K.I.S.S.

AVOIDING BAR COMPLAINTS AND MALPRACTICE SUITS

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Avoiding claims for legal malpractice and ethical violations requires more than merely following the law and exercising the appropriate standard of care. While meeting those criteria likely would allow you to prevail at a trial, it is important for an attorney to understand how to keep a client from contemplating such a claim, let alone threatening one or filing one.

Most legal malpractice claims (and awards) are not related to an attorney’s knowledge of the law. Substantive and procedural law is not hard to find, as long as you know that you need to look for it. The statute of limitations for a personal injury suit in Georgia is 2-years, and it has been for decades. If a lawyer misses that deadline, it isn’t because he did not know the law. The fact is, however, that bar complaints and malpractice claims arise out of a large group of administrative-type errors, including a failure to screen clients properly, monitor deadlines, analyze conflict issues, communicate effectively with clients, etc. The process of avoiding malpractice claims begins before you enter into an attorney-client relationship and continues after the relationship ends. If you think about the things that would aggravate you if a doctor did it to you, you can come up with a good list of things to avoid doing to your client. In other words, don’t keep you client waiting for an hour in the waiting room. Don’t wait 3 days to return a phone call. Don’t be dismissive of a client’s concerns. If the client thinks you don’t care about their case or their feelings, they are going to be more likely to conclude that you did not work hard or obtain the best result possible.
Choosing Clients

Choose your clients carefully. You can avoid a claim for legal malpractice by considering a few factors, including: (a) the client’s experience with prior attorneys—has the client threatened or pursued legal action or filed a bar complaint against a former attorney? (b) the client’s motives and goals—can you achieve those goals for your client? Does the client seek revenge or some other remedy that you either cannot or are prohibited from achieving? (c) the client’s use of alcohol or drugs—will this impair the judgment of the client? (d) the client’s financial condition, including bankruptcy or outstanding judgments—can the client afford to pay the fees which will be incurred during the representation? You always want to avoid a potential dispute over fees, as discussed below; (e) the client’s prior legal problems—does the client have a criminal record (including felonies, which may impact credibility at trial)?

Formalize

Formalize your attorney-client relationship. You should have a written agreement with your client regarding the representation. If you are using an engagement letter, it should be signed by the client. (Contrary to popular belief, The Rules of Professional Conduct do not require that a contingency fee agreement be signed by the client. The Rules simply require that the agreement be in writing. Nonetheless, be sure the agreement is signed by the client. One day you may need to prove what the terms/limitations of the attorney-client relationship were, and there is no better way to prove the terms of an agreement that to have a signed copy.)
It never ceases to surprise me that many lawyers fail to have fee contracts with their clients. The contract is the best opportunity you have to set forth the duties you and your client owe to one another, as well as the limitations on the representation. Some lawyers feel that a long contract may scare/concern a prospective client. A contact is too important; don’t limit it. All the terms of the representation should be disclosed in the agreement, including the scope of the representation, the fees that will be charged, whether a retainer is required, etc.

The fee agreement should specifically discuss the hourly rate to be charged by each attorney (or other professional working on the matter, such as a legal assistant) or other form of fee, such as a contingency fee. Any plaintiff attorney’s contingency fee should be accurately described in the fee agreement, be it a form used for many clients or an engagement letter. For instance, does the fee vest upon the agreement to settle with the opposing party or upon the receipt of the settlement proceeds? Under Georgia law, you can protect yourself from the possibility that a client, in attempt to deny you your contingency fee, may discharge you after settlement offers have been made. In Morrow v. Stewart, 197 Ga. App. 689, 399 S.E. 280 (1990), the Court of Appeals approved of (and enforced) the following language from an attorney-client contingency fee contract:

“I understand that I may dismiss my attorney at anytime, for any reason, upon written notice to him and payment of unpaid expenses and services rendered to the date of the receipt of such notice; payment to be based upon time
devoted to my case at any hourly rate of $80.00 per hour, or the applicable percentage of fee due him under the terms of this agreement of any offers which have been made by any adversary or collateral party, whichever is greater.”

