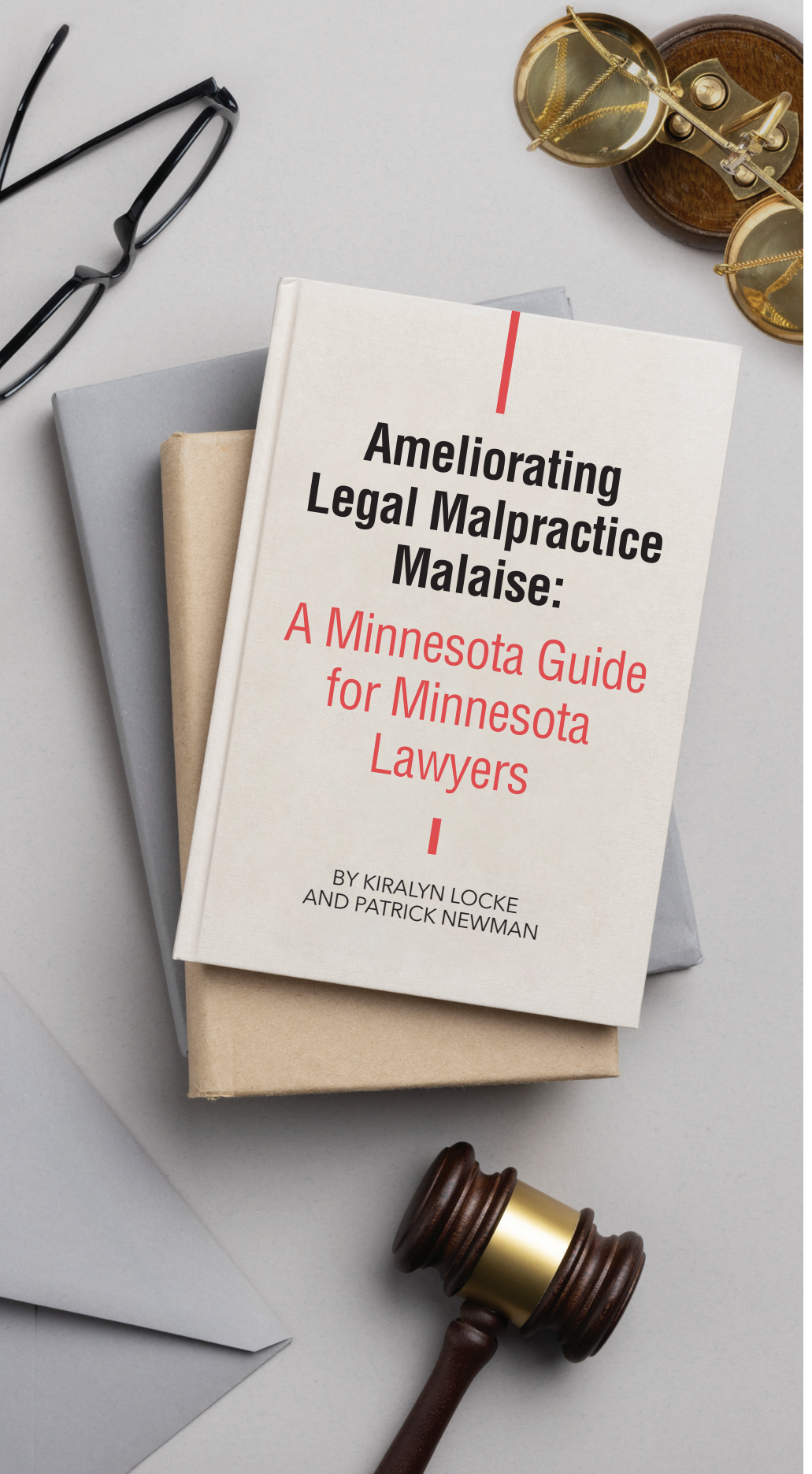


What is one thing Minnesotans love more than Caribou Coffee and a good hotdish? The Minnesota State Fair, dontcha know. As summer comes to an end, the Minnesota State Fair begins. And that means it is time to indulge in our favorite deep-fried foods that are impaled on a stick and sold for a terrifying amount of money. Is there anything more frightening than your bill at the end of a long day at the Minnesota State Fair? Yes – being sued for legal malpractice (which typically causes just as much indigestion as fair food).

