

## Attorney-Client Relations in Divorce Cases: The Intersection of Ethics and Malpractice in Family Law

by  
David S. Dolowitz\* and Jamila Abou-Bakr\*\*

Since 1985, the American Bar Association (ABA) has conducted numerous legal malpractice surveys and has published a *Profile of Legal Malpractice Claims* approximately every four years. The ABA publications analyze data from participating malpractice insurers to obtain statistics that reflect the rates of malpractice claims in twenty-five different areas of practice.<sup>1</sup> These surveys regularly show family law to be in the top three areas of practice with the highest number of malpractice claims.<sup>2</sup> Among these family law malpractice claims, the majority arise from divorce proceedings and relate to property division.<sup>3</sup> Similarly, state disciplinary reports show that approximately twenty percent of disciplinary complaints arise in the field of family law.<sup>4</sup> Unfortunately, in cases where complaints actually result in disciplinary action, family law practice typically ranks first or second in the represented practice areas.<sup>5</sup>

Explanations for the high rate of malpractice claims and ethical complaints in the family law field include: (1) the highly emotional nature of family law leads many clients to turn their anger against their attorneys, even when their complaints are un-

---

\* Partner, Dolowitz Hunnicutt PLLC, Salt Lake City, UT.

\*\* Associate, Dolowitz Hunnicutt PLLC, Salt Lake City, UT.

<sup>1</sup> See ABA STANDING COMM. ON LAWYERS' PROF'L LIABILITY, PROFILE OF LEGAL MALPRACTICE CLAIMS: 2008-2011 5 (2012).

<sup>2</sup> See *id.*

<sup>3</sup> Andrew S. Grossman, *Avoiding Legal Malpractice in Family Law Cases: The Dangers of Not Engaging in Financial Discovery*, 33 FAM. L.Q. 361, 372 (1999).

<sup>4</sup> Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 970 (2007).

<sup>5</sup> *Id.* at 971.

founded;<sup>6</sup> (2) the highly emotional nature of family law places a high psychological burden on attorneys that may negatively impact their representation;<sup>7</sup> (3) many general practitioners and other attorneys engage in the practice of family law even when they are unfamiliar with family law and do not possess the requisite knowledge to effectively represent their clients;<sup>8</sup> (4) the number of disciplinary and malpractice actions against family law attorneys reflects the fact that family law cases represent a fairly large percentage of all legal actions, specifically between one-quarter and one-third of all state court actions;<sup>9</sup> and (5) family law is highly interdisciplinary in nature and, thus, demands skill and knowledge in many complicated areas of legal practice.<sup>10</sup>

Family law presents unique challenges to attorneys because, unlike many areas of practice, family law disputes are about people and relationships as well as property and tax issues.<sup>11</sup> While economic issues often accompany family disputes, “the economics are imbued with fundamental psychological layers.”<sup>12</sup> The problems that clients bring to family law practitioners are partic-

---

<sup>6</sup> See, e.g., SANFORD M. PORTNOY, *THE FAMILY LAWYER’S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS* 7 (2000) (noting that the actual rate of disciplinary action against divorce attorneys is much lower than the number of ethical complaints filed against divorce attorneys and arguing that many complaints against divorce lawyers are unfounded).

<sup>7</sup> See Fines & Madsen, *supra* note 4, at 966 (arguing that “competence problems in family law practice often flow from caring problems,” either caring too little or caring too much); See also Grossman, *supra* note 3, at 371 (stating “The highly charged emotional environment present in family law cases . . . contributes to the high incidence of family law malpractice claims.”).

<sup>8</sup> See Fines & Madsen, *supra* note 4, at 978 (speculating that a large percentage of family law representation is performed by lawyers who are not family law practitioners).

<sup>9</sup> See *id.* at 971-72 (stating that “In state court . . . family law cases represent between one-quarter and one-third of all client representations. Thus, it might be that family law attorneys are not drawing any disproportionate number of complaints.”); See also Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 *FLA. ST. U. L. REV.* 785, 829-30 (2004) (stating “Why these areas generate the most grievances is unclear. Certainly, there may just be more such lawyers.”).

<sup>10</sup> Grossman, *supra* note 3, at 371 (stating that “the requirement of expertise in other complex areas of the law, such as property and taxation, contributes to the high incidence of family law malpractice claims.”).

<sup>11</sup> Fines & Madsen, *supra* note 4, at 968.

<sup>12</sup> *Id.*

ularly personal in nature, meaning emotions run very high, while legal issues can be very complex.

During a divorce, clients experience great emotional turmoil because life as they know it is severely disrupted. In many instances, clients feel a great sense of betrayal because they didn't see the divorce coming, they do not want to get a divorce, or infidelity was discovered. Clients are often extremely upset, scared, or angry. During this time, they may fear financial instability and the loss of custody of their children. These high emotions can make clients more difficult to deal with, lead to unrealistic client expectations, and result in dissatisfaction with results or "buyer's remorse" when it comes to settlement. This in turn may result in ethical complaints and malpractice claims against family law attorneys, particularly when the attorney is not well-versed in family law issues.

These emotions can likewise make it more difficult for attorneys to effectively represent clients. Heightened client emotions place a heightened emotional burden upon family law attorneys who must therefore be skilled in dealing with human emotions to effectively manage clients and to ensure that their own competence and representation does not suffer from the psychological burden that accompanies family law practice.<sup>13</sup>

Another likely reason for the high incidence of family law malpractice claims includes the high level of expertise required in multiple areas of law to properly conduct a divorce action.<sup>14</sup> For example, divorce cases may involve complex property valuation and division issues that require in-depth knowledge of property law. They may also involve complicated tax implications that require a good understanding of tax law. When a custody or parent-time issue is presented, a knowledge of custody law, psychology, and child development is required. To avoid mistakes, the family law attorney should seek education about these other areas of law as they relate to divorce and property division. As the issues become particularly complex, family law attorneys should consult with other attorneys and experts who specialize in these areas.

---

<sup>13</sup> See *id.* at 965.

<sup>14</sup> See Grossman, *supra* note 3, at 371.

Divorces may entail the division of assets that are particularly difficult to value such as businesses,<sup>15</sup> art,<sup>16</sup> royalties, patents, and stock options.<sup>17</sup> When it comes to such assets, proper valuation may require the hiring of financial experts. If an attorney fails to take reasonable steps to discover the value of these assets, leading the client or the court to believe they are worth much less or more than they really are, that attorney may face a malpractice suit down the line when the client discovers that he or she settled for or was awarded less than an equitable share of the assets.

When the highly emotional aspects of family law practice are combined with its often complicated and cross-disciplined problems, the result is an area of practice where ethical complaints and malpractice claims frequently arise. Thus, it is important that family law attorneys develop skills to effectively navigate client emotions, remain knowledgeable in all relevant aspects of the law, obtain help from outside counsel and experts when necessary, and be mindful and vigilant of the many places where ethics violations and malpractice may arise.

