Malpractice claims: What not to do

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LEGAL MALPRACTICE claims are bad enough. Unfortunately, many attorneys respond in a way that causes them to become nightmares.

A straightforward claim that might have been resolved early instead becomes an expensive and complex claim with significant exposure and high defense costs.

To avoid this possibility, here are the five common mistakes made after receipt of a legal malpractice claim.

Don’t assume a claim means a lawsuit

Contrary to public perception, the filing and prosecution of a legal malpractice lawsuit is not easy. The mere assertion of a legal malpractice claim requires little. It is the difference between a claim and a lawsuit that is important.

Data confirm that most legal malpractice claims are meritless. Sometimes, clients threaten a claim in order to avoid paying a bill, or because the client is unhappy with an outcome. Neither scenario necessarily supports a viable legal malpractice lawsuit.

Moreover, even with claims involving an actual attorney mistake, the mistake alone is insufficient to support a legal malpractice lawsuit. Instead, the mistake must proximately cause damage. Even then there might be financial or other pressures that will prevent a claim from actually filing suit.

For example, there are the fixed costs associated with a lawsuit, including filing fees. In some states, legal malpractice claims also require expert testimony including an affidavit from an expert prior to filing.

Putting aside the out-of-pocket expenses, there are other issues associated with filing a legal malpractice action. For example, clients who sue their attorneys waive all the protections of attorney-client privilege. This typically means that everything the client has told the attorney can be disclosed. Moreover, there is the time that clients must spend on the litigation itself.

These factors mean that a claim is not necessarily followed by a lawsuit – even if the claim is based on an actual mistake.

Before a client can bring a claim, the client must decide that claim is worth the risks and hire counsel to file suit. Then the client and the client’s legal malpractice attorney must decide that the return on investment is worth the money and time necessary to pursue the lawsuit.

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Don’t admit legal malpractice
The duty to keep clients informed includes self-reporting when mistakes happen. However, there is a fine line between the duty to report facts material to the representation of a client and admitting legal malpractice that would virtually assure that a lawsuit follows.

Attorneys who fail to timely report mistakes face significant risks. These can include tolling of the statute of limitation, exposure to a conflict of interest (based on the conflict between the client’s interests and the attorney’s interests), and bar grievances. In addition, failure to report an error increases the likelihood that a malpractice claim will become a legal malpractice lawsuit.

One of the factors motivating plaintiffs’ legal malpractice attorneys to file a lawsuit is the concealment of a mistake from the client. In those circumstances, juries do not react well. On the other hand, not all mistakes equal legal malpractice. In addition, there are some serious consequences for admitting malpractice when legal malpractice has not yet occurred.

Obviously, such admissions can make defending the lawsuit on the issue of liability very difficult. Less obvious, however, is that an admission can constitute a violation of the “no admissions” clause of the typical legal malpractice insurance policy, negating insurance coverage.

Thus, the best approach is to follow the rule of Joe Friday – “just the facts” – which is a good practice regardless of the risk of legal malpractice claim.

In practice, if there is an adverse development in a representation, the best and safest approach is to timely report it to the client. If the adverse development arises of out of the attorney’s action (or inaction), then the report should include that fact as well.

The important thing is to stop short of concluding or conceding that the mistake and the adverse development constitutes legal malpractice. There are many reported cases where attorneys have admitted to legal malpractice, but where no legal malpractice actually existed.

Don’t ignore the problem
While some attorneys overreact to potential claims, there are others who simply choose to ignore the problem in the hope that the issue will go away. This strategy rarely works.

If a client is convinced that an attorney has committed legal malpractice, the client is unlikely to let it go. Emotions take over, which is why legal malpractice claims are till filed, even where so many are without merit.

A better approach is to engage, by providing the client with a copy of the file and by responding to any client inquiries. If there are issues to be addressed, then address the. It is equally important that attorneys ensure that all appropriate notices are provided to the attorney’s legal malpractice insurance company.

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Don’t sue to get ahead
In many instances, potential legal malpractice claims include an unpaid fee or expense component. Some attorneys see this as an opportunity to “get ahead of the curve,” by filing their own lawsuit against the client first to recover the unpaid fees, so that the attorney can dictate the beginning of the lawsuit.

However, that approach makes a potential legal malpractice claim into a reality, with the resulting initial out-of-pocket expenses associated with the filing.

Certainly, there may be reasons unique to a particular situation that would justify the pre-emptive filing of a lawsuit against a client. However, those circumstances are very rare and inapplicable to most attorneys.

Unless the client’s claim is little more than an excuse to avoid paying fees, and the attorney has concluded that the likelihood of success far outweighs the risk, attorneys should not start the litigation.

Don’t make settlement offers without insurer consent
Some claims merit early settlement attempts. Attorneys should not ignore those opportunities, especially if the amount required to settle is small compared with the costs and exposure of the claim.

The typical legal malpractice policy prohibits an attorney from making a settlement offer with the insurance company’s consent. It is critically important than any efforts to settle be coordinated with the insurance company. The risks of failing to do so are significant.

Most notably, settlement offers without the insurer’s consent can jeopardize coverage for the entire claim, even if the proposed settlement is within the law practice’s deductible. Attempts to settle without involving the insurer are just too risky.

Because not every claim becomes a lawsuit, the key for an attorney receiving a claim is to avoid making these mistakes, as they do little more than increase the likelihood of a claim.

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