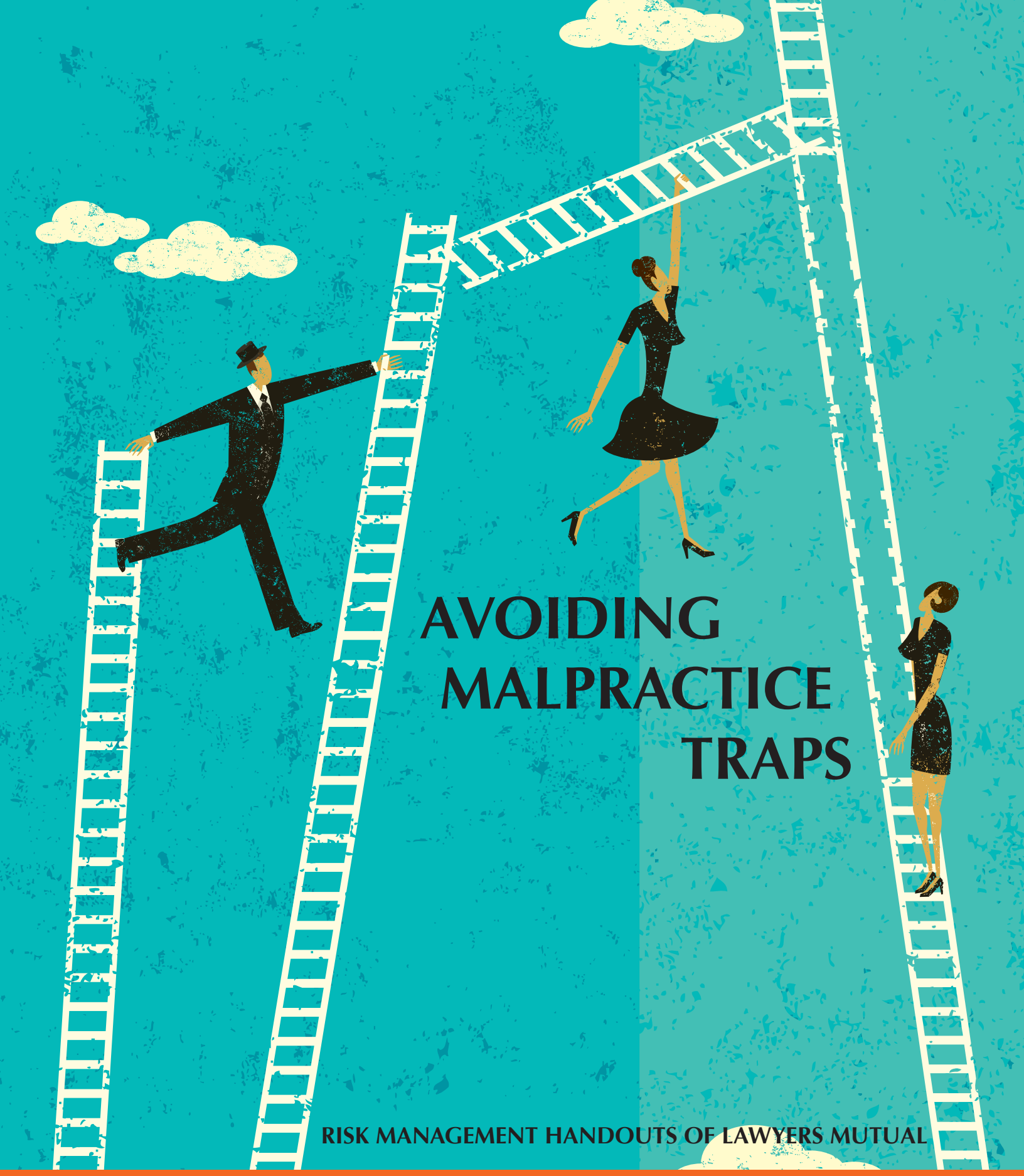

AVOIDING MALPRACTICE TRAPS

RISK MANAGEMENT HANDOUTS OF LAWYERS MUTUAL

LAWYERS MUTUAL | LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

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October 2017

Avoiding Malpractice Traps

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LITIGATION — MISSED DEADLINES

Litigation errors breed the largest number of malpractice claims reported to Lawyers Mutual each year. In recent years, errors arising out of litigation were some of the most numerous of all reported claims. 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.