Though modern America is a litigious society—and this audience is mostly comprised of lawyers who understand that all too well—we as a profession are not often faced with legal malpractice claims (or at least that is the hope). And if we do get that unfortunate notice of claim (or service of a summons and complaint!), that event typically comes around far less often than the Fair. (Again, here's hoping, anyway.)

As a result, most lawyers don't maintain a protocol for that unfortunate event. But as the ages-old legal truism goes, "There's never a problem until there is one." Indeed, the statute of limitations for a legal malpractice claim is six years, which can make these claims feel as though they appeared out of nowhere. As a result, you *should* think about a "game plan" in the event the unthinkable does happen, even years after the fact.

Happily, that's the purpose of this article. Of course, our thoughts are no substitute for legal advice, but we do outline some considerations for steeling yourself and your practice against a malpractice claim.

One more "table setting" note: much like fair food, legal malpractice claims come in all

different shapes and sizes. The most common claims relate to missed deadlines, failure to follow client direction, and failure to dedicate an appropriate amount of time (and responsiveness) to a file. The specifics of the particular claim should guide your strategy—the "protocol" outlined below is for illustrative purposes only, counsel.

STEP 1 Put on a Different Hat

Lawyers wear many, many "hats." They can include the "parent" hat; the "spouse" hat; the "managing partner" hat; the "overworked-associate" hat; and even the "gosh-I-never-anticipated-clients-being-quite-this-difficult" hat. But there's one we *all* wear: the "I'm-an-attorney-who-advocates-for-and-counsels-and-represents-clients" hat. That is, we're all accustomed to being the one developing the strategy, giving the advice, and diving headlong into the fray (whether it be a deal or dispute).

Thus (fair warning incoming), this next bit is going to feel uncomfortable for most of you.

When a lawyer is sued for legal malpractice, the first thing they should do is remove their "lawyer" hat and put on the "client" hat. For several reasons. First and foremost, it's virtually never advisable for a lawyer to represent themself in a lawsuit, no matter the issue or the stakes. They are simply too close to the situation to be objective.

This is *especially* true in a legal malpractice claim, where a lawyer's integrity and skill are being attacked. Plus, Rule 3.7 of the Minnesota Rules of Professional Conduct prevents a lawyer from acting as a witness and an attorney in the same matter. Rule 3.7, MRPC. So, you couldn't do it even if you wanted to (for some ill-advised reason).

So, brace yourself for this change of hats. The sooner you perform this wardrobe change, the better for you, your counsel, and your insurance carrier.

STEP 2 Notify Your Carrier and Obtain Counsel

Speaking of insurance (you have insurance, right?!?), your first order of business after emerging from the hat room is to immediately contact your insurance carrier about the claim. While malpractice policies vary widely, most will typically provide a lawyer-defendant with a defense attorney to navigate the legal malpractice claim. This is the exact purpose of legal malpractice insurance – *use it.*

And don't delay too long getting your client hat on just right—time is of the essence. Many policies require lawyers to notify the insurance carrier in the event a legal malpractice claim has been alleged or is even foreseeable. Consult your policy to understand what is required of you in this situation.

Because Minnesota does not require lawyers to have legal malpractice insurance, there are uninsured lawyers who may be sued for malpractice. In those cases, even though a lawyer-defendant may not have an insurance policy to cover the cost of a defense attorney, the lawyer-defendant should still seek counsel from a defense attorney. (See Step 1 above, folks.)

Having a defense attorney is invaluable for all the same reasons you tell your clients to hire you: they'll know the terrain and the players; will have seen many more malpractices claims than you (presumably); and will have effective strategies for extricating you from the situation as efficiently and effectively as possible. From a mental health perspective, which should never be discounted, having someone on your side who is familiar with the process can take away a lot of the stress surrounding an already stressful situation.

STEP 3 Then Actually Let Your Defense Attorney Do Their Job

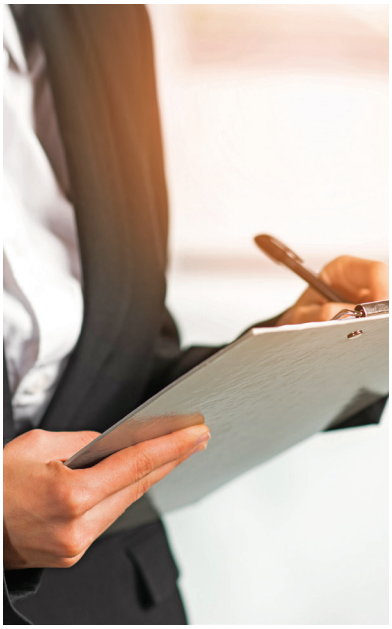
Remember, you are wearing your "client" hat now. It is time to let your defense attorney do their job.

