



# **Risk Management & The Paralegal**

## **An Ethical Lawyer: The Paralegal's Responsibility**

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**NCPA's 38th ANNUAL MEETING & SEMINAR**  
**March 22, 2018 – March 24, 2018**

## **Mark A. Scruggs**

Mark Scruggs joined Lawyers Mutual in March 2001 as claims counsel. Formerly a partner with Spears, Barnes, Baker, Wainio & Scruggs, LLP in Durham, Mark has over 14 years' experience as a trial attorney concentrating in insurance defense litigation. For the last 16 years, Mark has worked with Lawyers Mutual primarily in litigation-related claims and workers compensation and family law matters. He is a 1986 *cum laude* graduate of Campbell University School of Law. Mark is a past chair of the Law Practice Management section of the North Carolina Bar Association. He has served as an Advisory Member of the State Bar Ethics Committee and as an Advisory Member of the State Bar Authorized Practice Committee. He has also served as co-chair of the North Carolina Bar Association's "Transitioning Lawyers Commission" working to address issues facing aging lawyers.

# **AN ETHICAL LAWYER: THE PARALEGAL'S RESPONSIBILITY**

**NORTH CAROLINA PARALEGAL ASSOCIATION  
GREENSBORO, NC  
MARCH 23-24, 2018**

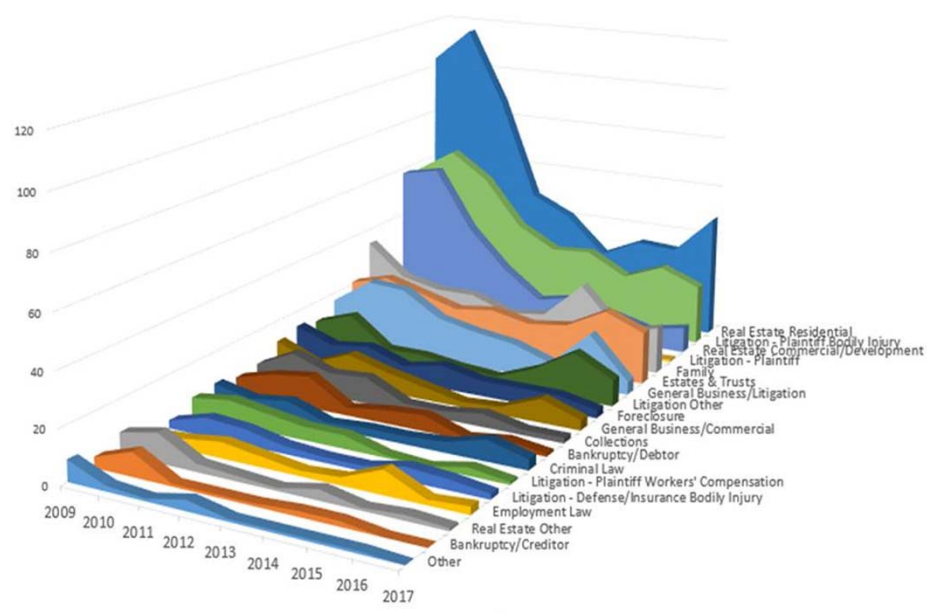
Mark A. Scruggs  
Claims Attorney  
Lawyers Mutual



**LAWYERS  
MUTUAL**

LIABILITY INSURANCE  
COMPANY OF  
NORTH CAROLINA

Claim Counts by Report Year and Area of Law (>= 15 claims over period)



The Number One Lawyer Excuse for Mistakes Resulting  
in a Malpractice Claim.



My **former** paralegal failed to . . .

## **WHAT IS THE REAL CAUSE OF MOST PARALEGAL MISTAKES?**

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- (1) The office procedures the paralegal was following were not adequate in the first place.
- (2) The paralegal had been performing with inadequate supervision for a long time before the mistake was made.
- (3) The paralegal was given broad responsibilities and did not keep the supervising attorney informed of significant developments in the claim.

