Top 10 Ways for Family Law Attorneys to Avoid Malpractice

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Speaker:
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INTRODUCTION: I am a lawyer with 41 years of experience. I have been practicing in the relatively small city of Jackson, MS and throughout the mostly rural State of Mississippi. I have focused solely on family law for the past 30 years. Since I opened my own practice in 1988, I have been committed to delivering world class service to my clients and creating systems, forms and procedures to foster a consistent level of high performance, but to also provide malpractice and ethical protection to me. All lawyers have heard for years that the biggest problem for lawyers is communication and showing clients they care. The biggest complaint is that lawyers don’t call people back. When people who have been represented by other lawyers call me, the most common complaint I hear is that they don’t know what is going on. For my firm, the motto is, “Answer questions before they ask. If the client asks you a question about their case, you are too late with your service.” But all lawyers know this, so this presentation on malpractice prevention is not on what all lawyers already know. This presentation is designed to inform you of the ever-increasing surge of malpractice claims against lawyers, and to advise you of what the insurance companies and other sources are saying about malpractice. Finally, this presentation will include 6 basic but major areas of concern that I would like you to be aware of in fending off malpractice. This is from the perspective of someone who has been in the trenches in the small and big towns all over the State of Mississippi, and who has benefitted greatly from attending ABA Family Law Sections and getting to know lawyers from all over the world in discussions around the coffee tables in the ABA Family Law Section meeting room.

I. Malpractice Claims In Divorce Are On The Rise. The ABA’s recent study on malpractice trends noted that there has been a steady increase in the number of family law claims. Thomas J. Watson, Feature, Beware the Danger Signs: The Top Ten Family Law Malpractice Issues, 40 Fam. Adv. 6, 6-11 (2017). CNA insurance reports that the claim frequency in the family law area of practice has been consistently higher when compared to all other areas of practice in the last six years. Many legal observers believe changes in divorce laws in the last 30 years have led to an increase in malpractice claims against lawyers. With no-fault divorce, the emphasis has shifted from fault to proper identification, valuation and distribution of assets. Moreover, the risk can be especially acute because of the very high personal stakes in divorce actions where emotions typically run high. Kathleen A. Hogan, From the Editor in Chief, 40 Fam. Adv. 4, 4-5 (2017).

II. What Are the Claims? CNA reports the following claim categories with the most claims listed first:

- Inadequate Representation
- Failure to settle or unsatisfactory Settlement
- Fee Dispute
- Improperly Drawn or recorded documents
- Failure to follow client’s instructions
- Failure to know or properly apply the law
• Inadequate Discovery/investigation
• Failure to obtain consent or inform the client
• Failure to record document
• Malicious prosecution/abuse of process
• Fraud
• Conflict of Interest

III. What Is the Legal Standard For a Claim? To sustain a malpractice action, the plaintiff must prove that:

(1) there is an attorney-client relationship that gives rise to a duty,
(2) the attorney breached that duty, and
(3) the attorney's breach of the duty proximately caused the plaintiff to sustain actual damages.


IV. What are the Warning Signs? Thomas J. Watson, of Wisconsin Lawyers Mutual Insurance Company in Madison, Wisconsin, writes in the Fall 2017 edition of the Family Advocate that his company turned to lawyers to help the company explore the different ways things can go “sideways” with a client. He came up with the following list of THE DANGER SIGNS of The Top Ten Family Law Malpractice Issues:

1. Poor Client Relations and Client Selection.
2. Inadequate Communications with the Client.
3. Qualified Domestic Relations Orders.
4. Fee Disputes.
5. Poor Client Documentation.
6. Runaway Client Emotions.
7. Unrealistic Expectations.
8. Inadequate Discovery or Investigation.

Watson, supra at 6-11, 21.

V. Practical Tips from a Divorce Lawyer. We have now heard from the authorities about the rise in malpractice claims against family law attorneys, as well as the type of claims and the warning signs, many of which we all already know. My purpose is to provide you with some practical tips and checklists for avoiding some of the malpractice problems identified by the authorities, as well as some I have spotted along the way. We will start with client intake and move through the process.

A. New Client Intake. The new client intake is obviously the beginning of your client relationship and can set the stage for all to follow. It is therefore, very important. You must create a process which is designed to welcome new clients, but which also limits the intake to good clients and has mechanisms to prevent conflicts and misunderstandings.

1. Friendly Reception. The person who talks to prospective clients is critical. This person must be friendly and make new customers feel welcome. Even though there may be some
procedures for intake, this person must not make it difficult for prospective clients to begin the process with your firm. Since this is so important, law firm managers should create a script for the people doing the initial screening. Our firm has three tiers of new client intake.

a. The first tier is the receptionist. The receptionist’s job is to be friendly and welcoming and to get information that allows us to determine if the case fits our firm profile and that there are no obvious conflicts. Set forth below is our receptionist screening form and script.

TELEPHONE SCREENING FORM

Date: __________________

Greeting: “Good morning/afternoon, [Firm Name], this is ____________, how may I help you?”

