A FEW WORDS FROM THE EXPERTS:

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Maximize the quality of your work.
While no lawyer can completely eliminate legal malpractice suits, lawyers can take steps to minimize common legal malpractice claims. Surveys show that most legal malpractice claims stem from poor work or poor communication with the client. For this reason, an obvious first step is to do excellent work. Find ways to maximize the quality of your work: read advance sheets, allow sufficient time to research and prepare important documents, do not "over delegate" or "under prepare," and ask for assistance when needed.

Engage in meaningful communication.
Meaningful communication with your client goes hand in hand with an excellent work product. Set up systems which allow you to easily keep the client informed. Ask your assistant to forward routine correspondence or pleadings to your client. Send emails or correspondence to update your clients regularly (even if nothing is happening), and keep clients informed about the status of fees and costs. Invite questions and suggestions, and involve your client in decisions about the strategy and handling of the case. When a client makes a decision, be sure to memorialize it in writing to avoid misunderstandings. If you cannot return a call or email within a reasonable time, have your assistant let the client know that you will respond as soon as practical.

Send an engagement letter.
Other malpractice claims stem from issues that can be addressed in advance. At the beginning of any legal matter, make sure your engagement letter clearly sets forth the parameters of your representation to avoid misunderstandings. Clearly identify the client (and if necessary, who is NOT the client) and exactly what you are engaged to do. Specifically set out how your fee will be calculated and the likely costs. When the case concludes, send an "end of engagement" letter to avoid any misunderstanding about your future duties or any future conflict issues. If you decline a representation, immediately send a non-engagement letter to remove any argument that you owe the potential client any duties. When declining the matter, refrain from giving advice about the merits of the potential claim.

Manage conflicts throughout representation.
Throughout representation, constantly look for conflicts of interest. As witnesses are discovered, experts are named, and unexpected issues arise, new or previously unknown conflicts may surface. While virtually all lawyers have systems to check for conflicts at the beginning of a representation, many lawyers do not check for conflicts that may arise later. Make sure you actively manage conflicts until the case is over.

Safeguard funds.
Finally, money issues are often at the heart of malpractice claims. Educate your staff on handling client funds and have as many safeguards in place as practical. It is critical that your trust account be protected by a system of checks and balances that can be defended if later questioned. Never allow one person – no matter how trusted – to handle trust account funds without oversight or involvement by others.

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Write effective engagment letters.
Since we live in a world with constant and instantaneous communications, why do lawyers so frequently fail to send their clients effective engagement letters? In fact, studies show that in 85% of all legal malpractice claims, an effective engagement letter was not sent to the client, and that in 65% of the claims, no engagement letter was ever even drafted. This failure occurs despite the Model Rules of Professional Responsibility's strong recommendation (and oftentimes, requirement) that engagement letters be sent in all matters, and despite the fact that a good engagement letter often works to substantially limit an attorney's liability.

Additionally, poorly drafted engagement letters can operate to impose liability where none exists, thus leaving lawyers worse off than had no engagement letter been sent. Without certain basic elements in an engagement letter, an attorney is not only not protected from suit, but also can be harmed by the letter. At a minimum, an engagement letter should: (1) clearly identify the client, (2) contain a detailed description of the legal matter and the work to be performed, (3) recommend that the client obtain independent counsel before entering into an attorney/client relationship or signing the engagement letter, (4) disclose the fee structure and the arbitration provisions, and (5) explain required state-specific disclosures. Additionally, before services are provided, attorneys should require the client to sign the engagement letter, thus acknowledging in writing that its terms are understood and agreed to, and that the client had the right to consult with independent counsel before entering into the attorney/client relationship.

Clearly set out which matters you will and will not handle.
Equally as important as having a carefully crafted engagement letter is communicating with the client when you decide not to represent him or her, or when you decide to handle only part of the client's legal matter. Thus, if you are asked to represent an existing client in a new matter outside your expertise and you decide not to accept this representation, send a letter clearly setting out which matters you will not be handling, while making clear which matters you will continue to handle. For example, if you are retained to represent a homeowner whose home is in foreclosure and who seeks out your services to assist in a bankruptcy filing, the engagement letter should make very clear whether you will or will not be representing the client in the contemporaneous foreclosure action.

Document who is not the client.
Non-client liability is also a growing risk for attorneys. This is commonly seen in business transactions, such as formations of corporations or partnerships, private borrower-lender transactions, and real estate transactions. When the corporation or partnership fails, or the loan is in default, the risk that one of the parties will claim reliance on the represented party's attorney is real. In this case, it is suggested that at minimum a letter is sent with proof of receipt to the non-client advising that you are not representing him or her. Additionally, it is highly recommended that you have all parties sign a document showing who you are and are not representing. As added reinforcement, the documents that have been drafted by the attorney should identify who was represented by whom as well as list unrepresented parties to the business transaction.

Avoiding frivolous legal malpractice claims can sometimes be as simple as spending the time to draft a template for an engagement letter and customizing it as needed for every matter you handle. A long history of legal malpractice claims has shown that clear and effective engagement and disengagement letters often help avoid protracted litigation. If you and your firm are not presently following this practice, the time to start is now.

John Drath
Shareholder, Bishop, Barry and Drath

Listen to your inner voice.
We each possess an inner voice that lets us know when trouble is brewing. No matter how soft the voice is, we need to pay heed - because it is usually on the mark. A client with unrealistic expectations at the outset of a relationship is likely to hang on to those expectations throughout your representation. Other red flags include: (1) you will be replacing other, competent counsel; (2) there are third parties in the background whose advice may likely trump yours; and (3) there is inordinate wrangling over your fees and a retainer requirement. If you have your doubts, they are probably valid. Listen to that voice.

Communicate.
Failing to communicate got Paul Newman in trouble in Cool Hand Luke, and it gets lawyers in trouble as well. Not returning phone calls, not responding to emails and not adequately explaining matters are among the most common complaints. Communicate early, often and clearly.

Confirm
Giving good advice is only good if the client hears it, understands it and remembers it. Putting the advice in writing increases the likelihood of it reaching its mark, and eliminates the "he said – she said" debate in the event of a dispute. Written confirmation of all agreements reached or authorization conveyed will also reduce the likelihood of the client misunderstanding.

Be the bearer of bad news.
Is the client's case worth less than they thought or you had initially predicted? Has some damaging evidence been unearthed? Has an important witness turned out to be more harmful than helpful? Did an important motion not go your way? Our job as lawyers is to keep our clients fully and timely informed as to both the strengths and weaknesses of their matters, so that they can make informed decisions based on the advice given. Realistic evaluations and discussions should take place throughout the representation, not just before heading into a mediation or trial. In "settle and sue" cases, clients claim, that they felt pressured into accepting a settlement and that they thought they had no choice but to accept what was being proposed, even though it varied substantially from what they were led to expect.

Send detailed monthly bills.
The fact is a significant percentage of fee disputes turn into malpractice claims. Fee issues should be dealt with swiftly, as they arise. Clients should be billed monthly, and in detail, so the client can readily see what was done. Legal work is expensive, but if you have been regularly communicating, if the client has been involved in the process, if you have been confirming your discussions, and if you have been realistic in your assessment, a fee dispute is unlikely.