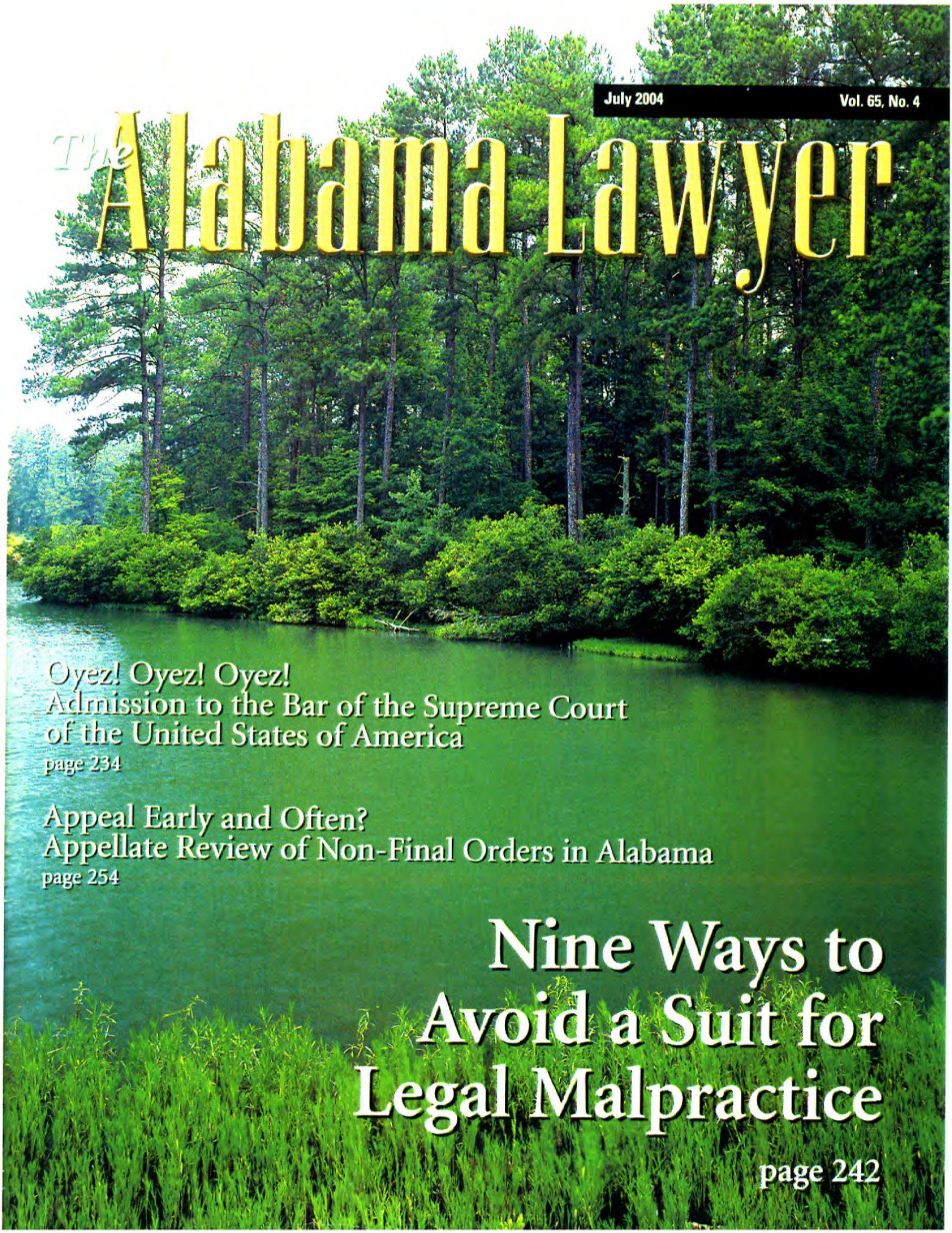
July 2004 Vol. 65, No. 4

# The Alabama Lawyer



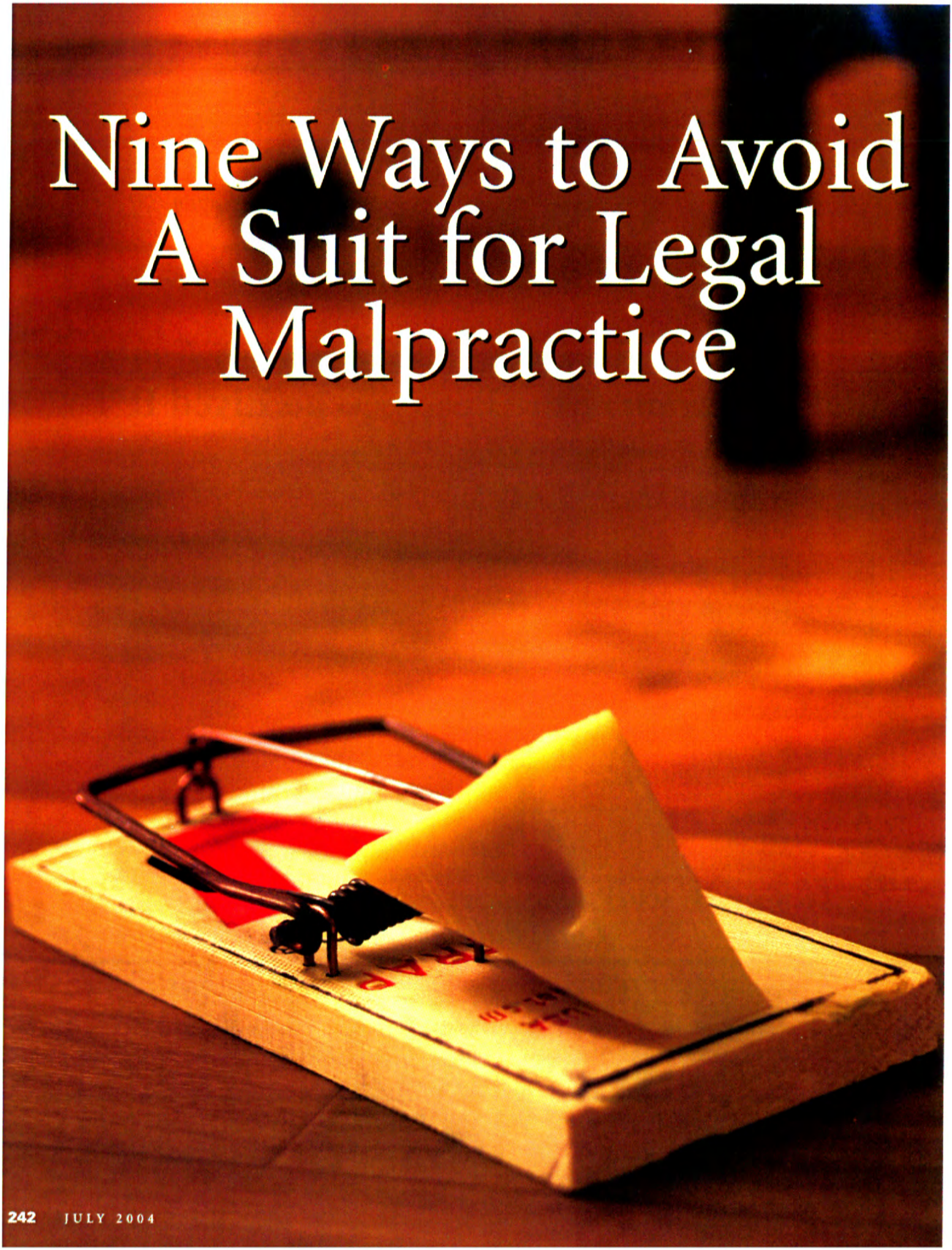
Oyez! Oyez! Oyez!
Admission to the Bar of the Supreme Court of the United States of America
page 234

Appeal Early and Often?
Appellate Review of Non-Final Orders in Alabama
page 254

## Nine Ways to Avoid a Suit for Legal Malpractice

page 242

# Nine Ways to Avoid A Suit for Legal Malpractice



BY W. MICHAEL ATCHISON AND ROBERT P. MACKENZIE, III

On April 12, 1988, the Alabama legislature enacted the Alabama Legal Services Liability Act ("ALSLA") to remedy a growing crisis in the delivery of legal services, and provide attorneys with protection similar to what is offered to physicians under the Alabama Medical Liability Act. See, "The Professional Liability of Attorneys in Alabama," 30 *Cumb. L. Rev.* (1999-2000). Despite its intent, the ALSLA has failed to reduce the number of legal malpractice suits. While every attorney is potentially subject to a claim of malpractice, careful handling of a client's matter can reduce one's exposure. The following factors should be recognized as potential causes of suits, and steps available to address them.

## 1 Conflict of Interest

There is perhaps no more compelling reason for a legal malpractice suit than when the attorney's actions prejudice the client's position. The duty owed to a client is to provide reasonable legal services. *Ala. Code* § 6-5-572(3)(a) (1975). From the onset of any attorney-client relationship, an attorney should not perform any service which will adversely affect the client. *Alabama Rules of Professional Conduct* (ARPC) 1.7 and 1.8. Foremost to resolving a conflict of interest is to first acknowledge the attorney's duty under the ALSLA is to the client only. *Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002). Careful attention must be given any time there are multiple clients, and whether the representation of one will affect the interest of another. In suits involving more than one client, such as a principal and agent, an employer and employee, or a partnership and a partner, a decision must be made whether separate representation is required. In *Leighton Avenue Office Plaza, Ltd. v. Campbell*, 584 So. 2d 1340 (Ala. 1991), limited partners brought suit against the partnership, other limited partners and the partnership's attorney over disputed ownership of an office building. Among the issues was the duty owed by the attorney to the various parties interested in the business venture. Portions of the complaint were eventually dismissed based upon the statute of limitations but other claims survived.