Determine: Is the caller a (circle)
Potential New Client, Current client, attorney, court personnel, other ________________

If any but potential new client, get name and number and brief description of what they need:
Name: ________________ number: ____________________________
Need: __________________________________________________________________

If potential new client, get the following:

CLIENT INFO.
Name: ___________________________________________________________________
Address: __________________________________________________________________
Telephone: ____________ Who referred you to us? ________________

How can we help you? ______________________________________________________________________
_______________________________________________________________________________________

Spouse or ex-spouse’s name: ____________________________________________________________

One of the purposes of both tier 1 and tier 2 is to make sure there is no conflict before any significant information is given. ABA Model Rule of Professional Conduct 1.7. This protects against conflicts and may also protect against “well poisoning” where people contact multiple lawyers in an attempt to conflict you out.

b. Tier Two. This is the initial interview by phone with a trusted paralegal or associate. The purpose of this tier is to gain the information necessary for the firm to judge whether or not the case fits within the firm’s client prospectus. This interview should answer the preliminary question for the prospective client whether they want to move forward and the question for the firm whether this is a potential client. Set forth below is the “Tier Two” “New Client Screening Form.”
New-Client Telephone Screening Form

Date: ____________
Name: ____________________________________________
Secure Telephone: ____________________________
Who referred you to us? __________________________
How can we help you? ____________________________
Another attorney involved? ______________________
Court action Pending? __________________________
Spouse or ex-spouse's name? ______________________
How long were you married? _____________________
Children: _______________________________________
What do you do for a living? ______________________
Annual Income: _________________________________
Assets:
Home Value: ______ Loan balance: _____________
Pensions: ______________________________________
IRA's: ________________________________________
Stocks: _______________________________________
Savings: ______________________________________
Checking: _____________________________________
Other assets: __________________________________
Cars: _________________________________________
Debts: _________________________________________

Our firm charges for the initial conference or “assessment” of the case and we quote a specific charge. This allows the client to determine if they want to invest in advice with our firm and also creates a layer of protection against “well poisoning” conduct. If the client elects to schedule and appointment and pay the fee, we have them fill out a New Client Intake online. This allows us to once again check conflicts.

Client Intake Questionnaire

DATE: _______________ FILE NO: _______________________
STAFF: _______________ CLIENT NAME: ________________

ADDRESS (Indicate preferred mailing address, being sensitive to privacy concerns):
Mailing: ____________________________________________
________________________________________________________________________

COMMUNICATIONS (Indicate preferred method):
Office: ___________________ Fax: _____________________
Email: ___________________ Home: ___________________
Cell: _____________________ Other: ___________________

ADVERSE PARTY & OPPOSING COUNSEL

STYLE OF CASE AND COUNTY OF FILING

________________________________________

4
FILE TYPE (Please Circle)

(1) DIVORCE
(2) CONTEMPT
(3) MODIFICATION
(4) INTERSTATE
(5) ALIENATION
(6) PRENUP
(7) PATERNITY
(8) SEPARATE MAINTENANCE
(9) GUARDIANSHIP
(10) PROTECTION FROM ABUSE
(11) CONSERVATORSHIP
(12) GRANDPARENT VISITATION
(13) MARITAL ASSESSMENT

CREDIT CARD: _______________ EXP. DATE: _______________
RATES: Attorney _________ Paralegal ___________

NAME AND ADDRESS OF PERSON RESPONSIBLE FOR PAYMENT
____________________________________________________
____________________________________________________

REFERRAL SOURCE(S)
(It is critical to obtain accurate and detailed referral source information and helpful to staff
to obtain addresses and phone numbers at intake):
INTERNET? Which site?
_____ Divorcesource.com
_____ Divorcemag.com
_____ Other
Name: ____________________________
Address: _________________________ Office: _______________
_______________________________ Home: ________________

Is referral source an attorney, counselor, past client, or other?

Name: ____________________________
Address: _________________________ Office: _______________
_______________________________ Home: ________________

CRITICAL DATES
(E.g., Is an answer due, or answers to requests for admissions, or is there an appeal time
running or a statute of limitations?)

____________________________________________________
____________________________________________________

Complaint and Agreement Preparation Information

Name and address for Service of Process of Opposing Party: __________
Address: ___________________ Office Ph: __________
Home: ___________________
Date of Marriage: __________________________
County & State of Marriage: __________________________
Date of Separation: __________________________
County & State of Separation: __________________________

CHILDREN
Name: _______ DOB: _______ SSN#: _______
Name: _______ DOB: _______ SSN#: _______
Name: _______ DOB: _______ SSN#: _______
Name: _______ DOB: _______ SSN#: _______
Name: _______ DOB: _______ SSN#: _______

Identify and list in detail the places where the children have lived, with whom, and during what dates in the last five years, starting with the most current.