## STRENGTHS OF PARALEGAL – ATTORNEY TEAM



- Recognize and maximize the talent and experience of various team members
- Open door policy - face to face is often more effective than email
- Communication – weekly status meeting – deadlines, status of cases, new assignments, determine priorities, brainstorm strategy
- Mail distribution – don't let work sit on the attorney's desk, get it to the paralegal right away
- Use paralegal as case manager rather than task oriented assignments



## **STRENGTHS OF PARALEGAL – ATTORNEY TEAM**

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- Paralegals show initiative / be a self starter
- Lawyers support continuing education / association involvement of their paralegals
- Paralegals should think proactively and the attorney should encourage and reward that behavior
- Excellent writing is a must for all members of the team
- Trust is key – with clients and within the legal team



## PARALEGALS ARE VITAL TO ETHICAL CLIENT SERVICE

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- Current client contact information and regular updates
- Critical dates highlighted and properly entered into office calendaring system and backup system.
- Engagement, non-engagement, or limited engagement letter in place.
- Know what the scope of representation is and stick to it.
- Set expectations for client communication.
- Documentation of all client calls and attempted calls.
- Documentation of attorney advice and client instruction
- Emphasize to client that you cannot give them legal advice . . . and don't.

## WHAT HAPPENS WHEN YOU CLICK

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### 1 - Instant Contamination - Infected with a virus

- Slows computer performance
- Adds computer to a "bot net" to coordinate attacks on other computers
- Erases data
- For fun, amusement, to prove a point

### 2 - Malware installs that tracks your movements/keystrokes

- Hidden programs run in the background
- Secretly capture and transmit information about your computer use such as websites, user names, & passwords
- To obtain personal and financial information for financial or identity theft

### 3 - Cyber Extortion

- All data on the computer and/or network is encrypted
- Must pay a ransom to obtain the decryption key (with no guarantee they will give it to you)
- Extortionist measure to have funds sent overseas

## WHAT YOU CAN DO

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- Educate employees on proper internet etiquette
  - Do not follow suspicious links
  - Do not download or install items without verifying the source
  - Avoid websites that are frequent targets (e.g. online shopping, website ads, etc.)
- Never go to a finance related site through email links. Always use your previously set up bookmark/favorite or type in your destination.
- Keep work e-mail for work purposes
- Restrict internet access on computers used for the firm's online banking
- Develop and enforce a data security policy

## LAWYER / PARALEGAL RELATIONSHIP

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NOTARY NAME  
NOTARY PUBLIC  
Mecklenburg County  
North Carolina  
My Commission Expires May 8, 2008

## **LAWYER / PARALEGAL RELATIONSHIP**



- NC Gen Stat. 10B
  - Class 1 Misdemeanor if unintentional.
  - Class I Felony if done with the intent to commit fraud.
  - Suspension/Revocation of Notary License.
  - The North Carolina AG's office does prosecute these.
    - Venue for these matters is usually Wake County, NC regardless of where the fraudulent activity occurs



- N.C.G.S. § 84-2.1 defines the practice of law in NC as:
- General Definition -- Performing any legal service for another person, firm or corporation, with or without compensation
- Preparing documents to be filed in any judicial or quasi-judicial body
- Preparing deeds, wills, accountings of trustees, guardians, or executors
- Preparing title abstracts
- Assisting in legal work; or
- Advising another person, firm or corporation about their legal rights.
- “Practice of law” includes these specifics and any other acts “within the general definition.”

In other words, more than half of what a paralegal does in a typical law office is the “practice of law.”

So why aren't you in jail for practicing law without a license?



## **N.C. RULE OF PROF. CONDUCT, RULE 5.3 – RESPONSIBILITIES REGARDING NON-LAWYERS**



With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and . . .



## UNAUTHORIZED PRACTICE

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- Rule 5.3 Lawyers Duty to Supervise and Remedy
  - Requires Attorneys to Educate Support Staff
  - Requires Attorneys to Attempt to Mitigate Damages
  - Subjects Attorneys to Discipline for failing to do either.

## RED FLAG CLIENTS

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- Beware the client who insists they can only afford an inadequate retainer or is looking for a guarantee of success
- Beware the client who expresses unreasonable expectations
- Beware the client who demonstrates a pattern of boundary violations, everything is a crisis, frequent telephone calls, unreasonable requests or demands special favors
- Beware the client who constantly praises you while belittling everyone else
- Beware the client who has fired or been fired by every other lawyer in town
- Beware the client who says “it’s not the money, it’s the principle.”
- Beware the client who has done their own research and refuses to follow your advice.
- Beware the client who arrives on your doorstep on the verge of an important deadline
- Beware the client who over communicates or who never communicates

