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DAILY REPORT
IN PRACTICE

Many lawyers ignore a mistake in hopes that it goes away, or worse, fall on the sword for something that may not be malpractice.

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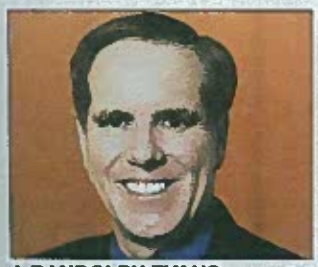
# What to do when mistakes happen

**MOVE FORWARD** by telling your client, involving your insurer and recommending independent counsel



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SO YOU MADE a mistake—what now?

Mistakes happen. Tax liens during a title search get missed. A lawsuit isn't filed within the statute of limitations. A signature gets missed on a critical document. Or, as happened recently, an attorney fails to follow the right procedure for an appeal.

What now?

The normal instinct is to simply move forward and try to fix it. If the problem can't be fixed, many lawyers choose to either ignore it in hopes that it just goes away, or worse yet, fall on the sword for something that may not even be malpractice. More often than not, these actions create problems worse than the mistake itself.

There is a better way. The first step is to stop.

Then, take three simple steps to minimize risks and create a solid platform for moving forward and possibly fixing the problem. These steps were described by the Georgia Court of Appeals recently in a legal malpractice case involving a straightforward mistake. (It was also proof that years of seminars can pay off).

In *Sowerby v. Doyal*, 307 Ga. App. 6 (2011), the attorney used the wrong appellate procedure in an attempt to appeal a contempt order in a domestic relations case. When the attorney discovered the mistake, he: (1) told his client "that the appeal likely would be dismissed for [the] procedural deficiency," (2) "provided [his client] with contact information for his professional liability insurance carrier," and (3) "advised her to seek other counsel regarding a potential claim against him."

In sum, the attorney made sure that his client was "aware that she had a potential claim against him." This proved critical in his eventual success against a legal malpractice claim based on his mistake.

## 1. Tell your client about the incident

This first step is often the most difficult thing that a lawyer will ever do. For lots of reasons (involving both disciplinary and malpractice exposure), it is also one of the most important.

Remember, a decision not to tell the client about a mistake is no less a decision. When viewed through the prism of conflicts of interest, most juries view it as a decision to put the interests of the lawyer (i.e., hopes of fixing it, or that the client will never find out) above the interests of the client.

In virtually every case, the risks of nondisclosure far outweigh the risks of telling the client. The safer, ethical course is to tell the client about the incident. This does not mean to fall on the sword and agree to pay. Importantly, telling the client about the incident is very different than admitting a mistake has been made or agreeing to pay money.

Most legal malpractice policies contain provisions (typically called "No Admission" clauses) that forbid a lawyer from admitting a mistake or agreeing to pay money without jeopardizing her/his legal malpractice coverage. As a result, it is very important that the letter to the client (and yes, it should be confirmed in writing) only describe what has happened and what the risks are. The ultimate legal conclusion, i.e., whether it is legal malpractice, is best left out of the letter.

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## 2. Involve your legal malpractice insurance company

Many attorneys believe that it is better to wait for the claim (typically defined as a "written demand for money or damages") or a lawsuit before involving their legal malpractice insurer. In reality, the risks of waiting far exceed any perceived advantages.

Yes, most legal malpractice policies are "claims made" or "claims made and reported" policies. This means that the policy covers claims against lawyers that are made (and if required, reported to the insurance company) during the policy period. As a result, the important date is when the claim is made. This is the latest time when a claim must be reported to the insurance company.

On the other hand, most policies also permit a potential claim to be reported as soon as the lawyer learns about any basis upon which a claim could be made, including a simple mistake. In legal malpractice nomenclature, such a report is called a "notice of a circumstance."

By giving notice of a circumstance, a lawyer assures coverage in the event a subsequent claim results regardless of when the claim is finally made or the lawsuit is filed. If the malpractice coverage ends after the mistake is made but before the claim is made, the attorney is still covered. The insurance policy might end for non-renewal, firm changes, lateral moves or cancellation, but the coverage for the potential claim continues.

Also, by giving the notice of circumstance, attorneys can avoid some tricky issues in the renewal process for their malpractice insurance. Many applications ask if any attorney applying for insurance is aware of a circumstance that might give rise to a claim. Attorneys who have not already reported the circumstance then face the inevitable obligation to do so in response the question.

Then, once the malpractice insurer is involved, the better approach, as in *Sowerby*, is to provide the client with the contact information for the professional liability insurance carrier. Basically, get out of the middle.

## 3. Advise the client to seek other counsel regarding the incident

This seems to be the most obvious of the three steps. Yet, it is one of the most difficult in practice. Inevitably, the client will ask what the attorney thinks. There are only bad answers to this question. Any information regarding the legal malpractice claim can only lead to problems. There is probably no better illustration than in *Sowerby* itself.

In that case, after the Georgia Supreme Court dismissed his client's appeal based on the fact that the lawyer employed the wrong appellate procedure, the attorney sent his client a letter enclosing a copy of the order and stating "[t]his is the date upon which the Statute of Limitations begins to run on any claim you may have against me for negligence in filing the Notice of Appeal instead of an Application for Discretionary Review." There was only one problem. This statement was legally wrong. In Georgia, the statute of limitations begins to run from the date if the alleged act, not the date of the dismissal.

The client in *Sowerby* argued that the attorney's erroneous letter tolled the statute of limitatinns. But the attorney's actions in fact saved him. The court concluded that it was clear that the client was "aware" of her cause of action within the limitation period and so it was not tolled.

Good things can happen when simple, effective steps are taken. So, when mistakes happen, don't panic.

Stop. Tell your client. Involve your insurer. And then recommend independent counsel.

Simple. Effective. Easy.

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