BEST PRACTICES IN RESPONSE TO A MALPRACTICE CLAIM OR THREAT OF A CLAIM

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Trends in Legal Malpractice Claims

In a recent survey performed by insurance broker Ames & Gough of seven leading insurance companies that write Lawyer’s Professional Liability Insurance coverage (and who insurer eighty percent of the AM Law 250 firms), seventy-one percent reported an increase in the number of claims filed in 2012, as compared to 2011. (Report available at http://www.amesgough.com/alerts-lawfirms.) According to the report, which was published in June 2013, forty percent of the insurers who saw an increase in claims said that claims frequency had increased twenty-one percent or more, twenty percent of those insurers saw an increase between eleven and twenty percent, and the remaining forty percent saw an increase of six to ten percent.

Top 10 Practice Areas with the Highest Risk of Claims

<table>
<thead>
<tr>
<th>Rank</th>
<th>Practice Area</th>
<th>Number of Claims</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Real Estate</td>
<td>10,772</td>
<td>20.33%</td>
</tr>
<tr>
<td>2</td>
<td>Personal Injury – Plaintiff</td>
<td>8,260</td>
<td>15.59%</td>
</tr>
<tr>
<td>3</td>
<td>Family Law</td>
<td>6,432</td>
<td>12.14%</td>
</tr>
<tr>
<td>4</td>
<td>Estate, Trust and Probate</td>
<td>5,652</td>
<td>10.67%</td>
</tr>
<tr>
<td>5</td>
<td>Collection and Bankruptcy</td>
<td>4,876</td>
<td>9.20%</td>
</tr>
<tr>
<td>6</td>
<td>Corporate/Business Organization</td>
<td>3,597</td>
<td>6.79%</td>
</tr>
<tr>
<td>7</td>
<td>Criminal</td>
<td>2,996</td>
<td>5.65%</td>
</tr>
<tr>
<td>8</td>
<td>Business Transaction Commercial Law</td>
<td>2,176</td>
<td>4.11%</td>
</tr>
<tr>
<td>9</td>
<td>Personal Injury – Defense</td>
<td>1,727</td>
<td>3.26%</td>
</tr>
<tr>
<td>10</td>
<td>Labor Law</td>
<td>1,160</td>
<td>2.19%</td>
</tr>
</tbody>
</table>

Case Examples

Real Estate/Foreclosure:

- Bayview Loan Servicing, LLC v. Law Firm of Richard M. Squire & Assocs., 2011 U.S. Dist. LEXIS 51412 (E.D. Pa., May 11, 2011). The law firm represented the mortgagee in a foreclosure action, successfully obtaining an in rem judgment in favor of the mortgagee. The mortgagee purchased the foreclosed property at a sheriff’s sale and subsequently sold the property to a third party. Thereafter, the mortgagee instructed the law firm to seek a deficiency from the mortgagor. However, the law firm failed to timely file the necessary petition to fix the fair value of the property. As a result, the court issued an order marking the judgment against the mortgagor satisfied. The mortgagee then filed an action against the law firm for breach of contract and breach of fiduciary duty. The law firm moved for summary judgment. The court denied the motion, finding a genuine dispute of material fact as to whether, and to what extent the mortgagee suffered an actual loss because of the law firm’s error.

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1 Statistical data is from the American Bar Association’s most current quadrennial publication of Profile of Legal Malpractice Claims (2008-2011).
Collection Practices:

- *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2011). The client retained the law firm to pursue a debt collection matter. The law firm raised a potential statute of limitations issue. The client represented that the debtor had recently made a partial payment, thereby tolling the statute of limitations. It turned out that the debtor’s payment to the client was not actually related to the debt. Four months after the client alerted the law firm to that fact, the law firm dismissed the action. The debtor then sued the law firm, alleging violations of the FDCPA, along with state law claims for malicious prosecution and abuse of process. The district court granted summary judgment in favor of the debtor on his FDCPA claims and the jury found in favor of the debtor on all remaining claims. The Ninth Circuit affirmed, holding that the law firm had engaged in abusive and unfair practices. It further held that the law firm was not entitled to rely on the bona fide error defense, which requires the debt collector to have procedures reasonably adapted to avoid such errors. In this case, the law firm’s reliance on the client’s statement regarding the statute of limitations was not such a procedure.