## **DANGERS OF THE GOOD CLIENT**

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- So much work comes from this client that you feel obligated
- You make exceptions you would never make for other clients
- You do business deals on cocktail napkins because you are friends
- You do business deals on cocktail napkins because you are in business together
- You dabble in areas of practice that you otherwise would not



## RUNNING INTERFERENCE

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## **RUNNING INTERFERENCE**

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- 2015 FEO 4
- Rule 1.1 – Competence
- Rule 1.4 – Communication with Clients

## MISGUIDED LOYALTY

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- 2013 FEO 8. Responding to the Mental Impairment of a Firm Lawyer

## BAR TALK

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## CLIENT CASE STUDY – MILEY CYRUS

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- Miley Cyrus contacted retained your lawyer to negotiate and draft contracts for a whirlwind 15-city “Naked Wrecking Ball Music Revue.” At the county bar luncheon today, others at your table start discussing Cyrus’s recent MTV Video Music Awards show . You tell the table, “Cyrus just hired our firm to represent her.”
- Permitted Disclosure?

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## CONFIDENTIALITY

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- Confidentiality >> Privileged Communication
  - “Confidential information” means any information relating to the representation of a client acquired from any source during the professional relationship with the client, even such information that is generally known to the public.
  - “Privileged communication” is a rule of evidence that protects a confidential communication between an attorney and client made for the purpose of obtaining legal advice or assistance.

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## HOW TO HANDLE FIRM MISTAKES

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- Call Lawyers Mutual and talk through the situation with a claims attorney
- Study 2015 FEO 4 (Disclosing Potential Malpractice to a Client)
- If you made a material mistake, tell your client and advise them to consult independent counsel
- Provide the client with a copy of their file and make sure you keep a copy

## THE 'OH NO' MOMENT

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- Don't email your client and say 'Oh No!!!'
- First Call should be to Lawyers Mutual:
  - The Carrot:
    - 7 Claims Attorneys – all licensed in North Carolina and all of us were in private practice prior to working for Lawyers Mutual.
    - We literally answer telephone calls like yours every day.
    - Many, many errors are correctable.
    - Frequently it will not trigger your deductible or affect your insurability or premium.
    - Communications are confidential and non-discoverable.

## CONTACT INFORMATION

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## Helping Your Firm Avoid Legal Malpractice Claims

By Mark A. Scruggs  
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When a litigation lawyer reports a mistake to Lawyers Mutual that has created a legal malpractice claim, that conversation often starts with the words, “Well, this former paralegal at the firm failed to . . .”. While the reporting attorney usually acknowledges that the “buck stops here,” i.e. with him or her, the attorney may also deflect responsibility by detailing the ways the paralegal failed to follow established office procedure. After investigating the claim, we often find that the true import of the situation is one of three things:

- (1) The office procedures the paralegal was following were not adequate in the first place.
- (2) The paralegal had been performing with inadequate supervision for a long time before the mistake was made.
- (3) The paralegal was given broad responsibilities and did not keep the supervising attorney informed of significant developments in the claim.

Solos and small-firm attorneys are particularly vulnerable to charges of legal malpractice, and in many of those firms paralegals have wide-ranging responsibilities for client communications, file and deadline management, and case investigation. According to the American Bar Association, most malpractice lawsuits are filed against lawyers in firms with one to five attorneys. Without the information technology departments, big and small firms must be proactive in avoiding common malpractice traps, and that includes duties often handled by litigation paralegals. Let’s review some of the more common legal malpractice traps that we at Lawyers Mutual encounter in our handling of claims against litigation attorneys and ways that paralegals can help keep the firm from receiving malpractice claims.

### **I. MISSED DEADLINES**

Litigation errors breed the largest number of malpractice claims reported to Lawyers Mutual each year. In 2007, errors arising out of litigation accounted for 29% of all claims reported. In the majority of cases, the statute of limitation on the client’s case expired and there was nothing left to do but assess the damages.