Current Residence: _______ to present With Whom __________

Date of Previous Residence: _______ to ______ With Whom __________

Date of Previous Residence: _______ to ______ With Whom __________

Has custody of the children ever been an issue in any court of law? If so, state the court and the style of the action and when it took place: __________

Is there anyone other than the parents who could claim a right to custody of or visitation with the children? If so, identify: __________

Is wife currently pregnant? __________

CLIENT INFORMATION
Marital Home Address: __________
Social Security Number: __________
Date of Birth: __________ Gender: __________
Employer: __________
Compensation: __________
Highest Level Education: __________

HEALTH INSURANCE
Company: __________
Employer: __________
Maintained: __________
Cost: __________ Paid By: __________
BASIC FACTS

MISSION STATEMENT
(The intake attorney is to generate a short, concise statement, with the client, of what is to be achieved.)

ACTION PLAN
(1) Deadline: _____________________________
(2) Deadline: _____________________________
(3) Deadline: _____________________________
(4) Deadline: _____________________________
(5) Deadline: _____________________________

WARNINGS TO CLIENT
The intake attorney should issue the following warnings and information:

_____ DATING. A client is not to date until the divorce is final
_____ ABUSE. If a client is worried about abuse, advise:
   • Call police and alert them of potential problems well in advance;
   • If confrontation occurs, withdraw to safety;
   • If danger persists, call the police;
   • If danger merits calling police, follow through with charges.

_____ COUNSELING. Each of our clients is encouraged to engage in personal therapy.
This is different from marriage counseling. The name of the client's therapist or recommended therapist should be set forth here: _____________________________

_____ CONDONATION. All clients who have grounds for divorce should be warned that "resuming the marriage relationship" or sleeping with their spouse or forgiving their spouse can wipe out their grounds for divorce.

_____ STD/HIV. All clients should be advised to obtain testing for sexually transmitted diseases, whether they think their spouse is guilty of adultery or not.

_____ MEDICAL EXAM. All clients should be counseled to obtain at least a basic medical examination. We would not want to settle a case unaware of a serious medical problem or disability.

_____ TEMPORARY PROTECTIVE ACTIONS. Clients should be warned to guard against dissipation of jointly held assets and "raiding" of jointly held credit cards. It may be appropriate to advise clients to obtain jointly held assets, or to write letters to bankers and stockbrokers and credit card companies in an effort to protect assets and credit.

_____ Inform clients how we charge.
Explain financial statement procedure (i.e., documentation/appraisal).
Warn client of potential surveillance and conversation recording (e.g., tap on phone, private investigator following, etc.).
Advise client of need for changes to or creation of Will; Durable Power of Attorney; and Advance Healthcare Directives.
Advise client to take possession of spouse's computer or contents of the hard drive and other removable storage drives and warn client of danger of spouse taking client's computer.
Warn clients not to admit fault either verbally or in writing.
Warn clients not to talk to anyone about this meeting. They could waive their privilege.
Warn clients not to lie to us.

DOCUMENTS NEEDED FROM CLIENT
Social Security requests, which should be completed with a return address to the firm (signed by client and in file).
Financial statements form to client to complete and return.
Executed contract.
Check or credit card for retainer.
Employment history.

OFFICE MANAGER DUTIES
Deposit Check in trust.
Examine documents for proper completion. If not completed, contact person conducting survey and initial interview.
Obtain and assign file number. (If existing client, use old number with new matter number.)
Set up file with documents in order: questionnaire, contract, etc.
Make file label for file.
Place file on firm docket.
Prepare confidentiality letter.
Send copy of contract to client.
Calendar client's birthday.

CASE MANAGEMENT FILE OPENING CHECKLIST
Run conflict check of opposing party; if conflict, notify attorney.
Insert client and other information in case management software (complete and accurate information is critical to the use of the system).
Record referral source in influencer system and send thank you.
Calendar any critical dates (answer, hearing, etc.).
Client Mission Questionnaire

I. Write, in your own words, what your mission is for this representation: 


II. State the important facts of your case: 


III. What relief do you want? 


2. Case Management Software. Almost all malpractice insurance questionnaires require information about conflict checks. Case management software allows for easy conflict check through the checking of names in the system because all contacts with the firm are recorded in the system. Here are some of the Case Management Systems listed on the ABA Technology Website:

   i. Abacuslaw 
   ii. Amicus Attorney 
   iii. PCLaw 
   iv. PROLaw Ready 
   v. STI PracticeMaster 
   vi. Time Matters 
   vii. Clio 
   viii. Practice Panther 
   iv. My Case 

3. Conflict Management Checklist. The following is a conflict checklist found at Hinshaw on the web which may be helpful for those who want to be extra special careful. https://lawyeringlaw.com/index.cfm?fuseaction=subgetdoc&docid=2432

   1. Name of client, including all trade names and "d/b/a" names;
   2. If a corporation, identification of any parent and subsidiary corporations;
   3. Names of affiliates or co-venturers;
   4. Matter description including:
      § nature of the case
      § practice area
      § nature of the relationship of client parties to adverse or possibly adverse parties,
      § the principal legal issues in the case;
   5. Identification of adverse parties;
   6. Identification of potentially adverse parties;
   7. Identification of non-adverse parties involved in the matter;
   8. Description of the role and relationship of all non-client parties;
   9. Whether this is a new matter for an existing client or for a new client;
   10. Identities of the attorneys/law firms representing other parties.
4. In summary, the initial intake is critical to welcoming new customers by ensuring the client and firm fit and that there are no conflicts. It is important for prospective clients to know that the problem they have is the kind of problem your firm handles, and it is important for both attorney and client to have straightforward conversations and understanding about the kind of investment that will be required for the project. This helps in managing expectations from the very beginning.