Bankruptcy:

- *Feroleto v. O’Connor*, 2011 U.S. Dist. LEXIS 49566 (N.D.N.Y., May 6, 2011). The attorney represented the plaintiff in a bankruptcy proceeding. After being informed that the mortgagee of the plaintiff’s house had scheduled a foreclosure sale, the attorney advised the plaintiff that she may be able to prevent the foreclosure for a certain amount of time if she filed for bankruptcy and made monthly post-petition mortgage payments and chapter 13 plan payments. The plaintiff assured the attorney that she could obtain the necessary monthly income to make the payments. However, the plaintiff did not ultimately make the necessary payments and the mortgagee was allowed to commence foreclosure proceedings. The attorney ultimately filed a motion to withdraw as counsel. Thereafter, the plaintiff filed a suit against the attorney for legal malpractice and breach of contract. The court granted the attorney’s motion for summary judgment, finding that the plaintiff had failed to provide any evidence establishing that the attorney’s conduct fell below the applicable standard of care. The court further concluded that, even if there were a material dispute on the issue of negligence, the plaintiff had failed to show any nexus between the attorney’s actions and her losses.

Types of Alleged Errors

![Pie Chart]

- Administrative Errors - 30.13%
- Substantive Errors - 45.07%
- Client Relations - 14.61%
- Intentional Wrongs - 10.19%

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2 Statistical data is from the American Bar Association’s most current quadrennial publication of Profile of Legal Malpractice Claims (2008-2011).
Case Examples

Administrative Errors - Commencement of Action

- Bennett v. Hill-Boren P.C., 52 So. 3d 364 (Miss. 2011). The client hired the law firm to pursue a medical malpractice claim on her behalf. However, the law firm failed to effect service of process upon the health care provider, and the suit was dismissed for lack of prosecution. The client subsequently filed a legal malpractice claim against the law firm. The trial court granted summary judgment in favor of the law firm, finding that the client’s lawsuit was not timely filed pursuant to the three-year statute of limitations. The Mississippi Supreme Court reversed, holding that there were genuine issues of material fact regarding when the client knew or, with reasonable diligence, could have discovered the alleged legal malpractice. The law firm had failed to communicate the lack of service, and the client presented evidence that she lacked actual knowledge of the alleged malpractice prior to her new counsel’s review of the case file.

Substantive Errors - Conflicts of Interest

- Whitney Lane Holdings, LLC v. Sgambettera & Associates, P.C., 2010 U.S. Dist. LEXIS 114467 (E.D.N.Y., Sept. 8, 2010). In this breach of fiduciary duty case, the defendant law firm represented the seller of a piece of real property. Later, the purchaser retained the law firm to represent it in eminent domain proceedings involving the property. The purchaser agreed to waive any actual or potential conflict of interest arising by virtue of the law firm’s representation of the seller. Thereafter, the purchaser sued the seller for not disclosing the eminent domain issue. The purchaser also sued the law firm, claiming that it breached its fiduciary duty by accepting the retention even though its independent professional judgment was adversely affected by its representation of the seller and by accepting employment without providing a full disclosure of the implications of the simultaneous representation and the risks involved. The law firm moved to dismiss, claiming that the purchaser’s lawsuit was not ripe and that the breach of duty claim was wholly dependent upon the outcome of the lawsuit between the purchaser and the seller. The Court disagreed, noting that “New York law recognizes an independent cause of action predicated on an attorney improperly representing conflicting interests, irrespective of how that attorney actually performs his or her duties.” It is the act of taking on a new representation while impossibly conflicted, or without properly disclosing waivable conflicts, that breaches the fiduciary duty of client loyalty, which subjects the attorney to disgorgement of fees, among other things.