This article addresses the attorney-client relationships and accompanying challenges unique to family law. It explores how these challenges put attorneys at risk of both ethical complaints and malpractice claims, and focuses on the intersection of attorney-client relations, the Model Rules of Professional Conduct, and malpractice liability during divorce actions. It discusses the interrelation of legal ethics and legal malpractice in family law and sets forth a number of areas in which the uniquely emotional nature of family law can threaten effective attorney-client communication, impact attorney competency, and otherwise increase the likelihood of both ethical complaints and legal malpractice claims. It further identifies common communication and compe-

---

<sup>15</sup> See Alan S. Zipp, *Divorce Valuation of Business Interests: A Capitalization of Earnings Approach*, 23 *FAM. L.Q.* 89 (Spring 1989) (discussing the valuation of businesses in divorce actions).

<sup>16</sup> See Vanessa G. Ellermann, *Marital Property: An Attorney's Guide to the Valuation of Art and Antiques*, 11 *J. CONTEMP. LEGAL ISSUES* 275 (1997).

<sup>17</sup> See James F. Cann, *Valuation, Distribution, and Division of Employer-Issued Stock Options in Divorce*, 19 *NEB. LAW.* 23 (July 2016) (discussing the challenges of valuing and distributing stock options in a divorce).

tency missteps in family law practice, and advises attorneys on ways to avoid committing ethical violations and malpractice.

## **I. The Intersection of Legal Malpractice and Legal Ethics**

The elements of a legal malpractice claim are established by the common law. To succeed on a claim of legal malpractice, a plaintiff must prove the following elements: (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.<sup>18</sup>

The creation of an attorney-client relationship gives rise to a duty that the attorney owes his or her client. This duty is widely defined by the courts.<sup>19</sup> The scope of the duty is contingent upon whether the attorney is held to the standard of a general practitioner or whether the attorney is held to the heightened standard of a specialist.<sup>20</sup> The *Restatement (Second) of Torts* has adopted the following standard of care for professionals, including attorneys: "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing."<sup>21</sup> Attorneys will generally not be held liable to clients for a good faith error of judgment, but they will be liable to their clients if their conduct does not comport with the ordinary care, skill, and knowledge required of an attorney. As one court has stated:

[W]e acknowledge that attorneys who pursue reasonable strategies in pursuing their cases and who render reasonable advice to their clients cannot be held liable for the failure of their strategies or for any unprofitable outcomes that result because their clients took their advice. The law demands that attorneys handle their cases with knowledge,

<sup>18</sup> See, e.g., *Bennett v. Jones*, Waldo, Holbrook, 70 P.3d 17, 19 (Utah 2003); *Roderick v. Ricks*, 54 P.3d 1119 (Utah 2002); *Campbell, Maack, & Sessions v. Debry*, 38 P.3d 984, 986 (Utah Ct. App. 2001).

<sup>19</sup> Grossman, *supra* note 3, at 363.

<sup>20</sup> *Id.*; See also RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* 864 (3d ed. 1989).

<sup>21</sup> RESTATEMENT (SECOND) OF TORTS § 299A cmt. b (Am. Law Inst. 1965).

350 *Journal of the American Academy of Matrimonial Lawyers*

skill, and diligence, but it does not demand that they be perfect or infallible, and it does not demand that they always secure optimum outcomes for their clients.<sup>22</sup>

In addition to the ordinary duty of care, courts have also enumerated specific duties that this broad duty of care encompasses, such as: (1) the duty to investigate the facts of the case thoroughly,<sup>23</sup> (2) the duty to render a full and fair disclosure of material facts to the client,<sup>24</sup> (3) the duty to advise a client of the consequences of taking or not taking certain actions,<sup>25</sup> (4) the duty to give a client competent and reasonable advice concerning risks,<sup>26</sup> and (5) the duty to do adequate research.<sup>27</sup>

Once it has been established that an attorney owed a duty to a client and that attorney breached that duty, the plaintiff must prove proximate cause and actual damages to succeed on a claim of legal malpractice.<sup>28</sup> The plaintiff must prove that but for the attorney's negligence the plaintiff would not have incurred the injury. This proximate cause element leads to what is known as the "case-within-a-case" hurdle, which requires the plaintiff to prove that but for the attorney's negligence, the client would have achieved a more favorable result in the action giving rise to the malpractice claim.<sup>29</sup> Therefore, a legal malpractice plaintiff

<sup>22</sup> *Ziegelheim v. Appollo*, 607 A.2d 1298, 1306 (N.J. 1992).

<sup>23</sup> *Canady v. Shwartz*, 577 N.E.2d 437, 440 (Ohio Ct. App. 1989).

<sup>24</sup> *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 491 P.2d 421, 429 (Cal. 1971) ("The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests."); *See also* *Millwright v. Romer*, 322 N.W.2d 30, 34 (Iowa 1982).

<sup>25</sup> *Grossman*, *supra* note 3, at 366 (citing *Cheek v. Poole*, 390 S.E.2d 455 (N.C. Ct. App. 1990); *McMahon v. Shea*, 688 A.2d 1179 (Pa. 1997); *Musselman v. Willoughby Corp.*, 337 S.E.2d 724 (Va. 1985)).

<sup>26</sup> *Id.* (citing *Gruse v. Belline*, 486 N.E.2d 398 (Ill. App. Ct. 1985); *Gillespie v. Klun*, 406 N.W.2d 547 (Minn. Ct. App. 1987); *Stewart v. Sbarro*, 362 A.2d 581 (N.J. Super. Ct. App. Div. 1976)).

<sup>27</sup> *Id.* (citing *Horn v. Croegaert*, 542 N.E.2d 1124 (Ill. App. Ct. 1989); *Copeland Lumber Yards, Inc. v. Kincaid*, 684 P.2d 13, 15 (Or. Ct. App. 1984)).

<sup>28</sup> *See, e.g., Bennett*, 70 P.3d at 19; *Roderick*, 54 P.3d 1119.

<sup>29</sup> *See, e.g., Shaw v. Dept. of Admin.*, 861 P.2d 566, 573 (Alaska 1993), *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 856 N.E.2d 389, 395 (Ill. 2006); *Thomas v. Bethea*, 718 A.2d 1187, 1197 (Md. 1998); *Bowers v. Dougherty*, 615 N.W.2d 449, 457 (Neb. 2000); *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 893 N.E.2d 173, 177-78 (Ohio 2008); *Haberer v. Rice*, 511 N.W.2d 279, 285 (S.D. 1994).

must essentially prove two cases—the one that gave rise to the malpractice action and the one for legal malpractice liability.