In the event an attorney represents more than one client, it is highly recommended that the clients sign an acknowledgment consenting to the multiple representations. The acknowledgment should reflect the clients' understanding of all existing conflicts, and that continued representation of multiple parties nevertheless is acceptable. The clients should be told to promptly inform the attorney if a conflict arises in the future. *ARPC* 1.7(b)(2). Even if separate representation is provided, an attorney's conflict may not be sufficiently resolved if information already obtained by the attorney prejudices the former client. In those situations where the conflict cannot be resolved even with separate attorneys, the original attorney should withdraw. *ARPC* 1.9; See also *Goldthwaite v. Disciplinary Board of the Alabama State Bar*, 408 So. 2d 504 (Ala. 1982). Otherwise, a former client wishing to disqualify a lawyer need only show that the matter involved in the pending case is substantially related to the matter of prior representation. *Ex parte State Farm Mutual Auto Ins. Co.*, 469 So. 2d 574 (Ala. 1985).

In addition to the representation of multiple parties, a conflict may arise out of the subject matter at issue. *ARPC* 1.8.

An attorney must be extremely cautious when the attorney and client become involved in a joint business transaction. In *Ex parte Seabol*, 782 So. 2d 212 (Ala. 2000), the client brought suit against his former lawyer for legal malpractice and fraud as a result of the attorney's purchase of client-owned property. The client contended he sold the property to the lawyer at an unreasonably low price. The Supreme Court of Alabama refused to dismiss the claim based upon the statute of limitations. *Haston v. Crowson*, 808 So. 2d 17 (Ala. 2001), speaks to a client's claim against her former attorney for negotiating the sale of a newspaper owned by the client where the lawyer failed to disclose his financial involvement with the purchaser. Summary judgment was entered for the attorney upon a showing that after the plaintiff discovered the attorney's interest, the client had the opportunity to stop the sale but failed to do so.

The opportunity for a conflict arises when a lawyer is alleged to have received an extraordinary benefit from the client, or has a relationship with one client to the exclusion of another. In *Peterson v. Anderson*, 719 So. 2d 216 (Ala.Civ.App. 1997), third-party beneficiaries to a will brought suit against the attorney who drafted the will and was a prime beneficiary. The case was ultimately dismissed when the court held the plaintiffs had no standing to bring suit. Likewise, a conflict may arise where there is a contention the attorney is biased in favor of one client. In *Kuhlman v. Keith*, 409 So. 2d 804 (Ala. 1982), the plaintiff lost custody of her children after signing a consent agreement drafted by her ex-husband's father who happened to be a lawyer. The case was ultimately dismissed because the plaintiff could not demonstrate she relied upon any act by the attorney, or that the outcome would have been different but for the lawyer's actions.

The potential for personal and transactional conflicts should be closely examined. In those situations, the clients must be well informed of the right to separate counsel. The individual client's permission for continued representation should be documented. To minimize the chance for a conflict claim, the transactional documents should be drafted by independent counsel. *ARPC* 1.8(a)(2).

***To avoid a misunderstanding as to the scope of representation, an engagement letter should be sent at the very beginning of the attorney-client relationship.***

## 2 Scope of Representation

The attorney and client should have a clear understanding as to who is to be the client and the scope of the representation. (*ARPC* 1.2). In *Sessions v. Espy & Metcalf, P.C.*, 854 So. 2d 515 (Ala. 2002), the attorney was retained in a commercial dispute arising out of the purchase of a business. The plaintiffs later brought suit alleging the attorney had agreed to represent them in an individual capacity in addition to the corporation in which they had a vested interest. On appeal, the summary judgment was reversed given there were disputed facts concerning the scope of representation. *Sampson v. Cansler*, 726 So. 2d 632 (Ala. 1998), also involves an attorney's agreement to represent a client in a limited fashion. After being sued for personal injury arising out of an automobile accident, the client sought representation from the attorney. The lawyer did not enter an appearance, but agreed only to contact the client's insurance carrier and to advise the plaintiff's attorney of the insurance coverage. The personal injury action proceeded and a default judgment was taken against the client. The plaintiff simultaneously appealed the default judgment and brought a separate claim for legal malpractice. Thereafter, the default judgment was fortunately set aside which allowed the legal malpractice suit to be resolved.