B. The Initial Interview and contracting with the client.

1. Determine alternatives and objectives. The initial interview has five objectives:

   a. To obtain basic information about the case to make decisions.
   b. To give the client advice on immediate protective measures.
   c. To establish a relationship.
   d. To provide legal and practical alternatives for the case.
   e. To determine a scope of work and mission.

From the standpoint of warnings, it is critical that the lawyer give the client immediate protective warnings, such as to protect assets or credit and to protect passwords to accounts, etc. My standard intake questionnaire has a checklist of these warnings.

2. The Contract. The contract between the lawyer and the client is an essential ingredient of avoiding malpractice claims. The reasons are many: contracts can manage client expectations by stating the law and the legal options and courses of action; contracts can define the scope and length of representation, thus limiting exposure for claims of lack of competence; contracts can set the basis for the fee, thus limiting fee dispute problems; contracts can limit exposure to claims of inadequate investigation by setting agreed upon limits on the scope of work. Many states require written contracts or letters of understanding. The ABA Model Rules of Professional Conduct provide in Rule 1.5 (b) that representation should be documented, “preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.” I believe it is critical that every single client matter be separated by case number and documented by a contract or written document provided to the client which specifically sets for the following elements:

   a. The facts. When I do an intake, I write a summary of the pertinent facts and the problem presented by the client and place it in my case management system summary for me to review as needed. I usually cut and paste this statement of facts to my contract, so the context of the representation—as presented by the client—is clearly set forth. This gives some protection to the lawyer for client lies or omissions in presenting the case in the first place.

   b. Legal and Practical Alternatives. Every case has different paths that can be taken and different objectives. It is critical that these be discovered and articulated in the initial interview. For example, clients almost always have the option of deciding if they want to settle, mediate, litigate or do nothing. These options have legal and practical ramifications, and these should be spelled out
in the contract. This controls, or limits claims based upon “client expectations” or inadequate discovery or investigation.

c. Mission. Attorneys should ask every client: “What do you want me to do?” If this does not get an answer, the question can be rephrased: “If we are sitting here one year from today and you were happy with the result, what would have happened?” The purpose of these questions is to establish a mission. For example, if a client’s objective is to settle the case amicably without significant expense or litigation, this should be spelled out in the contract to diffuse any later claims of a failure to litigate or use formal discovery. ABA Model Rule 1.2 (a).

d. Scope. ABA Model Rule 1.5 (b) states: The “scope of the representation” shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. Recently there has been a lot of writing and speaking on “limited scope” representation. I don’t believe “limited scope” is an exception; it should be the rule. Every single project you start for a client, whether they are a long-term client or not, should be set up with a separate case number and a separate written statement of the scope of representation. For example, if a client is hiring you to settle a case, state with specificity that the client is hiring you to settle a case and not to litigate. Another example is that clients can often get embroiled in other lawsuits or tangential lawsuits with their opposing spouse such as Youth Court actions or domestic abuse orders or criminal charges. They can plop these lawsuits on you without warning and expect you to cover those also. Your contract should specifically except those other actions. My contracts also except me from responsibility for actions after verdict such as appeal. This is critical to avoiding a claim of a missed appeal time, which would fall under the number one CNA category of “Inadequate Representation.” I charge flat fees, so my contracts also usually contain scope of time limitations. For example, I might accept a flat fee for negotiation only for three months.

e. Fees. Obviously, contracts should clearly set forth how you are going to charge the client. ABA Model Rule 1.5 (b) and 1.5 (c).

f. Expenses. Contracts should clearly set forth exactly what expenses are to be paid by the client.

g. Trust Language. Contracts should contain specific authorization for attorneys to withdraw funds from retainers in client trust for fees and expenses. Trust account violations are among the most dangerous from a Bar Disciplinary standpoint, so it is recommended that no fee or expense be taken from client trust without a blanket permission built into the contract, although written permission does not seem to be required by the ABA Model Rules 1.15.

C. Due Diligence. One of the more dangerous areas for today’s divorce lawyer is the issue of due diligence in financial discovery. This issue is clouded by the desire of people to settle without litigation. Mediation and Collaborative Law may also lead a lawyer into resolving cases
without having done standard sworn discovery. The lawyer can protect himself and the client with a carefully limited contract, with explanatory letters to clients or with some standard procedures that provide due diligence cover. Miles Mason, The Forensic Accounting Deskbook: A Practical Guide to Financial Investigation and Analysis for Family Lawyers, (2d ed. 2019).

