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Navigating the Matrimonial Malpractice Minefield: Strategies for Avoiding Legal Malpractice Claims

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The frequency of legal malpractice claims arising in the matrimonial law context tends to be higher than in many other areas of practice.

[1] This article discusses some common reasons why matrimonial lawyers are sued and strategies for avoiding legal malpractice claims and defending the claims successfully if they are ultimately made.

1. Client Emotions and the Perception of an Inadequate Resolution

Unlike many other areas of the law, matrimonial cases present uniquely personal disputes. A client facing divorce is typically at a stressful and unpleasant period of his or her life. In addition to significant financial issues that arise, there often are highly intense issues involving the client's children, including critical issues of child custody. It is without question that emotions run high in these cases. Often, neither party to a divorce will ultimately feel satisfied with the result that was obtained. Notwithstanding that this dissatisfaction generally has nothing to do with what a client's lawyer did or did not do in the context of the representation, the client may direct their emotion outward, and seek to place blame on someone else – *i.e.*, his or her attorney – for what the client perceives was an inadequate

Authors

Richard A. Simpson
Partner, Deputy General Counsel
202.719.7314
rsimpson@wiley.law

Mary E. Borja
Partner
202.719.4252
mborja@wiley.law

Kimberly A. Cereijo
Partner
202.719.7326
kcereijo@wiley.law

Practice Areas

D&O and Financial Institution Liability
Insurance
Professional Liability Defense

resolution.

To help avoid legal malpractice claims stemming from a client's intense (and often negative) emotional state, an attorney should take steps to build a strong personal client relationship. Establishing this relationship will help enable an attorney to manage the client's emotions and, more importantly, their expectations. Although it may sound overly simplistic, actively listening to the client's thoughts and needs is a critical first step in building a strong relationship. By actively listening, an attorney can begin to understand the client's perspective fully, including what issues or factors are the most significant to the client with respect to reaching an acceptable resolution of their divorce. Maintaining open lines of communication with a client is also key to building (and keeping) a strong client relationship. It may be that a client's initial feelings about how to best resolve the matter changes as the matter progresses, and an attorney should frequently communicate with the client in order to determine if and how a client's perspective may be changing. By establishing a strong relationship early on, a lawyer can also help to redirect the client in the event that the client's emotional state leads them to suggest actions that are irrational or potentially damaging.

Managing a client's emotions should always involve managing their expectations as to what is a realistic result for them in the divorce proceeding. This requires a firm grasp of the applicable law (to know what a realistic result might be) as well as effective communication skills in order to ensure the client understands the realities that they are facing with respect to the possible outcomes of their divorce. By explaining to the client early in the representation regarding how the law applies to his or her particular situation and, more importantly, how the law influences the range of possible outcomes the client might achieve, the lawyer can help to ensure that the client does not have unrealistic expectations about how the divorce will be resolved. A client also should be kept involved in the resolution process as much as possible, and a lawyer should ensure that the client's input is obtained as to the specific terms of any potential settlement.

Finally, the strong emotional component associated with these matters also makes it even more critical to document thoroughly all key communications and decisions in order to create a clear record that the client was well-informed and participated directly in the decision process. Clear documentation will aid in the event that the client later challenges the lawyer's course of action in the matter or asserts that he or she did not approve the ultimate resolution that was reached, and a thoroughly document file unquestionably helps in defending any legal malpractice claim that may arise. In particular, to the extent that a client's emotional state leads the client to be uncooperative or make irrational decisions regarding the divorce proceeding, clear documentation of the client's conduct could aid in establishing a contributory negligence defense in the event that the lawyer is later sued.

2. Failure to Obtain Adequate Financial Information

One of the key challenges in many divorce proceedings is identifying the couple's financial assets and agreeing on the assets' proper distribution. Often, arguments are raised as to assets that the opposing spouse deems "separate property" obtained prior to the marriage that should not be subject to distribution in the divorce. There also can be situations in which a client believes that his or her spouse is "hiding" assets in order to avoid distribution. Malpractice claims can arise where a client is dissatisfied with the ultimate

resolution because he or she believes that the attorney did not secure sufficient financial information from the opposing spouse in order to value the marital assets properly and, thus, that the distribution of assets is inequitable. *See, e.g., Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 646 A.2d 195 (Conn. 1994) (affirming judgment against defendant attorneys for legal malpractice during divorce proceeding where, among other things, attorneys advised client to enter into a settlement without first conducting an adequate investigation and evaluation of the opposing spouse's business interests and assets).