#### **1) Failing to Maintain a Comprehensive Calendaring/Docket Control System**

Law firms 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 your docket system is a computerized case management and calendaring system or an old-fashioned tickler box. The most important thing

is to assure that the necessary events are entered and executed. **The basis of a well-designed docket system is the use of a central system, i.e., one controlled by a person who is not the person responsible for meeting the deadlines.** There is double security when responsibility for compliance rests with both the lawyer or paralegal responsible for meeting time limitations and with the person responsible for the central system. Having the person responsible for the central system verify compliance is critical in achieving a well-designed system. Both the person responsible for the central system and the person responsible for meeting the deadline should verify compliance with important deadlines. Lawyers Mutual handles numerous claims every year resulting from missed deadlines caused by the one person in charge of docket control being sick or otherwise away from the office when the deadline passes.

2) 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 paralegal forget to calendar 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.

3) 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. 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.

## II. 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 or paralegal. Law firms 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.

### 1) 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. This error is especially prevalent in medical malpractice and premises liability cases. To avoid such errors, plaintiffs' attorneys should make every effort to ascertain the defendant's proper corporate name either well 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.

North Carolina state court is especially strict in requiring near perfection in the naming of the defendant, regardless of whether the complaint and summons give actual notice to the proper defendant that it has been sued. See, *Crossman v. Moore*, 340 N.C. 185, 459 S.E.2d 715 (1995) (Complaint dismissed because improperly named defendant "Van Dolan Moore" rather than "Van Dolan Moore, II"), and *Franklin v. Winn-Dixie Stores, Inc.*, 117 N.C.App. 28, 450 S.E.2d 24 (1994), *aff'd* 342 N.C. 404, 464 S.E.2d 46 (1995) (Complaint dismissed even though defendant Winn-Dixie and its unnamed subsidiary had same headquarters and registered agent). Unfortunately, even insurance company malfeasance in misrepresenting the correct identity of the corporate defendant does not prevent dismissal of a complaint where the true identity of the defendant should have been found from other sources. See, *Bailey v. Handee Hugo's, Inc.*, 173 N.C.App. 723, 620 S.E.2d 312 (2005) (True identity of corporate defendant was on record at Register of Deeds).

Make sure to always check the Secretary of State website for corporate records, the Register of Deeds records for filed Certificates of Assumed Names, and even SEC records and filings that are available online. Take special care in correctly naming and serving foreign defendants. Foreign service requirements, including Hague Convention requirements, may need to be followed.

## 2) Serve All Defendants Within Statutorily Prescribed Time Limits

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, the complaint must be served on a defendant to a lawsuit in federal court within 90 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 “violation 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). 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). An attorney risks malpractice liability if the statute of limitation runs before the alias or pluries summons is issued in such a situation.

## 3) Keep the Summons Alive or Enter Into Enforceable Tolling Agreements Within the Statutes of Limitations While Engaging In Settlement Discussions Or Until Answer Filed With No Service or Statute of Limitations Defenses.

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. 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.

It is also best practice to keep the summons alive until the defendant has filed an answer that has no service or statute of limitations defenses. If the answer raises such defenses, always keep the summons alive until the defenses are either withdrawn or ruled on by the trial court.

### **III. POOR CLIENT RELATIONS**

The attorney and firm's relationship with the client is the most important aspect of any engagement and is one of the chief factors in the likelihood that a malpractice claim is made against the firm. Unfortunately, this is probably one of the areas most ignored by attorneys and staff. Maintaining good attorney-client relations can help prevent malpractice claims, and paralegals are often the first and most important line of communications with the client. A client who feels satisfied that the firm values his or her case and has made its best efforts will be more understanding and willing to forgive if you commit an error.

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, failed to keep them informed and failed to involve them in important decisions affecting their case. Unhappy clients, clients who feel disrespected and neglected, are most likely to blame their lawyer when the case fails to turn out as they hoped.

Many times these client frustrations are communicated to the paralegal rather than directly to the lawyer. A good paralegal will make sure that the following steps are taken when a client expresses to the paralegal unhappiness with the firm's handling of their case:

- 1) Document in the file that the client called to complain.
- 2) Document in the file that the client was told when to expect a response from either the attorney or the paralegal.
- 3) Document in the file that the paralegal communicated the client's complaint to the supervising attorney and that the attorney in fact responded.
- 4) Document in the file all attempts to contact the client, whether by mail, e-mail, or as voice mail messages.

If you, as the paralegal, are fielding the client's complaint, listen to your client. Strive to make them feel comfortable and important. Never be condescending or evasive. Instead tell them that you will communicate their concern to the attorney and will make sure that the attorney calls them back. Always try to set reasonable parameters for client expectations of attorney communications. In other words, don't tell the client that the attorney will call him or her back "today" unless you know that the attorney will be able to follow through.