1. Due Diligence in Litigation. Many lawyers file suit and then think about discovery later down the road. Sometimes they think about it too late. This can lead to approaching a trial without having asked for witnesses or documents. If lawyers are not monitoring the progress of a case, they can find themselves lacking an appraisal or an expert at the last minute. Here are some ways to protect against inadequate representation.

a. Create Form Discovery and File it with the Complaint or Answer. Make a rule that you will never file a complaint, motion, petition, or answer without also serving at least basic discovery. Our firm has established fairly elaborate discovery for original petitions and for modification actions which can be prepared in minutes and served with the initial pleading. At the very least, make sure that you file discovery immediately with at least the following requests:

**Interrogatory No. 1.** Identify each witness having knowledge of discoverable matters (or, that you expect to call at a trial or hearing of this matter) and with regard to each witness, state the following:

a. Name;
b. Address;
c. Telephone number;
d. A statement of the facts to which the witness is to testify.

**Request for Production No. 1.** Produce any statements provided by any witness, including the opposing party.

**Interrogatory No. 2.** Identify each expert witness you intend to call at a trial of this matter and with regard to each such witness, state the following:

a. The subject matter on which the expert is expected to testify;
b. The substance of the facts and opinions to which the expert is expected to testify;
c. A summary of the grounds for each opinion.

**Request for Production No. 2.** Produce any statements, opinions, memorandums, studies or any other information provided by said expert.

**Request for Production No. 3.** Produce a curriculum vitae with a listing of all court appearances by said expert, all courts or proceedings in which the expert has been certified as an expert and a listing of all matters in which said expert has been retained in the past by you or your attorney or your attorneys’ firm.

**Interrogatory No. 3.** Identify investigators employed or utilized by you or from whom you have obtained or will obtain information, and state:
a. The name, address and telephone number of the investigator;
b. What reports, verbal or otherwise, have been provided by the investigator.

**Interrogatory No. 4:** Identify any and all documents or tangible items of evidence, including illustrative exhibits, that you may use at a hearing on this matter. (“Identify” means to describe the document; it is not sufficient to state something like, “All documents provided in discovery.”)

**Request for Production No. 4.** Produce all documents or tangible items of evidence, including illustrative exhibits, that you intend to use at a hearing on this matter. Our firm standard discovery also has detailed requests for financial answers under oath as well as requests for financial statements.

2. Non-Litigation Due Diligence. There is always risk in settling a case without having performed all of the discovery functions available in Court such as interrogatories, requests for documents, subpoenas and depositions. The contract should spell out a limitation of scope in this regard. The client should also be warned in letters or disclaimer statements such as the following:

**AUTHORIZATION AND INSTRUCTION TO SETTLE**

This authorization instructs my attorneys to take certain steps in the settlement of my divorce. I am specifically authorizing the settlement of my case and the withdrawal of fault grounds to obtain a divorce on the grounds of irreconcilable difference, and to accept the terms of settlement in the *Child Custody and Property Settlement Agreement* attached hereto. My attorneys have my authorization to proceed with this course of action and to undertake the work necessary to accomplish this task.

I authorize and instruct my attorneys to send the attached *Child Custody and Property Settlement Agreement* to my [husband or wife’s] attorneys. I understand that once this document has been signed by all parties and incorporated in a Final Judgment of Divorce, it shall be enforced as an order of the Court and binding contract between my [wife or husband] and me. I have reviewed this agreement and it contains the terms and provisions to which I have agreed in my effort to reach a settlement.

I understand that I am making a decision to forego further pursuit of my case and will be waiving the following rights:

- The right to take the depositions of Experts.
- The right to take the deposition of paramours.
- The right to further discovery and subpoenas of documents from third parties.
- The right to review final financial numbers.
- The right to interview fired employees.
- The right to try my case before a judge and receive a decision.
- The right to appeal the trial of my case to higher courts if I were to be unhappy with the trial judge's decision.
I understand that by giving up the right to further discovery I have given up the following opportunities:

- The opportunity to stretch the negotiations over a longer time in hopes of obtaining a higher settlement.
- The opportunity to take more time and see if my husband has arranged for a profitable sale of part or all of his stock.
- The opportunity to see if my husband has some profitable opportunity or venture waiting around the corner.
- The opportunity to see whether the companies in my husband's control that do not have great value at this time will become extremely profitable companies in the future.
- The opportunity to see if a Judge would award me a higher award than that for which I am settling.

I have made the decision to forego the above-stated rights and opportunities because of the following considerations:

- The cost of pursuing litigation to the fullest extent required may be prohibitive.
- There is question that I will prevail on all financial issues and that a judge would conclude that the marital estate is as little as the opposing party and counsel may contend.
- The judge may accept the appraisal of the business propounded by the opposition.
- Even if a judge were to award me more money, I recognize that the award would likely be ordered to be paid to me over a much longer period of time than I desire, and that would give the opposition the opportunity to fail. It would also give me less freedom to control my investments.
- I have placed a premium on security and feel that the opposition is a very unreliable person who could easily destruct financially or otherwise.
- I am aware of a lot of people who are waiting in the wings to get back at my [husband or wife] and I feel I must move quickly to resolve this property distribution before trouble starts.