An attorney should use all available methods in order to ensure that complete financial documentation is obtained both from the attorney's own client and from the opposing spouse prior to agreeing to any divorce settlement. In this regard, it is critical that the attorney first listen carefully to his or her client regarding the client's beliefs about the couple's assets and ask detailed questions in order to ensure that all potential asset sources are identified. The attorney should then request all relevant financial documentation from the opposing spouse's counsel, and include in the request as much specific information as possible regarding the assets that the attorney's client has identified. The lawyer should review all documentation that is received with his or her client and determine if additional requests are necessary. Where information cannot be obtained voluntarily or there is a belief that the spouse is concealing assets, the attorney may need to employ the assistance of the court to secure further information. *See, e.g., McClung v. Smith*, 870 F. Supp. 1384, 1405 (E.D. Va. 1994) (attorney breached the standard of care by failing to institute formal discovery in divorce proceeding where "it was obvious from the obstinate, irrational, conflicting and contentious positions being taken by [the opposing spouse] that informal discovery would not adequately protect [the client's] interests."). The services of an investigator may also be warranted where there is a concern that significant assets are being concealed.

With respect to claims of separate property, the attorney needs to be aware of the applicable jurisdiction's law regarding the viability of such claims and the burden of proof on the opposing spouse to substantiate the claims. The lawyer should be sure to challenge separate property claims where the documentation supporting the claim is inadequate or questionable.

As with all other aspects of the representation, the attorney should routinely communicate with his or her client regarding the status of the spouse's financial disclosures and obtain the client's agreement in writing when any critical decisions are made regarding the need to pursue additional discovery or challenge the information that the opposing spouse has provided. This documentation can assist greatly in defending against any later accusations that the attorney failed to secure a proper settlement because of inadequate discovery of the spouse's financial information.

3. Failure to Retain Necessary Experts/Consultation

In many divorce proceedings it may be necessary to retain experts in business or in other areas of the law, including business valuation experts, tax experts, and/or trusts and estates experts. The attorney's need to retain outside experts in a particular matter likely will depend in large part on the complexity of the divorcing couple's assets and the lawyer's level of knowledge and experience in areas of the law beyond matrimonial law. A lawyer's failure to consult with experts could provide the basis for a later malpractice claim by a client

who believes that the ultimate resolution of the proceeding was unfavorable or unfair. *See, e.g., McClung*, 870 F. Supp. at 1405 (involving claim against attorney for failing to value opposing spouse's law practice properly, including failing to seek expert assistance in valuing the asset); *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W. 2d 118 (Wis. 1985) (holding that there was substantial evidence to support jury's finding of malpractice where divorce attorney had failed to obtain independent financial appraisals for the marital home, the spouse's dental practice, and three trusts).

An attorney should attempt, early on, to identify the need for outside expert assistance. Like all other significant decisions regarding the matter, the lawyer should consult closely with his or her client regarding the decision to employ such expert(s), including the cost involved and the risks associated with failing to retain an expert. Where an attorney believes that he or she is unable to advise the client fully with respect to certain legal issues that are beyond the attorney's area of expertise or experience, such limitations should be communicated to the client in writing and the client should be advised of the need to retain outside assistance to consult on these issues.

Where an expert is retained, the lawyer should ensure that the individual is competent, qualified, and has the necessary resources to handle the assignment successfully. Where possible, recommendations or referrals from trusted colleagues who have previously worked with the expert are preferable.

Finally, as with all other significant aspects of the representation, clear documentation regarding the attorney's advice on retaining experts is key to both preventing and, if necessary, defending a legal malpractice claim based on an attorney's alleged failures to secure the necessary outside assistance.

4. Fee Disputes

A common source of complaint by matrimonial clients involves an attorney's fees. For example, a client may argue that the fees charged were excessive or unreasonable in comparison with the assets at stake and/or the result obtained. A client may also complain that the fees far exceeded the attorney's initial estimate. Regardless of the specific contours of the claim, the common thread underlying all of the disputes is generally the same – *i.e.*, the client's belief that he or she paid the attorney too much money. *See, e.g., Ballesteros v. Jones*, 985 S.W.2d 485 (Tex. App. 1998) (alleging that one-third contingency fee agreement for divorce proceeding was unconscionable).

