You've Been Sued for Malpractice—Now What?

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Authors' Note

Readers' comments and feedback on this series of "Whoops—Legal Malpractice Prevention" articles are welcomed and appreciated. References in the articles to "safest courses to proceed," "safest course," or "best practices" are not intended to suggest that the Colorado Rules require such actions. Often, best practices and safest courses involve more than just complying with the Rules. In practice, compliance with the Rules can and should avoid a finding of discipline in response to a grievance or a finding of liability in response to a malpractice claim. However, because most claims and grievances are meritless, effective risk management in the modern law practice involves much more. Hence, best practices and safer courses of action do more: they help prevent and more quickly defeat meritless claims and grievances.

The risk that an attorney in private practice will face a malpractice claim has increased significantly over the last 50 years. Statistically, an attorney will be the subject of three claims over his or her legal career.[1] The increase in the number of practicing lawyers, increased consumerism, higher client expectations, better educated clients, and the need for more specialized legal skills have all contributed to this increase in allegations of legal malpractice.[2]

For these reasons, malpractice claims and grievances have become a reality in the modern-day practice of law. Further, professional negligence lawsuits often follow claims and grievances. There are rarely quick or easy solutions once a former client files a legal malpractice lawsuit. Plaintiff's counsel has typically vetted malpractice claims that reach the courthouse. Even when a case has a quick and easy solution, such as a successful dispositive motion or a nominal settlement, legal malpractice lawsuits leave a permanent mark on the attorney or the law firm against whom they are filed.

A misstep early in the life of a legal malpractice lawsuit can be very costly for the attorney or law practice. As a result, when a malpractice lawsuit is filed, it is important that the attorney and the law practice respond in a decisive and regimented way to prevent the case from becoming a legal malpractice nightmare. This article provides best practices that can help reduce the detrimental impacts that a legal malpractice claim can have on an attorney and law firm.[3]

1. Notify the legal malpractice insurer immediately.

Legal malpractice claims are bad enough, but legal malpractice claims without insurance coverage are even worse. The quickest way to lose legal malpractice insurance coverage is to fail to provide timely notice to the insurance carrier or to fail to report the claim during the policy period.

Most legal malpractice insurance policies contain specific provisions governing notice of a legal malpractice claim to the insurance carrier. To minimize or avoid the risk that an attorney's or law practice's notice and report of a claim will be considered ineffective, it is critically important to review and strictly adhere to the precise policy provisions regarding the reporting and notice of claims.

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Many insurers include in the notice provision of their policies both a phone number and a physical address for providing notice of a claim. Use both and confirm receipt of the notice. This simple act of confirmation is arguably the most important step an attorney can take to minimize any potential problems associated with the provision of notice to the insurance carrier.

Typically, this step involves the insured attorney's receipt of an acknowledgment of the claim from the legal malpractice insurer that includes a claim number. Any insured attorney who does not receive an acknowledgment from the insurer within 72 hours should call back and get a claim number. Include that number on all future communications with the legal malpractice insurer regarding the claim to prevent any miscommunications concerning the handling of the claim.

2. Get professional assistance with responding to the claim.

It is true: A lawyer who represents herself has a fool for a client. This is especially true when it comes to responding to a legal malpractice claim. Because the range of emotions for attorneys who have been sued extends from resignation—just wanting to make the dispute go away—to righteous indignation and defiance, it is imperative that an attorney who is the subject of a claim seek assistance from an attorney who specializes in legal malpractice defense. Understandably, the personal nature and high stakes of a legal malpractice claim make it very difficult for the attorney who is the subject of a claim to act objectively and reasonably. The safest and best course for the attorney is to take a step back and let someone else handle the claim.

At a minimum, this means allowing someone else in the law practice to assume responsibility for responding to the claim. If the law firm has its own general counsel, communications within the firm seeking legal advice regarding the claim should be directed solely to that person, marked "attorney–client privileged communication." Courts that have considered this issue have held that an attorney's discussions with his firm's general counsel are privileged.[4]

If the claim has matured into a lawsuit, it means retaining outside counsel to defend the litigation. More often than not, the legal malpractice insurer will offer or retain counsel to defend the claim, sometimes subject to a reservation of rights under the legal malpractice insurance policy. It is vital that the attorney or the law firm being sued is comfortable with counsel that the insurer has retained.

If either the attorney or the law practice is not completely comfortable with the selected counsel, the attorney or law practice should ask for someone else. With a career or law license at stake, it is not the time to begrudgingly go along to get along.