Substantive Errors - Failure to Know/Research the Law

- General Nutrition Corp. v. Gardere Wynne Sewell, LLP, 2008 U.S. Dist. LEXIS 72266 (W.D. Pa., Sept. 23, 2008). In this legal malpractice action, the plaintiff claimed that the law firm gave improper legal advice concerning the consequences of terminating certain contracts. The law firm argued that the claims were barred by the “attorney judgment rule,” which provides that “lawyers are not required to be infallible in their predictions of how a court will decide a matter.” To prevail pursuant to the “attorney judgment rule,” the law firm must establish that it made an informed judgment based upon sufficient research and familiarity with applicable legal principles. The court concluded that the complaint adequately pled that the law firm breached this standard by assigning labor and employment attorneys to a contract case and by conducting inadequate legal and factual research. The court found that these issues of fact precluded summary judgment.
Client Relations - Failure to Follow Client Instructions

- *Ruby Tuesday, Inc. v. Emmanuel Sheppard & Condon PA*, 2009 U.S. Dist. LEXIS 121462 (N.D. Fla., Dec. 30, 2009). Ruby Tuesday was sued for negligence and tortious interference action, based upon a use restriction contained in a contract between Ruby Tuesday and Florida Soccer. The negligence claim was dismissed on summary judgment and the case went to a jury trial on the tortious interference claim. The jury ultimately found Ruby Tuesday liable for tortious interference. Ruby Tuesday sued the attorneys who had represented it in the transaction for negligence and breach of fiduciary duty, claiming that they failed to follow its instructions regarding the scope and modification of the use restriction. The attorneys filed a motion to dismiss. The court denied the motion, finding that the restaurant had alleged enough facts to state a claim to relief that was plausible on its face.

Intentional Wrongs - Malicious Prosecution

- *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP*, 184 Cal. App. 4th 313, 109 Cal. Rptr. 3d 143 (2010). The law firm had represented the executors of the estate of Diana, Princess of Wales and the trustees of The Diana, Princess of Wales Memorial Fund in a lawsuit filed against Franklin Mint. The lawsuit alleged false advertising and trademark dilution arising out of Franklin Mint’s use of Princess Diana’s name and likeness in connection with certain merchandise that it advertised and sold. The court ultimately granted summary judgment on those claims in favor of Franklin Mint. Thereafter, Franklin Mint sued the law firm for malicious prosecution. That case proceeded to trial and, at the close of the evidence, the trial court entered judgment in favor of the law firm. The court concluded that Franklin Mint had not proven all of the elements of its malicious prosecution claim, inasmuch as the law firm had probable cause to prosecute the false advertising and trademark dilution claims. The Court of Appeals of California reversed, concluding that probable cause did not exist.

Take These Steps When a Malpractice Claim Is Made

According to the American Bar Association, attorneys in private practice have between a 4 percent and 17 percent chance of being sued for malpractice each year. (ABA’s *Lawyer’s Desk Guide to Preventing Legal Malpractice* 62 (2d ed. 1999).) Over the course of a career, these risks mount.

Some mistakes are made by good lawyers. 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. An attorney fails to follow the right procedure for an appeal. A client makes or threatens to make a claim.

In addition, malpractice claims – both legitimate and not – are made against good lawyers. Although the possibility of a malpractice claim is unpleasant, an attorney can make her or his potential liability exponentially worse through her or his post-claim conduct.

What now? The normal instinct is to simply move forward and try to fix it. If the problem can’t be fixed, many attorneys 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. Don’t try to fix or manage the issue. There are a few simple steps to minimize risks and create a solid platform for moving forward. Although it may be impossible to avoid liability outright, by following these steps, an attorney can manage the risk and avoid making the situation worse.

1. **Tell Your Client About the Incident, But Don’t Admit (or Shirk) Liability**

This first step is often the most difficult thing that an attorney will ever do. For lots of reasons (involving both disciplinary and malpractice exposure), it is also one of the most important. If an attorney discovers an error committed by the attorney or another attorney in the same firm, the first step is to notify the client of the error to allow the client to protect her or his own interests. If the attorney fails to inform the client, and, as a result, the client subsequently fails to take steps to protect her or his separate legal interests, that failure can exacerbate the harm to the client and potentially increase any liability of the attorney.

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. Indeed, it can be impossible for a jury in a subsequent malpractice action to determine whether the attorney, during the remainder of the representation, was motivated to act in the client’s best interest or was merely looking out for her or his own interests.

In virtually every case, the risks of non-disclosure 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, admit malpractice, and agree to pay. Telling the client about the incident is very different than admitting a mistake has been made or agreeing to pay money.

Notifying the client of an error is not the same as admitting fault for that error. Most legal malpractice policies contain provisions (typically called “No Admission” clauses) that forbid lawyers from admitting a mistake or agreeing to pay money without jeopardizing their legal malpractice coverage. It is best not to get into a situation in which this issue is ever a point of contention between an attorney and an insurer. 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.

