Protecting Yourself

Against Legal Malpractice Claims

By Peter L. Dunlap

Fast Facts

Legal malpractice claims are not uncommon, and attorneys should evaluate potential clients by looking for danger signs, such as multiple attorneys on a claim, a litigious history, unrealistic expectations, or vindictiveness.

An informed client is generally a happy client. Make it a habit to provide your client with a copy of every document that you prepare.

If you think you have committed legal malpractice, the worst possible action is to do nothing.

A friend of mine recently had an endoscopy. The following day, he received a phone call from his doctor. The call was alarming, as he did not expect the results for an additional two days, and then from an office technician rather than from the doctor himself. The doctor advised that he was calling because a "mistake had been made." Somehow, an unsterilized piece of equipment had been used (the bad news), but the doctor didn't expect any harm to come of the mistake since the equipment's previous "user" was an elderly woman who was in good health and no tissue biopsy had been taken. My friend was furious, understandably so. However, he thanked the doctor for his candor, waited an appropriate time, and, when no harm resulted, did not take any action against the doctor either civilly or administratively.

We lawyers can learn a lesson from this story. Honesty rather than a cover-up has its advantages. What follows is a brief outline on protecting yourself from a growing trend—clients suing their lawyers for legal malpractice.

Selection of the Client

You, the lawyer, are in total control of this most important decision. There is no person whom you *must* represent, whether a referral comes from a lawyer outside your firm, one within your firm, or even from an insurance company. There are a number of danger signs that will immediately become apparent.

Multiple attorneys. Has the client had more than one attorney on this particular matter? Anyone can disagree with his or her initial attorney, but is it reasonable that the client would discharge two attorneys before selecting you?

Litigious history. Determine if your client has a litigious history. People who have been involved in multiple lawsuits usually have high expectations and frequently have weak factual bases for their claims.

Unrealistic expectations. Does the client voice unrealistic expectations in the initial interview?

The vindictive client. This client wants you to hurt the other side, but does not care about a fair result. It is an indication of irrationality that will probably turn on you as the next victim.

Nonpaying client. The client who can't (or won't) pay your fees. It is almost guaranteed that your suit to collect those fees will be met with a counterclaim for legal malpractice.

The emergency case. The client in an "emergency" situation who wants you to file a suit NOW without adequate factual or legal preparation on your part. A good principle is the one expressed in this phrase, uttered many years ago by an experienced attorney: "Your emergency becomes my emergency right after the check clears."

The micro manager. Yes, it is very useful to have an organized client who comes into your office with files or medical records neatly prepared. Beware of the client, however, who starts to tell you exactly how the lawsuit should proceed and what actions you, the attorney, should take.

Safeguards

A fee agreement is absolutely essential in any case. Put it in writing and provide your client with a copy. You may wish to put an arbitration provision in the fee agreement, but if you do, make sure that it allows the arbitration award to be reduced to a judgment at the circuit court level or it may be deemed unilaterally revocable.[1] Have a conflict system in place and do a conflict check. If your firm has a review process by which other members of the firm must authorize a lawyer to accept a case after reviewing the facts, use it. If you are a solo practitioner, discuss the facts of the case with other lawyers over lunch and listen to what they have to say. It is easy to become enraptured by a client's story, which ends up being a losing proposition for you and, ultimately, results in a disappointed client who might sue you.

Beware of relatives and close friends. One word of advice: Don't! Their motive for hiring you and your motivation for accepting cases from relatives and close friends is to save them money. That sort of case usually generates the file that finds its way to the comer of your desk, where shortcuts are always tempting since you know your fee will be either reduced or waived altogether. But beware. Relatives do sue their lawyers in spite of what the lawyers thought to be family loyalty.

Volunteer boards. Define your role on volunteer boards as soon as possible: "I am not your lawyer." "I can't give legal advice to this group." Most legal malpractice policies will not cover acts of malpractice committed while you were on volunteer boards. If you do serve on such a board, make sure that the organization itself has liability coverage for its officers and directors and refrain from providing legal advice.

> When either you or the client reaches the point at which the attorney-client relationship is to be ended, the "divorce" can be conciliatory or brutal. The more conciliatory it is, the greater the chance that your client will not bring a legal malpractice action.

The best way to prevent malpractice is through continuing legal education. One of the first questions asked by the plaintiff's attorney in a legal malpractice action, either in deposition or in interrogatories, will be what seminars you have attended and what organizations or bar sections you are a member of. "None" is a bad answer.

Declining the Case

When you decline a case, send the client a "non-engagement" letter. Do not say, "I have reviewed your file and you have no case."[2] Do tell your client to have another attorney review the case as that attorney may have an opinion different than yours. Make clear to the client that you are accepting no responsibility for the file as of the date you sent the letter and return all file materials the client has sent you. Retain copies of the file for your own protection.

There is always a question about whether a lawyer should tell the client in a non-engagement letter that the period of limitations for his or her claim will expire on X date. Some attorneys believe that statements concerning the statute of limitations in a non-engagement letter involve providing the client with legal advice, thus creating a continuing attorney-client relationship. However, if the period of limitations is about to expire, I believe that it is best to advise the client of the impending deadline. If the period of limitations will not expire for some time, it is probably sufficient to say that "your claim is subject to certain statute-of-limitations requirements that must be satisfied or your case will be dismissed. If you wish to proceed further, please consult another lawyer immediately."