THE MOST COMMON CLAIMS RELATE TO MISSED DEADLINES, FAILURE TO FOLLOW CLIENT DIRECTION, AND FAILURE TO DEDICATE AN APPROPRIATE AMOUNT OF TIME (AND RESPONSIVENESS) TO A FILE.

Unresponsive clients are just the worst. Don't be that client. Be responsive to your defense attorney and provide them with whatever documentation and information they may need. Typically, this will include your relevant representation agreement, any communications with whoever is suing you, or anything else your defense attorney deems relevant – even if the information is considered privileged. (Under Rule 1.6 of the Minnesota Rules of Professional Conduct, a lawyer is permitted to disclose otherwise confidential information if it is necessary to establish a defense in a dispute with their client.)

Be sure that you've instituted a "litigation hold" over all the information even vaguely touching on your representation in the underlying matter. Do everything you can to provide your counsel and carrier with a "Fully Baked Batch of Martha's Cookies" at the start of the defense. Don't provide the information to your counsel in dribs and drabs, if you can help it.

Also take pains to not provide any "gloss" to the facts when presenting them to your counsel. That's going to be difficult, because you are professionally trained to take facts and present them in the best light for your client. But that is at odds with your "client" hat. It's absolutely mission-critical that you give your defense counsel the good, the



NO ONE WANTS TO BE ON THE RECEIVING END OF A LEGAL MALPRACTICE COMPLAINT. BUT IT HAPPENS–EVEN TO REALLY, REALLY GOOD LAWYERS. NATURE OF THE GAME, PLAYER. AND IF IT HAPPENS, THE WORLD–AND MORE SPECIFICALLY, YOUR PRACTICE–DOES NOT STOP.

bad and the ugly, free from editorial, commentary or legal theorizing. The sooner you can make that uncomfortable "hat" adjustment, the better for all involved (especially *you*).

Finally, be reasonable in your expectations. We've all had clients in very tough situations who are wholly unwilling to accept that their counterparty isn't going to accept all the demanded concessions, that their claim might not actually make it to the jury, or that the plea deal is going to include prison time. No one can blame them—there is real existential shock at the potentially lifechanging consequences that come along with being a party to high-stakes deals and disputes, especially when the facts dictate that the outcome won't be "pretty." But, dear reader, please do your best to rise above that and trust that your counsel is paving the very best "offramp" from your situation as possible under the circumstances.

STEP 4 Trust the Process

Stop us if you've heard this before, but an experienced defense attorney will work with you to protect your interests (including your license!) and develop a strategy for how to defeat the claim or resolve it on the very best terms possible under the circumstances. This includes potential procedural defenses that defeat the malpractice claim as well.

For example, Minnesota, like many other states, has an expert affidavit requirement for complaints that assert claims of legal malpractice. Under Minnesota Statute § 544.42, a complaint for legal malpractice must be accompanied by an affidavit of an "expert," stating they believe there is a good faith basis for the claim.

If a plaintiff does not include an expert affidavit with their legal malpractice complaint, an experienced defense attorney will immediately demand plaintiff's compliance with Minn. Stat. § 544.42 If the plaintiff does not produce the required affidavit within 60 days of being notified of noncompliance, the statute requires ***mandatory dismissal with prejudice.*** While this may seem like a harsh penalty, it is an inflexible standard that is repeatedly upheld by Minnesota Courts – even for *pro se* plaintiffs.

An experienced Minnesota legal malpractice defense lawyer will be aware of this, and other, defense strategies available. Trust that they're "flexing" that legal muscle in your favor, with an eye toward concluding the "process" as promptly as possible.

Conclusion

No one wants to be on the receiving end of a legal malpractice complaint. But it happens—even to *really, really good* lawyers. Nature of the game, player. And if it happens, the world—and more specifically, your practice—does not stop. By following the guidance in this article, and by allowing a defense attorney to take on the burden of managing the situation, you will have more time to dedicate to what really matters: advising your clients, advocating for your clients, and yes, even going to the state fair.

If you catch a claim, remember:

- **Step 1:** Put on your "client" hat.
- **Step 2:** Contact your insurance carrier and secure counsel.
- **Step 3:** Let your defense attorney do their job.
- **Step 4:** Breathe. Trust the process.

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