I have felt comfortable with the negotiation process and I have felt well-advised and protected by my attorneys. I feel that my attorneys have treated me with courtesy and have given me the strength to make the demands necessary to secure this settlement offer. I have had numerous discussions about this type of settlement with my forensic accountant and my financial advisor and have been counseled to attempt to resolve this matter by securing a settlement that meets my needs instead of attempting to pursue a big judgment. My attorneys have advised me that there are other settlement options available to me, including the possibility of negotiating a bifurcated settlement. I have also discussed this settlement with my family and other influencing people who feel this settlement is in my best interests.

Another strong consideration in making the decision to settle this matter is the opportunity to retain a positive relationship with my [spouse] and to create a constructive environment for raising our children.

________________________________  ______________________________
CLIENT SIGNATURE    DATE
3. Finally, a disclaimer can be included in settlement agreements which states something like this for appraisals of property:

B. Property Values. The parties acknowledge that the usual and customary method of determining fair value of property is to employ a competent individual trained in valuation techniques for the property sought to be valued. They acknowledge that the surest way of determining value is to hire specialized appraisers for appraisals of the real and personal property. Notwithstanding the foregoing, the parties, in some instances, have elected to agree on the values or equities of their property divided herein without the employment of specialized appraisers in order to save costs and in some instance, may have employed competent appraisers for the purpose of establishing valuations. The parties acknowledge that they rely on the valuations of such appraisers or on the values that they themselves have agreed to and not on representations of their attorneys in establishing these values.

A disclaimer for mediated settlements would be included in the marital dissolution agreement:

3.4 Mediation. The parties have entered into this Agreement as the result of mediation. The parties understand that by mediating their case they have knowingly waived their rights to fully develop their respective cases through discovery methods and direct and cross examination testimony in trial. They further understand and acknowledge that they have knowingly waived their right to a trial and to an appeal of any undesired result. Both parties also acknowledge that they understand that by waiving their rights to further discovery and trial, they may be relying upon representations of the other party and to assumptions as to the values of real estate and other properties, which, given trial or full appraisal, may have different values than those assumed in negotiations. Both parties represent that this waiver of rights in order to pursue mediation and settlement is knowingly entered into and is in the best interests of each of them, as well as their minor child.

D. Taking over from Another Lawyer. A real dangerous area is taking over a case from another lawyer. The dangers include: the case may be really messed up; there may be a really serious deadline looming at the very moment you speak to the client such as a deadline to answer requests for admissions or a deadline to designate experts; the initial pleadings may be faulty and fail to request the appropriate relief; there may be significant discovery deficits; there may be hearings set at times you cannot attend or properly prepare for.

1. Don’t take the Case if the other lawyer is competent. Our firm has a written policy that we do not take cases from lawyers we know are competent without specifically telling the client their lawyer is competent and advising them to go back their lawyer with forthright complaints to see if it can be worked out.

2. Checklist. If you take a case from another lawyer, follow the following checklist with urgency:
CHECKLIST FOR TAKING FILE OVER FROM ANOTHER LAWYER

a. Call clerk of court and check the electronic filing docket to determine what pleadings are on file. Is an answer due to anything, and if so, when?

b. The original court file is to be obtained immediately.

c. As much of the file as possible is to be obtained from the client or old counsel. This is not to be relied upon but is to be used only as needed.

d. A motion and order substituting counsel are to be sent to counsel.

e. Contact previous counsel to determine:
   --Status of pleading
   --inside information
   --whether anything is due

f. Current counsel is to be written confirming information received and notifying them that we are relying upon their information.


E. **Areas of Special Expertise.** There are many areas that have become areas of expertise that the typical family lawyer—such as me—should tread cautiously to avoid or delegate altogether. Jeffrey P. Aiken, *What's a Reasonably Prudent Lawyer to Do – Or Not Do?* 40 Fam. Adv. 16, 16-20 (2017). In my experience and the experience of the authors of the *Family Advocate*, these areas include:


b. Federal Pensions and benefits such as leave time and vacation pay.


F. **File Closing and Follow Up.** Cases should have a clear beginning and a clear end. The beginning of cases should be documented with the contract which says when the representation begins. The contract should also indicate what events may cause the case to end, such as settlement, trial or reconciliation. It is just as important to document the conclusion of representation as it it’s the beginning and it is very important to make sure that all loose ends are tied up at the end. Finally, there are post-closing steps to protect from or catch potential areas of malpractice.

1. There are cases where you interview a client and they may even pay a fee, but they do not retain you to continue. Document termination with an email or letter which states as follows:

   Thank you very much for taking the time to come by our office and interview with us for the purpose of determining if you wished to retain this firm. Everyone on our staff enjoyed meeting and talking with you.

   I am confirming that although we spent some time together and I gave you some legal information and alternatives and recommendations, you elected not to retain this firm to represent you. I respect your decision. Legal representation is very important, and it is imperative that both the lawyer and the client feel comfortable with the relationship before embarking upon it. The fact that we did not contract with each other should not be taken as a poor reflection on either of us.

   Legal situations are complicated and ever changing. Advice can change based upon changes in time, facts, attitudes, disclosures, moods, desires, or of course, changes in laws. You should not rely upon anything you think I might have said in our conversation. My advice cannot be good beyond the point it is given, particularly where my relationship with the client and involvement in the case is not ongoing. You have a very important legal situation and you should immediately seek legal counsel.

