



RISK MANAGEMENT RESOURCES

ARTICLES

Top 12 Common Malpractice Traps



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TOP 12 COMMON MALPRACTICE TRAPS

Each month our claims attorneys have the opportunity to speak with dozens of lawyers about problems they have encountered while representing their clients. John Hester, a Lawyers Mutual claims attorney, shares some of the most common stories he has heard over the years.

After speaking with so many attorneys over the last twenty-five years, there are some statements I regularly hear when we discuss their malpractice concerns. These statements may be of some assistance to you in your practice. I can certainly see how easy it is to awaken to the prospect that there may be a problem with the representation. Here is a Top 12 list of frequently reported malpractice concerns.

1. I knew that medical malpractice claims had a three year statute of limitations. I never saw this case as being a wrongful death case with a two year statute of limitations.
2. Every day I represent clients in auto accident cases and I know our statute of limitations. I always thought I could file this out of state auto accident in North Carolina and use our three year statute, rather than having to file the case in another state with a one year or two year statute of limitations, where the statute has already expired.
3. When I paid off the home equity loan after the real estate closing, I told the bank personnel to pay off and cancel the lien. They assured me they would do so. I never thought of putting that request in writing and I never thought the sellers would again draw down that line of credit, placing a lien on the house that is now owned by another.
4. When I prepared the estate plans for my husband and wife client, they never told me about their prenuptial agreement and I never asked them if they had one.
5. With the economic downturn I cannot afford to turn away potential clients, even those involving matters where I have no experience and no expertise. I decided to use this matter as a learning experience. I never considered associating another attorney who regularly handles such matters, as I did not want to share the fee. I am now facing a motion to dismiss and I am not sure what to do.
6. I took the case for the purpose of obtaining a settlement offer for the client. As I never intended to file suit or complete the case, I did not think I needed to examine the proper statute of limitations or determine what the proper jurisdiction might be.
7. When my client did not return my calls or respond to my letters, I concluded he was no longer interested in pursuing the matter and closed my file. I did not realize that he had moved and was not receiving my calls or letters until after the statute passed for filing his suit.

8. As this was my first medical malpractice case, I did not realize that either my client or I would have to advance thousands of dollars in expenses for expert witness fees, obtaining records and securing depositions. After I was deep in the litigation, the client advised me that he had no funds to pay for these necessary expenses and neither did I. At the same time I came to realize that both proximate cause and damages were going to be difficult to prove.
9. During the initial client interview I had a feeling that this client was not being completely forthcoming with information. My intuition said there was going to be a problem, but I dismissed that feeling as I badly needed another client. Now two years into the representation the client is proving more difficult to represent with his ever increasing demands for unnecessary and self-defeating actions. Realistic settlement offers are being rejected with unrealistic demands. I now understand that difficult clients may occupy 80% of my time and result in about 10% of my income. I wish I had acted on my initial feelings about this client and declined the representation. The red flags were there but I chose to ignore them.
10. I successfully represented my client and the matter was resolved to his satisfaction, but now he refuses to pay the balance of my fee. When I pressed him for payment or to use the Fee Resolution Program with the State Bar, he threatened me with a malpractice claim and wants the fees he paid to be refunded. When I sued him for the fee and he counterclaimed for malpractice, I did not realize that my policy deductible would be impacted for defense expenses. My deductible is a substantial portion of the fee I am seeking, and I am not even sure the client has the assets now to pay a judgment if I am successful with the collections case.
11. My cousin referred a new client to me with a personal plea to help this person in a difficult situation. The new client turned out to be a member of my church who I see every Sunday. He told me he had seen several other attorneys and no one was able to help him. He told me that money was not a problem and he wanted to pursue the matter on the principle involved, not based on the likely damages to be awarded. Now after handling the matter for a year, the expenses and time necessary to accomplish the matter are increasing and the client is no longer making his promised payments. Because this was a referral by a family member and involved a church friend, I did not utilize my usual employment or retainer agreement, which allowed me to withdraw if fees were not timely paid. If I withdraw it will cause me difficulties with my family, my friends, and at church. My client has threatened a Bar Grievance if I file a motion to withdraw. I knew I should have never taken this case.
12. To increase my real estate closing practice, I hired a new, yet experienced paralegal. Because she was experienced, I did not check her references or past employers. She asked for my signature stamp to avoid delays in closings. I gave her my trust account records and asked her to balance the monthly accounts to relieve me of this monthly burden. I was surprised when my bank called indicating an over-draft in the account. My paralegal said it was a mistake and she would sort out the issues with the bank for me. I did not realize that she told the bank to start contacting her when there was a problem rather than me. After my paralegal called saying she was unable to come to work for the fourth day in a row, I began to receive calls from the bank. The shortfall was now in the hundreds of thousands of dollars. Bruno DeMoli with the State Bar has called me to discuss the trust account situation.

As soon as we hear these kinds of statements from good lawyers, we quickly take action to provide advice or attempt to repair the problem. If a repair is not possible, we begin to gather sufficient evidence to evaluate the claim. Unfortunately some of these matters are not covered by your malpractice policy and some involve matters that can impact your law license.

If any of these statements sound familiar to you, please contact Lawyers Mutual and one of our specialized claims attorneys will begin to assist you. We help good lawyers every day and we want to help you.

John Hester has twenty-five years of experience handling claims for North Carolina attorneys. When he's not repairing legal problems, John enjoys collecting Indian art. He and his wife commissioned a 16.5 foot tall, 800 pound totem pole for his home.