



Litigation Traps

RISK MANAGEMENT HANDOUTS OF
LAWYERS MUTUAL



**LAWYERS
MUTUAL**

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DISCLAIMER: This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.

INTRODUCTION

Litigation attorneys are at a greater risk of malpractice claims than all other types of attorneys. Typically, errors arising out of litigation accounted for 35% to 40% of all claims reported. Clients who lose suits often point to a perceived error by their attorney as the reason their suit was unsuccessful and seek a remedy against the attorney.

The main causes of malpractice stem from missing deadlines, failing to calendar, failing to file, failing to meet discovery obligations, inadequate trial preparation, inappropriate post-trial actions and improper withdrawal. The use of good docketing and tickler systems and the development of good client relations can significantly reduce malpractice risk.

Another way to reduce malpractice risk is through information. While litigators obviously need to be

knowledgeable about the substantive issues in any lawsuit, they must also take care to learn and follow the procedural rules of court. Even experienced litigators do not know every procedural rule for every court in which they practice. Rather, they know where to find the particular procedural rules governing the litigation and make sure they follow them, thereby reducing their exposure to malpractice actions.

This handout, while not exhaustive, provides important tips to help litigators avoid common pitfalls that result in malpractice liability. The handout highlights ten prominent points during the course of litigation where attorneys are prone to make mistakes, emphasizing specific types of rules and procedures that are often overlooked. Armed with the information contained in this brochure, you can reduce your exposure to malpractice liability.

STATUTES OF LIMITATION DEADLINES

One of the biggest mistakes we see at Lawyers Mutual is the failure by plaintiffs' attorneys to file the complaint within the statutes of limitation period.¹ Attorneys fail to file a claim within the appropriate statutes of limitation for numerous reasons. For example, lawyers often fail to determine the correct statute of limitation applicable to the claim. Do not assume that you know the statutes of limitation period for every claim. Take the time to look it up.

To assist you in finding the appropriate limitations period, Lawyers Mutual has published a North Carolina Statutes of Limitation Index. To request a copy, please visit the Lawyers Mutual website at www.lawyersmutualinc.com.

¹ Indeed, "calendar errors remain a leading cause of malpractice claims." The Top Ten Malpractice Traps and How to Prevent Them, available at www.aba.com.

A GOOD DOCKETING SYSTEM

Attorneys risk malpractice claims when they correctly identify the expiration date of a claim but fail to file the complaint in a timely manner, allowing the claim to expire. One common pitfall is that the attorney or staff person calendars the deadline in the attorney's calendar, but the attorney fails to check the calendar, thus missing the date. All lawyers can reduce their malpractice risk by diligently calendaring statutes of limitation deadlines and other deadlines that arise. Everything that involves a time limit should be entered into the docket system and the system should generate several advance warnings of each deadline to be given to the attorney and support persons involved.

Although it is ultimately the lawyer's responsibility to meet deadlines, unforeseen circumstances may prevent the lawyer from meeting a deadline. Every file should be assigned a backup lawyer or staff member who is responsible for bringing the deadline to the attention of the main attorney on the matter; or who is able to meet a filing deadline in the lawyer's absence.

AVOID FILING AT THE LAST MINUTE

Malpractice suits for missing the statutes of limitation also arise when the lawyer and/or his office staff simply neglect to follow through and make sure the complaint is filed with the proper court on or before the deadline. A variety of unforeseen problems may delay filings. For example, lawyers should not assume that complaints sent by overnight mail will arrive in time and be processed by the court the next day. Similarly, office staff or third parties hired to assist with the filing may make errors, such as filing the complaint with the wrong court, or missing a last minute deadline.

Such errors can be avoided by routinely filing complaints, motions and other documents in advance of the deadline. Filing at the last minute is a risky practice. Unexpected glitches are bound to occur from time to time. Filing ahead of time will give you breathing room to resolve the unforeseeable problems that might get in the way of filing before the limitation period expires.

KNOWING THE APPLICABLE LAW

DETERMINE THE CORRECT STATUTES OF LIMITATION FOR YOUR JURISDICTION

Attorneys often miss statutes of limitation deadlines when they incorrectly assume that the statutes of limitation runs after the same amount of time in different jurisdictions. For example, the statutes of limitation for a wrongful death claim in Tennessee runs in one-year.² However, a North Carolina plaintiff's attorney handling a wrongful death suit arising in Tennessee might assume that North Carolina's two-year statutes of limitation for a wrongful death claim applies in the situation.³ If the attorney files a claim after Tennessee's expiration date but before North Carolina's

expiration date, the attorney missed the appropriate state's deadline and could face a claim for malpractice.