Firing—You or Them

When either you or the client reaches the point at which the attorney-client relationship is to be ended, the "divorce" can be conciliatory or brutal. The more conciliatory it is, the greater the chance that your client will not bring a legal malpractice action. First, copy all the file materials no matter what it costs. Giving the client all the file materials without retaining copies is the worst possible monetary "savings" that you can employ. You will be at the client's mercy when your legal malpractice defense attorney seeks to "discover" your own files, which the client may have "sorted" by then. Second, put the facts and terms of the termination in writing, just like the non-engagement letter covering the same points. Among other things, such a letter indicating exactly when you ceased doing work for the client will begin the two-year period of limitations on legal malpractice,[3] although there is an unpublished case that held that the period of limitations began to run when the attorney filed a motion to withdraw and not when the client came into the attorney's office to pick up the file.[4] Third, an attorney lien is certainly within the attorney's prerogative and beyond the scope of this article. On the other hand, demanding any amount of money from the client before returning the files is a bad idea that can only make a bad situation with the client worse. See MRPC 1.16 for further ethical obligations when terminating the attorney-client relationship.

Client Relations

An informed client is generally a happy client. The cost of a stamp is the only downside to providing the client copies of anything filed with the court on his or her behalf or letters written to doctors, the other attorneys, or witnesses. Make it a habit. Also, document the substance and dates of any conversations with your client that could possibly be construed as legal advice. A letter to the client is best; a file memorandum is the absolute minimum. Send billings on a regular basis (even in a contingent-fee case). Provide the client with billings showing what has been done and the costs incurred for that particular month. The client should not be surprised at the end of a contingent-fee case when costs and fees have substantially reduced the client's portion of the recovery.

Business Ventures with the Client

Avoid this situation religiously. If the time comes when you and your client wish to enter a business together, write a termination letter to the client and perhaps to the newly created business entity itself, advising that you are no longer doing legal work for the client and that the client should retain other counsel.[5]

Conflicts of Interest—Real or Perceived

The phrase "real or perceived" is important. There are numerous cases in which the lawyer does not feel that a conflict of interest has occurred, but there is enough "smoke" leading the client to believe that a "fire" has in fact occurred. Again, point out to the client any possible conflicts, in writing, and get the consent of all clients involved before proceeding. If there is a possible appearance of a conflict, write to the client advising him or her how you will maintain the client's confidentiality if he or she later concludes, without the benefit of your thinking, that a conflict existed.

Common Acts of Malpractice

Claims for malpractice can arise for any number of reasons, but these are probably the most common:

- Violations of a statute of limitations. This usually occurs through staff error, but clearly is the ultimate responsibility of counsel.
- Counterclaims for legal malpractice when the lawyer has sued for an unpaid fee or a portion of the fee.
- Suits by "friends" or relatives that the lawyer has taken as a "favor."
- Cases the lawyer has taken outside his or her areas of expertise.

If You Think You Have Committed Legal Malpractice

Like the patient in the endoscopy scenario at the beginning of this article, the client needs to know. The worst possible action is to do nothing. If your office has an administrative structure, advise the persons in authority. If your office has no such structure, talk it over with other lawyers who you trust. Don't call the client just yet, as the problem might be fixable or you might simply be wrong. The wording of an admission to a client is certainly important, so you should carefully craft a letter to the client admitting a mistake. There is certainly nothing wrong with having a partner or your secretary in on a phone call to the client when you discuss the issue of malpractice. Obviously, the client needs to be advised of any third party's presence. There has been much publicity recently about the medical community rethinking the idea of an "apology" to the patient, which certainly can deter a malpractice lawsuit. Such thinking is equally applicable to our profession.

Finally, notify your malpractice carrier and follow its procedures to the letter. If you are in a firm, providing to one of your partners a written outline of what has occurred and having him or her call the malpractice carrier may be a better idea than calling the carrier yourself.

The Law

This article is far too short to summarize all legal malpractice decisions, but the State Bar of Michigan e-Journal usually reports at least one legal malpractice case a week from the Michigan Court of Appeals or the Michigan Supreme Court. Read them. Profit by the mistakes of others. It is worth reading *Simco v Blake,*[6] which summarized the "attorney judgment rule." Essentially, the Michigan Supreme Court (along with the courts of many other jurisdictions) has taken the position that an attorney cannot be charged with malpractice for making a tactical decision that turns out, in hindsight, to be wrong. Certainly read *Simco v Blake* before you write a letter to the client advising that you have committed malpractice.

Conclusion

The best way to prevent malpractice is to continue to be competent in your field by reading journals, such as *Michigan Defense Quarterly,* and attending seminars in your areas of practice. Michigan is one of seven states that do not require continuing legal education. In my opinion, this is wrong and will probably change. One of the first questions asked by the plaintiff's attorney in a legal malpractice action, either in deposition or in interrogatories, will be what seminars you have attended and what organizations or bar sections you are a member of. "None" is a bad answer. You have worked hard to obtain your position as a preeminent lawyer in your community. The last thing you need to see is your own name as a defendant in a circuit court complaint. ■

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FOOTNOTES

1. See *Wold Architects & Engineers v Strat,* 474 Mich 223; 713 NW2d 750 (2006).
2. See *Colbert v Conybeare Law Office,* 239 Mich App 608; 609 NW2d 208 (2000).
3. MCL 600.5805(5).
4. *Rochlen v Landau,* unpublished opinion of the Michigan Court of Appeals, issued December 13, 2002 (Docket No. 232151).
5. See also MRPC 1.8(a).
6. *Simco v Blake,* 448 Mich 648; 532 NW2d 842 (1995).