You should also contemplate whether you want your fee arrangement to reference the possibility that an appeal may be filed and whether you will charge an additional fee or whether such work included in the contingency? Note that Georgia Rule of Professional Conduct 1.5 requires that a contingency fee be in writing and shall state the method by which the fee is to be determined, including the percentages, whether interest will be charged, etc.

Expenses that will be billed to the client should be discussed in the fee contract. This is true whether the expenses will be billed (and paid for) each month or whether the attorney is paying the expenses and expects to be reimbursed from the expected recovery. In a contingency fee context, the client should be informed that he will be responsible for the expenses of litigation even if there is no recovery. If the attorney is going to charge interest on the funds that are used for out-of-pocket expenses, the interest rate should be clearly set forth in the contract. The contract should also be clear as to whether the expenses will be paid out of the client’s portion of the settlement proceeds or from the top, before the attorney and client’s portions are determined.

If an attorney will be billing by the hour, the contract should clearly set forth the frequency of the billing and when the client will be expected to pay the bill. The monthly statement is an excellent opportunity to describe to the client
the work that is being performed, not only for purposes of asking to be paid, but for purposes of making sure the client knows that you are toiling for him. If an attorney performs any work for a prospective client, but ultimately decides not to enter into a formal attorney-client relationship, the attorney should send a nonengagement letter. A nonengagement letter protects the attorney from a subsequent claim that the client expected certain work to be performed. A nonengagement letter may not be practical for every situation in which an attorney converses with an individual with regard to prospective representation, but there are certain situations in which the failure to send a nonengagement letter can lead to disaster. One situation occurs when an attorney charges a fee for a consultation regarding the merits of a particular case. For instance, consider the situation in which a family member of a resident of a nursing home hires an attorney to review medical records, consult with an expert witness, conduct research and do whatever else is necessary to determine whether a valid claim for medical malpractice exists. Should the attorney decide that no such claim exists (or, perhaps, that a claim does exist, but it is not a claim which his firm will handle), the attorney should send a nonengagement letter to the prospective client stating that the firm will not be representing the client and providing any information which the client may need, particularly the date when the applicable statute of limitations will expire. The letter should suggest that the client consult with another attorney as soon as practicable.

Should an attorney find himself in a situation in which he has been engaged and later decides to withdraw, a disengagement letter should be sent to the client. This letter may discuss the reason why the attorney-client
relationship is ending, whether the attorney will work with/consult with subsequent counsel, and whether any additional attorney’s fees are owed. The attorney should confirm that the client receives a written notice of the disengagement. This means that the letter should be sent by certified mail (or some other means such that the client’s receipt of the letter can be confirmed). While this information will be helpful to the client, the written confirmation that the client is aware of the disengagement may be extremely important to the attorney. There have been several legal malpractice cases arising out of the running of the statute of limitations, followed by the client suing the attorney. The attorney claims that he had withdrawn and told the client that he would not be filing suit, and the client claims that he had no such knowledge of a withdrawal and expected that suit would be filed in a timely manner. Why risk this he said-she said? Document the withdrawal.

One final point: Do not wait until the statute of limitations is about to expire to decide to withdraw. It is not uncommon for an attorney to agree to review a file when there are several months remaining before the statute of limitations (or other filing deadline) will expire. Given the lack of an imminent deadline, the file is placed on the back burner. As the deadline for filing approaches, the attorney decides, for some reason, that he does not want to handle the case after-all. If the attorney withdraws at such a late date that the client cannot find substitute counsel, he is inviting a claim for legal malpractice. The duty to withdraw in an appropriate manner is particularly important in a complicated case. It is not reasonable to expect that you can tell a client you decided not to take her medical malpractice case three days before the statute
expires, leaving the client without counsel and without much opportunity to find counsel.

**Impressions**

Impressions are extremely important. Malpractice actions are not filed for every error or every negligent act. Developing a rapport with your client may not prevent malpractice, but it can assist in preventing malpractice claims. If a client values the attorney-client relationship, it might outweigh the perceived value of a malpractice claim. Always avoid the impression that you are being neglectful. Georgia ethical rules require that an attorney keep a client reasonably informed about a matter. This is a minimum threshold, and in emotional cases, such as those involving divorce or child custody issues, additional communication is helpful. An attorney should provide the client with the impression that the legal matter is being given the attention that it requires. This is best handled through quality communication. This communication can take many forms, including effective billing (in which the work performed is itemized), phone calls to the client, letters to the client and sending copies of pleadings to the client. See section entitled “Communicate,” below.