While ethics violations are not synonymous with committing malpractice, there can be substantial overlap between what constitutes malpractice and what constitutes an ethics violation subject to disciplinary proceedings.<sup>30</sup> Each state has adopted its own ethics code for practicing attorneys, and violations of the ethics code result in disciplinary proceedings conducted by state bar organizations which may result in public reprimand, suspension, or disbarment.<sup>31</sup> Most states have adopted some form of the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules).<sup>32</sup> As long as the ethics violation also satisfies all of the elements of malpractice, then it can also be legal malpractice.<sup>33</sup> Likewise, an attorney's conduct may not constitute an ethical violation, but the conduct may still result in malpractice liability.<sup>34</sup>

Even where an ethics rule involves conduct that could potentially subject attorneys to malpractice liability, there is still a key difference with respect to damages. Where an attorney engages in conduct that violates ethical and professional conduct rules and such conduct also demonstrates a failure to exercise requisite care, skill, and knowledge, that attorney cannot be liable for malpractice unless proximate damages are proven.<sup>35</sup> In contrast, damages need not be proven for an attorney to be subject to disciplinary action.

In a legal malpractice case, one of the central questions is whether an attorney's acts conformed with the law's standards for attorney due care, skill, and diligence.<sup>36</sup> To determine the applicable standard of care for an attorney, the employment of

---

<sup>30</sup> See Lewis Becker, *Ethical Concerns in Negotiating Family Law Agreements*, 30 FAM. L.Q. 587, 635 (1996); See also Kristi N. Saylor, *Conflicts of Interest in Family Law*, 28 FAM. L.Q. 451, 470 (1994).

<sup>31</sup> See Saylor, *supra* note 30, at 470.

<sup>32</sup> See Becker, *supra* note 30, at 588 (“The *Model Rules* have been adopted by at least thirty-five jurisdictions, albeit with amendment.”).

<sup>33</sup> See Saylor, *supra* note 30, at 470.

<sup>34</sup> See Becker, *supra* note 30, at 636.

<sup>35</sup> See Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER & SOC. POL'Y & L. 1, 27 (2012).

<sup>36</sup> See *id.* at 24.

an expert is usually necessary in a legal malpractice case.<sup>37</sup> In fact, many legal malpractice cases fail before the merits of the case are reached because the plaintiff does not employ an expert, thereby failing to establish a standard of care that the attorney violated.<sup>38</sup> An expert must testify as to whether the attorney acted reasonably and with the skill and knowledge ordinarily possessed by attorneys in the area.<sup>39</sup> The expert testimony will provide evidence regarding the requisite skill and knowledge, taking into consideration the effect of local customs in legal practice.<sup>40</sup>

Therefore, it logically follows that the standard of care for attorneys in the area will often overlap with or be influenced by the ethical rules because those rules put forth and reflect certain standards and expectations for attorneys. Notably, Model Rule of Professional Conduct 1.1 states, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>41</sup> This rule mirrors the attorney’s duty of care in a malpractice case.

Even the American Bar Association has recognized that an attorney’s violation of an ethics rule may be evidence of a breach of the attorney’s duty of care, though it is careful to note that a violation of a rule “should not itself give rise to a cause of action against a lawyer.”<sup>42</sup> While the extent to which professional conduct rules should influence legal malpractice proceedings evokes debate among legal scholars,<sup>43</sup> if the rule involves conduct that

---

<sup>37</sup> See *Luvane v. Waldrup*, 903 So. 2d 745, 748 (Miss. 2005) (“Expert testimony is ordinarily necessary to support an action for legal malpractice.”); *Stoeckel v. Twp. of Knowlton*, 902 A.2d 930, 938 (N.J. Super. Ct. App. Div. 2006) (stating that expert testimony is usually required to explain a breach of duty).

<sup>38</sup> See, e.g., *Tatum v. Oberg*, 804 F. Supp. 2d 88 (D. Conn. 2011) (holding that the plaintiff’s failure to provide expert testimony barred his legal malpractice claim which was based on an alleged failure of his attorney to uncover the full extent of his wife’s finances in a divorce action).

<sup>39</sup> See *Boothe-Perry*, *supra* note 35, at 24.

<sup>40</sup> See *id.* at 25.

<sup>41</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 (2011).

<sup>42</sup> MODEL RULES OF PROF’L CONDUCT, pmb. & scope, § 20 (2011).

<sup>43</sup> See, e.g., Daniel L. Draisen, *The Model Rules of Professional Conduct and Their Relationship to Legal Malpractice Actions: A Practical Approach to the Use of the Rules*, 21 J. LEGAL PROF. 67 (1996) (stating that the ABA Model



might subject the attorney to malpractice liability then “the ethical rule arguably has a bearing on the lawyer’s duty to act with reasonable care toward the client.”<sup>44</sup>

An ethics code violation does not automatically give rise to a malpractice claim against an attorney.<sup>45</sup> However, using ethics code violations as evidence in legal malpractice cases is an emerging trend. Legal malpractice plaintiffs often cite the ABA Model Rules when arguing that an attorney has breached his or her duty to the client,<sup>46</sup> and the majority of courts will admit evidence of ethical rules as relevant to the determination of the standard of care an attorney owes his or her client.<sup>47</sup> Courts often invoke applicable ethics rules in legal malpractice decisions, but the extent to which courts rely upon those rules to make determinations is largely inconsistent.<sup>48</sup>

For example, at least one state has gone so far as to hold that a violation of the ethics code creates a rebuttable presumption that a lawyer has committed malpractice.<sup>49</sup> Other courts have held that ethics and professional conduct rules provide some evidence as to the requisite standard of care or that the rules are relevant to the duty of care even though they do not give rise to

---

Rules should act as a gauge for measuring appropriate attorney conduct in malpractice actions); Ann Peters, *The Model Rules as a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609 (1993); *c.f.* Jean E. Faure & R. Keith Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363, 374-78 (1986).

<sup>44</sup> See Boothe-Perry, *supra* note 35, at 45.

<sup>45</sup> See Saylor, *supra* note 30, at 470.

<sup>46</sup> See Boothe-Perry, *supra* note 35, at 28 (citing Nicole A. Cunitz, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 638 (2012)).

<sup>47</sup> *Id.* at 28.

<sup>48</sup> See, e.g., *BCCI Holdings (Luxemborg), S.A. v. Clifford*, 964 F. Supp. 468, 481 (D.D.C. 1997) (“A breach of an attorney’s ethical standards can constitute a breach of the fiduciary duty owed to a client.”); *cf.* *Beach Higher Power Corp. v. Rekant*, 832 So. 2d 831, 834 n.2 (Fla. Dist. Ct. App. 2002) (stating that the state’s rules of professional conduct “do not play into our consideration in the instant case, because the rules themselves clearly provide that they are not to be applied . . . for the purpose of determining liability”).