Each year, Lawyers Mutual spends thousands of dollars defending claims arising out of automobile accidents that occurred in other states. In these cases, a North Carolina resident hires a North Carolina lawyer to handle the matter and the statutes of limitation is erroneously set for three years from the date of the accident. To avoid this all too common mistake, attorneys should inform their staff that if a personal injury or wrongful death claim arises in another state, the lawyer handling the matter should be immediately consulted to determine the appropriate statutes of limitation deadline before the matter is calendared in the docket control system.

² Tenn. Code Ann. § 28-3-104(a)(1)

³ N.C. Gen. Stat. § 1-53(4).

The table attached to this handout lists common causes of action and the appropriate statutes of limitation in different jurisdictions to help you avoid this pitfall.⁴ Please note that each jurisdiction included in the table carves out exceptions for most of the causes of action included in the table.

Attorneys must review the relevant statutes before determining the appropriate statutes of limitation on these particular claims.

PERFORM ADEQUATE RESEARCH AND INVESTIGATION

Nearly half of all malpractice claims arise from substantive errors.⁵ Examples include failure to learn or properly apply the law, and inadequate discovery or investigation.⁶ In addition to ascertaining all relevant statutes of limitation deadlines, attorneys should become familiar and comply with the law and standards of care in each applicable state.

One common type of malpractice claim resulting from inadequate knowledge of substantive law is in the area of personal injury claims arising out of automobile accidents. Such a claim arises, for example, where the client suffers personal injury 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 policy limit of \$25,000. The lawyer neglects to investigate whether any other coverage exists. The client later learns he could have recovered

an additional \$75,000 from his own insurance policy that included uninsured/underinsured "UM/UIM" coverage. By then, however, it is too late because the client has already signed a release of all claims against the tortfeasor. Since "[a]n underinsured [UIM] motorist carrier's liability is derivative of the tortfeasor's liability," the UIM carrier may decline to provide any coverage. *Liberty Mut. Ins. Co. v. Pennington*, 141 N.C. App. 495, 499, 541 S.E.2d 503, 506 (2000), cert. granted, 353 N.C. 451, 548 S.E.2d 526 (2001); see also *Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835 (1994) (UIM carrier was not liable after plaintiff executed general release). To avoid this type of situation, the attorney should have the client execute a limited release that protects the client's right to recover UIM or UM benefits. For an example of a limited release that was upheld by the courts, review *North Carolina Farm Bureau, Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 483 S.E.2d 452, review denied, 347 N.C. 138, 492 S.E.2d 25 (1997). In other cases, the lawyer may fail to notify the UIM carrier of the claim in a timely manner. If the client is unable to recover from his UIM carrier because of his lawyer's neglect, he may have a claim for damages against the attorney.

Lawyers Mutual has handled other claims that arose out of accidents caused by uninsured motorists. In these cases, the law requires the plaintiff to timely serve the summons and complaint on both the tortfeasor and the UM carrier prior to the expiration of the statutes of limitation. See N.C. Gen. Stat. § 20-279.21(b)(3); *Thomas v. Washington*, 136 N.C. App. 750, 525 S.E.2d 839, review denied, 352 N.C. 598, 545 S.E.2d 223 (2000). Failure to properly serve either the tortfeasor or the UM carrier may result in lost benefits for the client and a malpractice claim against the attorney.

These types of errors can be prevented through careful research and methodical procedures. Attorneys should stay abreast of new legal developments. Experts should be consulted, where needed.

⁴ This table does not include statutes of limitation for a proceeding against the federal government.

⁵ 27 N.C. Admin. Code Chap. 2 Rule .1.

⁶ Top Ten Malpractice Traps (supra) at 56.

PROVIDE ADEQUATE SUPERVISION OVER ASSIGNED TASKS

Malpractice concerns arise when lawyers fail to adequately supervise non-lawyers or junior associates. Lawyers can be held responsible for mistakes made by their employees. *See e.g., Pincay v. Andrews*, 367 F.3d 1087 (9th Cir. 2004) (Judge

Kozinski's dissent; holding attorney liable for a paralegal's miscalculation). Such malpractice risk can be minimized by providing adequate supervision and fostering an environment where questions and concerns can be freely raised. Staff should be carefully supervised as the attorney is ultimately the responsible party.

FILING THE COMPLAINT AND SERVICE OF PROCESS

After the proper statutes of limitation period has been properly identified and the complaint properly filed, other pitfalls await the unwary attorney. Attorneys commonly make mistakes in naming and serving the proper parties. Such defects can often be corrected. However, when a lawsuit is commenced at the eleventh hour (just before the statutes of limitation expires), the attorney may not have time to correct such flaws, and the client may suffer prejudicial harm as a result.

IDENTIFY AND NAME THE PROPER DEFENDANT

One of the most common mistakes attorneys make is that they fail to discover and identify the proper name of the corporate defendant whom the plaintiff seeks to sue. To avoid such errors, plaintiffs' attorneys should make every effort to ascertain the defendant's proper corporate name either before filing the complaint or as soon as possible thereafter through discovery. A diligent effort should be made to determine all possible entities and persons who should be named as parties in the lawsuit. Take special care in correctly naming and serving foreign defendants. Foreign service requirements, including Hague Convention requirements, may need to be followed.

