyer has a duty to keep up with changes in the law that affects the cases he undertakes. If uncertainty about a point of law exists, consult an expert. If you are not sure how to proceed, contact an attorney with more

experience. Attend seminars, join the section of the bar that addresses your area of practice, and attend CLE seminars (even if you do not need the credits).

A common preventable error resulting from a lack of adequate research is in the area of personal injury claims arising out of automobile accidents. For example, the client is in a wreck and there is a \$ 25,000 limit on the defendant's auto insurance. Since the client has \$100,000 worth of damages, the defendant's carrier readily issues a check for the limits of the policy, \$25,000. The lawyer neglects to investigate whether any other coverage exists. The client later learns that he could have recovered an additional \$75,000 from his own insurance policy that included underinsured motorist ("UIM") coverage. By then it is too late because the lawyer did not properly preserve the UIM claim.

In addition, do not begin a lawsuit without doing a thorough investigation of the claim. Even well meaning clients can state "facts" that are not true. It is better to learn the holes in the client's story before you begin a lawsuit than after.

Faced with an unsatisfied client, or worse yet service of a complaint for legal malpractice, the first reaction of many attorneys will be to contact their former client in an attempt to remedy what must surely be just a misunderstanding. This is often the attorney's first mistake in dealing with a claim for legal malpractice. Once the client threatens or files a claim for malpractice, an important change has occurred in the relationship. While good client communications is important in preventing malpractice claims, once a claim is threatened or filed, further communication with the client can do more harm than good. For example, communications with a disgruntled client are not privileged. Anything you say can and will be used against you. Honest attempts to cure what must surely be a simple misunderstanding can become testimonial nightmares when brought out later in a malpractice trial. It is essential that the attorney seek outside help in dealing with this situation. The best place to turn is to your professional liability insurance carrier. We have the expertise and resources to assist you in responding appropriately to first notice of a claim or potential claim.

## I Made a Mistake. What Now?

### DON'T MAKE IT WORSE!

After instituting appropriate risk management practices and procedures, even the most competent, diligent attorneys may still make a mistake. Fortunately, most attorney mistakes are minor, resulting in little consequence to the client. There also may be ways to remedy the mistake before the client is adversely affected. However, when a material mistake does occur, many attorneys make matters worse by mishandling the matter with their client or their professional liability insurer. The potential consequences of mishandling a material mistake may subject an attorney to significant consequences such as: 1) disciplinary proceedings at the State Bar; 2) additional causes of action (beyond mere negligence) and damages in a legal malpractice claim; 3) fee disgorgement; and 4) potential loss of coverage under your malpractice policy. Of course, all the attorneys here want to behave ethically and avoid these outcomes, so what should an attorney do after discovering that a mistake may adversely affect a client?

#### **I. Ethical Considerations to Client**

After becoming aware of a mistake that may prejudice your client's interests, you should first remember your ethical obligation to keep the client apprised of information that is material to the representation. Rule 1.4 of the N.C. Rules of Professional Conduct requires a lawyer to "keep the client reasonably informed about the status of the matter." Comment 3 clarifies further that the client be kept abreast of "significant developments affecting the timing or the substance of the representation." Certainly, any actual material mistake by the lawyer is a significant development that affects the representation and should be discussed with the client as soon as practicable after learning of the circumstances.

Additionally, an attorney must always remember that his client's interest is paramount to his own interest. A lawyer should not withhold information from a client to serve the lawyer's own interest (N.C. Rules of Professional Conduct R 1.4, Comment 7), and the lawyer must avoid impermissible conflicts of interest. A "conflict of interest exists if . . . the representation of one or more clients may be materially limited . . . by a personal interest of the lawyer." N.C. Rule of Professional Conduct R 1.7(a)(2). Therefore, if you continue to represent and advise your client without adequate disclosure of your mistake, assuming it is a material mistake, you are likely to run afoul of Rule 1.7 due to the possibility that your representation is limited by your own person interest, *i.e.* avoiding a malpractice claim against yourself.

If you know that you have made a material mistake that cannot be fixed, you should **promptly inform the client of the mistake and tell them that due to a conflict of interest you may no longer advise him on the subject of your representation.** You should also tell the client that he may have a malpractice claim against you, and that he should seek independent legal advice regarding his rights. Do not give the client any further advice on the case or its value. You may also tell your client you have informed Lawyers Mutual of the matter, and that the client may call us if he wants to make a malpractice claim.