<sup>49</sup> See, e.g., *Beattie v. Firmschild*, 394 N.W.2d 107 (Mich. Ct. App. 1986) (“There is a rebuttable presumption that violations of the Code of Professional Responsibility constitute actionable malpractice.”).

malpractice actions.<sup>50</sup> Contrarily, some courts have held that ethical and professional conduct rules have no place in legal malpractice cases and refuse to take the rules into consideration when determining the applicable standard of care in legal malpractice actions.<sup>51</sup>

## II. Communication Barriers in Family Law Practice

*“A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required by these Rules.”*

ABA Model Rule of Professional Conduct 1.4(a)

*“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”*

ABA Model Rule of Professional Conduct 1.4(b)

Among all areas of legal practice, the most frequent ethical complaints are those alleging inadequate communication.<sup>52</sup> Fam-

---

<sup>50</sup> See, e.g., *Watkins & Watkins, P.C. v. Williams*, 518 S.E.2d 704, 706 (Ga. Ct. App. 1999) (noting that state professional conduct rules may be considered in determining whether an attorney represented his client with the requisite degree of skill and care); *Fanaras Enters, Inc. v. Doane*, 666 N.E.2d 1003, 1006 (Mass. 1996) (stating that a violation of a state professional conduct rule may provide “some evidence of the attorney’s negligence”); *dePape v. Trinity Health Sys., Inc.*, 242 F. Supp. 2d 585, 609 (N.D. Iowa 2003) (holding that a violation of the Iowa Code of Professional Responsibility provides some evidence of negligence).

<sup>51</sup> See, e.g., *Boccone v. Eichen Levinson LLP*, 301 Fed. App’x 162, 168 (3d Cir. 2008) (“Even assuming defendants did violate a Rule of Professional Conduct, that violation would not give rise to a cause of action nor [would] it create any presumption that a legal duty has been breached.”); *Toler v. Brackin*, 710 So. 2d 415, 416 (Ala. 1998) (“[A] violation of the Rules of Professional Conduct may not be used as evidence, regardless of whether the attorney has been charged with a violation of those Rules.”); *Baxt v. Liloia*, 714 A.2d 271, 275 (N.J. 1998); *Lazy Seven Coal Sales, Inc. v. Stone & Hines, P.C.*, 813 S.W.2d 400, 405 (Tenn. 1991) (“[I]n a civil action charging malpractice, the standard of care is the particular duty owed the client under the circumstances of the representation, which may or may not be the standard contemplated by the Code.”).

<sup>52</sup> Stephen Schemenauer, Comment, *What We’ve Got Here . . . Is a Failure . . . to Communicate: A Statistical Analysis of the Nation’s Most Common*

ily law in particular demands that attorneys develop and implement strong interpersonal communication skills. Such communication skills are two-fold: they involve listening to clients, providing them with appropriate emotional support, and effectively navigating their emotions to develop a good rapport and encourage clear, rational thinking, and they also involve maintaining steady communication with clients to make sure they stay fully informed of the status of their cases and have the requisite knowledge to make informed decisions.

#### A. *Listening to Clients and Dealing with Client Emotion*

The public perception of attorneys is that they are often “inattentive, unresponsive, insensitive, non-empathetic, uncooperative, and arrogant.”<sup>53</sup> In family law, where clients’ problems are particularly personal and emotional in nature, such perceptions of attorneys are likely to be exacerbated. Family law attorneys must strike a particularly difficult balance between acknowledging their clients’ emotions and encouraging their clients to maintain focus on the legal information necessary to engage in rational decision making. While many attorneys may be inclined to ignore their clients’ emotions in an effort to avoid what is perceived to be a dangerous distraction from the legally relevant, such a practice is counterproductive. Listening to clients’ emotional concerns, showing empathy, and encouraging them to feel less helpless will help calm clients, reduce their stress, and, in turn, make rational and informed decision-making easier.<sup>54</sup> While attorneys have an ethical obligation to respect and comply with clients’ choices, they also have an ethical obligation to ensure that clients are fully informed in arriving at their decisions.<sup>55</sup>

---

*Ethical Complaint*, 30 *HAMLIN L. REV.* 629 (2007) (concluding that the most common complaint to state disciplinary boards is that the attorney failed to communicate and, more specifically, failed to stay in contact with clients).

<sup>53</sup> Fines & Madsen, *supra* note 4, at 979-80 (citing W.L.F. Felstiner, *Professional Inattention: Origins and Consequences*, in *THE HUMAN FACE OF LAW* 121, 124 (Keith Hawkins ed., 1997)).

<sup>54</sup> *See id.* at 981-82 (arguing that “[f]eelings are facts that are relevant to the client’s informed decision making” and “[t]o ignore fear, anger, anxiety, sadness, denial, or any other psychological states of mind is to leave the client in a condition that makes rational informed decision-making difficult, if not impossible”).

<sup>55</sup> *Id.* at 980.

Additionally, it is imperative that an attorney listen to all of a client's concerns, including the emotional, non-legally relevant concerns, because these concerns allow the attorney to more completely assess a client's situation: how does the client feel about what is happening, what are the client's values, what goals does the client have going forward, etc.<sup>56</sup> Assessing the bigger, emotional picture will therefore allow attorneys to help their clients pursue the most appropriate remedies for their unique situation.

Some of the simplest steps family law attorneys can take to avoid ethical complaints and malpractice claims are to establish a good rapport with their clients, make sure there is good communication with their clients, and try to manage their clients' expectations. Even when attorneys have not committed malpractice, they are still often sued by disgruntled clients who regret their settlements or did not achieve the results they wanted at trial. When the end result is less than ideal to a client, that client will be less inclined to sue his or her attorney if he or she actually likes that attorney. Simple gestures of effective communication, such as returning client phone calls and emails in a timely manner and making sure a client stays apprised of updates in the case, can go a long way when it comes to client satisfaction.

#### *B. Keeping the Client Fully Informed*

While particularly angry and emotional clients may be inclined to submit ethical complaints or malpractice claims against their attorneys, it may also be the case that having "difficult," highly emotional clients may also cause attorneys to neglect their cases, increasing the likelihood that those attorneys end up committing an ethical violation or malpractice. For example, if a client is extremely difficult or unreasonable, an attorney may be inclined (consciously or subconsciously) to avoid communicating with that client, ignore that client's emails and phone calls, and

---

<sup>56</sup> *See id.* at 982 (arguing that understanding a client's situation involves "being receptive and responsive to clients by listening to their problems and concerns with sensitivity, warmth and understanding"); *See also* DAVID A. BINDER, PAUL BERGMAN, & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 3 (1991) (arguing that good lawyering requires effective communication which requires an understanding of the context of the client's problems).

fail to keep that client appropriately apprised of developments in the case. The attorney may end up giving first priority to those clients that are more amiable and fail to get back to the other, more difficult clients. The same holds true for clients that are slow to pay their bill as opposed to those clients who are always up to date on payment.