SERVE ALL DEFENDANTS WITHIN STATUTORILY PRESCRIBED TIME LIMITATIONS

Attorneys who commit errors in timely serving a complaint and summons on a defendant may also face

malpractice liability. Attorneys must serve a defendant with a complaint and summons within the statutorily required time limitations. These limitations vary according to jurisdiction. For instance, an attorney must serve a defendant to a lawsuit in federal court within 120 days of the filing of the complaint. Fed. R. Civ. P. 4(m). However, a defendant in a lawsuit in North Carolina State court must be served in most cases within 60 days after the date of the issuance of the summons. N.C. Gen. Stat. § 1A-1, Rule 4(c).

Attorneys who fail to perfect service upon a defendant within the statutory expiration period may request an extension of time for service of process. A federal court will grant an extension only if the attorney provides good cause for the delay in service. Fed. R. Civ. P. 4(m). On the other hand, a North Carolina court will issue an alias or pluries summons to extend the time period for service upon request, provided certain guidelines are met. N.C. Gen. Stat. § 1A-1, Rule 4(d)(2). Thus, an attorney may be vulnerable to malpractice claims for failing to follow the rules of the particular court in which the case is being litigated. For instance, attorneys may request an alias or pluries summons "at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses." *Id.* Provided that the request is not made in "violations of the letter or spirit of the rules for the purpose of delay or obtaining an unfair advantage," an attorney may request numerous alias or pluries summonses and extend the service deadline for a lengthy period of time without committing malpractice. *Smith v. Quinn*, 324 N.C. 316, 319, 378 S.E.2d 28 (1989). However, an attorney who does not request an alias or pluries summons within the 90 day time period invalidates the old summons and begins a

new action. See *CBP Resources v. Ingredient Resource Corp.*, 954 F. Supp. 1106, 1110 (M.D.N.C. 1996). An attorney risks malpractice liability if the statutes of limitation runs before the alias or pluries summons is issued in such a situation. In addition, an attorney must refer to the original summons in an alias or pluries summons or else the alias or pluries summons is invalid. *Integon Gen. Ins. Co. v. Martin*, 127 N.C. App. 440, 441, 490 S.E.2d 242 (1997).

In addition, the attorney may encounter the situation where he is unable to serve the defendant with the summons and complaint because the defendant has died. To complicate matters further, the statutes of limitation has expired. The attorney should consult N.C. Gen. Stat. § 1-22. This statute will help the lawyer resolve the issue and save the client's cause of action.

KEEP THE SUMMONS ALIVE OR ENTER INTO ENFORCEABLE TOLLING AGREEMENTS WITHIN THE STATUTES OF LIMITATION WHILE ENGAGING IN SETTLEMENT DISCUSSIONS

It is often in the client's best interest to pursue settlement before spending the time and money involved to file or serve a complaint. In such cases, it is crucial to keep the required summons alive and/or enter into an enforceable tolling agreement with the opposing party. Such tolling agreements must be executed before the statutes of limitation passes.⁷ Regardless of how close the parties may be to settlement, do not let the statutes of limitation pass without invoking proper protections for your client.

RESPONDING TO COMPLAINTS AND FILING DISPOSITIVE MOTIONS

CALENDAR DEADLINES AND RESPOND IN A TIMELY MANNER

Defense attorneys are not immune from malpractice claims. One of the most common pitfalls the defense attorney faces is failure to timely file an answer or otherwise respond to a complaint, resulting in a default judgment against his or her client. It is important to bear in mind that the time period for responding to a complaint differs under the North Carolina and the Federal Rules of Civil Procedure. Under the North Carolina rules, defendants have 30 days to respond, whereas under the Federal Rules of Civil Procedure, defendants have 20 days to respond. N.C. Gen. Stat. §1A-1, Rule 12(a)(1); Fed. R. Civ. P. 12(a)(1).

Attorneys must also make sure they do not neglect to calendar and respond in a timely manner to any crossclaims and/or counterclaims that might arise during the course of the lawsuit. In North Carolina state court, a party generally must respond to a crossclaim or counterclaim within 30 days after being served. N.C. Gen. Stat. §1A-1, Rule 12(a)(1). In federal court, a party must respond to a crossclaim or counterclaim within 20 days after being served. Fed. R. Civ. P. 12(a)(2).

⁷ *Piedmont Inst. of Pain Mgmt. v. Staton Found.*, 157 N.C. App. 577, 584, 581 S.E.2d 68, 73 (2003) (tolling agreement entered into after the appropriate statutes of limitation deadline had passed resulted in the bar of plaintiff's claim).