Of course, if a mistake is correctable or has no real effect on the client's interests, there is no conflict of interest between the lawyer and the client. Should you be unsure whether the mistake has created a conflict of interest with your client, **make sure to contact Lawyers Mutual immediately so that we can advise you under our claims repair program.** For instance, service problems are often correctable and default judgments may be set aside for excusable neglect. With a prompt and effective claims repair effort, such problems may get corrected and get your client's matter back on course. Lawyers Mutual frequently engages outside claims repair counsel to assist our insureds and their clients with pleadings, motions, hearings, and appeals where it appears that a mistake may be fixed.

In determining whether an attorney mistake creates a conflict of interest with his client, the attorney should ask herself whether there is a real likelihood that the mistake will result in a malpractice claim by the client against the attorney. Relevant factors to this question are whether it is clear-cut that the attorney was negligent, whether the error can be fixed, and whether the potential consequences to the client might be severe. Furthermore, if a client has threatened to sue you, there is a clear conflict, and you must immediately withdraw.

When informing your client that you may have made a mistake, keep in mind that the ethics rules prohibit a lawyer from settling a legal malpractice claim "with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in connection therewith." N.C. Rules of Professional Conduct R 1.8(h)(2). This may often come up when a disgruntled client says to an attorney that the client is inclined to sue for malpractice unless the attorney returns or gives up a fee. If the attorney agrees to do so without meeting the ethical requirements of Rule 1.8(h)(2), it may not only result in an ethical violation, but also add fuel to the fire in a subsequent malpractice claim.

If the mistake is one that requires you to withdraw as counsel due to the conflict of interest with your client, you should also provide your client with their file, **keeping a copy for yourself.** N.C. Rules of Professional Conduct R. 1.16(d) says that a lawyer "shall take steps to the extent reasonably practicable to protect

a client's interests, such as . . . surrendering papers and property to which the client is entitled." Comment 10 to the rule specifies as follows:

The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. **The lawyer's personal notes and incomplete work product need not be released.**

You also should keep your notes and correspondence from communications with Lawyers Mutual claim staff about reporting the potential legal malpractice claim separate from your client's file. Your correspondence with Lawyers Mutual is yours, not your client's.

## **II. Mishandling a Mistake May Result in Disciplinary Proceedings, Increased Damages, and Fee Disgorgement**

A review of the N.C. State Bar Journal's monthly announcements of attorney discipline illustrates the severe disciplinary consequences to an attorney who mishandles a mistake in violation of the ethics rules. Attorneys have been disciplined for hiding their mistakes from clients, lying about the mistakes to clients, and misappropriating funds to cover their mistakes. Newsworthy instances of such attorney conduct in North Carolina include an attorney whose negligence resulted in the dismissal of several client cases that he subsequently covered up by telling the client that he had settled the cases for them. Of course, he had done no such thing, and the money for the "settlements" was misappropriated from other clients' funds. While such egregious conduct is clearly unethical, sticking your head in the sand after discovering a mistake and failing to inform your client may rise to an ethical breach also.

Beyond the potential for discipline from the State Bar, mishandling duties to the client after discovering a mistake may also result in increased malpractice exposure for the attorney. A client who is promptly informed of a mistake and dealt with honestly may decide not to pursue a legal malpractice claim, especially if there is a good history with the attorney. At Lawyers Mutual, we frequently see potential claims that never materialize because of the honesty of the attorney with his client and the good will the attorney established with the client in prior representations. However, when a client discovers that his attorney has not been

honest about making a mistake, the likelihood of the client suing for malpractice is increased tremendously.

Obviously, evidence that the attorney was hiding things from a client is also red meat for a legal malpractice attorney before a jury. Evidence that an attorney was not forthcoming about a mistake with his client can inflame a jury, especially given the public misperception of attorneys already existing. Many times this evidence will be presented by an expert in legal ethics who opines on all the ways the defendant-attorney violated the ethics rules.

Equally serious may be the increased damages and theories of liability that are opened up where an attorney mishandles his duties after making a mistake. Mere negligence may turn into claims for double damages for breach of fiduciary duty and punitive damages where such claims would not otherwise exist except for the attorney's post-mistake conduct. Some jurisdictions have held that emotional distress damages may be recoverable for post-mistake misconduct of the attorney that rises to a breach of fiduciary duty. Not only will these types of claims increase the damages in a legal malpractice case, but they are likely excluded from coverage under your malpractice insurance policy.

