

Is Your File Missing the Paper That Could Clear You?

By Anne E. Thar, Vice President and General Counsel, ISBA Mutual

If you were sued for legal malpractice tomorrow, would your file documentation prove that you handled the matter professionally and competently? The answer is often no. Time and time again legal malpractice defendants have no documentation to back up their version of events. Instead, it's your word against your client's — and attorneys rarely win these battles. The better course is to train yourself to document critical decisions and unusual circumstances that arise during the representation. Here are a few examples from the files of Attorney Smith.

File No. 1 — Farmer Brown. Farmer Brown owns 9/10ths of the family farm and his sister owns the other 10th. Brown decides to sell the homestead and buy a condo in Florida. Being a benevolent guy, he instructs Attorney Smith to divide the proceeds of the sale equally between himself and his sister Nell. Attorney Smith complies.

A few months after the sale, Brown suffers a fatal stroke while sipping a pina colada poolside. Brown's greedy kids sue Attorney Smith, alleging that Smith erroneously distributed half of the farm's proceeds to Aunt Nellie rather than the 1/10th to which she was entitled. Smith has no documentation to back up Brown's instructions.

File No. 2 — Not-So-Fun-Time Barbie. Ken and Barbie decide to call it quits after 15 years of marriage. Although Ken earns considerably more than Barbie, Barbie instructs Attorney Smith to waive maintenance. According to Barbie, the couple has agreed to split the property equally to avoid a long, drawn out divorce and preserve their "friendship." Smith follows Barbie's instructions and the divorce is quickly finalized.



Poor Attorney Smith just didn't get the message – you have to document important decisions.

One year later, Barbie is fighting off creditors and struggling to survive on her meager salary. She begins comparing notes with co-workers about the terms of her settlement. Her friends argue that Attorney Smith should never have allowed her to waive maintenance. After all, Smith was Barbie's trusted adviser during her time of crisis and should have dispelled her naive notions of a friendly divorce. Barbie takes her colleagues' advice and sues Smith for malpractice. Even though she was asked at the prove-up if she wanted to waive maintenance, her malpractice lawyer now contends that the prove-up was superficial and that Barbie was not fully informed about her options beforehand.

File No. 3 — Rhode Runner's last run. Attorney Smith represents the family of Mr. Rhode Runner who was

killed when he was struck by a truck owned and operated by Wylie Coyote and Sons. Shortly before trial, Wylie Coyote offers \$1 million to Runner's family. Attorney Smith strongly encourages the Runners to take the offer. Smith points out to the Runner family that their case has weaknesses from a liability standpoint. In particular, the defense alleges that Mr. Runner was sprinting down the middle of the road at the time of the accident.

The Runners are convinced they can get more and instruct Smith to reject the offer and proceed to trial. The jury returns a not liable verdict. Shocked and disappointed, Mrs. Runner experiences a sudden mental lapse and cannot remember Smith's advice to settle. She hires another lawyer and sues Smith for legal malpractice. The complaint alleges that Smith failed to convey the settlement offer to his clients, failed to adequately advise the Runner family of the risks of trial, and failed to vigorously pursue settlement negotiations. Smith has no documentation to buttress his version of the story.

File No. 4 — Barbie's back. Meanwhile back in Mattelville, Barbie is in the process of divorcing husband number two, Ned. Since Barbie's prior legal malpractice claim against Attorney Smith has been settled to her satisfaction, she asks Smith to represent her again in the current dissolution proceedings. Smith, ever the optimist, agrees. Barbie's new husband owns stock in a few small, closely held corporations. During a conference at which many subjects were discussed, Smith advises Barbie to hire an appraiser to value the shares. Barbie is determined to keep the legal fees for this divorce to a minimum and tells Smith to accept her husband's estimate of the stock's value. Smith complies.

A year later, Barbie sees Ned driving around town in a new Land Rover. She makes a few inquiries and learns that Ned recently made a killing when he sold some of his shares. Barbie now believes that her husband's shares were worth far more than estimated in the divorce settlement and once again blames Attorney Smith. She doesn't remember their five-minute conversation a year ago in which Smith suggested a stock value appraisal. And of course, Smith did *not* document this conversation with a quick letter to the client.

File No. 5 — Lois and Clark. Attorney Smith is retained by Lois Lane to pursue a wrongful death claim arising out of the death of her husband Clark Kent. Kent was driving home in the rain when his car skidded off the road and struck a light pole. The pole became electrically charged and Kent was electrocuted when he opened the car door. Smith sued several defendants: the City of Metropolis, which owned the property where the accident occurred and the light pole; Olsen &

Olsen, the engineering firm that designed the light pole; Luthor Manufacturing Company, the company that manufactured the light pole; and Lex Electric, the company that maintained the light pole pursuant to a contract with Metropolis.

Judge Perry White grants the summary judgment motion of Olsen & Olsen. Smith feels that Judge White's reasoning was flawed and believes his client has a good chance of prevailing on appeal. He advises Ms. Lane, however, that the appeal could cost thousands of dollars. Lane instructs Smith to pursue the other defendants instead. Luthor Manufacturing declares bankruptcy. Smith again discusses the situation with Lane and she agrees that it would be foolish to spend money pursuing a bankrupt manufacturer, and with the client's consent, Smith voluntarily dismisses this defendant. Smith settles with Lex Electric for its insurance policy limits of \$100,000. The case proceeds to trial with the City of Metropolis as the sole defendant. The jury returns a verdict of \$50,000, after

finding that Kent contributed to the accident by speeding.

As the legal correspondent for her newspaper, Lane has reported on several large wrongful death verdicts. She can't accept the outcome in her own case and starts looking for a scapegoat. Ultimately, she decides to blame Smith for failing to appeal the dismissal of Olsen & Olsen, who Lane now believes was the primary cause of her husband's death (and who in hindsight appears to have been the deepest pocket).

Epilogue: Smith reports all of his claims to ABC Insurance Company. ABC nonrenews Smith and no other carrier will insure him. He declares bankruptcy because he can't pay the deductibles on all of his claims. Rather than practice uninsured, Smith retires from the practice of law and ends up selling cars at his cousin Larry's dealership. If only Smith had documented all major decisions made during the course of his representation.

It's too late for Smith, but not for you. Start improving the quality of your file documentation today.