So You've Been Accused of Legal Malpractice?

Well, Don't Just Do Something - Sit There!

Del O'Roark, Loss Prevention Consultant, Lawyers Mutual Insurance Co. of Ky.

KBA *Bench & Bar*, Vol. 58 No. 1, Winter 1994

One of the first things that hits you when you start working with legal malpractice is how counterintuitive so much of it is. If someone asked you who was most likely to have a malpractice claim, a rookie lawyer with one year of practice or a seasoned lawyer with ten years experience, you would be wrong if you answered the rookie. As Ross Perot would say, think about it. It seems natural enough to assume that malpractice claims typically involve serious and convoluted questions of law. In fact, the vast majority of claims could not be more prosaic in nature, involving missed deadlines, poor proofreading, and procrastination. The only malpractice claims raising constitutional issues that I've ever seen involved claimants with return addresses of nearby prisons which offer inmates a good law library instead of Nintendo.

Perhaps just as counterintuitive is the answer to the question of the best way to deal with an allegation of malpractice when you're the accused lawyer. Instinctively, the first reaction of most lawyers is to do something -anything- fast. As the lead to this article implies, following an instinct for self-preservation by moving fast could be exactly what not to do. This article provides some thoughts on risk management and how to proceed with all due deliberate speed to meet your professional responsibilities and protect your own best interest when facing a malpractice claim.

The Four Phases of a Malpractice Claim

While the development of a malpractice claim follows no set sequence, the process is divisible into four phases: discovery of the malpractice; notification of client and insurance company; claims repair; and adjudication. The risk management considerations of each phase are as follows:

Phase 1: Discovery of the Malpractice

When a lawyer is served with a complaint claiming malpractice or receives a demand letter for money because of malpractice, it is obvious that prompt action is required concerning the matter, the client, and the firm's professional liability insurance company. Less obvious is what to do when a lawyer learns that something may have gone wrong in a representation which has the potential to become a malpractice claim (usually referred to as an "incident"), but either has not been discovered by the client or has not yet resulted in damage to the client. At this discovery phase of the development of a malpractice claim these risk management considerations apply:

1. Formal written instructions concerning incidents and claims and how to report them internally should be part of every firm's standing operating procedure. Lawyers and staff must be thoroughly trained to be on the alert for potential malpractice and how and to whom to report malpractice issues of any kind.

2. There is a strong tendency for an accused lawyer to overreact upon first learning of an incident or claim. It is critical to appreciate that while malpractice is an urgent matter, there is virtually always reasonable time available to carefully and deliberately assess the situation before taking any action at all. The accused lawyer should immediately discuss the merits of the matter with another lawyer in the firm (e.g., designated loss prevention partner) or, if a sole practitioner, informally with a trusted lawyer friend as a matter of professional courtesy. The matter must be addressed objectively with a realistic assessment of the malpractice exposure without making premature admissions or retaining defense counsel without coordinating with the firm's malpractice insurance company. [1]This assessment should cover whether it is clear that negligence occurred, can the problem be repaired or minimized, what is the maximum liability exposure, what caused the problem, and is a statute of limitations tolling agreement appropriate to allow more time to properly evaluate and resolve the situation.

3. Simple cases of misunderstanding when, in fact, no malpractice is involved are usually resolved by consultation between the lawyer and the client. If, however, more is involved, the accused lawyer should proceed according to the considerations discussed in the following Notification Phase .

4. It is important to appreciate that from the moment a malpractice claim arises until it is resolved, enormous stress is placed on a firm or sole practitioner. Administrative steps must be taken to preserve the client file in its current posture and to separately maintain records concerning the malpractice issue. The accused attorney is mentally distracted from normal work as well as deeply involved in time consuming work on the malpractice claim. In partnerships other lawyers use considerable time in working with the problem. Contemplation of cost in terms of lost time, defense cost, insurance deductible amounts, and indemnity all in the context of the uncertainty of the litigation process is demoralizing for a protracted period of time. Sole practitioners and firm partners must make an extraordinary effort from the outset to control the human cost of a malpractice claim as well as the economic cost if the law practice is to come out of this crisis in a healthy state.

Phase II: Notification of Client and Insurance Company

Once satisfied a matter involves a genuine issue of malpractice, consideration must be given to the professional responsibility of the lawyer to notify the client and the procedure for invoking the firm's professional liability insurance coverage. Key considerations are:

1. Under the Kentucky Rules of Professional Conduct a lawyer is required to "keep a client reasonably informed about the status of a matter and promptly comply with

reasonable requests for information." [2]Patently, a question of malpractice is a matter that must be promptly brought to a client's attention. This may be done by telephone or letter, but the preferred procedure is a personal meeting with the client followed with a letter. A complete copy of the file should be made with the original going to the client at the appropriate time. It may be prudent to have another lawyer from the firm along with the errant lawyer when the client is advised of the problem. It is imperative that no representation be made to the client that the firm's malpractice insurance will cover the claim. While candor is required when first notifying a client of an apparent error, admissions against interest concerning details of the error or value of the claim should not be made. There usually should be no attempt at this juncture to settle the claim.