Breach of fiduciary duty may also give rise to a claim for disgorgement or forfeiture of fees. For example, in Booher v. Frue, 86 N.C. App. 390, 358 S.E.2d 127 (1987), the North Carolina Court of Appeals recognized a claim for constructive trust against an attorney for disgorgement of a fee where the Court found that an attorney was unjustly enriched based on a breach of fiduciary duty to the client. Again, the potential damage to an attorney from such a claim is magnified because legal malpractice insurance policies typically exclude coverage for claims seeking reimbursement of a fee.

Hiding a mistake from your client may also toll the statute of limitations on a legal malpractice case against you. Typically, the statute of limitations on a legal malpractice claim is three years and starts to run on the date of the "occurrence of the last act giving rise to a cause of action". N.C. Gen. Stat. § 1-15(c). However, if the lawyer is not forthcoming with the client about the mistake, the statute of limitations may be extended as much as one additional year, depending on when the client finally learns of the mistake. N.C. Gen. Stat. § 1-15(c) does contain a four-year statute of repose that states that no professional malpractice claim may be brought more than four years after the last act giving rise to the cause of action.



### **III. Call Lawyers Mutual Promptly and Report a Potential Claim**

You purchased legal malpractice insurance to protect yourself from personal monetary liability for your mistakes. Make sure that you do not jeopardize such coverage by failing to give prompt notice of a claim to your legal malpractice insurer. One of the most common consequences of trying to hide a mistake or just hoping that it will magically go away is that an attorney will fail to give timely and proper notice of the claim to the insurance company. Such delay may jeopardize your coverage for an otherwise covered claim under your policy.

For instance, your Lawyers Mutual policy is a “Professional Liability Claims-Made Policy” that provides that Lawyers Mutual will pay money damages you become legally obligated to pay as a result of your rendering of legal services while licensed to practice law. As a claims-made policy, only claims that are first made to the company during a policy year will be covered. Therefore, regardless of when an attorney mistake occurs, if a claim is first presented to Lawyers Mutual after a policy has expired there most likely will be no coverage.

Furthermore, every year when you apply for a re-issue of your professional malpractice policy you are responsible to report any potential claim of which you are aware. Failure to do so may result in loss of coverage for a claim that is first presented to the insurance company after the effective date of the new policy year if that claim should have been reported on the application or during the prior policy year. Just because you think that you may be able to fix a mistake does not mean that you do not have to report it to your insurer. If you have reason to think that you breached a professional duty to your client, then you most likely have reason to foresee that such breach could be the basis for a malpractice claim against you.

Promptly reporting mistakes to your professional liability insurer will avoid any uncertainty about timeliness of the claim under your policy. Prompt reporting to Lawyers Mutual may also result in a **claims repair** opportunity that remedies the situation before a malpractice claim by the client. Remember that the Lawyers Mutual claims attorneys and the outside counsel that we employ have extensive experience in claims repairs that fix attorney errors and mitigate damages to the client from those mistakes. We work with our insured attorneys everyday in claims repair efforts both large and small.

### **IV. Cooperate in Your Defense and Be a Good Client**

After you have reported a claim to Lawyers Mutual, our claims staff will ask you to provide us with a written narrative that summarizes the nature of your representation of the client and the circumstances of the mistake. More than likely, we will also ask you to provide us with a complete copy of your file so

that we may conduct our investigation and determine whether the claim has merit. It is important for you to provide us with the information and materials we request in a prompt manner so that we may determine as soon as possible whether there is a chance for a successful claims repair or mitigation of damages that might be lost after a delay.

Providing the necessary information to Lawyers Mutual quickly also allows us to evaluate claims and determine whether there is a good prospect for settling the matter earlier and before incurring defense costs. In many claims, our claims counsel are dealing directly with your former clients who may want to avoid hiring another attorney if the claim can be settled without litigation. If our claims attorneys cannot adequately investigate and evaluate the claim due to an attorney's delay in providing the requested file, the likelihood that the case will settle before a malpractice suit is filed is greatly diminished.

Should Lawyers Mutual retain defense counsel to defend you against a legal malpractice action, please remember that you are a client of that attorney, and treat him or her as you would want to be treated by your clients. You best assist in your defense by fully disclosing all available information to your defense counsel and promptly responding to his requests. As a lawyer, you know what makes a good client and what makes a difficult client, so act accordingly.

Finally, a legal malpractice defendant frequently has experience and training that may be valuable to Lawyers Mutual's claims staff and your defense counsel when investigating and evaluating a claim. The lawyer-defendant usually knows the former client better than claims staff or defense counsel and may also have expertise in the area of law for which he or she is being sued. Your insight into the substance of the claim against you may be very helpful in reaching a determination of the validity and value of a claim.