REVIEW LOCAL, STATE AND FEDERAL RULES

Under the North Carolina Rules of Civil Procedure, a party must respond to an amended pleading within 30 days after service of the amended pleading. N.C. Gen. Stat. §1A-1, Rule 15(a). Note, however, under the Federal Rules of Civil Procedure, the time for responding to an amended complaint or pleading is much shorter. Under Federal Rule 15, a party must respond to an amended pleading “within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.” Fed. R. Civ. P. 15(a).

Attorneys should be certain to review the appropriate Rules of Civil Procedure as well as any relevant local rules of the court to determine the appropriate response deadline.

Finally, both plaintiffs and defense attorneys should be sure to review the local rules of court regarding deadlines for filing dispositive motions, such as motions for summary judgment. For example, the U.S. District Court for the Middle District of North Carolina requires that any party who intends to file a motion for summary judgment or any other dispositive motion first file and serve a notice of intention to file a dispositive motion within 10 days following the close of the discovery period. M.D.N.C. L.R. 56.1(a).

The Middle District further requires that all dispositive motions and supporting briefs be filed and served within 30 days following the close of the discovery period. M.D.N.C. L.R. 56.1(b). The U.S. District Court for the Eastern District of North Carolina also requires that “all motions in civil cases except those relating to the admissibility of evidence at trial ... be filed on or before 30 days following the conclusion of the period of discovery.” E.D.N.C. L.R. 7.1(a). The Eastern District Local Rule further provides that “[i]f an extension of the original period of discovery is approved by the court, the time for filing motions is automatically extended to 30 days after the new date.” *Id.*

Again, a thorough review of procedural rules, including diligent attention to the local rules of court, and a good docketing or calendaring system are essential to help you comply with such deadlines.

MEETING DISCOVERY OBLIGATIONS

RESPOND TO ALL DISCOVERY REQUESTS WITHIN THE STATUTORILY PRESCRIBED TIME LIMITS

During the discovery period, attorneys are prone to make errors that can result in malpractice exposure. Malpractice claims stemming from failure to meet discovery obligations usually involve an attorney’s failure to meet the deadlines associated with responding to discovery requests. For example, a client can suffer serious prejudice if the attorney fails to respond to requests for admission. Failure to respond to admission requests can result in the client being deemed to have admitted “facts” that are adverse to the client’s position

in the lawsuit and may even cause the client to lose the litigation. Should the lawyer fail to respond to requests for admissions in a timely manner, the appropriate course of action is to file a motion under Rule 36(b) of the Rules of Civil Procedure to withdraw or amend the admission.

Failure to respond to discovery requests will likely lead the opposing party to file a motion to compel response to the discovery requests, possibly resulting in sanctions for failure to respond. Furthermore, failure to timely respond to discovery requests may constitute a waiver of any objections the party may have to the requests and might even result in the waiver of attorney-client and work product privileges relating to the information requested.

See, e.g., *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.*, 200 F.R.D. 255 (M.D.N.C. 2001); see also *Zornes v. Specialty Indus.*, 1998 U.S. App. LEXIS 31686 (4th Cir. Md. Dec. 21, 1998). Accordingly, it is imperative that discovery deadlines be calendared and tracked.

Generally, under both the North Carolina and the Federal Rules of Civil Procedure, a party has 30 days after service of a discovery request to respond to it. The court, however, has the discretion to shorten or lengthen the response period. Additionally, bear in mind that under Rule 26(a)(1) of the Federal Rules of Civil Procedure, a party is generally required to make initial disclosures of certain information to the other parties without waiting for discovery requests.

SERVE ALL NECESSARY DISCOVERY

Failure to serve discovery requests on the opposing party is another potential source of malpractice liability. If an attorney fails to serve the necessary discovery, the attorney may not have the facts to adequately prove the elements of a client's claim or defense. Do not neglect to use the discovery tools at your disposal to help gather all the information you need to vigorously represent your client.

When propounding discovery requests, make sure the time for completing discovery has not expired. The time period for completing discovery may vary, depending on local rules and court order. For example, under the local rules of the U.S. District Court for the Eastern District of North Carolina, discovery must be scheduled and conducted in accordance with the court order entered pursuant to Rule 16 of the Federal Rules of Civil Procedure. "After the time for completing discovery has expired, further discovery may proceed only by order of the court and may, in no event, interfere with the conduct of either the final pre-trial conference or the trial." E.D.N.C. L.R. 26.1.

The Local Rules of the Middle District specify the time period by which discovery must be completed based on the complexity of the case. M.D.N.C. L.R. 26.1(a). The rules specify that the "requirement that discovery be completed within a specified time means that adequate provisions must be made for interrogatories and requests for admission to be answered, for documents to be produced, and for depositions to be held within the discovery period." M.D.N.C. L.R. 26.1(f). Thus, for example, interrogatories must be served 30 days in advance of the close of the discovery period, so that the opposing party has time to answer them within the discovery period.