To avoid a misunderstanding as to the scope of representation, an engagement letter should be sent at the very beginning of the attorney-client relationship. The letter should set forth the identity of every client, provision of services to be rendered, and the fee arrangement. If representation is declined, a letter should be provided to the potential client outlining the reasons why the matter cannot be accepted and describe in layman's terms, any statutory time problems with the filing of the claim. If termination of the attorney-client relationship occurs after the client's receipt of legal services, any unused retainer should be returned along with an itemization of the work performed. As described in *Alabama State Bar v. Chandler*, 611 So. 2d 1046 (Ala. 1992), the failure to promptly refund any money due the client may lead to a complaint and bar investigation. A closing letter should be delivered after the case has been resolved. This letter will confirm all matters have been completed, including payment of legal fees, and that the client has no expectation for further legal services.

***Attorneys should be mindful that while their duty remains only to the client, there is, nevertheless, exposure to suits from dissatisfied non-clients.***

## 3 Responsibility to Third Parties

The performance of legal services may have an impact on third parties who are not clients. In those situations where there is a third party, the attorney's duty under the ALSLA remains only to the client. *Shows v. NCNB National Bank of North Carolina*, 585 So. 2d 880 (Ala. 1991). There is no duty owed by the attorney under the ALSLA to those parties whose interests are in conflict with the client. *Carraway Methodist Medical Center, Inc. v. American Indemnity Company*, 642 So. 2d 973 (Ala. 1994). However, careful attention should be given to third parties who have a contractual right to the client's share. *Birmingham News v. Chamblee & Harris*, 617 So. 2d 689 (Ala. Civ. App. 1993). The duty to be a zealous advocate, however, does not bestow the right to ignore standards of civility. Further, the mere fact that ALSLA does not provide a forum for a third-party action does not make attorneys immune to suits by non-clients. In *Kinney v. Williams*, Ala. Sup. Ct. 1020412 (Dec. 30, 2003), the court determined the plaintiff had standing to bring a claim for fraud given the plaintiff was a third-party beneficiary of the attorney's advice.

The dissatisfaction by a non-client who was beneficiary of a will led to a suit against the attorney who had drafted the will. In *Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002), the attorney had been instructed by the decedent/client to make certain changes to a will, including, at one point, instructions to destroy it. When the will was not destroyed and the client died, the proceeds of her estate were divided in a manner disagreeable to the plaintiff. The suit for legal malpractice was dismissed as the lawyer's duty had been to the maker of the will, not the beneficiary.

Attorneys must be specifically aware of their vulnerability to claims brought by third parties whose interests are adverse to the client. In *Dickinson v. Echols*, 578 So. 2d 1257 (Ala. 1991), a physician was sued for medical malpractice. After the trial court had granted a judgment as a matter of law in the underlying medical malpractice suit, the doctor sued the plaintiff's lawyer for malicious prosecution. The Alabama Supreme Court affirmed a summary judgment because the plaintiff had not satisfied the elements of malicious prosecution. In *Walker v. Windom*, 612 So. 2d 1167 (Ala. 1992), the attorney and his law firm represented a bank in a collection action over a credit card dispute. Suit was filed and in response, a counterclaim made against the attorney. Summary judgment was affirmed.

How the reasonable representation of a client can lead to suit by a non-client was examined in the companion cases of *Averette v. Fields*, No. 1992171 (Ala. May 18, 2001) and *Morrow v. Gibson*, 827 So. 2d 756 (Ala. 2002). The supreme court reaffirmed an attorney owed no duty to a non-client. The supreme court, however, did not fully address the issue of whether a claim brought by a non-client against an attorney arising out of the performance of legal services is subject to the ALSLA. Where a non-client's position is affected by the performance of legal services, and suit is filed, the ALSLA should control. Such application is consistent with the statutory language of *Ala. Code* § 6-5-570 (1975). Attorneys should be mindful that while their duty remains only to the client, there is, nevertheless, exposure to suits from dissatisfied non-clients.

## 4 Failure to Communicate and Document

Clients are entitled to be adequately and timely informed about their case. *ARPC* 1.4. Uncertainty by the client may lead to dissatisfaction. A bad outcome is made even worse if it is a surprise. Whether the cause is the attorney's workload or simply inattention, the results can threaten the attorney/client relationship. In *Thompson v. D.C. America, Inc.*, 951 F.Supp. 182 (M.D. Ala. 1996), the client moved to set aside a settlement agreement reached by her attorney, whom she later fired. As part of her argument that she should not have been bound to the agreement, the client contended she had been unable to communicate with the former attorney. The court refused to set aside the settlement.