**Expectations**

Preparing quality documents, meeting deadlines and understanding the law are obvious ways to avoid malpractice claims. In certain areas of law, however, it is inevitable that a client will be disappointed from time-to-time. This is particularly true in cases in which there is a trial: one party is going to lose. In
addition, legal matters such as divorce and criminal cases are rife with emotion and disappointment, sometimes misdirected at the attorney. It is important that the client understand the difference between losing and substandard representation. This potential for confusion on the part of the client should be addressed from the beginning of an attorney-client relationship through its conclusion.

One important way for an attorney to avoid having a disappointed client (and thus one who might pursue a legal malpractice claim) is to set realistic expectations. Many clients will have some expectations upon entering the attorney-client relationship. However, most clients form their expectations regarding the outcome of a legal matter based on conversations with their lawyer. An attorney should avoid the temptation to set unreasonably high expectations during the initial interview process (when the lawyer knows that the prospective client may be choosing between several attorneys). Of course, you should never give the client the idea that you are guaranteeing a successful result.

An attorney who has had no experience with legal malpractice might be surprised to learn that many clients who call for a consultation with regard to a prospective legal malpractice claim think that their attorney was “paid off” by the opposing attorney or party. Why would a client feel like he has been “sold out?” This feeling is often caused by the failure of the attorney to meet the expectations he has helped to set. If you tell your client (or prospective client) that his claim is worth $100,000, and it ultimately settles for $5,000, you have some explaining to do. However, if you keep the client informed as to the status of the matter you are handling, and you promptly let the client know of any important
developments, you can continue to manage the expectations of your client throughout the representation. By doing so, the chances of surprise and bitter disappointment are reduced.

Communicate

It is not possible to overstate the importance of effective communication with your client. Clients’ phone calls should be returned promptly. If the primary attorney handling the file cannot return the call, then another attorney at the firm, a legal assistant or a legal secretary should return the call. When clients feel that they are being treated as unimportant, it is inevitable that they will feel that their case is not being handled zealously. A less than favorable conclusion to the case will be blamed on this perceived lack of attention.

Communicating with a client is not only a good way to keep attorney-client relations healthy; there is an affirmative ethical duty to keep clients apprised of the status of their case. Georgia Rule of Professional Conduct 1.4 is entitled “Communication” and reads as follows:

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, shall keep the client reasonably informed about the status of matters and shall promptly comply with reasonable requests for information. The maximum penalty for a violation of this Rule is a public reprimand.
This ethical rule can become a problem when the attorney knows, or suspects, that he has made a mistake in the course of representing the client. The attorney may feel that he can repair the error and will therefore decide not to tell the client that their case is in peril. This decision can rise to the level of fraud in a subsequent legal malpractice lawsuit, and is not worth the risk. Tell the clients the good, the bad and the ugly. It’s often a difficult task, but the alternative is unacceptable: the client sues you for hiding the error from him. Additionally, hiding the error can extend the statute of limitations, as certain types of fraud will toll the statute of limitations until such time as the client knew, or reasonably should have known, of the fraud. Furthermore, it should be noted that fraud committed after the negligence can support a claim for punitive damages, even if no monetary damages were caused by such fraudulent concealment. The Court of Appeals has held that such behavior constitutes a breach of fiduciary duty, which can give rise to punitive damages. (Holmes v. Drucker, 201 Ga. App. 687 (1991)).