Remember, to recover for legal malpractice, a plaintiff does not need to merely prove the existence of a mistake. The plaintiff must prove that the mistake caused them injury. Many legal malpractice cases are won (or satisfactorily settled) on issues of causation. It is much harder to win a causation issue, however, where an attorney has admitted liability for a mistake.

Just as it is unhelpful for an attorney to admit liability for an error, it can be just as unhelpful to go on the defensive. That is, if an attorney is confronted by a client with a potential problem or claim, an attorney should avoid telling the client, “It’s not my fault.” If the attorney is later determined to be responsible for the error, the denial of responsibility will be asserted against the attorney and will damage her or his credibility in a future malpractice action. The best option when confronted with a potential claim is to avoid taking responsibility and avoid assigning
responsibility to others. Instead, an attorney should exercise the right to remain silent, telling the client that the attorney will pass the claim on to the firm’s quality control partner.

It is rarely beneficial to the attorney to continue with the representation once the client has acknowledged an error or identified a claim. However, if the attorney decides to continue the representation, the attorney should confirm that the client understands the conflict issue arising from the attorney’s prior work and agrees to the continued representation by the attorney after full disclosure of the conflict. The client’s consent to the continued representation should be documented in writing. Moreover, from that point on, the attorney should carefully document her or his involvement and communications with the client. This includes drafting memos to the file on interactions with the client (at the attorney’s expense), no matter how time-consuming this administrative practice can be. The attorney should also consider having another person present for meetings with the client (whether an administrative assistant or managing partner) to witness further interactions between the attorney and the dissatisfied client. If the client provides positive feedback or acts such that the causal chain between breach and damages is broken, the attorney should ensure that such evidence is preserved.

For attorneys who take pride in their work, it can be difficult to objectively describe the events and advise the client without either taking or shifting blame. However, it is critical. Notifying the client of the error in a timely manner may have a positive impact on the statute of limitations and may provide a solid defense to a later lawsuit.

PERSPECTIVE OF MALPRACTICE PLAINTIFFS’ COUNSEL: Your former (or sometimes current) client is in my office, asking me to review the file. What do you want me to see? The maxim is “less is less”. If you presume that the malpractice lawyer wants to make the right decision as to whether it is in the client’s best interest to make the claim against you, everything in that file that demonstrates that you conducted yourself in an ethical, conscientious manner can at best cause me to advise that there is no valid claim, and at worst, allow the claim to be brought with the least serious consequences for you. The suggestions set forth above as to what to tell your client should be seen as a minimum; in those situations where in your judgment, the expenditure of reasonable efforts stand a reasonable chance of solving the problem. I suggest that ethically you either undertake such efforts, or give the client the names of several competent lawyers who might be able to help. Obviously, a successful mitigation effort either eliminates or minimizes the malpractice claim. Also, when there is a bad result, clients are less likely to sue a lawyer they see as loyal, fair, conscientious, kind. Express sympathy, search together for reasons why the result occurred, remain in touch. Above all, listen.

2. Involve Your Legal Malpractice Insurance Company

Legal malpractice claims are bad enough. Legal malpractice claims without insurance are even worse. 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. Always err on the side of caution with disclosure to an insurer.

Most legal malpractice insurance policies have specific provisions regarding providing notice of a legal malpractice claim. To minimize the risk that an attorney’s or law practice’s notice and
reporting of a claim is ineffective, it is critically important to review and strictly adhere to the precise policy provisions.

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 for coverage purposes 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 that might give rise to a claim, 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 to the question.

For purposes of notice, many insurers include both a phone number and a physical address for purposes of providing notice of a claim. Use both. Then the reporting attorney should confirm receipt of the notice. Typically, this involves the insured attorney’s receipt of an acknowledgement of the claim from the legal malpractice insurer that includes a claim number. Any insured attorney who does not receive an acknowledgement from the insurer within 72 hours should call back and get a claim number. Include that number on all future communications with the insurer regarding the claim.

Once the malpractice insurer is involved, the best approach is to provide the client with the contact information for the professional liability insurance carrier. Then the attorney can get out of the middle and let the insurer and client communicate directly. This helps the attorney avoid an improper admission and will also help defend against allegations of fraud later.

