

I MADE A MISTAKE. NOW WHAT DO I DO?

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It is every lawyer's nightmare: a mistake in handling a client matter. Now what?

First, mistakes happen. You are certainly not the first lawyer to make a mistake while representing a client. Nationwide, more than 55,000 claimants initiated claims against lawyers who had legal malpractice insurance in the 2008-2011 report period.¹

Next, be pro-active in responding to the situation. Consult your firm's internal procedures for handling these situations. The information below should be considered advisory guidelines that may assist you throughout the process.

A. Notify your malpractice carrier

You will want to make sure that your legal malpractice insurance company is notified as soon as you discover the error. Most legal malpractice insurance policies are claims-made policies. Under a claims-made policy, known claims must be reported during the policy period or reporting time period window as defined by the policy. This is a key difference from occurrence policies (i.e., most homeowners insurance policies) where claims may be reported indefinitely into the future if the "occurrence" giving rise to the claim occurred during the policy period. It is an important distinction to keep in mind since untimely reporting to a malpractice insurance company can jeopardize your coverage. Malpractice insurance policies can differ in their notification terms and conditions so it is important to carefully review your policy. For example, some malpractice insurance policies define a "claim" to be: (1) a demand communicated to the insured for damages or professional services; (2) a lawsuit served upon the insured seeking such damages; (3) any notice or threat, whether written or oral, that any person, business entity or organization intends to hold an insured liable for such damages; or (4) any act, error, or omission by any insured which could reasonably support or lead to a demand for such damages. As you can see, the obligation to notify the malpractice insurance carrier under that definition of claim is much broader than simply waiting for a formal demand or suit to be initiated. Moreover, the carrier can give information and guidance on how to proceed and what to tell the client.

B. Notify your client

You have an ethical obligation to notify your client of the error. It is hard to admit mistakes, but it is even worse to be in violation of the Minnesota Rules of Professional Conduct. The rules governing your obligation are 1.7 and 1.4.

Rule 1.7

Minnesota Rule of Professional Conduct 1.7(a) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there

¹ American Bar Association Standing Committee on Lawyers' Professional Liability, Profile of Legal Malpractice Claims 2008-2011 (2012).

is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer. Rule 1.7(b) goes on to state that notwithstanding the existence of a concurrent conflict of interest under 1.7(a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and 4) each affected client gives informed consent, confirmed in writing.

An error by a lawyer during representation may create a conflict of interest for the lawyer. Specifically, the lawyer may now have a personal interest in how the client's matter is resolved as it may impact the lawyer's potential liability relating to the error.

Rule 1.4

Minnesota Rule of Professional Conduct 1.4(a) requires a lawyer to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information. Rule 1.4(b) goes on to state that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Ideally, you should meet with your client in person to discuss the situation. An in-person meeting provides the opportunity to fully explain to your client what has happened. You will want to disclose all facts material to the client's decision on how to proceed. You should advise the client that he or she may wish to retain counsel to review this matter, or, that your client can contact your malpractice insurance company directly (if it is a situation where the client has a potential claim against you). It is, however, imperative that you avoid giving legal advice regarding any potential malpractice claim against you.

After you meet and discuss with your client, the best practice is to send follow-up written correspondence confirming the discussion of the meeting. If you have malpractice insurance, its staff will often assist you in drafting this correspondence. Be sure to save a copy of this correspondence for your file.

At this point, it becomes a "wait and see" situation. Not every error leads to a malpractice lawsuit or demand. After your client has been fully advised of the situation, he or she may choose to: (1) not pursue a claim against you; (2) pursue a claim by initiating suit; or (3) try to resolve the matter by submitting a demand. