



WHEN  
IS A  
Mistake  
Malpractice?

BY KIRALYN J. LOCKE  
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**P**icture this: You walk into your living room on Sunday morning, ready for a peaceful transition into your week. You have your coffee in one hand and, a newspaper in the other. You toss your newspaper onto the couch and, as it is flying in mid-air, you realize you have made a mistake. You have tossed your coffee. (Note: This may or may not be a personal story. No further comments will be given.)

Everyone makes mistakes, even lawyers. We are not immune from missing emails or forgetting a scheduled meeting—or tossing a cup of coffee on the couch. But when does an action or failure to take action constitute legal malpractice? The answer to that question is (you guessed it): *it depends*.

Some mistakes will constitute legal malpractice. Others will not. This article will help demonstrate which mistakes may constitute legal malpractice and what to do if you think you have made a mistake.

### What is Legal Malpractice?

Attorneys have a duty to their clients to exercise that degree of care and skill that is reasonable under the circumstances, considering the nature of the undertaking. A client might assert a legal malpractice claim or commence an action against their attorney if they believe the attorney's conduct fell below the proper standard of care and caused the client damages. The attorney could have made a mistake in taking or not taking action.

### What is Required to Prove Legal Malpractice?

Demonstrating that a lawyer made a mistake is not enough to establish legal malpractice. Traditionally, to succeed on a claim of legal malpractice, a plaintiff must establish the following elements: (1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts were the proximate cause of the plaintiff's damages; and (4) that but for defendant's conduct, the

plaintiff would have been successful in the prosecution or defense of the action. The elements that a legal malpractice plaintiff must establish may vary depending on the type of underlying case and nature of the plaintiff's claims against the attorney. Expert testimony is generally required to establish the applicable standard of care and whether the attorney deviated from that standard.

The big takeaway from this is that even if a lawyer makes a mistake that falls below the standard of care, if the mistake does not cause the client harm, or if the mistake would not have adversely affected the outcome of the matter, the necessary elements of legal malpractice are lacking.

### Common Examples of Legal Malpractice

There is a seemingly never-ending list of legal mistakes that may constitute legal malpractice. There are many times where there are acts or failures that may violate the Minnesota Rules of Professional Conduct but do not amount to malpractice. It depends on the facts and circumstances of each case.

Common legal malpractice claims arise from an attorney missing a crucial deadline. If an attorney fails to timely serve an answer and this results in a judgment against the client, the attorney may face exposure for malpractice if the client can establish that they had meritorious defenses. If an attorney fails to file a timely appeal, the attorney may face exposure for malpractice if the client can demonstrate they would have likely succeeded on appeal.

Legal malpractice claims also commonly arise from situations that are not

deadline driven. If an attorney settles a case without client consent or without adequately explaining the terms of settlement, the attorney may face exposure for malpractice if the client can demonstrate they would have succeeded at trial.

There are many examples of conduct that might form the basis for a legal malpractice claim. In each instance, the facts and circumstances of the particular case must be analyzed.

### You Made a Mistake. Now What?

If you think you have made a mistake that could rise to the level of legal malpractice, do not panic. There are a number of things you can do to put yourself in a position to protect yourself and your client.

If the mistake can be fixed, take the proper steps to fix the mistake. For example, let's pretend you prepare a summons and complaint and mail it to the opposing party. You later realize that you forgot to formally serve the pleadings on the opposing party. If you are still within the statute of limitations to serve the complaint, do it. Mistakes like this can be rectified and it is unlikely that your client will suffer damages as a result.

On the other hand, there are situations where a mistake may be irreparable. Let's keep going with the example where you prepared a summons and complaint. You now properly serve the

defendant. However, you forget to add a second defendant to the complaint and fail to serve this desired defendant before the statute of limitations expires.

What do you do?

Reach out to your legal malpractice insurance carrier. Many insurance carriers will provide you with a defense attorney to help you navigate the situation—even when the client has not yet made a legal malpractice claim or commenced an action. An experienced defense attorney can help repair errors before a claim is asserted. Early resolution provides

great relief, particularly in light of the six-year statute of limitations for legal malpractice claims.

At the end of the day, do not sit on your mistakes. Fix them as you are able to, communicating with your client so they are aware of potential issues that might impact their case. And when in doubt, reach out.

### Conclusion

Mistakes happen. Although all mistakes will not constitute legal malpractice, it is important to recognize when they might. If you have made a mistake, be sure to utilize all resources available to you, whether that be your legal malpractice insurer, outside counsel, or—if the mistake is spilling coffee on your couch—a damp paper towel.

**DO NOT SIT ON YOUR MISTAKES. FIX THEM AS YOU ARE ABLE TO, COMMUNICATING WITH YOUR CLIENT SO THEY ARE AWARE OF POTENTIAL ISSUES THAT MIGHT IMPACT THEIR CASE.**

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