While such lack of communication may anger clients and increase the likelihood of complaints against attorneys, the lack of communication becomes especially problematic when a client isn't promptly informed of a circumstance or decision that requires his or her informed consent or when a client does not receive enough information from his or her attorney to make an informed decision regarding his or her case. If this occurs, then the attorney will likely be on the hook for an ethical violation as Model Rule of Professional Conduct 1.4 requires that attorneys "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>57</sup>

Such severe lapses in client communication may also put attorneys at risk for malpractice. The *ABA Profile of Legal Malpractice Claims: 2000-2003* indicated that nearly six percent of all legal malpractice claims related to an alleged failure to obtain client consent or keep the client informed.<sup>58</sup> In divorce cases, failures of communication that put attorneys at risk for malpractice liability include the failure to discuss offers of settlement with clients promptly and thoroughly and the failure to apprise the client of the relevant laws necessary to inform their legal decisions. Communication with clients is of utmost importance during settlement negotiations. A settlement requires the client's informed consent, and if the client's attorney does not provide the information necessary to make an informed settlement

---

<sup>57</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2011).

<sup>58</sup> See ABA STANDING COMM. ON LAWYERS' PROF'L LIABILITY, PROFILE OF LEGAL MALPRACTICE CLAIMS: 2000-2003 (2004) (indicating that 5.75 percent of the claims in their survey cited an alleged failure to obtain consent or inform the client).

decision, then that attorney may be liable to the client for damages.<sup>59</sup>

There are a number of ways that the highly emotional nature of family law can pose unique challenges to family law attorneys. Clients may be quicker to anger, attorneys may be quicker to tire, and, along the way, attorney-client relationships may suffer. This may lead to a decline in attorney-client communication, increase the likelihood that attorneys neglect cases, and make attorneys more likely to miss deadlines or submit sloppy work. Family law attorneys must remain cognizant of their relationships with clients and make sure they maintain appropriate communication so that they can keep representing their clients competently.

### **III. Client Screening and Consultations**

Apart from maintaining good client communication and exercising competence and diligence throughout the divorce representation, family law attorneys can begin taking steps to reduce the risk of ethical and malpractice complaints from the very first consultation. One such step is to have conversations with clients early on about their rights and realistic outcomes. This may dissuade clients from harboring unrealistic expectations and suing when those expectations are not met. Such unrealistic expectations are prevalent in the divorce world where clients may believe they have the moral high ground and, as such, are entitled to everything. On the other hand, clients may not understand that they may be on the hook for substantial sums of alimony and child support. Attorneys should not promise the world to their clients when they cannot realistically get them the world. While making unrealistic promises may secure clients, it will lead to dissatisfied clients in the long run when the attorney cannot live up to the expectations he or she set for himself or herself.

Additionally, attorneys should be sure to (1) thoroughly screen potential clients for conflicts of interest, (2) avoid misrepresenting themselves as specialists, (3) make sure that attorney-

---

<sup>59</sup> See *McWhirt v. Heavey*, 550 N.W.2d 327, 337-38 (Neb. 1996) (affirming a lower court determination that an attorney committed malpractice when he gave client inaccurate advice concerning alimony and marital versus non-marital property which caused the client to accept a poor settlement agreement).

client relationships are not formed unwittingly, (4) avoid accepting clients who have unreasonable expectations, and (5) avoid accepting clients with substantial emotional issues.

A. *Conflicts of Interest*

*“[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”*

Model Rule of Professional Conduct 1.7(a)

*“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”*

Model Rule of Professional Conduct 1.9

The ABA Model Rules state that an attorney shall not represent a client where there is a conflict of interest.<sup>60</sup> Family law attorneys must be sure to take appropriate steps to screen new and potential clients for conflicts of interest to avoid ethics violations. Additionally, conflicts of interest may also put attorneys at risk for malpractice liability. Representation of a client where there is a conflict of interest may result in malpractice liability if the conflict of interest causes the client proximate damages.<sup>61</sup> In family law, where disputes involve personal relationships, many potential conflicts of interest may arise. It is important to screen new clients to be sure there is not a conflict with an existing client. Sometimes these conflicts will arise during representation and must be disclosed and resolved immediately.

Furthermore, some spouses contemplating divorce become so vindictive that they enact a strategy to disqualify certain attorneys from representing their spouse.<sup>62</sup> To accomplish this, they

<sup>60</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7-1.10 (2011).

<sup>61</sup> See, e.g., *Stonewell Corp. v. Conestoga Title Ins. Co.*, 678 F. Supp. 2d 203, 211-12 (S.D.N.Y. 2010) (holding that a conflict of interest only supports a legal malpractice cause of action where it is established that such a conflict proximately caused injury).

<sup>62</sup> See *Saylor*, *supra* note 30, at 457 (stating that a conflict of interest “can be intentionally created by a spouse who schedules a consultation with a particular lawyer as a calculated maneuver to disqualify him or her from representing the spouse”); See also Marshall Wolf & Deborah Akers, *Disqualification*, A

360 *Journal of the American Academy of Matrimonial Lawyers*

schedule consultations with selected attorneys even when they have no intention of retaining those attorneys.<sup>63</sup> After they have consulted with an attorney, there is a “presumption of shared secrets” that disqualifies that attorney from representing the other spouse.<sup>64</sup> One way that attorneys can counteract such behavior is to implement a consultation fee. While not all people will be deterred from consulting with an attorney just to disqualify them from representing their spouse later on, many likely will be deterred when there is a consultation fee.

For divorce attorneys in particular, conflicts of interests to avoid include: (1) dual representation of both spouses in a contested divorce,<sup>65</sup> (2) dual representation of both spouses in an uncontested divorce,<sup>66</sup> (3) representation of one spouse in a divorce while simultaneously representing the other spouse in a separate and unrelated matter,<sup>67</sup> (4) representation of one spouse in a divorce and then subsequently switching representation to the other spouse in the divorce,<sup>68</sup> (5) representation of one spouse in a divorce and then subsequent representation of the other spouse post-divorce in a matter directly arising from the divorce,<sup>69</sup> (6) representation of one spouse in a divorce and then subsequent representation of the other spouse post-divorce in a matter substantially related to the divorce,<sup>70</sup> and (7) representation of both spouses during divorce and subsequent repre-

---

*Seemingly Innocent Conversation with the Wrong Party May Prevent You from Participating in a Case*, 9 FAM. ADVOC. 33, 34 (Winter 1987).

<sup>63</sup> See Saylor, *supra* note 30, at 457.

