

Family Law Malpractice Prevention Tips

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Family law is unlike most other areas of practice in two respects. First, the level of emotional intensity is usually high, and frustrated and unhappy clients sometimes lash out at their lawyers. Distraught clients are often in a mental fog that prohibits them from participating in the proceedings in a rational, productive manner. When the fog lifts, clients may be unsatisfied with the results obtained on their behalf.

Second, family law touches upon many other substantive areas, such as real estate, tax, pension, and corporate law. Family law practitioners must carefully define the scope of their representation and advise clients to seek the advice of other professionals where necessary.

These factors influence the kinds of malpractice suits clients bring in the family law setting, according to California attorneys Sandra Musser and Lynne Gold-Bikin, who offered malpractice prevention tips for family law practitioners at a recent conference sponsored by the ABA Standing Committee on Lawyers' Professional Liability.

Musser and Gold-Bikin note that missed deadlines are not the major source of malpractice claims in the family law setting, as they are in other areas. Rather, the problems typically arise from (1) *unmet expectations*, (2) *fee disputes*, and (3) *lack of expertise in a related area of the law*. Many family law claims can be prevented by following basic loss prevention rules.

The problem client

The first step in avoiding claims based upon unmet expectations and fee disputes is recognizing the "prob-



The complex financial issues and highly charged emotional atmosphere of family law practice create special malpractice risks.

lem" client. Some clients will never be satisfied with the results you obtain or the fee you charge. The experts suggest that you think about dissatisfied clients from the past and create a problem-client composite, which may include some of the following features:

The client who wants a quick escape. "I want out of this marriage. Give her/him anything she/he wants." You may follow these instructions, only to have the client wake up a few months later, realize how much is gone, and ask, "Why did you let me give away everything? You were my lawyer and should have talked me out of it."

The client who is overly concerned

about cost. Suing a client for fees is the quickest way to be sued in return.

The hysterical client who wants blood. Although many family law clients are distraught, avoid the ones who seem bent on revenge. They are hard to work with and are rarely satisfied with the result, no matter how favorable.

Communicating with your client

Once you have decided to represent the client, communication is the key to avoiding claims. Musser and Gold-Bikin offer the following advice.

(1) Use a carefully drafted retainer or engagement letter. Be specific about the scope of the representation and your billing practices. For example, if you charge clients for anything other than your legal services, such as photocopies and faxes, spell it out clearly in the engagement letter.

(2) Mail the retainer letter to the client and explain that your representation will not begin until it is signed and returned. Clients who sign the agreement at the initial interview may argue that they did not have enough time to review it.

(3) Give clients a notebook or folder in which to hold all papers relating to the representation. *Copy them on all pleadings and correspondence.* Clients who have reviewed your work product become important partners in the decision-making process.

(4) Provide clients with forms to complete for gathering assets. Have them initial each form upon completion.

(5) Provide clients with a brief written description of the legal proceedings to come, including a glossary of

terms and a copy of the relevant divorce statutes.

(6) As you become aware of issues outside of your expertise, write the client a letter pointing them out and recommending that he or she seek advice from an accountant, tax specialist, investment advisor, or other expert. If you offer referrals, always provide at least three names from which to choose.

Settlement versus trial

Family law experts have learned that clients generally prefer settlement to trial. Settlements usually resolve the matter faster and at lower cost. Ask yourself what percentage of your cases go to trial. If the percentage is high, you may be risking future client dissatisfaction.

Even settled cases can come back to haunt you. You can reduce the danger by keeping the client informed. In addition, keep dated copies of each version of the settlement agreement. This lets you prove that certain terms were considered but negotiated out of the final agreement.

Before the client signs the settlement agreement, send him or her a letter setting forth the factors considered in reaching a settlement and why the terms are favorable. The letter should describe any rights that the client will waive as a result of the proposed settlement.

If settlement is reached at the last minute in court, make a detailed settlement statement for the record indicating that your client has been fully advised of all relevant facts and has agreed to the terms.

Confidences and Conflicts

Nothing annoys a client more than having his or her private business discussed in public. Advise both full-time and temporary staff, including clerks and attorneys, that the name of one client should never be repeated in the presence of another. If you receive a call from one client while meeting with another, your secretary should hand you a written message rather than announcing that "Mr. Smith" is holding. The client will be reassured by such privacy protection measures.

Also, family law practitioners should maintain rigid conflicts controls. Before you have any discussions with a potential client, check for conflicts. Remember that information you collect during an initial telephone or office consultation may reveal client confidences and secrets that prohibit you from representing the other spouse. Some practitioners refuse at the initial interview to discuss specifics or to accept documents such as asset lists, permitting them to decline representation before an attorney-client privilege has been established.

Finally, lawyers can be sued by clients who claim that the lawyer did not obtain the client's "informed consent," a charge that arises often in adoptions and prenuptial agreements. Some experts recommend that you memorialize client consent on audio or video tape, which provides a record of the client's emotional state at the time of consent and may help you establish that the he or she was fully informed.