MATERIAL WITNESSES

IDENTIFY AND SUBPOENA ALL POTENTIALLY MATERIAL WITNESSES

In addition to an attorney's obligation to seek information from the opposing party through discovery, the attorney also has a duty to gather information from the client as well as other non-party witnesses. Failure to interview and subpoena material witnesses can hinder the lawyer's ability to prosecute or defend an action. For example, in a personal injury case arising out of an automobile accident, both the plaintiff's attorney and the defense attorney should interview all witnesses who saw the accident take place. If a bystander states that he saw the defendant run a red light and then collide with the plaintiff's car, the plaintiff's attorney would obviously want

to subpoena the bystander to testify on plaintiff's behalf. Similarly, if the police report indicates that the defendant had alcohol in his blood at the time of the accident, the plaintiff's attorney would need to investigate to determine whether there were any witnesses to the fact that defendant had been drinking prior to the accident. If it turns out that defendant had been at a bar and the bartender saw him consuming three beers fifteen minutes before the time of the accident, the plaintiff's attorney would want to interview the bartender and, if the case goes to trial, subpoena the bartender as a witness.

Rule 45 of both the North Carolina and the Federal Rules of Civil Procedures set forth the requirements regarding subpoenas commanding the attendance of a person and subpoenas for the production or inspection of documents and things.

TRIAL PREPARATION

As every litigator knows, litigation involves a series of steps in preparation for trial. Even though most cases settle before trial, attorneys must carefully prepare for trial, building the client's case at each step of the litigation process in the event that the matter does not settle. As such, adequate trial preparation includes making sure you avoid the first five pitfalls mentioned in this brochure. In addition, adequate trial preparation involves being organized on the day of trial and having all the materials necessary to present your client's side of the lawsuit at your disposal.

PREPARE ALL REQUIRED PRE-TRIAL SUBMISSIONS WITHIN STATUTORILY PRESCRIBED DEADLINES

The following are some examples of the types of submissions you may be required to make prior to trial:

Under the Eastern District rules, five business days before the first day of the session at which a civil action is set for trial, counsel for each side must file a brief on all anticipated evidentiary questions and on all contested

issues of law and motions relating to the admissibility of evidence and a final pretrial order. *See* E.D.N.C. L.R. 39.1; L.R. 16.1(b)(1).

Similarly, in the Middle District, “[n]o later than 20 days before trial, each party shall file a trial brief, along with proposed instructions on the issues (jury cases) or findings of facts and conclusions of law (non-jury cases).” M.D.N.C. L.R. 40.1.

Generally, an attorney may be held liable for ignorance of the rules of practice or for failure to adequately prosecute or defend an action. However, allegations that amount to nothing more than the client's dissatisfaction with the attorney's strategic choices will generally not support a malpractice claim. In addition to preparing substantively for the trial, knowing the law and being able to present the facts supporting your theory of the case, do not neglect to familiarize yourself thoroughly with the rules of civil procedure, the local rules of court, the rules of evidence, and any particular court orders the judge presiding over the case has issued to govern the trial. Make sure you have adequate personnel to assist you during trial, both in the courtroom and back at the office.

REFILING AFTER A VOLUNTARY DISMISSAL

BE COGNIZANT OF THE DISTINCTION BETWEEN FEDERAL AND STATE REILING DEADLINES

Under Rule 41 of the Federal Rules of Civil Procedure, a plaintiff may voluntarily dismiss his or her claim “without prejudice” prior to service by the defendant of an answer or motion for summary judgment, whichever occurs first. This generally means that the plaintiff can dismiss the claim and retain the ability to refile the same claim within the statute of limitations. North Carolina Rule of Civil Procedure 41 is similar to the federal rule. However, under the North Carolina Rule, the plaintiff may refile the claim within one-year of the voluntary dismissal. Under the North Carolina

rule, even if the second action would otherwise be filed after the expiration of the statutes of limitation, the one-year provision extends the period for refile. One trap for the unwary is that Federal Rule 41 does not allow for the one-year grace period to refile outside the statutes of limitation. Under the Federal Rules, if dismissal is taken outside the statutes of limitation, the case is over. Furthermore, under the Federal Rules, even if the statutes of limitation has not expired when dismissal is taken, attorneys should keep in mind that any refile must be accomplished within the limitations period, not within one-year of the dismissal.