In a perfect world, at the inception of a matrimonial representation, an attorney would be able to predict accurately the fees that would be incurred, communicate that estimate to his or her client, and charge amounts within or lower than that initial estimate. Unfortunately, this is often not realistic because a divorce matter is an evolving process that can become far more complex than initially anticipated. Nonetheless, an attorney should attempt to predict as accurately as possible the range of fees that the client can expect and communicate that expectation in writing to the client as early as possible. In connection with the estimate, an attorney should be sure to discuss any unknown variables that could impact the projected fees. The attorney should obtain the client's approval in writing as to how fees will be charged and the amount of any retainer(s) that will be collected. Throughout the representation, the lawyer should keep the client informed of the fees

being incurred on a frequent and ongoing basis (e.g., through monthly billings). In addition, as soon as an attorney suspects that his or her fees may exceed the initial estimate, the attorney should communicate that expectation in writing to the client and should include in that communication a detailed explanation regarding why the anticipated fees will exceed what the attorney initially had forecasted.

Where possible, the attorney should also identify up front any costs that may be incurred beyond the attorney's fees (e.g., expert fees). The attorney should be sure to obtain the client's written consent before any such costs are incurred. When a client attempts to limit the amount of the lawyer's work in order to control the lawyer's fees, or the client refuses to incur costs for outside resources that the lawyer has recommended, the client's directions should be clearly and specifically documented in writing and, where applicable, the lawyer should communicate in writing that such direction is taken against the advice of counsel. To the extent that a client attempts to place untenable limitations on an attorney's work, the attorney should consider whether it is necessary to withdrawal from the representation.

With respect to pursuing the client for payment of outstanding fees, as most attorneys likely are aware, such attempts often invite a malpractice claim, regardless of whether any such claim has actual merit. To help avoid a situation in which a client has a large outstanding bill at the end of a representation, a lawyer may want to secure an adequate retainer up front (and/or ask the client to refresh the retainer amount during the course of the representation) that can later be applied to any outstanding fees. The lawyer's practice with regard to the collection of a retainer(s) should be stated in writing and provided to the client at the inception of the representation.

As a final note, a client's dissatisfaction with the lawyer's fees often is not so much a product of the amount of fees actually charged as it is a reaction to the client's perception that the result the lawyer achieved for the client wasn't sufficient to justify the lawyer's bill. In this regard, one of the best ways to protect against a malpractice claim, including those purportedly stemming from claims regarding fees, is to ensure that the client has realistic expectations regarding the outcome that can be achieved and is directly involved in the resolution process.

5. Failure to Properly Draft Key Legal Documents

A matrimonial attorney is often called upon to draft key legal documents memorializing agreements between parties, including prenuptial, separation, and divorce settlement agreements. Claims may arise based on alleged drafting errors in connection with these documents or the client's allegations that he or she did not agree to the terms reflected in the agreement (or would not have agreed to such terms had the terms been fully explained). See, e.g., *Vande Kop v. McGill*, 528 N.W.2d 609 (Iowa 1995) (alleging attorney committed malpractice by failing to include in antenuptial agreement provisions addressing the situation whereby the marriage ended by divorce); *Brust v. Newton*, 852 P.2d 1092 (Wash. Ct. App. 1993) (involving allegations of malpractice in drafting prenuptial agreement where the client ultimately had to concede that the agreement was unenforceable because, at the time the agreement was entered into, there was no full disclosure of the couple's assets, the assets were grossly disproportionate, the opposing spouse did not have independent advice of counsel, and the agreement did not make fair and reasonable provision for the opposing spouse).

To help avoid these claims, it is critical that the lawyer be aware of the applicable jurisdiction's legal requirements regarding the form and content of the documents. The lawyer must also have strong attention to detail when drafting these documents to ensure that the resulting writing clearly and unambiguously reflects the parties' agreement on all terms. If the parties later orally alter their agreement on one more issues, the changes should be documented in writing and, where necessary, a revised document should be drafted and signed.