   Again, we enjoyed meeting you and visiting with you. We wish you all the best of luck in the future.

2. There are cases where you have worked for the client and the work is finished. Document that with a letter that states that your work is concluded, and you are closing their file.

3. Closing a file. Closing a file you have worked on can be dangerous because something that the client expects you to complete could be left undone. When divorces are settled, there are many tangential items to take care of:

   --transfer of cars
   --title changes to property
   --QDRO’s
--transfers of bank accounts or stocks
--exchanges of property

Our firm designed and uses the following file closing checklist and office file closing checklist to help us with these nagging details:

Date:_________________
Client:______________
File #:______________
Reporter:____________

Use this form after entry of any order, particularly Temporary and Final Orders. Other orders may not necessitate this form and many blanks may not be applicable on some orders, but the checklist should be followed line by line to avoid error and omission.

BY THE RESPONSIBLE ATTORNEY:

_____1. Are the pleadings complete?
   Has the order been signed by the Court and entered? (Make sure an unsigned copy of the order is not in pleadings instead of a fully executed order.)
   Type of Order: ____________________________
   Date Order Entered: ________________________

_____2. Has an interview been scheduled/conducted with the client to go over the order?

_____3. Calendar significant dates in the future such as:
   ____ future dates for transfer of property or payment of funds

   ____ termination of payments

   ____ termination of child support – calendar when each child turns 18 (college) and 21
   List Children (DOB’s): __________________________

   ____ significant visitation or custody events

   ____ compliance with directives to attend counseling, or evaluation

   ______________________________________________________
   ______________________________________________________
   ______________________________________________________
4. Is there a letter from the attorney explaining the order, such as our standard temporary hearing letter?

5. Modification. If applicable, advise the client that periodic alimony, child custody and child support are modifiable. A modification can be obtained where there has been a substantial change in circumstances, such as the following:

- increase or decrease in either party's earnings or wealth
- increase in either party's expenses
- increase or decrease in needs of children

If an event has occurred which may trigger a modification, the client should call immediately.

6. Contempt. Failure to comply with the decree is punishable by confinement in jail. Failure to pay child support or alimony or to perform other obligations can result in contempt and possible confinement.

Warnings:

- If the client owes child support and cannot pay, they should contact [Firm Name] immediately
- The client should not retaliate against the other party for their contempt (e.g., withholding support if visitation is withheld). Failure to comply with the decree may prevent the client from seeking to enforce it.

7. Alimony. Check on terms and length of alimony. Alimony could be terminated for moral misconduct or co-habitation.

8. Compliance. The client must comply with the order as written. If they get into a situation where they cannot comply, they must contact [Firm Name] immediately. If there is any change in circumstances, consult with [Firm Name]. If either party wishes to do something different from the decree, do not do it without consulting [Firm Name].

9. Medical Bills. The best way to handle payment of medical bills is for the person obtaining the service to send the bill to the other person with an enclosure letter, keeping a copy. Where a time limit is not stated, the courts will view thirty days as a reasonable time to reimburse. Extraordinary non-emergency expenses should not be incurred without prior notification to the other parent. Orthodontic expenses should never be reimbursed or incurred without prior consultation with [Firm Name]. Documentation of medical expenses is essential to obtaining reimbursement. In court, the person seeking reimbursement will have to prove they submitted the bill to the other party before the court will hold them accountable for failure to reimburse.

10. Custody. Custody can be modified if there is a substantial change in circumstances. Although many factors are important, the key inquiry is what is best for the children. The law is that a child who reaches the age of twelve (12) has a say in custody but the overall best interest of the child is still the key inquiry.

11. Visitation. This is an area which causes trouble. Adhere to the letter and "spirit" of the Decree. Try to cooperate. The courts expect healthy cooperative visitation. When you have a question, they should always consult the Decree and try to do right. Clients should consult with [Firm Name] if problems arise or if they think visitation may constitute a danger to the children.
12. Moving. The Court requires each party to advise the other of changes of address or phone number. Moving by either party may constitute a change in circumstances. The client should advise [Firm Name] immediately if either party plans to move. Moves during the pendency of a case are generally not a good idea.

13. Restraining Order. If the order has a restraining order in effect, advise the client what should or should not be done.

14. Insurance Policies and Wills. Unless order not to, beneficiaries should be changed on insurance policies and pension funds, wills etc.

15. Taxes.
   - Dependent tax exemptions. Custodial parent gets the exemption unless waived or otherwise specified in the return.
   - Part or all of Attorney fees may be deductible.
   - Send the IRS a change of address form 8822
   - Check with accountant now and obtain advice now about tax issues.

16. Documentation. The client should try to document what they and their spouse do. Keep a diary or log of things. Confirm arrangements in writing and keep a copy. If they are making payments, get documentation. Use a check or get a receipt.