In *Bamberger v. Bernholz*, 96 N.C. App. 555 (1989), *reversed on other grounds*, 326 N.C. 589, 391 S.E.2d 192 (1990)

a case before the North Carolina Court of Appeals, plaintiff hired an attorney to represent him in a personal injury action. The original case was called for trial on August 2, 1984. Plaintiff was going to be out of town that week and asked his attorney whether he should change his schedule in order to be present for the trial. The attorney told him that he would have no problem getting a continuance for the trial and that plaintiff need not change his plans. On August 22, 1984, when the case was called, the court denied plaintiff's motion for a continuance, and the attorney took a voluntary dismissal in open court under Rule 41. However, the attorney failed to notify his client of this action. When plaintiff later wrote inquiring about the trial date, the attorney in his reply implied that the case merely needed to be rescheduled, not that it had been dismissed and needed to be refiled. The attorney did not refile the case until August 26, 1985 – after the statutes of limitation period had expired and more than one-year after the date of the voluntary dismissal. The Court of Appeals refused to grant the attorney's motion for summary judgment on the malpractice claim.

The above case illustrates that attorneys must exercise caution when taking a voluntary dismissal. Although a plaintiff can refile a claim after voluntarily dismissing it without prejudice, attorneys need to be cognizant that under the federal rules, the statute of limitations continues to run and could impose a bar on the claim should the plaintiff later wish to refile. Under state law, the claim may be filed within one-year after the voluntary dismissal, even if the statutes of limitation has run. However, it is essential that the first action have been filed within the statutes of limitation period in order to obtain the extension under this rule. Also bear in mind that when an action filed within the statutes of limitation expires under North Carolina Rule of Civil Procedure 4(e) due to lack of service of process, and then the statute of limitations expires, a subsequent voluntary dismissal does not give the plaintiff an additional year to file a new action. *See Latham v. Cherry*, 111 N.C. App. 871, 433 S.E.2d 478 (1993), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994).

Again, a good calendaring system and attention to the rules of the particular jurisdiction can help you avoid any litigation traps arising from taking a voluntary dismissal.

CHALLENGING AND APPEALING

CONSIDER AND/OR TIMELY FILE POST-TRIAL MOTIONS

Following the close of the evidence, a party may make a motion for a directed verdict (called a “motion for judgment as a matter of law” under the federal rules). *See* N.C. R. Civ. P. 50; *accord* Fed. R. Civ. P. 50. If your motion for directed verdict is denied, the case goes to the jury, and the jury finds against your client, you can make a motion for judgment notwithstanding the verdict (called a “renewed motion for judgment as a matter of law” under the federal rules). *Id.* Attorneys sometimes forget to make a motion for directed verdict and/or a motion for judgment notwithstanding the verdict no later than 10 days after entry of judgment. *See id.* However, if you win either of these motions, your client will prevail and you could save your client the cost of an appeal. Note, however, that under both the federal and state rules, you must make

a motion for directed verdict at the close of evidence in order to preserve the right to make a motion for judgment notwithstanding the verdict. Note also that a party who moves for a directed verdict at the close of the evidence offered by an opponent (typically this is the defendant) must renew his motion at the close of all the evidence in order to preserve his right to move for a judgment notwithstanding the verdict (JNOV).

In cases containing irregularities, or involving newly discovered evidence, a party should consider making a motion for a new trial. *See* N.C. R. Civ. P. 59 and Fed. R. Civ. P. 59. Generally a motion for a new trial must be served not later than 10 days after the entry of judgment. *See id.* Similarly, clerical mistakes, inadvertent, surprise, excusable neglect, fraud, and other valid reasons might provide grounds for filing a motion for relief from a judgment or order. *See* N.C. R. Civ. P. 60; *see also* Fed. R. Civ. P. 60.

FILE APPEALS WITHIN STATUTORILY PRESCRIBED TIME LIMITS

Following a loss at trial, the attorney must decide whether to appeal the case. The attorney must consider the likelihood of success on appeal, based upon the facts and merits of the case, and advise the client on whether to appeal. In the midst of these considerations, the attorney should not lose sight of the fact that there is a time limit in which to appeal. Under the North Carolina Rules of Appellate Procedure Rule 3(c), an appeal from a judgment or order in a civil action must be taken within 30 days after its entry.

When a judgment is “entered” is governed by Rule 58 of the North Carolina Rules of Civil Procedure. Likewise, under the Federal Rules of Appellate Procedure, the notice of appeal in a civil case must be filed with the district clerk within 30 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(A).

Note that the time period for filing an appeal is tolled while the post-trial motions mentioned above are under consideration. The time to file an appeal runs from the entry of order disposing of the last of such post-trial motions. N.C. R. App. P. 3(c); Fed. R. App. P. 4(a)(4).

