

# Legal Malpractice

YOU CAN HELP AVOID IT

by David Lefkowitz

Everybody needs a lawyer at some point, and everyone hates a lawyer at some point. People get angry at doctors, construction contractors and car salesmen, but you won't find entire books dedicated to jokes about those folks. When it comes to lawyers, however, you can buy: *500 Great Lawyer Jokes*, *The Best Lawyer Jokes*, *The Best Lawyer Jokes Ever* and *The Best Lawyer Jokes of All Time*.

While there are, indeed, some bad lawyers, I genuinely feel that the percentage of "bad apples" in the legal field is no higher than the percentage among doctors, architects, accountants, teachers, etc. Maybe the lawyer jokes/bashing is due to the fact that when a mistake is made, it can cause dire consequences. Or, maybe the jokes are due to the fact that so many politicians are lawyers. Whatever the cause of the negative sentiment towards lawyers, the fact is, that the overwhelming percentage of lawyers who are practicing in Georgia and elsewhere, are caring, smart and responsible. That, however, does not mean they can't make mistakes.

I am often asked about legal errors, because I spend much of my time suing the lawyers who make those errors. The question

I hear most often is: "What is a typical error that a lawyer makes?" Since many people will need to hire a lawyer to handle a will, a divorce, or some other matter, it can never hurt to be aware of the most common errors that occur in various areas of the law. Let's cover a few of these.

*Personal Injury cases:* The most typical error is a missed deadline. In Georgia, you generally have two years from the date of the injury to file suit against the person who hurt you. The lawyer also has to get the defendant personally served with the lawsuit. (The county sheriff often handles this.) It is not very common for a lawyer to miss the two-year deadline, but what is all-too-common is for the lawyer to fail to get the defendant served with the lawsuit within those two years. If the lawsuit is filed at the very last moment, you are allowed five extra days to serve the defendant. For reasons that are not quite clear, lawyers often like to do things at the last minute. Filing a lawsuit right at the deadline is risky, because so many things can go wrong at precisely the same time, leaving very little margin for error. If you have a lawyer handling a personal injury case, I encourage you to keep track of deadlines, and send gentle reminders to the lawyer about the

deadline. Caveat: Some injury claims (workers' compensation, for instance) have shorter filing deadlines than two years. Other injury cases, such as those against a city or county, have short deadlines within which you must put the governmental entity on notice of the claim. If that deadline is missed, the case is lost. Hire a lawyer as soon as possible after an injury so that you can be sure that all deadlines are met.

*Divorces:* The errors that are most likely to lead to a legal malpractice case are (a) the failure to identify the assets of the marriage and (b) the failure to ensure that the proper spouse ends up with the assets that have been identified. The problem often arises in the context of retirement assets. A retirement account, such as a pension, is often in the name of one spouse. However, that retirement account may very well be an asset of the marriage that is subject to a fair division, particularly if one spouse did not have a job outside the house, spent her time raising the kids and did not have a retirement account in her name. Once the attorney identifies the retirement accounts, the work is only half complete. A divorce decree that divides the retirement account is not binding on the company that provides the pension.

Instead, the divorce court must issue a separate order (usually called a Qualified Domestic Relations Order) which instructs the company to segregate the accounts and put each spouse's portion in his or her name. Retirement accounts often cannot be liquidated immediately, so it is important that the legal title to the retirement account be clear. It is amazing how many divorce lawyers fail to handle this part of their job. If you are involved in a divorce (or recently have been) and retirement assets are being divided, be sure to discuss these issues with your attorney.

*Drafting a will:* Let me begin by saying this: You need a will. Even if you don't have much money, you really need a will. It allows you to direct how your assets are divided, how your remains will be handled, and it takes a lot of pressure off your surviving family members. Assuming you have decided to hire an attorney to draft a will, be sure that the attorney you hire is a specialist in that area of the law. You really do not want your next-door neighbor who specializes in bankruptcy law to spend an evening drafting your will. In terms of the errors that can be made when drafting a will, the most significant, when it comes to a potential malpractice claim, is the handling of a trust. Many wills contain trusts, which allow money to be provided for the benefit of one person, but in the control of another person (with the goal usually being tax avoidance). It would take a week

to explain the minutiae of trusts within wills; suffice it to say that if you have a net worth which justifies the creation of a trust, then you absolutely must hire someone who is capable of drafting the document correctly. Particularly significant tax ramifications can come into play if your estate is worth more than \$5,000,000. If you have an estate that size, yet you won't pony up and pay for a good lawyer to draft your will, then you can't complain (not that you could, from the grave) that your money went to the government rather than to your family.

*Buying a home:* When you are buying a home, there is always a lawyer at the closing table. She hands you documents, and you sign them as quickly as you can. As you sign them, you say to yourself, "I really should be reading these documents." Well, you are right, but then again, virtually no one has the time to read 50 documents at a real estate closing. But, you can ask the lawyer questions and be assured of receiving a reliable answer, right? The answer is no. Actually, this is a trick question. When you are buying a house and getting a mortgage, the lawyer at the table is almost never representing you; the lawyer represents the bank that is providing the mortgage. One of the documents you signed but did not read, said that you understood that the attorney handling the transaction was not representing you. Most people do not have their own attorney involved in the purchase of a home. But, if you do want an at-

torney to review the sales contract or to give you any other advice, you need to hire your own lawyer, because the one at the closing probably doesn't represent you. And, if she doesn't represent you, then you can't sue her for any bad advice she may have given you at the closing.



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