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. It does not matter whether you use a computerized case management and calendaring system or an old-fashioned tickler box. The most important aspects of a good docket control system are that (a) all relevant dates, whether they be statutes of limitation, appointments, or discovery deadlines be entered into the system and (b) several advance warnings of each deadline be given to the attorney and support persons involved.

Waiting Until the Last Minute to File the Complaint

One of the biggest mistakes we see at Lawyers Mutual is the tendency for the plaintiff's lawyer to file a complaint 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

Litigation errors breed the largest number of malpractice claims reported to Lawyers Mutual each year.

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.

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 time limit for filing a tort claim against the federal government is two years, not three years as it is with a personal injury action against an individual. Similarly, 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.

#1 THE MOST COMMON REASON FOR A MISSED DEADLINE IS THE LACK OF A GOOD CALENDARING AND DOCKET CONTROL SYSTEM.

REAL PROPERTY ERRORS

Real property errors account for nearly as many malpractice claims as those originating from litigation. In recent years, real property claims comprised another large portion of all claims reported to Lawyers Mutual.

Wire Security

Over the last few years, criminal interception of wires to and from Real Estate attorneys went from an unknown occurrence to the greatest threat facing the Real Estate Bar. Millions of dollars have been diverted to international criminal organizations, leaving attorneys facing lawsuits, state bar ethics inquiries and upset buyers and sellers who have lost their life savings.

In the typical fraud scenario, hackers quietly gain access to an email account of a party involved in the transactions. It could be an attorney, mortgage broker, realtor or the buyer/seller. The hacker will secretly monitor activity, potentially for months at a time, and substitute fraudulent wiring instructions when a large enough deal presents. The substitute instructions are possibly sent via an email from the compromised

Over the last few years, criminal interception of wires to and from Real Estate attorneys went from an unknown occurrence to the greatest threat facing the Real Estate Bar.

account or by using an alias account which is indistinguishable in most email programs from the legitimate account.

This fraud can be avoided with little disruption and inconvenience if proper procedures are implemented, communicated to staff and followed even in busy times. Fraudsters ramp up fraudulent activity at the end of the month and immediately before holidays when the temptation to cut corners is the greatest. Attorneys reporting these matters frequently are well aware of the risks, but fail to communicate the dangers to all office personnel or properly supervise employees in following office procedures.

The State Bar, title companies, and Lawyers Mutual have all published articles and alerts detailing these schemes, which unfortunately continue to evolve. For incoming wires, educating the sender of the risks and red flags of fraud is key. The sender should know to never send a wire without first contacting the office to verify the validity of the instructions. *More details on preventing incoming wire fraud can be found at goo.gl/r9RwMh.*

For wires initiated by the law office, attorneys have the ethical responsibility to verify the validity of the wiring instructions before sending. The verification should be done in person, or via a telephone call with a number previously confirmed to be legitimate. *More details on preventing incoming wire fraud can be found at goo.gl/A4kWuj.*

Failure to Properly Cancel an Equity Line of Credit

Another preventable real estate error involves the failure to properly cancel equity lines of credit after a house has been sold or refinanced. 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 may present a pay-off check to the lender with oral instructions to cancel the equity line of credit and the deed of trust, or the attorney may provide a written request which is not signed by the buyer. 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, which thought it had a first place 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 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, who believes he has clear title to the property, will seek recompense from the attorney who handled the closing.

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 (2001). 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 licensed mortgage banker, and has posted a bond with the Commission of Banks. G.S. § 45A-4(7).

TOP 3

TOP 3 REAL PROPERTY ERRORS

1. Wire fraud
2. Failure to property cancel and equity line of credit
3. Disbursement of uncollected funds

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 prior to making any disbursements from the trust account.

In ethics opinion RPC 191, the 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 check maker has stopped payment on the check or the check has been dishonored.

