

11 Steps to Consider When Facing a Malpractice Claim

By Jon Weiss and Brian Pollock

As attorneys, we tend to focus on how to avoid being sued by a client in the first place. But when a malpractice lawsuit strikes (and it inevitably will), here are some steps to consider to help you through it.

Step #1: Immediately report a claim to your malpractice insurer, whether or not the client has filed suit yet. You can potentially lose coverage if you fail to



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report claims to your carrier in a timely manner. Review your policy to ensure you comply with any required notice provisions. You will also want to determine your policy limits and deductible and review any provisions regarding the selection of counsel to defend your firm.

Step #2: Identify the lawyers involved in the matter that prompted the lawsuit. Call a meeting to let them know about the malpractice claim and seek each attorney's cooperation as the case evolves.

Step #3: Remember the adage, "A lawyer who represents himself has a fool for a client." Lawyers are trained to access a client's case dispassionately; it is difficult to remain detached when you and your law firm are the ones involved in a lawsuit.

Step #4: Hire an outside law firm with significant experience representing law firms in malpractice and other professional liability cases. Professional liability is a specialized area with specific rules and procedures. For example, there are special rules about when malpractice claims accrue, the use and need for experts, and the standards for causation. You're best positioned for success when you hire an external legal team with a track record of helping law firms in your same position.

Step #5: Hire a law firm that also has attorneys with expertise in the specific practice area under scrutiny. If the malpractice claim involves an intellectual property matter, you're smart to make sure your professional liability attorneys have down-the-hall access to intellectual property attorneys. Often this means retaining a full-service firm.

Step #6: Assign one person to serve as outside counsel's point person. At the very least, this should be

a partner who isn't involved in the malpractice claim. Ideally, your firm's Ethics Partner/General Counsel would serve as the primary contact.

Step #7: Make sure all subsequent communication about the case is protected by attorney-client privilege. Keep in mind that just because those communicating at your firm about the claim may be lawyers, the attorney-client privilege will not necessarily attach. This is another reason why hiring an outside law firm is advisable. It draws a very clear line about what is privileged and what is not.

Step #8: Institute an internal gag order. Your firm's lawyers and staff should refrain from talking internally or externally about the case; it is especially important to curb any and all email and/or social media communications--both of which may be discoverable. The last thing you need is a partner emailing another partner saying something like: "We never should have taken this case. I just knew we would screw it up because we put so many young associates on it who had no idea what the hell they were doing." Remind your lawyers and employees of this no-communication edict often.

Step #9: Preserve all documents and electronic data related to the matter. Once a lawsuit is filed (and perhaps before), you will have obligations to preserve relevant data. Enlist the help of your IT department to make sure you meet your preservation obligations.

Step #10: Don't ignore mistakes. When a mistake has been made in an ongoing representation, your goal should be to take action aimed at serving the best interests of your client. Do not ignore the issue hoping that it will go away on its own. Do not send emails ascribing fault to others at the firm for the mistake. You may find that the mistake can be easily fixed or that it is not as bad as you originally thought. By tackling the issue head-on, you can often avoid exacerbating the problem. In these circumstances, keep in mind that conflicts of interest can arise between you and the current client that may require either withdrawal or a waiver from the client for representation to continue. To this end, you're wise to implement ongoing ethical training to help you and your firm's lawyers identify and confront any potential malpractice and ethical issues before they turn into a lawsuit or a bar complaint.

Step #11: Relax. As litigators know, lawsuits take time to resolve and can have an emotional toll on clients. Now that you and your firm are involved in a lawsuit, it is important to stay calm throughout the ordeal.

After the Dust Settles

All lawyers make mistakes, and unfortunately, sometimes those mistakes subject us to potential malpractice claims. If and when this situation confronts you or your firm, take a deep breath and keep the above tips in mind.



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