PERSPECTIVE OF MALPRACTICE Plaintiffs’ COUNSEL: This is extremely important, and it is always a mistake to rationalize away your obligation to report any particular circumstance. You would be surprised how many lawyers do just that, usually out of a misguided perception that reporting circumstances somehow causes a future underwriting problem. If you are unsure, find out who handles legal malpractice in your jurisdiction and get a consultation. In my opinion, if you have even the slightest reason to believe that the facts fit within the language of the reporting clause of your policy, report. This segues into another important coverage point; if you move to a new firm, often when you are brought within that firm’s coverage, you will have a retroactive bar date identical to the hiring date. This means any claim that is brought
thereafter is not covered if the alleged malpractice occurred prior to the bar date. Remedy: talk to an insurance agent and purchase a “tail” policy with appropriate limits.

3. Get Professional Assistance in Responding to the Claim

It is true: a lawyer who represents himself has a fool for a client. This is especially true when it comes to responding to a legal malpractice claim. The range of emotions for attorneys who have been sued extends from resignation (just wanting to make it go away) to righteous indignation and defiance. Neither is objective nor wise. Instead, for an attorney who is the subject of a claim, the safer and better course is to step back.

Once the carrier is notified, attorneys should consider retaining counsel specializing in law firm defense. Lawyers do not need to wait until they have been sued to find someone to provide them with objective advice. Even before any malpractice claim is filed, independent counsel can advise attorneys on the appropriate next steps to ensure that the situation is not worsened; communicate with an attorney’s insurance carrier; communicate with the client or its representative in connection with the claim; and provide an objective third-party viewpoint. Moreover, engaging outside counsel ensures that the attorney-client privilege attaches to communications and strategy meetings related to the claim or potential claim.

In addition, law firms should rely on their in-house counsel when a claim is made. This helps ensure that the attorney-client privilege will attach to internal discussions about how to handle a claim or a dissatisfied client.

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

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

**PERSPECTIVE OF MALPRACTICE PLAINTIFFS’ COUNSEL:** Excellent advice. Hire somebody with no ties to your insurer, and is not in competition for that insurer’s business. During that uncomfortable moment that sometimes occurs, when there is some divergence between the insurer’s view of the case and yours, assigned counsel is in an awkward position, so having your own lawyer, beholden only to you, can be quite helpful. He/she can often help persuade assigned counsel toward your position, and assigned counsel are sometimes grateful for that assistance.
4. Open a Segregated File for the Legal Malpractice Claim

Inevitably, litigated legal malpractice claims degenerate into serious discovery battles. The client is entitled to the file. The attorney can use whatever is in the file in the defense against the claim. The question then is, “What is in the client’s file?”

The 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, it is important that all such material be segregated into a distinct file separate from the client’s file. 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 and to ensure that the attorneys addressing the claim are not those that 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.

PERSPECTIVE OF MALPRACTICE PLAINTIFFS’ COUNSEL: Yes, of course. In Massachusetts, I insist on the original client file, permitting the defendant lawyer to copy it all for his defense use at his expense. Be ultra-professional. If your client has an outstanding bill, and your state’s ethical rules permit you to withhold work product that has not been paid for, consider providing it nonetheless. Taking the high ground rarely if ever causes a problem, and often helps keep the dispute on a manageable level, in terms of exposure to publicity and expenses.

5. Advise the Client to Seek Independent Counsel

If a claim has not yet been made formally, but an error has been discovered or a client has raised an issue with some aspect of the attorney’s representation, the attorney must decide whether he or she is going to continue with the representation. At a minimum, an attorney should advise the client to obtain independent counsel in connection with the error or asserted claim. The attorney will then need to consider whether to continue the representation of the client on the matter for which the attorney was originally retained. At that point, the attorney has three options: (1) continue to represent the client on the matter for which the attorney was originally retained; (2) counsel the client to obtain separate counsel and stay involved in the matter as co-counsel; or (3) withdraw from the matter entirely.