<table>
<thead>
<tr>
<th>ORDER ENTRY CHECKLIST</th>
<th>ASSIGNED TO</th>
<th>DUE DATE</th>
<th>DATE COMPLETE</th>
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<tbody>
<tr>
<td>1. Enter Divorce</td>
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<tr>
<td>2. QDRO</td>
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<td>3. IRA rollover</td>
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<td>4. Prepare Deeds</td>
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<td>5. Autos</td>
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<td>6. Bank Accounts</td>
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<td>7. Stock Transfers</td>
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<tr>
<td>8. Payment of money</td>
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<tr>
<td>9. Payoff of Loan</td>
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<tr>
<td>10. Transfer of property</td>
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<tr>
<td>11. Health Insurance</td>
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<td>12. Auto Insurance</td>
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<td>13. Life Insurance</td>
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<td>14. Disability Insurance</td>
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<td>14. Change will</td>
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<td>15. Child dependent exemption</td>
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</table>

ATTORNEY FILE CLOSING CHECKLIST
WHEN DIRECTED TO CLOSE A FILE, FOLLOW THE FOLLOWING PROCEDURE:

BY THE RESPONSIBLE ATTORNEY:

Initial:

_____ 1. Double check status of account.
    _____ Are all fees paid
    _____ Check Trust Balance

_____ 2. Are the pleadings complete. The case must be at end or we must be off the pleadings
    _____ Is there a final order
    _____ If not, is there a substitution of counsel?

_____ 3. Has an exit interview been done? Are checklists completed and in file.

_____ 4. Calendar significant dates in the future such as:
    _____ future dates for transfer of property or payment of funds
    _____ termination of payments
    _____ age of majority of children
    _____ anniversary date of divorce

_____ 5. Are there materials which should be returned to the client.
    _____ Pictures
    _____ Tax returns or checks or other financial
    _____ Personal documents
    _____ Copies of depositions (we do not need to keep these)

_____ 6. Is there a letter from the attorney terminating file responsibility.

_____ 7. Has the will revocation been signed?

_____ 8. Send card to counsel opposite telling them how nice it was to work with them (if warranted).

OFFICE MANAGER:

_____ 10. Office Manager file closing responsibility:
    _____ Review this checklist. If any item not done, please work with responsible attorney.
    _____ Prepare final closing letter indicating the file is being closed and documents destroyed.
    _____ Prepare letter to Referral Source indicating successful conclusion of case.
    _____ Set calendar reminder for 30-day status check by attorney
    _____ Close file in Word Perfect.
    _____ Close file in Amicus
    _____ CHANGE FILE TYPE STATUS
    _____ Set 5-month reminder to check with client to advise of Fraud limitations.
    _____ Scan in final pleadings - i.e. Final Judgment, PSA, Agreed Order etc...
    _____ Shred file

4. Post-Divorce. Many post conclusion complaints can be cured proactively by how the case is closed, how the client is treated, and if the client is warned post-closing. Our firm uses our case management system to calendar critical warning dates in the future. We also calendar an annual check when we send an email just to see how clients are doing. I have been called by many clients who were represented by other attorneys and are unhappy with the results. These calls usually take place within the statute of limitations for malpractice suits but outside the time limits for correcting the problem in the original case. Obviously, the first deadline is the post-trial motion and appeal process. If there is a judgment by a court, Clients should be sent detailed letters outlining post-judgment rights and detailing the strict deadlines. The last catch all for mistakes is the 6-month period that most states have in their rules. When you close a case, set a reminder for 5 months out to send the client that last warning letter about correcting a mistake or a fraud before 6 months elapses. The following is our firm’s standard letter:

"6 Month Fraud Letter"

It has been five months since the entry of your divorce. We trust and pray that all is going well. If not, or if you have question about something, please give us a call.

The purpose of this letter is to give you our standard warning that we give clients as six months following the divorce approaches. Courts have held that if a person believes a fraud has been perpetrated upon them in a divorce, they must bring such fraud to the attention of the court within six (6) months of entry of the decree of divorce. For example, if you have learned that your spouse lied about the value of an account or asset, then you can ask the court to address the fraud. However, the Motion must be filed within six (6) months of the entry of the decree. We just want you to be advised of this critical time period. If you have no suspicions of any fraud, then disregard this letter. Again, this is just a standard warning that we give.

We value our relationship with you and hope you will let us know if we can help you in any way


CONCLUSION: As stated at the beginning, most insurance companies and other sources in the know think one of the main secrets to malpractice lies in how we treat our clients. We all know that. For my part, the secret lies in utilizing my training and experience to create systems, checklists and procedures to protect both my clients and me. I set forth some of those procedures here and a lot more of them lie in the two books the Family Law Section has allowed me to publish: Mark A. Chinn, How to Build and Manage a Family Law Practice (2d ed. 2018) and Mark A. Chinn, Forms, Checklists, and Procedures for the Family Lawyer (2010). I understand How to Build and Manage a Family Law Practice was recently voted a best “Beach Read”! I have also referred to some other excellent books written by your fellow section members, particularly in the areas of expertise that you should avoid! My parting advice to all lawyers is to invest in and use case management software. This software solves a myriad of problems and completely annihilates the problem of deadlines! Another software to help you perform consistently is document merger software. Here’s wishing all of you a malpractice free career!