Communication does not have to be overbearing as certain cases are slow-paced, and sometimes there is little to report over a period of months. The client, however, needs to be apprised of the litigation process and understand that the absence of a report does not mean the case does not have the attorney's attention. The client should be informed well in advance of events which could substantially affect the course of action. A Web site, form letters or e-mails sent out in mass should be avoided, and are no substitute for a direct, personalized communication from the attorney to client. It should be remembered that the goal of communication is to advise and share information with the client.

Through communication, clients are able to evaluate and choose their options. Clients, particularly those knowledgeable about the legal process, should be actively involved in all aspects of making decisions. While attorneys are retained for their advice and skill, the ultimate determination regarding the resolution of a legal matter remains with the client. An informed client makes the best decisions. Failure to communicate has been the basis for numerous malpractice suits. In *Jones v. Blanton*, 644 So. 2d 882 (Ala. 1994), a client brought suit against her lawyer after settlement of a will contest. The plaintiff alleged the settlement was entered without her permission. Summary judgment was granted when the court determined the plaintiff was not the real party in interest. The Supreme Court of Alabama noted that while the plaintiff disputed the settlement, she nevertheless was present during the court proceeding where the settlement was discussed and the plaintiff offered no objection. In *Ex parte Panell*, 756 So. 2d 862 (Ala. 1999), the client contended he instructed his attorney to file a suit which was delayed for unknown reasons. The client was then sued and the attorney instructed to file a counterclaim. Instead, the attorney negotiated a settlement which required the client to execute warranty deeds conveying his interest in the real property. Despite the affirmative act of executing the deeds, the client asserted the attorney never had permission to affect the settlement. The suit was ultimately dismissed for failure to comply with the statute of limitations.

Documentation is needed where the client fails to follow the attorney's advice or does not disclose all relevant information. The Alabama Supreme Court has recognized that an attorney may assert contributory negligence as an affirmative defense. *Ott v. Smith*, 413 So. 2d 1129 (Ala. 1982). The court has also determined assumption of the risk is a viable defense. *Simpson v. Coosa Valley Prod. Credit Assn.*, 495 So. 2d 1029 (Ala. 1986). Obviously, a documented file will support the attorney's effort to prove the client was adequately informed.

With reasonable communication, the client is able to make informed decisions, and is not placed in the position of simply responding to an unfortunate result. If the client is knowledgeable about the decisions, the client will be more knowledgeable about the risks. Given this position, the client will recognize that all options were explained, understood and informed decisions made.

5

## Failure to Act

The client expects an attorney to perform in a prompt and efficient manner and with proper attention to each individual case. At the beginning of the case, the attorney and client should set forth a plan of action. The plan should include the client's desire to resolve the dispute by settlement or trial and the amount of time and money to be invested. The plan should be reviewed and modified as needed. The failure to have a reasonable and properly executed plan has resulted in disciplinary action and the filing of suits for various reasons. The Alabama Supreme Court has affirmed sanctions against an attorney for "an unmanageable case load" which prevented the delivery of quality legal services. *Davis v. Alabama*

*State Bar*, 676 So. 2d 306 (Ala. 1996). The court cited, as an example, associate attorneys having the responsibility for 600 active cases.

In civil actions, a claim has been made for an lawyer's alleged failure to properly investigate or to diligently pursue the express wishes of a client. *McDuffie v. Brinkley, Ford, Chestnut & Alldridge*, 576 So. 2d 198 (Ala. 1991). A suit was filed in *Cribbs v. Shotts*, 599 So. 2d 17 (Ala. 1992) for the attorney's failure to attend a condemnation hearing where the plaintiff's property was allegedly given a low appraisal by the trial court. In another action, suit was brought for the law firm's alleged failure to properly handle a bankruptcy matter. *Independent Stave Co., Inc. v. Bell, Richardson & Sparkman*, P.A., 678 So. 2d 770 (Ala. 1996). In *Green v. Nemish*, 652 So. 2d 243 (Ala. 1994), the plaintiff argued the attorney failed to contact witnesses, timely file a motion to illegally suppress seized evidence and conduct a pretrial investigation. Likewise, in *Adams v. Erben*, 681 So. 2d 594 (Ala. 1996), the plaintiff contended he was provided ineffective counsel and, as a result, was sentenced to prison. Notably, in all these cases, the alleged failure was determined not to have caused any damage to the plaintiff and summary judgment was granted.

The failure to act on behalf of the client should never be the result of improper influence by third parties. The most compelling examples are guidelines submitted by insurance carriers to a defense attorney outlining the litigation and discovery process. Similar guidelines have been determined by the Alabama State Bar to conflict with an attorney's duty to the client. "Third-Party Auditing of Lawyer's Billings—Confidentiality Problems and Interference With Representation," *The Alabama Lawyer* (January 1995). Such guidelines can interfere with the attorney's representation of a client by imposing measures which are too restrictive.

A well thought-out plan of action is one with joint input by the client and attorney. Both the client and attorney should have realistic expectations about when and how the plan should be implemented. The client shares the responsibility to provide sufficient information so that the plan may be initiated and followed. The attorney has the responsibility to assure he/she has the capability to enact the plan. If there are occasions where there is a failure to act either by the client or the attorney, prompt attention needs to be given to the omission. There needs to be a sound relationship upon which both the client and attorney can discuss such failures and the best means for remedy.



## 6 Compliance With Statutory Time Limitations and Court Orders

The best lawsuit or most crucial appeal may never be heard if statutory time limitations are not met. Every attorney should have a diary system with a suitable backup. Often, the failure to comply is simply the result of a miscalculation. In order to avoid missing a statutory deadline, one should not wait until the last day to file a pleading. Too often, uncertainties or unexpected consequences can prevent the timely filing of a document with the court.

The failure to timely file an appeal was the subject in *Childers v. Jewell*, 677 So. 2d 232 (Ala.Civ.App. 1995). Following a criminal conviction, the attorney filed a notice of appeal which was dismissed as being untimely but then subsequently reinstated. The attorney was fired and another lawyer retained to continue the criminal appeal. In a suit for legal malpractice, the plaintiff claimed to have been prejudiced when the original appeal was dismissed. Summary judgment was granted to the attorney on the basis that even though the initial appeal had been dismissed, it was later reinstated. To avoid a similar problem, one should calculate and double check the statutory time table and then file the pleading or response at least two to three days before the deadline. A stamped copy of the document should always be in the file.

In addition to time limitations, attention must be given to statutory procedures

and court orders. While there is a never-ending spectrum of rules and orders, almost every case includes a pretrial order. Among the terms, the pretrial order may govern the time to designate expert witnesses, identify exhibits or stipulate to the reasonableness and necessity of medical expenses. Pretrial orders may require the plaintiff to set forth each theory of liability and the defendant to describe each defense. In the Circuit Court of Jefferson County, for example, certain judges require theories of liability and defenses to be set forth with particularity. A general claim of negligence or denial of liability will not suffice. These pretrial orders do not allow the parties to rest upon the allegations of the complaint or the defenses set forth in the answer. Failure to comply may cause a party to waive an argument. In the Circuit Court of Mobile County, the general pretrial order requires the parties to timely object to such critical issues as the reasonableness of medical expenses and agency, or the issue is waived. In the United States District Court for the Northern District of Alabama, the failure to be listed as trial counsel in the pretrial order may preclude an attorney from participating at hearings or trial.

On occasion, the pretrial order becomes buried in a mound of pleadings and motions, and surfaces only weeks before a trial and after the time for compliance may have passed. The failure to comply may be devastating. When the pretrial order is not followed, a party may be precluded from obtaining necessary discovery, *Gonzalez v. Blue Cross/Blue Shield of Alabama*, 689 So. 2d 812 (Ala. 1997); may not be allowed to call an expert witness, *Ford Motor Co. v. Burdeshaw*, 661 So. 2d 236 (Ala. 1995); or introduce certain exhibits at trial, *USA Petroleum Corporation v. Hines*, 770 So. 2d 589 (Ala. 1999). Whether to amend a pretrial order is within the discretion of the trial judge and a ruling will not be reversed unless there is a clear abuse of discretion. *Electrolux Motor AB v. Chancellor*, 486 So. 2d 414 (Ala. 1986). The requirements of a pretrial order should be fully understood, the time limitations documented and a system be in place to assure compliance.

In defending legal malpractice actions, there is perhaps no more difficult an argument to overcome than a failure to comply with statutory and court orders. Laypersons have the expectation that lawyers should be held accountable to following schedules and orders by a court. The failure to comply with a statutory time limitation or court order is rarely the result of a tactical decision and likely will not be understood by the client. To avoid such an omission, the attorney should make sure all statutory and court orders are docketed; that the attorney along with another responsible party act upon these deadlines; and that there is a system in place to assure compliance.

## 7 Office Staff

Attorneys delegate to their office staff critical responsibilities such as conducting investigations, drafting pertinent documents and filing information with the court and opposing parties. The supervision of these employees is the attorney's responsibility. *ARPC* 5.3.

The omissions of a secretary were responsible for a claim against the firm

in *Sanders v. Weaver*, 583 So. 2d 1326 (Ala. 1991). In the suit for legal malpractice, the plaintiff alleged the law firm had negligently permitted the dismissal of suit against the plaintiff's former employer. The dismissal was the result of conduct by the firm's legal secretary who was described as obsessive and compulsive, and apparently acted beyond the line and scope of her employment. The case was dismissed without the knowledge of the firm, yet, the firm had to answer for the secretary's conduct.