<sup>64</sup> See *id.*

<sup>65</sup> See, e.g., *Klemm v. Super. Ct. of Fresno County*, 142 Cal. Rptr. 509 (Cal. Ct. App. 1977).

<sup>66</sup> See, e.g., S.C. Bar Op. 81-13 (stating that dual representation of parties in a divorce is improper even where parties settle differences prior to seeking counsel).

<sup>67</sup> See, e.g., *Jeffrey v. Pounds*, 136 Cal. Rptr. 373 (Cal. Ct. App. 1977).

<sup>68</sup> MODEL RULES OF PROF'L CONDUCT R. 1.9 (2011).

<sup>69</sup> See, e.g., *State ex rel. Oklahoma Bar Ass'n v. Katz*, 733 P.2d 406 (Okla. 1987) (lawyer disbarred where he represented the wife in divorce action and then represented the husband in a post-divorce action to reduce child support); *In re Conway*, 301 N.W.2d 253 (Wis. 1981) (ordering a public reprimand of an attorney where the lawyer represented a woman in a post-divorce action after representing her husband in the underlying divorce action).

<sup>70</sup> See, e.g., *Cleland v. Cleland*, 404 A.2d 905 (Conn. Super. Ct. 1979).



sentation of only one of the spouses in the divorce or another matter substantially related to the divorce.<sup>71</sup>

Representation of both spouses in a contested divorce is always a per se conflict of interest and is improper regardless of client waiver.<sup>72</sup> If the divorce is uncontested, some jurisdictions may permit clients to waive the conflict of interest if the clients are in agreement on all matters;<sup>73</sup> however, attorneys should refrain from ever representing both spouses even when the divorce is uncontested because even if it appears the clients are on the same page, that may not actually be the case or disagreement may ensue in the near future, opening the lawyer up to potential liability. Divorce is a highly emotional process, and attorneys should always be prepared for conflicts to arise between parties.

Lawyers can avoid conflicts of interest by maintaining a conflict check system that identifies any apparent conflicts of interest. There are many case management software programs available that run such conflict checks, or the attorney may choose to utilize a forms-based conflicts check system. Maintaining an effective conflict check system is a necessary part of every lawyer's office. If a conflict of interest becomes known, then the attorney should either immediately withdraw from representation or obtain proper consents and waivers from the necessary clients if the conflict of interest is waivable.<sup>74</sup> The conflict may arise during the case, such as when one client decides that he or she is going to sue another client over a business issue even though both clients are pursuing separate, unrelated divorce actions. To effectively withdraw, the lawyer needs to make clear to

---

<sup>71</sup> Saylor, *supra* note 30, at 458.

<sup>72</sup> *Id.* at 453; *See, e.g., Klemm*, 142 Cal. Rptr. at 512 (“As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation”); *Walden v. Hoke*, 429 S.E.2d 504 (W. Va. 1993) (“it is improper for a lawyer to represent both the husband and the wife at any stage of the separation and divorce proceeding, even with full disclosure and informed consent”).

<sup>73</sup> *See, e.g., Klemm*, 142 Cal. Rptr. at 512 (“if the conflict is merely potential, there being no existing dispute or contest between the parties represented as to any point in litigation, then with full disclosure to and informed consent of both clients there may be dual representation at a hearing or trial”).

<sup>74</sup> Saylor, *supra* note 30, at 472.

362 *Journal of the American Academy of Matrimonial Lawyers*

the client that he or she is withdrawing. Furthermore, the lawyer should carefully document the withdrawal in writing.

Obtaining informed consent and waiver of the potential conflict of interest from clients can be a bit trickier than simply withdrawing from representation. A conflict of interest waiver is only effective if the lawyer reasonably believes that the conflicting representation will not adversely affect either client.<sup>75</sup> An attorney may want to confer with another, non-interested attorney to determine whether he can effectively represent both clients without adverse effect to either.<sup>76</sup> Furthermore, a client's consent to waive such conflicts is only valid when the attorney has fully disclosed any known facts that might impact his or her ability to fairly represent both clients.<sup>77</sup> If the attorney reasonably believes he or she can effectively represent both clients and the clients agree to waive the conflict, then the attorney should prepare a written waiver to be signed by each client.

### B. *Specialization*

*“A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication.”*

Model Rule of Professional Conduct 7.2(c)

While some states offer specialty certification in family law,<sup>78</sup> attorneys may be tempted to represent to potential clients that they are “specialists” in family law even when their state

---

<sup>75</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2011); See also Saylor, *supra* note 30, at 472; Harry Schneider Jr., *An Invitation to Malpractice (Part II), Once a Conflict of Interest Is Spotted, Take Action Promptly*, 79 A.B.A. J. 100 (Jan. 1993) (“Where the lawyer reasonably concludes that dual representation of clients with conflicting interests can be accomplished without adversely affecting either, and with the client's informed consent, many conflicts of interest can be waived and representation undertaken”).

<sup>76</sup> Saylor, *supra* note 30, at 472.

<sup>77</sup> *Id.* at 473.

<sup>78</sup> See, e.g., 27 N.C. Admin. Code 1D.2400 (1994) (designating family law as a field of law for which certification of specialists is permitted in North Carolina”).

offers no such designation. However, the ABA Model Rules bar attorneys from representing that they are a specialist unless they have actually been certified by certain approved organizations.<sup>79</sup> When family law attorneys do not have such qualifications, then such representations may put them at risk of ethical violations and disciplinary action.

Such representations may also put attorneys at greater risk when it comes to malpractice claims. When an attorney holds him or herself out as a specialist in a particular area of law, then he or she is held to a higher standard of care than “the skill and knowledge normally possessed by members of that profession.”<sup>80</sup> The attorney is held to this higher standard merely by way of his or her representation to the client, and it is irrelevant whether the attorney is actually a certified specialist in that area of law or not. Instead of being held to the standard of the general practitioner of law, the attorney specialist (or one who represents that he or she is an attorney specialist) is held to the skill and knowledge normally possessed by other specialists in that area of law.<sup>81</sup>

In some instances, family law practitioners may be considered specialists for the purpose of establishing a duty of care.<sup>82</sup> For the purpose of a malpractice claim, attorneys who hold themselves out as specialists, whether they actually possess superior skill and knowledge in the area, will be treated as specialists.<sup>83</sup> Under general tort law, a person who claims special expertise in undertaking a task is held to a higher standard of care, so it is the attorney’s representations to clients as to his or her expertise that are determinative of the duty of care he or she owes to the client.<sup>84</sup> Likewise, attorneys who possess some type of family law specialist certification or attorneys who are labeled as specialists by virtue of membership in certain membership organizations (such as the American Academy of Matrimonial Lawyers) may also be considered specialists for malpractice claim purposes.<sup>85</sup> Attorneys may also be identified as specialists by virtue of their

---

<sup>79</sup> MODEL RULES OF PROF’L CONDUCT R. 7.2 (2011).