Although it may be tempting to maintain the representation, doing so may inadvertently compound the problem, as addressed above. An experienced and competent attorney may think that he or she can do something to undo the malpractice claim or potential claim that was asserted by the client. For example, it is not uncommon for attorneys confronted with a dissatisfied client to file motion after motion in the challenged representation. This flurry of paper is most often an attempt by the lawyer to demonstrate her or his efficacy or to achieve some positive result to prove the attorney’s competence to the client. However, this approach can backfire.
Taking a series of weak steps (such as the filing of a series of weak motions) in an effort to undo a mistake is akin to fighting fire with gasoline. If an attorney makes additional mistakes or takes steps consistent with the earlier alleged mistakes, a court may extend the statute of limitations on any future claim.

An attorney who has committed an error (or who has been accused of committing an error) can make even a minor problem much worse by staying on to supervise or monitor a client’s case or deal. By failing to unambiguously stay on or withdraw, an attorney may create new problems by creating ambiguity in work roles and responsibilities. Thus, if continuing the representation in a co-counsel role is appropriate, an attorney should be clear about her or his role with the client and clearly define the responsibilities of each attorney in writing.

A lawyer or firm accused of errors in an ongoing matter should seriously consider passing the case on to another attorney. For example, if a lawyer is accused of serious errors in connection with a trial, the same attorney should avoid handling the appeal of that trial. Similarly, a lawyer or firm accused of negligently drafting any type of corporate documents should not handle any subsequent litigation involving those same documents. Doing so not only leads to potential conflict issues based on alleged self-dealing, but also can compound any problems from the underlying representation (as described herein). Even when defending against a claim of malpractice, attorneys should never act to harm their clients. As such, it may be better to let another disinterested competent lawyer or law firm handle the next stages.

If the withdrawal or a termination of the attorney-client relationship is appropriate, the attorney should advise the client to obtain independent counsel and should withdraw from the representation clearly, unambiguously, and in writing. Inevitably, the client will ask what the attorney thinks the client should do. There are only bad answers to this question.

PERSPECTIVE OF MALPRACTICE PLAINTIFFS’ COUNSEL: I generally agree, but this issue is so fact-determinative that it is hard to generalize. Again, seek the assistance of outside counsel experienced in legal malpractice. If you are going to seek permission to withdraw, earlier is better. Many times, I have been asked to review the circumstance of tort plaintiff’s counsel being permitted to withdraw on the eve of trial (once, even in the moment prior to empanelment). These cases often involve an underlying medical malpractice action, with counsel waiting until the last moment to share the realization that the plaintiff is unlikely to recover, and is allowed to withdraw. This leaves the client in a terrible position, and even though it may be true that the underlying case was unwinnable, and thus a live proximate cause defense is set up, the client will eventually find a lawyer to sue you. Emotional harm, anyone?

6. **Be a Client, Not an Attorney**

The most difficult step for most attorneys who have had a legal malpractice claim asserted against them is to stop being an attorney in the case. Attorneys 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 area 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. Yet claims against attorneys are indeed uniquely personal to them. As a result, they will be more involved, more invested and more determined to help.

The challenge is to avoid “claim obsession” such that a legal malpractice claim becomes all-consuming. When that happens, law practices shrink, finances get strained, and the claim replaces an otherwise fully functioning law practice. Unchecked, it can expand to impairment or worse. In the end, as difficult as it may be, it is just a claim. Virtually all attorneys will have one or more over the course of their careers. As traumatic as it is, it should never be more than it is — just a claim.

By following these steps, responding to a legal malpractice claim should not be more difficult than it needs to be.

**PERSPECTIVE OF MALPRACTICE PLAINTIFFS’ COUNSEL:** Practicality and reliance on the judgment of trustworthy others is key. The “claim obsession” issue often comes up when the claim is ready for mediation. Should you attend? Mediation is no time for incendiary or aggressive tactics, unless you prefer a trial. I have never seen a claim-obsessed defendant add anything constructive to the mediation effort. From the point of view of the typical malpractice plaintiff, it is important to remember that this is akin to a divorce: there was a hope-filled relationship that has now been broken, with plenty of disappointment, hurt feelings, etc. to go around. You and your insurer want a reasonable financial outcome, with full confidentiality. Just as in a divorce, some respect, understanding and a conciliatory attitude are necessary to achieve such an outcome. If you are capable of performing to that standard at the mediation, with your attitude, words and body language all in service of that standard, you should attend. Otherwise, it is better to stay away.