FAMILIARIZE YOURSELF WITH THE RULES OF APPELLATE PROCEDURE

Once the decision to appeal is made, the attorney must carefully review the Rules of Appellate Procedure. The appendices to the Appellate Rules are an invaluable aid to the busy lawyer. The Appellate Rules are very specific even, for example, as to the format and style of documents filed with either Appellate Court. Appendix B of the Rules of Appellate Procedure sets forth the format and style requirements for documents filed with either Appellate Court. Appendix A is a handy reference that sets out the timetable of Appeals with references to the applicable Rule. Appendix C sets out the required arrangement of the Record on Appeal; Appendix D provides forms for documents commonly submitted to the Appellate Courts; and Appendix E provides guidance for the lawyer preparing his appellate brief. It cannot be overemphasized that a lawyer embarking upon his or her first or his one hundredth and first appeal should sit down and carefully study the Rules of Appellate Procedure. Failure to follow the applicable rules may result in dismissal of an appeal. *See, e.g., Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984).

IMPROPER WITHDRAWAL FROM REPRESENTATION

During the course of representing a client, you may decide that you wish to withdraw from representation for a variety of reasons such as the client’s failure to pay your fee or the client’s unwillingness to cooperate with you. Once you have become counsel of record in a case, you need the court’s permission to withdraw from representation.

According to the Revised Rules of Professional Conduct of the North Carolina State Bar, “[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.” Rule 1.16(c). Be sure to check the local rules of court to determine if you are required to receive permission from the court before withdrawing. Both the federal district courts for the Eastern District (L.R.83.1(g)) and the Middle of North Carolina (L.R. 83.1(e)) require

that you obtain a court order allowing you to withdraw as counsel. The Western District of North Carolina (L.R. 83.1(C)) allows you to withdraw as counsel if you file the client’s written consent to withdrawal and obtain the court’s permission. However, the Western District may allow you to withdraw over the client’s objection “upon good cause shown if it is determined that a scheduled hearing or trial will not be delayed.” (L.R. 83.1(C)).

To reduce their malpractice risk, attorneys must take care to protect clients’ rights, to the degree necessary, before withdrawing. To demonstrate, the North Carolina Court of Appeals allowed a malpractice suit to go forward against an attorney where the statutes of limitation expired after the attorney withdrew from representation. *See Wood v. Hollingsworth*, 166 N.C. App. 637, 603 S.E.2d 388 (2004).

In *Wood*, the court stated that “although plaintiff’s alleged injury occurred on the date the statutes of limitation tolled, the acts that gave rise to plaintiff’s injury occurred during the attorney-client relationship of plaintiff and defendants” and therefore allowed the plaintiff’s case to proceed. *Id.* 166 N.C. App. At 642, 603 S.E.2d at 392.

The Revised Rules of Professional Conduct of the North Carolina State Bar describe the attorney’s responsibilities toward the client upon withdrawal of representation as follows:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred.

N.C. R. Prof. Conduct Rule 1.16(d).

CONCLUSION

There are many procedural pitfalls awaiting the litigation attorney during the course of litigation. However, this brochure provides ways to reduce the number and size of the pitfalls. The information in this brochure is not exhaustive, and laws are subject to change. Lawyers Mutual recommends that all litigation attorneys thoroughly review all applicable federal, state or local rules at each step in the litigation process. With careful attention to these rules, diligence with respect to calendaring and the maintenance of strong client relationships, attorneys can not only fulfill their role as “a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice[,]”⁸ but also greatly reduce their exposure to malpractice claims.

In addition to paying attention to all rules and deadlines, lawyers should strive to maintain good working relationships with their clients. For example, lawyers should return phone calls in a timely fashion, ensure that staff treat clients in a friendly manner and give their clients their full attention. Lawyers should also properly document their files, including routine written and electronic correspondence with clients. The better a lawyer’s working relationship is with a client, the less likely that client may be to file a malpractice claim.

⁸ N.C. Admin. Code tit. 27, r. 0.1.

COMMON STATUTES OF LIMITATION DEADLINES

JURISDICTION

<u>CLAIMS</u>	<u>N.C.</u>	<u>S.C.</u>	<u>TN</u>	<u>VA</u>	<u>OH</u>
Personal Injury	3 years ⁹	3 years ¹⁰	1 year ¹¹	2 years ¹²	2 years ¹³
Wrongful Death	2 years ¹⁴	3 years ¹⁵	1 year ¹⁶	2 years ¹⁷	2 years ¹⁸
Medical Malpractice	3 years ¹⁹	3 years ²⁰	1 year ²¹	2 years ²²	6 years ²³
Injury to Real Property	3 years ²⁴	3 years ²⁵	3 years ²⁶	5 years ²⁷	10 years ²⁸
Recovery of Real Prop.	20 years ²⁹	10 years ³⁰	7 years ³¹	15 years ³²	21 years ³³
Contract Claim	3 years ³⁴	3 years ³⁵	6 years ³⁶	5 years ³⁷	15 years ³⁸
Slander/Defamation	1 year ³⁹	2 years ⁴⁰	6 months ⁴¹	1 year ⁴²	1 year ⁴³

⁹ N.C. Gen. Stat. § 1-52. However, the statute of repose in such actions is 10 years. *See* N.C. Gen. Stat. § 1-52(16) (“Unless otherwise provided by statute, for personal injury or physical damage to claimant’s property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.”).