Keep Yourself Apprised of the Status of a Case

In addition to keeping your client apprised of the status of his case, the attorney has a duty to keep himself apprised of the status. This may seem self-evident, but attorneys can be held liable for the failure to diligently follow the status of their cases. In Hipple v. Brick, 202 Ga. App. 571 (1992), a client sued his lawyer for failure to protect his right of appeal in the prior action. In the underlying case, the client had a $39,000 judgment against him. The attorney then moved for judgment notwithstanding the verdict or, in the alternative, a new trial. When the court denied the motion 13 months later, the attorney did not
receive notice of the entry of the order. After 35 days had expired, the attorney learned of the order in a telephone call from opposing counsel. At that point, the 30-day filing period for a notice of appeal had expired, and the attorney took no action to resurrect the case (such as filing a motion to set aside the judgment in order to gain a new 30-day period, under O.C.G.A. § 9-11-60 (d)). The client’s malpractice claim was predicated on attorney Hipple’s alleged negligence in failing to monitor the status of the case and timely to inform Brick of the order so that an appeal could have been taken. Attorney Hipple claimed he was entitled to summary judgment on the theory that, as a matter of law, he breached no duty to his client in relying on the court and the mail to provide notification to him of entry of the court’s order on the motions, as it is standard practice for attorneys to do so. The Court of Appeals held that O.C.G.A. §15-6-21 does not relieve an attorney from keeping informed of the progress of a client’s case. (O.C.G.A. §15-6-21(c) places a duty on the judge to file his or her decision on a motion for new trial with the clerk of the court in which the cases are pending and to notify the attorney or attorneys of the losing party of his or her decision.) According to the Court of Appeals, the attorney has a separate and independent duty that arises from the contract with the client. Therefore, even if the trial court had failed to send the notice, it would not have relieved the attorney of his obligation to check for over one year. The Court of Appeals noted that in Bragg v. Bragg, 225 Ga. 494, 496 (1969), the Georgia Supreme Court had held that, “[i]t is fundamental that it is the duty of counsel who have cases pending in court to keep themselves informed as to the progress of the cases so that they may take whatever actions may be necessary to protect the interests of their clients.”
Explain the meaning of Legal Documents to Clients

The general understanding of Georgia law is that if a client signs a document, he is held to have understood it and is subsequently bound by it. However, there are reported cases in which a lawyer presented a document to his client for signature and was subsequently sued because of the legal ramifications of the language. For instance, in Little v. Middleton, 198 Ga. App. 393 (1991), the defendant attorney had represented a client in a personal injury case arising out of a car accident. The case settled against the tortfeasor for his $25,000 liability limits. The release agreement released the tortfeasor and his “heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or who might be claimed to be liable....” The injured driver’s own underinsured insurance carrier subsequently refused to pay the plaintiff based on her execution of the release. The plaintiff then sued her attorney for legal malpractice, based on her attorney’s failure to read her policy to determine whether there was UM insurance, the failure to properly pursue the UM claim, and the failure to advise her as to the legal effect of the release on her UM claim. The attorney filed a motion for summary judgment asserting that the language of the release was clear, that the client should have understood it and that the client was thus barred from suing him for any misunderstanding regarding the effects of the release. The trial court granted the motion for summary judgment. However, the Court of Appeals reversed, holding that a question of fact existed as to whether the legal effect of the release posed to the plaintiff “a legal technicality that she was unequipped to appreciate as a non-lawyer.” Id. at 395. The Georgia Supreme Court granted cert., but subsequently vacated cert. after briefs were
filed and the Supreme Court heard oral argument. The practical effect of Little is that an attorney must explain the meaning of documents that are presented to a client for signature. While the need to explain language varies depending on the sophistication and education of the client, the safe approach is to explain language, including boilerplate that attorneys see on a daily basis.

**Fee Disputes**

At least 25% of all legal malpractice claims arise out of fee disputes (some claim it is as high as 75%). If you file a suit against a client for fees, any claim for legal malpractice becomes a *compulsory* counterclaim, and an invitation to be sued. When you apply for errors and omissions coverage, you likely will be asked whether you have sued a client for legal fees within the past year. You are asked this question because insurance companies know that fee disputes are a common cause for legal malpractice claims (legitimate or not) to be filed. You are entitled to be paid for the legal services you provide. But when deciding to file suit, file a lien, etc., keep in mind that your client may file a counterclaim that will cost you time and money. You will have to pay your deductible on your policy, and your insurance premiums likely will rise. You may suffer from bad publicity or damage to your reputation. Make sure that the decision to sue a client is made with an understanding of the professional and financial risks. Consider ADR as an option.