The attorney should carefully review all documents with his or her client, and explain in detail the implications of each provision in clear terms that the client can understand. See *Vande Kop*, 528 N.W.2d at 612 (holding that attorney did not commit malpractice in drafting antenuptial agreement and noting that the record clearly shows that, prior to signing the agreement, the attorney met with the client and the opposing spouse, read the agreement to them paragraph by paragraph, and periodically paused in order to ask if either party had questions). It may also be helpful to secure in writing the client's acknowledgment that the lawyer has fully explained the document and that the client agrees with its terms. This may be particularly warranted in instances where the terms of the agreement differ from the client's initial expectations or desired outcomes. Obtaining the client's written approval on key legal documents most certainly can help prevent and/or defend any later claims by the client challenging the lawyer's work.

6. Multi-Jurisdictional/Choice of Law Issues

Matrimonial matters may raise choice of law issues where the potentially applicable laws of one jurisdiction are more (or less favorable) to a client. For example, certain jurisdictions, like California, have "community property" distribution rules whereas other states, like New York, apply equitable distribution principles. Moreover, jurisdictions often have different rules regarding the available grounds for divorce and whether fault is required to be established. There also could be tax laws or trusts and estates laws specific to a jurisdiction that could positively or adversely impact a client. Depending on a client's particular circumstances, the differences in the jurisdictions' laws can have significant consequences.

Legal malpractice claims may arise based on a lawyer's alleged failure to understand or take into account multi-jurisdictional issues. A client may, for example, allege that an attorney should have brought suit in one jurisdiction to take advantage of that state's laws or conversely, to avoid suit being brought against the client in a less favorable jurisdiction. See, e.g., *Icahn v. Todtman, Nachamie, Spizz & Johns, P.C.*, No. 99 CIV 11783 (WHP), 2001 WL 1160582, at *1-2 (S.D.N.Y. Oct. 1, 2001) (involving allegations that divorce attorney committed malpractice by advising client to file a divorce action in New York rather than moving to Connecticut and filing in that forum to avoid New York's statute of limitations with respect to the rescission of a prenuptial agreement).

As an initial matter, a lawyer should ensure that his or her initial discussions with a client address all possible geographic connections that the divorcing couple may have in order to assess properly whether there are multiple jurisdictions in which a divorce proceeding could be maintained. To the extent that the laws of multiple jurisdictions potentially are implicated, the attorney must consider how the relevant law in those jurisdictions could impact the client, including but not limited to any timing requirements for when a divorce

action may be initiated, property distribution rules, and rules pertaining to the applicable grounds for divorce. The lawyer should also consider how any tax and/or trusts and estates laws that could impact the distribution of the couple's assets. If the lawyer is not sufficiently knowledgeable about the relevant law from other jurisdictions, the lawyer should advise the client about the need for additional counsel with relevant expertise and associate with counsel in another jurisdiction(s). This will ensure that the client is provided with adequate advice, which takes into account differences in the laws of the relevant jurisdictions, so that the client can make well-informed decisions about where to proceed with the divorce or, in some instances, about where to reside to the extent that the client's residency choice could open up the possibility of being sued for divorce in an unfavorable jurisdiction. To the extent that the divorce ultimately goes forward in another jurisdiction, a lawyer should consider carefully whether it is in the client's best interest to retain counsel in that jurisdiction or whether the lawyer can effectively handle the representation with (or without) the association of local counsel.

Finally, as echoed throughout this paper, the lawyer's advice regarding multi-jurisdictional/choice of law issues should be communicated in writing and fully documented, including, in the first instance, any initial communications with the client regarding whether the couple has connections with any other jurisdiction such that a divorce proceeding could be maintained there. In addition, any decision to associate with counsel in another jurisdiction should be approved by the client in writing. The attorney should clearly communicate the advantages and disadvantages of the applicable law in all potential jurisdictions, and it is optimal that such advice is documented in writing. Any decision by the client as to how to proceed should be confirmed in writing.

[1] See, e.g., ABA Standing Comm. on Lawyers' Prof'l Liability, Profile of Legal Malpractice Claims 2004-2007, at 4 (2008) (listing family law as having the third highest number of malpractice claims out of twenty-five different areas of law).