Don't ever lie to a client for any reason. You and the firm will not have a shred of credibility if a claim is ever brought and the jury learns that the firm lacked candor in its communications with the client.

Be careful not to create unrealistic expectations for the client. Legal malpractice claims inevitably result from actions that were not initially successful in the eyes of the client. Optimistic lawyers often invite the potential for legal malpractice claims. This frequently occurs during the initial client intake consultation. During client intake, the lawyer's desire to get the business leads him to opine optimistically as to the value of the case in terms that the client wants to hear. This can come back to haunt even the most experienced lawyer. Lawyers are advised to respond to the frequently asked question "What's the case worth?" with nothing but the most conservative estimate, all the while couching that estimate in the reality that all cases proceed differently and anything can happen. **Paralegals should never opine on or discuss the value of the case with the client.** Instead, paralegals should always remind the client that they are not attorneys and that questions about case value can only be answered by the supervising attorney.

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.

Don't procrastinate. Delay is usually found in every legal malpractice claim. Moreover, while it sounds simplistic and perhaps unattainable, do not leave any file in your office unattended. It is the neglected file, more than any other, that probably needs your attention and that may result in a subsequent legal malpractice claim.

Above all else, your firm should choose its clients wisely. Lawyers should look at their client-screening policies and decide if they need to say "no" more often to potential clients. According to the ABA, ineffective client screening is one of the major causes of legal malpractice claims. By declining to represent a "high-risk client" – one who is most likely to sue you and will never be satisfied with your hard work and effort - you could be avoiding a potential lawsuit in the future. "Red Flags" to look for are clients who have been rejected by other lawyers, or who have fired other lawyers in the case; clients who have unrealistic expectations or uncontrollable anger; clients who have trouble with the truth; or clients who have made claims against prior attorneys or other professionals. The general background of the client, financial condition, history of personal legal problems and business background of the client may also be relevant areas of inquiry when evaluating a potential client. Many times the paralegal will learn more about the client than the attorney. Paralegals should know the "red flags" of a problem client, and communicate such knowledge to the attorney as soon as it is discovered.

Sometimes good client relations involve knowing when to terminate the attorney-client relationship. Lawyers sometimes think they are not free to fire a client. A wise lawyer once

said, “Unless he had missed something, the practice of law is not involuntary servitude.” Indeed, it is not. If the representation is becoming unsatisfactory for either party, consider terminating the representation. You may have to seek permission from the court if you are attorney of record in the case, and you cannot prejudice your client by abandoning him, but in many cases, ending the attorney-client relationship is the thing to do to avoid a claim down the road. Just remember to do it courteously and document the withdrawal properly. Another wise lawyer once said, “The happiest day of my life was when I learned how to fire a client.” If your client requests their file or documents in their file, give it to him, but do not forget to keep a copy for yourself. At Lawyers Mutual, we occasionally have to request a copy of our insured’s file from the plaintiff because our insured has simply turned over his file to the client without keeping a copy. At worst, that is embarrassing. Finally, when you provide your client with his file, get a receipt noting the date and time and it was transferred to the client and stating that no further action will be taken by the lawyer on behalf of the client in the case.

**For more information on screening prospective clients**, read our “Attorney-Client Relationships” practice guide at [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com).

#### **IV. INADEQUATE DOCUMENTATION**

Many malpractice claims against lawyers and their firms 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. Remember that if an event is not made a part of the written file, an argument can be made later by the client that it never happened. When the client says the lawyer or paralegal told him one thing and the law firm 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 or paralegal is a lying to cover up negligence. The attorney or paralegal may be right about their recollection, but without adequate documentation to support his version of events, it is usually less costly to go ahead and settle a claim than to defend the lawyer’s integrity. Keep copious notes. A law firm that extensively documents client communications and events related to the matter provides itself with substantial evidence in defense of its competence, but also does much to avoid a legal malpractice claim in the first place. In addition, use certified mail, faxes, registered mail or overnight delivery services when it is necessary to document important decisions in the case.

##### **1) 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. 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 limitations.

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 limitations 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.

**For more information on client engagement, nonengagement, and disengagement letters**, read the “Attorney-Client Agreements” practice guide on our website, [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com).