<sup>80</sup> Grossman, *supra* note 3, at 369.

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* at 370.

<sup>83</sup> *See* Becker, *supra* note 30, at 635.

<sup>84</sup> *Id.*

<sup>85</sup> *See* Grossman, *supra* note 3, at 371.

364 *Journal of the American Academy of Matrimonial Lawyers*

professional undertakings.<sup>86</sup> For example, attorneys who present on family law for continuing legal education programs or other public speaking engagements are likely holding themselves out as specialists.

C. *Creation of an Attorney-Client Relationship*

To avoid malpractice suits where attorneys never intended for an attorney-client relationship to be established in the first place, diligent attorneys will always obtain a written engagement agreement before undertaking representation of clients. Attorneys should make it clear during any preliminary consultations or conversations with potential clients that they do not represent the client (and no attorney-client relationship is established) unless and until that client signs a written engagement contract. On the other hand, if attorneys suspect there is any possibility that a client may believe an attorney-client relationship exists where it does not, attorneys may be wise to send a letter to that party reaffirming that no attorney-client relationship has been established.<sup>87</sup>

It is important to recognize that, while such agreements and letters (or their absence) may evidence the existence or non-existence of attorney-client relationships, “no formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client.”<sup>88</sup> Rather, in a dispute as to whether an attorney-client relationship actually existed, the court will look to whether there was a “meeting of the minds” between the attorney and client to establish such a relationship.<sup>89</sup>

## IV. Attorney Competency

*“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”*

---

<sup>86</sup> *See id.*

<sup>87</sup> *Id.* at 363.

<sup>88</sup> *Tormo v. Yormark*, 398 F. Supp. 1159, 1169 (D.N.J. 1975); *Farnham v. State Bar*, 552 P.2d 445, 449 (Cal. 1976); *Kurtenbach v. TeKippe*, 260 N.W.2d 53 (Iowa 1977); *George v. Caton*, 600 P.2d 822 (N.M. Ct. App. 1979); *See also Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978).

<sup>89</sup> *See Grossman, supra* note 3, at 363.

Model Rule of Professional Conduct 1.1

The first ABA Model Rule of Professional Conduct states that an attorney must represent a client with the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>90</sup> Similarly, an attorney’s duty to a client for purposes of malpractice liability generally requires that the attorney’s conduct comport with the ordinary knowledge, skill, and diligence required to handle the issues presented.<sup>91</sup> The ordinary care, skill, and knowledge required of divorce attorneys includes, among other things, (1) conducting adequate and thorough discovery of marital assets, (2) providing competent and accurate advice during divorce settlement, and (3) promptly drafting qualified domestic relations orders.

A. *Conducting Discovery*

Inadequate discovery may prove to be disastrous to divorce attorneys, especially in high asset divorce cases. Most malpractice claims brought against family law attorneys relate to property division in divorce proceedings,<sup>92</sup> and such claims also have the potential to be the costliest. A common claim concerning property settlements is that attorney negligence caused the client to receive less than his or her fair share of property.<sup>93</sup> As such, malpractice in relation to property division is likely to be the result of inadequate discovery or property valuation.

Conducting adequate discovery is imperative, even when the divorce does not go all the way to trial. Family law attorneys cannot competently negotiate fair and reasonable settlement agreements for their clients if they do not have an accurate picture of the entire marital estate and its value. Some cases have allowed malpractice actions where the lawyer allowed a client to settle when there was inadequate disclosure of assets.<sup>94</sup> There-

---

<sup>90</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 (2011).

<sup>91</sup> See, e.g., *Ziegelheim v. Appollo*, 607 A.2d 1298, 1306 (N.J. 1992) (stating “[t]he law demands that attorneys handle their cases with knowledge, skill, and diligence. . .”).

<sup>92</sup> Grossman, *supra* note 3, at 372.

<sup>93</sup> *Id.* at 372-73.

<sup>94</sup> See, e.g., *Callahan v. Clark*, 901 S.W.2d 842 (Ark. 1995); *Grayson v. Wofsey*, 646 A.2d 195 (Conn. 1994); *Baldrige v. Lacks*, 883 S.W.2d 947 (Mo. Ct. App. 1994).

fore, a lawyer should utilize pre-trial discovery to its fullest and acquire as much information as possible before entering settlement negotiations.<sup>95</sup> That being said, there may certainly be instances when it is acceptable to conduct informal discovery rather than formal discovery.<sup>96</sup>

The extent to which a lawyer engages in discovery will also be heavily influenced by the wealth of the client. If the client does not have substantial assets, then a cost benefit analysis may indicate that extensive discovery would be inappropriate.

### B. *Negotiating Settlement Agreements*

In more recent years, family law has increasingly turned away from litigation to solve divorce and custody disputes and has turned to alternative conflict resolution techniques, such as negotiation, mediation, and arbitration.<sup>97</sup> When it comes to divorce settlement agreements, it is important to remember that just because a client agreed to a settlement, it does not necessarily mean that a malpractice action relating to that settlement is thereafter barred.<sup>98</sup> Similarly, court approval of the settlement is not a bar to a later malpractice action.<sup>99</sup> If a client is able to establish that the attorney failed to exercise the degree of skill and care required of him, and that failure resulted in damages to the client, then the client will succeed on a malpractice claim even though the client agreed to the settlement and the court thereafter approved the settlement.<sup>100</sup>

Examples of specific instances of conduct which have been found to constitute malpractice in the context of divorce settlement agreements include: (1) failure to recognize that an item of

---

<sup>95</sup> See Grossman, *supra* note 3, at 373.

<sup>96</sup> See, e.g., McClung v. Smith, 870 F. Supp. 1384, 1405 (E.D. Va. 1994) (noting “[w]ithout doubt, there are instances when it is professionally acceptable to rely on informal discovery rather than to institute formal discovery”).

<sup>97</sup> See Fines & Madsen, *supra* note 4, at 965 (citing Forest S. Mosten, *Mediation and the Process of Family Law Reform*, 37 FAM. & CONCILIATION CTS. REC. 429 (1999)).

<sup>98</sup> Becker, *supra* note 30, at 636.

<sup>99</sup> *Id.* at 637.

