What to Do if You Have a Situation That Might Result in a Malpractice Claim

If you encounter a situation that you believe might result in a malpractice claim (e.g., you become aware of an error you have made or important client documents are lost), you first need to assess the probable damage done. Begin by asking yourself these questions:

1. Could this incident cause my client harm?
2. If it were not for this incident, would my client’s case be successful?
3. Can the situation be fixed (e.g., can lost documents be replaced, can a deadline be extended)? Answer this question carefully. Often, insurance companies are experts in “righting malpractice wrongs” and can repair a seemingly impossible situation.

Based on your answers to these questions, you’ll have to decide whether to report the incident to your client and to your insurance company. Keep in mind the following important points:

1. Under the Model Rules of Professional Conduct (Rule 1.4, Communication), a lawyer has an ethical obligation to keep a client informed about the status of a matter to the extent necessary to permit the client to make informed decisions. A lawyer may not withhold information to serve the lawyer’s own interest or convenience. This duty extends to informing the client of any errors committed by the attorney that may result in harm to the client’s interest. Failure to disclose errors may result in disciplinary proceedings and a possible loss of the attorney’s license.

Failure to inform a client about an error may not in itself exacerbate a malpractice situation. The omission and, by extension, the basis for malpractice exist whether or not the attorney reports the omission to the client. Failure to inform the client of an error may not, therefore, cause a new malpractice situation to exist.

In most cases, however, attempts by an attorney to “fix” an error are not successful, and the client ultimately finds out about the attorney’s error anyway, setting the stage for a malpractice claim. If the attorney is found liable for malpractice, the ultimate monetary judgement awarded may be influenced indirectly by the attorney’s failure to disclose information to the client.

In addition, the statute of limitations for the malpractice claim may be “tolled” (suspended or stopped temporarily from running) if the client is not notified of a mistake or error discovered by the attorney.

The bottom line is that it is in the attorney’s and the client’s best interest to disclose any errors to the client as soon as possible.
2. All insurance policies include language requiring the insured to give prompt notice to the insurance company of a malpractice claim or suit. This requirement enables the insurer to defend the claim or, when possible, to mitigate or avoid a loss.

In addition, some policies also require the insured to report potential claim situations to the insurer as soon as the attorney becomes aware of such situations. Such language usually requires the insured to notify the insurer when he or she “becomes aware of any act, error or omission which could reasonably be expected to be the basis of a claim or suit covered by this policy....” Read your insurance policy closely. (The language will usually be contained in a section called “Claims” or “Notice of Claim or Suit.”) Failure to report promptly incidents or claims to your insurer could jeopardize your coverage.

Once a problem has been reported to the insurer, the insured may have an obligation to keep the insurer up-to-date on any progress made to solve the problem. The insured may thus find himself or herself in a “Catch-22” situation. If the attorney does not report the problem, he or she may not have coverage; if the attorney reports the problem, he or she may have an ongoing responsibility to keep the insurer informed about the situation.

3. Some state bars sponsor confidential, toll-free WATS lines for attorneys to call with questions concerning ethics and malpractice issues. These WATS lines offer the opportunity to discuss with an expert your duty in the situations described above. Find out if your bar sponsors such a program, and don’t hesitate to take advantage of this service.

In addition to situations where the attorney discovers a mistake, there may be situations where a client expresses serious complaints about the attorney’s services. When should you report these to your insurer? Whether or not you believe the complaint to be justified, you should probably report such complaints to your insurer if you think there is even the slightest chance that the complaint might turn into a malpractice claim. The insurer may be able to offer you advice onremedying the situation, enabling you to avoid the prospect of having a claim filed against you. This is especially critical when switching insurers. Your former insurer will require that all claims and any circumstances be reported before coverage expires. Your new insurer will not cover any claim/circumstances of which you had knowledge prior to the effective date. Failure to report a “claim or circumstance” could very well create a gap in coverage.