## 2) Failure to Document the Attorney’s Advice or the Client’s Instructions

Another error attorneys commonly make is failing to document all advice given to the client and all instructions given by 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.

If you as the paralegal are in a meeting with the client and the attorney, you may help the firm immeasurably by keeping contemporaneous notes of the discussions at the meeting and following up with a memorandum to the file. You may consider copying the client by mail with the memorandum, to the extent that is practicable.

Don't settle or agree to settle a client's case without specific authority from the client. Document the authority to settle. One of the most common mistakes we see at Lawyers Mutual is lawyers substituting their own judgment for their client's on decisions that are wholly the clients to make (with the lawyer's assistance, of course). In other words, don't forget whose case it is! Whether or not to settle, and for how much, is the client's decision to make. A lawyer should discuss with his client whether to take a voluntary dismissal and should document that authority. It is a good idea to have the client sign the voluntary dismissal. Although the line between tactical decisions for the lawyer and proprietary decisions for the client may be gray, the lawyer should consult the client on all significant matters. Moreover, important discussions should be memorialized in writing for the client's understanding and to record the lawyer's compliance. Lawyers Mutual receives a number of claims every year from claimants asserting that their lawyer took actions in their case that they, the clients, did not authorize.

## **V. INADEQUATE RESEARCH AND INVESTIGATION**

According to the ABA, substantive errors account for 46% 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).

### **1) Identify All Applicable Insurance Policies**

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.

### **2) Trust But Verify**

In addition, do not begin a lawsuit without doing a thorough investigation of the client's account of the claim. Even well-meaning clients can state "facts" that are not true. It is better to learn the holes in the client's story before you begin a lawsuit than after.

More importantly, early discovery that a client is hiding or misrepresenting the facts of his claim will alert the firm that it has a “Problem Client.” Problem Clients are one of the most common indicators of a potential legal malpractice claim. The earlier the firm can terminate the legal representation with such a client the better. Remember, once litigation has commenced, the firm can only withdraw with permission of the Court, so early withdrawal before imminent trial dates is essential.

3) 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, the plaintiff’s attorney or a paralegal 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.

## **VI. PREPARE ALL REQUIRED PRE-TRIAL SUBMISSIONS WITHIN STATUTORILY PRESCRIBED DEADLINES**

**KNOW THE LOCAL RULES OF COURT.** The following are some examples of the types of submissions you may be required to make prior to trial:

1. Under the Eastern District rules, seven 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;
2. Similarly, in the Middle District, “[n]o later than 21 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.

## **VII. REFILING AFTER A VOLUNTARY DISMISSAL**

### **BE COGNIZANT OF THE DISTINCTION BETWEEN FEDERAL AND STATE REFILING 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. Following the filing of an answer or motion for summary judgment by the defendant, the plaintiff may only take a dismissal without prejudice when all parties stipulate to the dismissal. Under the Federal Rule, the plaintiff only retains the ability to refile the same claim after the voluntary dismissal up through the date of the statute of limitations.

North Carolina Rule of Civil Procedure 41 allows the plaintiff to unilaterally take a dismissal without prejudice at any time before the plaintiff rests his case. 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 refileing. 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 refileing 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 statute of limitation has run. However, it is essential that the first action have been filed within the statute of limitations period in order to obtain the extension under this rule. Also bear in mind that a voluntary dismissal of an action based on defective service does not toll the statute of limitations. *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.

### HOW TO HANDLE FIRM MISTAKES

- Faced with an unsatisfied client, or worse yet service of a complaint for legal malpractice, the first reaction of many attorneys will be to contact their former client in an attempt to remedy what must surely be just a misunderstanding. This is often the attorney’s first mistake in dealing with a claim for legal malpractice. Once the client threatens or files a claim for malpractice, an important change has occurred in the relationship. While good client communications is important in preventing malpractice claims, once a claim is threatened or filed, further communication with the client can do more harm than good. For example, communications with a disgruntled client are not privileged. Anything you say can and will be used against you. Honest attempts to cure what must surely be a simple misunderstanding can become testimonial nightmares when brought out later in a malpractice trial. It is essential that the attorney seek outside help in dealing with this situation. The best place to turn is to your professional liability insurance carrier. We have the expertise and resources to assist you in responding appropriately to first notice of a claim or potential claim.
- The potential consequences of mishandling a material mistake may subject an attorney to significant consequences such as: 1) disciplinary proceedings at the State Bar; 2) additional causes of action (beyond mere negligence) and damages in a legal



malpractice claim; 3) fee disgorgement; and 4) potential loss of coverage under your malpractice policy