<sup>100</sup> See Grossman, *supra* note 3, at 367.

property is marital property,<sup>101</sup> (2) failure to sufficiently investigate assets prior to negotiations which leads to inadequate financial settlement,<sup>102</sup> (3) misrepresentations and/or lack of knowledge concerning divorce law and the provision of incorrect advice to the client,<sup>103</sup> (4) failure to include a provision in the settlement agreement stating that alimony terminates upon remarriage of the recipient spouse,<sup>104</sup> and (5) unreasonable delay in finalizing a settlement agreement.<sup>105</sup>

### C. *Qualified Domestic Relations Orders*

*“[A] lawyer shall act with reasonable diligence and promptness in representing a client.”*

Model Rule of Professional Conduct 1.3

Even after the divorce is finalized, attorneys must still remain vigilant. When a pension is divided in the divorce, an attorney's work does not end with the decree of divorce. The attorney must also immediately draw up an order dividing the retirement assets that conforms to both statutory requirements and the terms of the retirement plan. If the attorney for the nonparticipant spouse does not accurately draft up such an order in a timely fashion, then the client stands to lose his or her portion of the retirement as awarded in the decree of divorce. If attorneys do not want angry clients suing for malpractice, then they will do best to make sure to carefully and accurately prepare such orders concurrently with the finalization of the divorce.

---

<sup>101</sup> See *Bross v. Denny*, 791 S.W.2d 416, 423 (Mo. Ct. App. 1990) (holding that the attorney negligently advised the client as to her entitlement to a portion of her ex-spouse's military retirement benefits).

<sup>102</sup> See *Callahan v. Clark*, 901 S.W.2d 842, 848 (Ark. 1995) (affirming a \$120,000 jury award to client for her attorney's negligent failure to value marital assets).

<sup>103</sup> See *McWhirt v. Heavey*, 550 N.W.2d 327, 337-38 (Neb. 1996) (affirming a lower court determination that an attorney committed malpractice when he gave the client inaccurate advice concerning alimony and marital versus non-marital property which caused the client to accept a poor settlement agreement).

<sup>104</sup> See *McMahon v. Shea*, 657 A.2d 938, 942 (Pa. Super. Ct. 1995), *cert. granted*, 674 A.2d 1074 (Pa. 1996).

<sup>105</sup> See *Ziegelheim v. Appollo*, 607 A.2d 1298, 1306 (N.J. 1992) (stating that an attorney's negligent delay in finalizing a settlement agreement may constitute malpractice).

Most retirement plans are governed by the Employee Retirement Income Security Act (ERISA).<sup>106</sup> ERISA applies to private, employer-sponsored retirement plans and limits benefit division and payout.<sup>107</sup> While ERISA generally prevents the assignment or alienation of retirement benefits, there is an exception allowing division pursuant to a decree of divorce.<sup>108</sup> Qualified domestic relations orders (QDROs) are state orders that actually direct retirement interests to be divided pursuant to a decree of divorce.

Without a QDRO, the retirement benefits will not be divided despite a decree of divorce that provides for their division. An attorney must prepare a QDRO within a specified period of time after the divorce is finalized, or the nonparticipant client may lose his or her share of the retirement assets. Thus, QDROs create a significant malpractice risk for those attorneys representing the nonparticipant spouse. Since the QDRO is most important to the nonparticipant spouse, it is also typically the nonparticipant's attorney that prepares the QDRO. To avoid the risk of malpractice, it is essential that attorneys immediately draw up a QDRO at the time a divorce is finalized. Waiting to draft a QDRO may cause the nonparticipant client to lose a significant part of, or potentially the entirety of, his or her rightful share.

There are two different types of retirement plans: defined contribution and defined benefit plans.<sup>109</sup> Defined contribution plans are those in which a certain amount of money is placed into an account which grows without being taxed until the money is withdrawn at retirement.<sup>110</sup> Defined contribution plans are relatively simple to divide because there is a defined pool of money and, thus, the QDRO can state exactly how much money is to be divided.<sup>111</sup> On the other hand, defined benefit plans provide a stream of monthly payments after retirement for a certain length

---

<sup>106</sup> See Gary Shulman, *QDROs—The Ticking Time Bomb*, 23 FAM. ADVOC. 4, 26 (Spring 2001).

<sup>107</sup> 29 U.S.C. §§ 1001-1003 (1974).

<sup>108</sup> Shulman, *supra* note 106, at 26.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*



of time.<sup>112</sup> These plans are trickier because there is no specific amount of money to be divided, and the QDRO must divide the stream of payments as opposed to a fixed account balance.<sup>113</sup>

When it comes to defined benefit plans, it can be disastrous to the nonparticipant spouse if the participant spouse dies or retires before the QDRO is completed. For example, if the participant spouse retires or dies before the QDRO is drafted then the nonparticipant spouse may never see the pension benefits awarded him or her in the decree of divorce.<sup>114</sup> If the participant spouse retires before the QDRO is drafted and selects a single life annuity pension and foregoes survivorship benefits, such a selection is irrevocable.<sup>115</sup> In this instance, the nonparticipant spouse will never receive survivorship benefits from the pension if the participant spouse dies first even though he or she had the right to receive such benefits. The same holds true if a participant spouse dies before the QDRO is drafted. It is too late in this case to elect a survivorship annuity for the nonparticipant spouse, and he or she will never be able to receive any portion of the retirement benefits because, without survivorship coverage, the pension terminates upon the death of the participant spouse.<sup>116</sup>

Even if the participant spouse is already retired at the time of divorce, it is still very important to draft the QDRO as soon as possible. Because retirement payments cannot be made retroactively, every check a retired participant spouse receives before the QDRO divides the payment is a retirement check the nonparticipant spouse loses.<sup>117</sup>

## V. Conclusion

The attorney-client relationship in family law practice is rather unique given the personal and emotional nature of family law disputes. Even financial issues in family law are tinged with strong personal feelings. The highly emotional nature of family law disputes can put an immense psychological burden on not

---

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 28.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 27.

<sup>117</sup> *Id.* at 26.

370 *Journal of the American Academy of Matrimonial Lawyers*

only clients but on attorneys as well. This burden may in turn cause communication between attorneys and clients to suffer and further impair attorney competency.

The breakdown in communication can increase the likelihood that family law attorneys violate ethical and professional conduct codes and the likelihood that attorneys commit malpractice. While the commission of ethical violations and malpractice are not synonymous, there can be significant overlap between the two, and the majority of courts will give at least some consideration to the existence of an ethical rule when establishing an attorney's duty of care in a malpractice case.

To counteract the ethical and malpractice risks unique to attorney-client relationships in family law, it is important that family law attorneys develop exceptionally good communication skills and be wary of the various places where ethical violations and malpractice most commonly arise. From the start of a family law case, attorneys must be careful to screen clients and manage client expectations. During the case, attorneys must be sure to maintain effective communication with clients, engage in diligent discovery of marital assets, properly advise clients, and perform work in a timely manner. Once the divorce is finalized, attorneys must remain diligent and make sure that any necessary documents, such as qualified domestic relations orders, are prepared timely and competently. Furthermore, when the issues get complicated, family law attorneys should not hesitate to utilize the expertise of other attorneys and experts where needed.