¹⁰ S.C. Code Ann. § 15-3-530(5).

¹¹ Tenn. Code Ann. § 28-3-104(a)(1).

¹² Va. Code Ann. § 8.01-243(A).

¹³ Ohio Rev. Code Ann. § 2305.10.

¹⁴ N.C. Gen. Stat. § 1-53(4).

¹⁵ S.C. Code Ann. § 15-3-530(6).

¹⁶ Tenn. Code Ann. § 28-3-104(a)(1).

¹⁷ Va. Code Ann. § 8.01-244(B).

¹⁸ Ohio Rev. Code Ann. § 2125.02(D)(1).

¹⁹ N.C. Gen. Stat. § 1-15(c), 1-52(5). The statutes of limitation runs after three years from the treatment or the date of reasonable discovery of the negligence by the plaintiff, provided “that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action.” *Id.* § 1-15(c). The statutes of limitation runs after one-year from the treatment or the date of reasonable discovery in the event that a medical professional leaves an instrument in a plaintiff’s body, provided that the medical professional performed services for the plaintiff within 10 years. *See id.* § 1-15(c).

²⁰ S.C. Code Ann. § 15-3-545(A). The statutes of limitation runs after three years from the treatment or the date of reasonable discovery of the negligence by the plaintiff, which date of reasonable discovery is tolled after six years. *See id.* The statutes of limitation runs after two years from the treatment or the date of reasonable discovery, which is tolled after three years, in the event that a medical professional leaves an instrument in a plaintiff’s body. *See id.* § 15-3-545(B).

²¹ Tenn. Code Ann. § 29-26-116(a)(1). The statutes of limitation runs after one-year from the treatment or the date of reasonable discovery of the negligence by the plaintiff, provided that the medical professional last performed services for the plaintiff within 3 years. *See id.* § 29-26-116(a)(3). The statutes of limitation runs after one-year from the discovery or date of reasonable discovery in the event that a medical professional leaves an instrument in a plaintiff’s body, without an accompanying maximum time period to file a claim. *See id.* § 29-26-116(a)(4).

²² Va. Code Ann. § 8.01-243(A). The statutes of limitation runs after two years from the treatment or the date of reasonable discovery of the negligence by the plaintiff. The statutes of limitation runs after “a period of one year from the date the object is discovered or reasonably should have been discovered.” *Id.* § 8.01-243(C)(1).

- ²³ Ohio Rev. Code Ann. § 2305.113(A). The statutes of limitation runs after one-year after the cause of action accrues. *See id.* However, subject to specific objections, the statute of repose expires after four years. Practitioners should review this rule carefully when considering a medical malpractice action.
- ²⁴ N.C. Gen. Stat. § 1-52. However, the statute of repose in such actions is 10 years. *See* N.C. Gen. Stat. § 1-52(16) (“Unless otherwise provided by statute, for personal injury or physical damage to claimant’s property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.”).
- ²⁵ S.C. Code Ann. § 15-3-530(3).
- ²⁶ Tenn. Code Ann. § 28-3-105(1).
- ²⁷ Va. Code Ann. § 8.01-243(B).
- ²⁸ Ohio Rev. Code Ann. § 2305.14; *accord* § 2305.131, which provides a statutes of limitation of 15 years for damage to real property arising from improvements.
- ²⁹ N.C. Gen. Stat. § 1-39.
- ³⁰ S.C. Code Ann. § 15-3-340.
- ³¹ Tenn. Code Ann. § 28-2-103(a).
- ³² Va. Code Ann. § 8.01-236.
- ³³ Ohio Rev. Code Ann. § 2305.04.
- ³⁴ N.C. Gen. Stat. § 1-52(1).
- ³⁵ S.C. Code Ann. § 15-3-530(1).
- ³⁶ Tenn. Code Ann. § 28-3-109(a)(3).
- ³⁷ Va. Code Ann. § 8.01-246. The statute distinguishes between claims based on written contracts, with a statute of limitations of 5 years, and claims based on unwritten contracts, with a statute of limitations of 3 years. *See id.*
- ³⁸ Ohio Rev. Code Ann. § 2305.06. The statutes distinguish between claims based on written contracts, with a statute of limitations of 15 years, and claims based on unwritten contracts, with a statute of limitations of 6 years, § 2305.07.
- ³⁹ N.C. Gen. Stat. § 1-54(3).
- ⁴⁰ S.C. Code Ann. § 15-3-550(1).
- ⁴¹ Tenn. Code Ann. § 28-3-103.
- ⁴² Va. Code Ann. § 8.01-247.1.
- ⁴³ Ohio Rev. Code Ann. § 2305.11(A).