The actions of a law clerk were at issue in two related cases of unusual facts as described in *Richards v. Lennox Industries, Inc.*, 574 So. 2d 736 (Ala. 1990) and *Richards v. Robertson*, 578 So. 2d 673 (Ala. 1991). A former law clerk employed by the plaintiff's attorney was sued by the client for violating the attorney-client privilege. The original lawsuit was filed after the plaintiff had been injured from a defective gas furnace. The law clerk assisted in the preparation of the case, including the dismantling and handling of parts of the furnace. During the trial, the law clerk was called by the defense to testify about the inspection and removal of the valve assembly. The law clerk's testimony was allowed over the plaintiff's objection. A jury verdict was rendered for the product manufacturer. Following their products liability action, the plaintiffs, in a second suit, sued the law clerk for violating the attorney-client privilege for giving his testimony at trial. Ironically, both suits were brought by the same attorney. The suit against the law clerk was dismissed based upon the failure to state a claim.

In a more recent and unreported case, the attorney was retained to file suit for personal injury arising out of an automobile accident. The pre-suit investigation revealed a case of defendant's liability and substantial plaintiff's damages. The complaint was properly drafted and signed by the attorney. A copy was sent to the client advising that suit had been filed and that discovery would be undertaken. The complaint, unfortunately, was misplaced by the secretary and never filed with the court. Approximately one month after the statute had lapsed, the file was reviewed to determine the status of service of process. The unfiled complaint was discovered. The attorney properly brought the omission to his client's attention though, unfortunately, a suit for legal negligence followed. The case was settled.

To avoid a claim arising out of an employee's misconduct, all employees should be well trained and instructed in their areas of responsibility. The employee's scope of responsibility should be limited to his/her areas of expertise. Office procedures, though not necessarily reduced to writing, must be understood by all. Clearly, there must be sufficient supervision and an organized chain of command.

***...an attorney would not be wise to promise more than what can be delivered.***

***...the client who expects nothing less than perfection is one whom you will never satisfy.***

8

# Determination and Distribution of Settlement Proceeds

There is an increasing trend for legal malpractice suits to be based upon cases being settled for an unreasonable amount, or that the proceeds were improperly distributed. These suits range from the individual personal injury claim to those clients who receive a settlement in mass tort litigation. The theory is premised upon the attorney's failure to properly investigate and evaluate the plaintiff's injury. In *Edmondson v. Dressman*, 469 So. 2d 571 (Ala. 1985), the plaintiff entered into a settlement agreement for the wrongful death of her husband. The plaintiff later sought to be released from the agreement based upon the alleged negligence of her attorney. The plaintiff claimed to have suffered damage when she accepted an offer substantially less than the value of the case. The case was dismissed by summary judgment. In *Green v. Ingram*, 794 So. 2d 1070 (Ala. 2001), plaintiff filed suit for legal malpractice following the settlement of a workmen's compensation claim. The plaintiff argued that the settlement did not reflect the plaintiff's degree of injury and, as a result, was unreasonably low. Summary judgment was granted based upon the attorney's affidavit that his legal services were reasonable.

Even if the settlement amount is reasonable, there are still pitfalls as to the correct distribution of the proceeds. Before the settlement and distribution of funds, it is necessary to confirm the identities of those individuals who are proper parties to the action and who may be entitled to the settlement distribution. Court approval should be obtained if there is a question about the standing of any party who may have an interest in the settlement proceeds. An improper distribution may leave an attorney responsible to later pay a share to an individual who is unknown until after the settlement proceeds have been spent.

In a recent wrongful death action, suit was brought by the mother, as the administratrix of her son's estate, following the son's death in a construction accident. Based upon the investigation by the plaintiff's attorney and information received from the mother, the mother was the only known relative. Suit was filed and after negotiations, a reasonable settlement was reached. The settlement proceeds were paid and the case dismissed. An adult daughter born out of wedlock later gave notice of her intent to seek a share of the settlement proceeds. The settlement proceeds unfortunately had already been distributed and a substantial sum spent by the decedent's mother. A suit for legal malpractice was brought against the plaintiff's attorney for failure to have disbursed the appro-

priate sum to the daughter. The case was dismissed on the statute of limitations. The court was not required to consider the argument that the attorney's duty was to the administratrix and not to the beneficiaries of the estate.

Once a settlement is agreed upon and proper beneficiaries are confirmed, the distribution should be made without delay or impropriety. The failure to timely send clients their share of the settlement proceeds has resulted in a suit and judgment against an attorney. In *Oliver v. Towns*, 770 So. 2d 1059 (Ala. 2000), the defendant attorney had been hired to represent the plaintiff in a personal injury suit. The claim settled for $12,000. Instead of properly distributing the settlement proceeds as had been agreed, the attorney forged the clients' endorsement and kept the entire settlement for herself. Following the filing of the malpractice complaint, a default judgment was taken against the defendant attorney. Ultimately, a judgment in the amount of $75,000 in compensatory and $249,000 in punitive damages was affirmed by the Supreme Court of Alabama.