Georgia law currently allows you to put a clause in your attorney-client fee agreement which limits the time within which a client may object to an invoice. You can further limit the client’s right to object by requiring that the objection be
in writing. As the law currently is enforced, the client’s failure to object within the specified time period will forever bar the client from objecting to the invoice. Typical language used in a fee agreement reads as follows: “Your failure to object in writing to any bill within thirty (30) days of the date of each such bill shall constitute a waiver on your part of the right to challenge the charges made for legal services and expenses on each billing statement.” In *Loveless v. Sun Steel* 206 Ga. App. 247, 424 S.E.2d 887 (1992), the Court of Appeals addressed a situation in which an attorney sued for unpaid legal fees. The former client contended that he had verbally complained about the fees, and further, that he and the attorney had an understanding that the fees would only be due under certain circumstances. The Court of Appeals held that the written contact was binding and that any ‘understanding’ would constitute parol evidence and be inadmissible within the context of a dispute regarding a written attorney-client fee agreement. I should add that this type of contractual provision, which can limit the rights of the client, is of questionable ethical propriety, and it has never been approved by the Georgia Supreme Court. If your contract contains this type of provision, you should be very careful about seeking to enforce it.

This concern arises out of the fact that Georgia law does not allow an attorney to contractually limit the time in which a client may complain about legal malpractice (ie: the statute of limitations for legal malpractice claim is 4 years (or maybe six, if you had a written fee contract), and an attorney may not decrease that time frame by contractually limiting the time for a complaint to 30-days or some other time similar to the above *Loveless* time limit.) It seems contradictory that a client can be limited to the amount of time within which she
may complain about substandard legal work vis-à-vis the invoices, but may not be limited to the amount of time she may complain about substandard work in the context of a legal malpractice claim. That is a topic for an entire paper. My best advice is: be careful when you attempt to limit your client’s rights/remedies, as it can easily be construed as your placing your own interests ahead of your client’s interests.

**File Materials**

Attorneys often hesitate to turn over their file materials to clients, particularly clients who have not paid their bills or are threatening to file suit. Attorneys have a statutory lien on clients' papers and money in their possession, and they "may retain the papers until the claims are satisfied." O.C.G.A. §15-19-14 (a). However, Formal Advisory Opinion of the State Bar of Georgia No. 87-5, states that an attorney “may not to the prejudice of a client withhold the client's papers or properties upon withdrawal from representation as security for unpaid fees.”

In *Swift, Currie, McGhee & Hiers v. Henry*, 276 Ga. 571 (2003), the Georgia Supreme Court phrased the issue as follows: “Boiled down to its essence, the question is this: Does a document created by an attorney in the course of representing a client belong to the attorney or the client?”

The answer fell squarely on the side of the client and relied up the above-referenced Formal Advisory Opinion:

“An attorney's fiduciary relationship with a client depends, in large measure, upon full, candid disclosure. That relationship
would be impaired if attorneys withheld any and all documents from their clients without good cause, especially where the documents were created at the client's behest. See State Bar of Georgia, Formal Advisory Opinion No. 87-5 (September 26, 1988) (attorney may not, to the prejudice of client, withhold client's papers as security for unpaid fees).”

(Id. at 573)

What is “good cause?” The Supreme Court held that good cause to refuse to turn over the documents “would arise where disclosure would violate an attorney's duty to a third party. Good cause might also be shown where the document assesses the client himself, or includes "tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation." (Id.)

Missing from the Court's definition of good cause was “the client hasn't paid his bill.”

Most clients can make an argument that your retention of their files is causing them damage. The better choice is not to give the appearance that you are holding the file hostage.
Bar Complaints

If a client has filed a Bar Complaint against you, hire counsel to respond. There are many defenses that may cause the State Bar to dismiss a complaint at the first stage. It is not uncommon for a Bar Complaint that has no merit on its face to become a serious matter because the responding attorney says too much, or, even worse, lies, in the initial response. Hire someone who is experienced in these matters. It can save you a lot of stress, and for a serious allegation, it can save your license.

Meeting deadlines, filing appropriate pleadings and understanding the law are obvious ways to avoid malpractice claims. In certain areas of law, however, it is inevitable that a client will be disappointed from time-to-time. This is particularly true in cases in which there is a trial: one party is going to lose. It is important that the client understand the difference between losing and substandard representation. This potential for confusion on the part of the client should be addressed from the beginning of an attorney-client relationship through its conclusion. And always remember that if you treat a client well, the client is likely to remember should you happen to make a mistake.
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