Additionally, if the legal malpractice insurer retains counsel but raises significant insurance coverage questions, or if the potential exposure greatly exceeds the available policy limits, the law practice should consider retaining separate counsel solely to represent its interests. Assigned defense counsel cannot make demands or pursue claims against the insurance company; only independent counsel can do that.

3. Open a segregated file for the legal malpractice claim.

Inevitably, litigated legal malpractice claims degenerate into serious discovery battles. While the attorney can use whatever is in the file to defend against the claim, the client is entitled to her file.[5] The question then is, "what is the client's file?" In Colorado, a client's file "consist[s] of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice."[6] In addition, upon receiving notice that a malpractice claim is likely, the attorney must put a litigation hold in place and preserve potential evidence.[7]

Because the client has a right to her file, information generated by the attorney or the law practice in the defense of the legal malpractice claim should not be placed in the client's file. Instead, all such material must be segregated into distinct paper and electronic files—separate and apart from the client's files. This includes any notes or other work product generated among law practice members in response to the legal malpractice claim.

The best way to accomplish this segregation of representation is to open a new client matter with the firm as the client and the claim as the matter, ensuring that the attorneys addressing the claim are not those who worked on the file. Any time spent on the claim should be billed to that client/matter number to avoid any risk that confidential malpractice defense activity might appear on a client bill. As a segregated client/matter, the legal malpractice claim should have its own files that include correspondence, pleadings, and related materials.

4. Be a client, not an attorney.

This final best practice is a crucial piece of advice that any attorney facing a legal malpractice claim should heed. Most attorneys who have a legal malpractice claim asserted against them find it incredibly difficult to stop being an attorney in the case. They spend an inordinate amount of time thinking of ways to win, or at least deal with, the claim. Yet they have little experience in the legal malpractice arena and have the most personal interest at stake. More often than not, these attorneys end up creating more problems than they solve.

The fact is that the legal malpractice insurer, defense counsel, and in-house counsel or independent counsel will make every effort to favorably resolve the claim. They possess the requisite expertise and experience to handle such claims, understand the gravity and impact of the claims asserted against the attorney, and share the same interest as the attorney in resolving the claim. Unlike other claims, professional malpractice claims are uniquely personal. As a result, attorneys who face such claims will be more involved, more invested, and more determined to help with their cases than typical clients, which is not necessarily a bad thing. However, attorneys accused of legal malpractice must avoid "claim obsession," which happens when the claim becomes all-consuming. When that happens, negative and irreversible consequences can impact the attorney, such as a shrinking law practice, strained finances, and the claim replacing an otherwise fully functioning law practice. Unchecked, claim obsession can expand to impair the attorney's judgment and thereby impact his livelihood.

Conclusion

In the end, as difficult as it may be, an attorney must strive to remember that a legal malpractice claim is just that, a claim. Unfortunately, legal malpractice claims are now commonplace modern-day occupational hazards, and nearly all attorneys will face at least one claim over the course of their career. Following the best practices described above can assist attorneys facing a legal malpractice claim in reducing the impact the claim may have on their practice.

If it is any consolation, most legal malpractice claims result in no payment on behalf of the attorney. Many others are either resolved in favor of the attorney or for a small amount of money. The time and resources lost in defending oneself against a claim cannot be recovered, but it is possible to minimize the claim's permanent effect if the attorney responds to it in a decisive and disciplined way.

Notes

1. Mallen and Rhodes, 1 *Legal Malpractice* § 1:1 (2016 ed., Thomson West).

2. *Id.* at § 1:14.

3. This article is not a substitute for retaining counsel, and following these best practices will not resolve a legal malpractice claim. It is imperative that an attorney facing a legal malpractice claim seek the prompt assistance of an attorney who specializes in legal malpractice claims.

4. *See, e.g.*, *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn*, 746 S.E.2d 98, 106–08 (Ga. 2013); *RFF Family P'ship, LP v. Burns & Levinson, LLP,* 991 N.E.2d 1066, 1068 (Mass. 2013); *Crimson Trace Corp. v. Davis Wright Tremaine LLP,* 326 P.3d 1181, 1189–90 (Or. 2014).

5. *See* Colo. RPC 1.16A, cmt. [4] ("[a] lawyer may not destroy a client's file when the lawyer has knowledge of pending or threatening proceedings relating to the matter.").

6. Colo. RPC 1.16A, cmt. [1].

7. *See, e.g.*, *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D.Colo. 2007). ■