- After becoming aware of a mistake that may prejudice your client's interests, you **should first remember your ethical obligation to keep the client apprised of information that is material to the representation.** Rule 1.4 of the N.C. Rules of Professional Conduct
- Attorneys must always remember that **their clients' interest is paramount to their own interest.** A lawyer should not withhold information from a client to serve the lawyer's own interest (N.C. Rules of Professional Conduct R 1.4, Comment 7), and the lawyer must avoid impermissible conflicts of interest.
- If you know that you have made a material mistake that cannot be fixed, you should **promptly inform the client of the mistake and tell them that due to a conflict of interest you may no longer advise him on the subject of your representation.**
- Read 2015 Formal Ethics Opinion 4. It is a good roadmap for discussing a material mistake with your client.
- When informing your client that you may have made a mistake, keep in mind that the **ethics rules prohibit a lawyer from settling a legal malpractice claim "with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in connection therewith."** N.C. Rules of Professional Conduct R 1.8(h)(2).
- There may be **severe disciplinary consequences to an attorney who mishandles a mistake in violation of the ethics rules.** Attorneys have been disciplined for hiding their mistakes from clients, lying about the mistakes to clients, and misappropriating funds to cover their mistakes.
- Equally serious may be the **increased damages and theories of liability that are opened up where an attorney mishandles his duties after making a mistake.** Mere negligence may turn into claims for double damages for breach of fiduciary duty and punitive damages where such claims would not otherwise exist except for the attorney's post-mistake conduct.
- **Hiding a mistake from your client may also toll the statute of limitations** on a legal malpractice case against you.
- Your duties to your malpractice insurer make **you responsible to report any potential claim of which you are aware every year when you apply for a re-issue of your professional malpractice policy.** Failure to do so may result in loss

of coverage for a claim that is first presented to the insurance company after the effective date of the new policy year if that claim should have been reported on the application or during the prior policy year.

- **Promptly reporting mistakes to your professional liability insurer will avoid any uncertainty about timeliness of the claim under your policy.** Prompt reporting to Lawyers Mutual may also result in a claims repair opportunity that remedies the situation before a malpractice claim by the client.

## Law Firms and Associations

### *Rule 5.3 Responsibilities Regarding Nonlawyer Assistants*

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

#### Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. *See* Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[3] A lawyer who discovers that a nonlawyer has wrongfully misappropriated money from the lawyer's trust account must inform the North Carolina State Bar pursuant to Rule 1.15-2(o).

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

## ETHICS OPINION NOTES

CPR 163. An attorney may use a secretarial agency so long as reasonable care is used to protect confidentiality.

CPR 182. A layman may be employed to interview and represent social security claimants if the clients consent after disclosure of the layman's nonprofessional status.

CPR 253. A paralegal employed by a law firm may have a business card with the firm's identification.

CPR 262. A law firm's office manager may have a business card with the firm's identification.

CPR 334. An attorney's secretary may also work for private investigator. The attorney must take care that client confidences are not compromised.

RPC 29. An attorney may not rely upon title information from an abstract firm unless he supervised the nonlawyer who did the work.

RPC 70. A legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.

RPC 74. A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

RPC 102. A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

RPC 139. An attorney, having undertaken to represent adoptive parents, may sign and file adoption petition prepared by social services organization under her direct supervision.

RPC 152. District attorney is responsible for plea negotiating practices of lay assistant under

her supervision of which she has knowledge.

RPC 176. A lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

RPC 183. A lawyer may not permit a legal assistant to examine or represent a witness at a deposition.

RPC 216. A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

RPC 238. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law-related service, such as financial planning, if the law-related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

99 FEO 6. Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

2000 FEO 10. Opinion rules that a lawyer may have a nonlawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or for another legitimate reason.

2002 FEO 9. Opinion rules that a nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

2005 FEO 2. Opinion rules that a law firm that employs a nonlawyer to represent Social Security claimants must so disclose in any advertising for this service and to prospective clients.

2005 FEO 6. Opinion rules that the compensation of a nonlawyer law firm employee who represents Social Security disability claimants before the Social Security Administration may be based upon the income generated by such representation.

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