Settlements ought to provide satisfaction to all parties. Particularly in tragic cases, the settlement is viewed as closure by all parties. It should be the final step in the litigation process for financial and emotional reasons. To achieve a proper settlement, an attorney must evaluate the case for a reasonable value, confirm the authority to settle and distribute the proceeds in a timely manner to the appropriate parties. If a settlement is not properly handled, this intended resolution unfortunately may only be the beginning of a new problem.

9

## Satisfying the Client's Expectations

The practice of law is becoming more and more a competitive business. Television and newspaper advertisements proclaim the expertise and success of many attorneys. The label of "complex litigator" may be adopted without reservation. All the while, the law becomes more and more complicated. These factors converge to create unrealistic expectations for the client and place pressure on attorneys to accept matters with little regard. Too often, a matter is received by an attorney who is not experienced in the particular area of law. An attorney should refrain from handling a matter beyond his or her expertise unless the attorney can reasonably educate himself on the issues so as to protect the client's interest. A client dissatisfied with the outcome may question the attorney's experience.

It is incumbent upon the attorney to provide an accurate picture of the client's position and the chance of prevailing. Often the most difficult client is the one with the highest and sometimes most unrealistic expectations. Clients should not be given slanted views of the potential outcome. Attorneys should avoid the temptation to exaggerate the probable success of a case. In *Lawson v. Cagle*, 504 So. 2d 226 (Ala. 1987), a Mississippi attorney found himself the subject of a suit when the client failed to receive the $1,000,000 settlement which the attorney had allegedly guaranteed. The client claimed he was pursued by the Mississippi attorney and persuaded to transfer the suit from another lawyer based upon the Mississippi attorney's representation of success. The Alabama Supreme Court ultimately ruled that the statement, even if made, was only a prediction upon which the client had no right to rely.

Perhaps the most extreme example of the failure to satisfy a client's expectation is the California case of *Sims v. Gibson, Dunn & Crutcher*. As reported in the *Wall Street Journal*, the client's belief that a seemingly simple business dispute would be properly handled was shattered. *WALL ST.J.* July 31, 1995. The client was referred to the law firm and, particularly, to the senior litigation partner for representation concerning a real estate transaction. Before the attorney-client relationship ended, the client was caused to pay legal expenses sometimes exceeding more than $100,000 a month. A review of the firm's work product revealed the law firm spent 552 hours preparing the initial complaint. An additional 323 hours of research was devoted to a motion. The research, unfortunately, missed the leading California Supreme Court case on the issue. The billing records reflected a total of 10,000 attorney and paralegal hours and were charged by 54 different attorneys and paralegals. The client fired the law firm and retained another to handle the real estate dispute. The suit for legal malpractice followed.

In this day of advertisements and statements of almost guaranteed success, an attorney would not be wise to promise more than what can be delivered. A sound practice is to review the applicable law before accepting an assignment. If you do not and cannot reasonably educate yourself on the law at issue or adequately represent the client for whatever reason, the case should be referred or turned down. Likewise, the client who expects nothing less than perfection is one whom you will never satisfy. For the attorney who hears the client say, "If you do your job, I will win," careful consideration should be given as to the benefit of continued representation.

## Summary

Suits for legal malpractice continue to rise in Alabama. Unfortunately, there is no magic formula or set of rules to follow so as to avoid being subject to a claim. The above factors, however, continue to be primary causes for suits to be filed. It is hopeful the recognition of these problems will limit one's exposure. ■

## Endnote

1. The case examples are not all legal malpractice actions, and further, are not intended to imply a breach of the standard of care by the attorneys.

**W. Michael Atchison**
W. Michael Atchison, a partner with the firm of Starnes & Atchison LLP, graduated from Birmingham Southern College and Cumberland School of Law, Samford University. He has been a Fellow of the American College of Trial Lawyers since 1995, and is listed in Best Lawyers in America (two categories). Atchison is a member of the Birmingham Bar Association, the Alabama State Bar, the Alabama Defense Lawyers Association, the American Bar Association, and the Federation of Insurance & Corporate Counsel.

**Robert P. MacKenzie, III**
Robert P. MacKenzie, III is a member of Starnes & Atchison LLP. He was admitted to the Alabama State Bar in 1984 after graduating from the University of North Carolina, Chapel Hill, and Cumberland School of Law, Samford University. He is a member of the Birmingham Bar Association, the Alabama State Bar, the Alabama Defense Lawyers Association, the American Bar Association, the American Board of Trial Advocates, and the International Society of Barristers.