2. Although there is no requirement to notify the insurance company before notifying the client, it is usually best to do so. Using the insurance company's claims counsel as a resource in analyzing the merits of suspected malpractice and how best to inform the client can prove highly beneficial. Bar related companies like Lawyers Mutual uniformly encourage early reporting by insured lawyers for the very purpose of helping in assessing the merits of a claim assisting in notifying the client, and having the earliest possible opportunity to conduct claims repair.

3. Too many lawyers delay too long in reporting claims or incidents to their insurance company for fear of increased insurance cost or from simple denial of the problem. To appreciate the danger in delayed reporting it is crucial to understand that the standard lawyers professional liability policy is a one year in duration, "Claims Made" policy. Claims Made means that the policy in effect at the time the malpractice claim is first made against the lawyer covers that claim. If a lawyer fails to report the claim to the insurance company while that policy is still in effect, insurance coverage for that claim is lost at policy expiration even if the policy is renewed . For example, one firm failed to report during the one year period of their policy a claim even though three lawyers in the firm had received early in the policy year "Notice of Claim" letters for malpractice from the Federal Deposit Insurance Corporation (FDIC). This claim was not reported until the following year after the policy had expired and been renewed without the firm risking an increase in premium for the claim on the renewal policy. This was held to be a violation of the "Claims Made" policy terms and the firm thereby lost their insurance coverage for the FDIC claim. [3]The only way to assure compliance with the Claims Made feature of legal malpractice insurance policies and invoke coverage is to report claims and incidents promptly and always be mindful of when a current policy is due to expire.

4. All lawyers liability insurance policies contain provisions on when and how to report a claim or incident. While telephonic reports are useful for immediate assistance, claims typically must be reported in writing to invoke coverage. Usual requirements for written reports are names of claimants, date the alleged error was discovered, summary of the circumstances, estimate of the potential liability, copies of relevant documents, and the insured lawyer's views on defenses or claims repair that may be available.

5. Most policies contain provisions requiring the cooperation of the insured lawyer and specific guidance on appointment of defense counsel. Insured lawyers should not retain

defense counsel without prior coordination with their insurance company. Even if the insurance company denies coverage or issues a reservation of rights letter concerning some aspect of the claim, the insurance company may still have a duty to defend the claim. Independent counsel at the insured lawyer's own expense may be necessary to resolve reservation of rights and duty to defend issues if contested by the insurance company.

Phase III: Claims Repair.

After a thorough assessment of the malpractice and proper notifications, every effort then should be made to cure the error, mitigate its effects or at least keep the problem from becoming larger. Specific claims repair actions are determined on a case-by-case basis, usually through the cooperative efforts of the accused lawyer, defense counsel, insurance company claims counsel and other interested parties. Some examples of effective claims repair are timely appeals, requests for reconsideration, alternative legal remedies for the client, discovery of the availability of other applicable insurance, negotiated cooperation of other parties mitigating the error and, on occasion, by condonation by loyal clients who have been otherwise treated professionally in the matter or over a period of many years.

Phase IV: Adjudication.

The adjudication of a malpractice claim involves the same legal method as any other civil legal dispute. Claims are denied, negotiated settlements are reached, and contested law suits are conducted. As in other civil cases, alternative disputes resolution procedures are an evolving method of adjudication. It is beyond the scope of this article to delve into the special considerations of malpractice claim adjudication such as use of expert testimony to establish the standard of care, the "case within the case" aspect of claims involving litigation errors, defenses such as the lawyer malpractice statute of limitations and the unique tripartite relationship of insured lawyer, insurance company and defense counsel. Mallen and Smith's *Legal Malpractice* (3rd Ed.)(1989) includes comprehensive chapters titled "Litigation of the Legal Malpractice Action" and "Insurance Counsel," and Part V., "Defenses," which are recommended for further research. What is important to appreciate is that in the adjudication phase of a malpractice claim the accused lawyer is a defendant and should behave as such. With professional reputation and pride at stake, along with a potentially large monetary loss, being a defendant in a malpractice action is easily the most difficult thing a lawyer faces in a legal career. These circumstances require strong support from the lawyer's firm, family, defense lawyer and insurance company.

Conclusion

One of the hardest aspects of dealing with a malpractice accusation is that very few Kentucky lawyers have any prior experience. This commendable fact speaks well for the Kentucky Bar, but is all the more reason why every lawyer practicing in Kentucky must spend the time when the unexpected happens to "just sit there" and carefully think

through how to deal with the most difficult experience they can have as a lawyer. That's what risk management and these articles are all about.

Endnotes

1 It is not unusual for a lawyer in an emotional state to erroneously notify a client of malpractice when, in fact, none had occurred. Sometimes the promise is made that insurance will cover any problem without the lawyer's prior coordination with the firm's insurance company. Promises like this usually impress the insurance company as a disingenuous ploy by the lawyer to save fees at the insurance company's expense -a particularly bad way to start off a sensitive relationship. At the other end of the spectrum is the lawyer who casually gave the complaining client his insurance company's 800 number. That's asking for it from all sides!

2 Kentucky Rules of Professional Conduct; Kentucky Supreme Court Rule 3.130; Rule 1.4 COMMUNICATION. [Florida Rule of Professional Conduct 4-1.4, COMMUNICATION]

3 National Union Fire Insurance Co. of Pittsburgh v. Baker & McKenzie, CA 7, Nos. 92-1718, etc. , 6/22/93.