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 prior to making any disbursements from the trust account.

For example, Lawyers Mutual recently 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 closing attorney 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.

FAMILY LAW - SUBSTANTIVE ERRORS

Slightly less than ten percent of all claims reported to Lawyers Mutual originate 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 and (2) errors related to the division of retirement benefits.

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. N.C. Gen. Stat. § 50-11 (2001). 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. *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.

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

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.

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 a 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 his 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 client's lost benefits.

MOST COMMON
FAMILY LAW MATTERS

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.

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.

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.

> **"Maintaining good attorney-client relations can help prevent malpractice claims.**

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, and failed to keep them informed. Unhappy clients, feeling disrespected and neglected, are most

likely to blame their lawyer when the case fails to turn out as they hoped. 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. Be careful not to create unrealistic expectations for the client. 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. Above all else, choose your clients wisely. By declining to represent a high-risk client, you could be avoiding a potential lawsuit in the future.

7 WAYS
TO FOSTER GOOD CLIENT RELATIONS

1. Put in writing terms of your employment agreement.
2. Don't create unrealistic expectations.
3. Keep the client informed of the status of his case.
4. Send the client a copy of all meaningful correspondence, including memoranda, pleadings, and briefs.
5. Return all phone calls promptly.
6. Be on time for meetings.
7. Protect client confidentiality and train your staff to do the same.
8. Choose your clients wisely.

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. 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 absolutely right, but without adequate documentation to support his version of events, it is usually less costly to settle a claim than to defend the lawyer's integrity.

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.

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.

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.

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.

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.

KNOW YOUR LETTERS

ENGAGEMENT LETTER. Memorializes the attorney/client relationship and scope of representation.

DISENGAGEMENT LETTER. Details the date the attorney-client relationship terminated and is important for purposes of establishing the date the statute of limitation began to run.

NONENGAGEMENT LETTER. Documents the fact that an attorney-client relationship does not exist.

CONFLICTS OF INTEREST AND CONFLICTS OF MATTER

An attorney may not serve two masters. Claims arising out of conflicts of interest 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.

> **Claims arising out of conflicts of interest represent an increasing area of malpractice.**

A conflict of interest arises when there is a chance of influence on the attorney-client relationship which 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 specific 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.

The attorney must consider "whether the interests of the client will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest." Comment 15 to Rule 1.7.

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.

WHEN ARE CONFLICTS LIKELY TO OCCUR?

1. An attorney represents more than one person on the same matter.
2. The attorney has a personal interest, other than professional fees, in the matter she is handling on behalf of the client.
3. The attorney represents one client against another client.
4. The attorney represents one client against a former client.

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.

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.

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.

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.

4 QUESTIONS BEFORE YOU SUE

1. Is the amount collectible?
2. Is the amount substantial?
3. Did you obtain a good outcome for your client?
4. Has another attorney gone through your files to look for potential malpractice claims?

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.

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.

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 into 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." Either refer the potential client to someone else or obtain the client's permission to associate counsel.

CAUTION

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.

BREACH OF FIDUCIARY DUTY TO A 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 into 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.

> **"An increasing number of malpractice claims involve a breach of fiduciary duty to a non-client.**

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.

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). 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 when the attorney receives and accepts notice of the claim for medical services. *See* N.C. Gen. Stat. § 44-50 (1999). 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 (1999). Since this area of the law is particularly complicated, you should take time to thoroughly familiarize yourself with the relevant statutory sections and case law. *See* also proposed 2017 FEO 4.

INADEQUATE RESEARCH OR INVESTIGATION

According to the American Bar Association Standing Committee on Lawyers' Professional Liability, substantive errors account for nearly half 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).

SUBSTANTIVE ERRORS ACCOUNT FOR NEARLY HALF OF ALL MALPRACTICE CLAIMS.

Reasons lawyers are sued for malpractice

1. They failed to know or properly apply the law.
2. They failed to know or ascertain deadlines.
3. They conducted inadequate discovery or investigation.

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 uninsured/underinsured "UM/UIM" coverage. By then it is too late because the lawyer did not properly serve the UM/UIM carrier within the statute of limitation period.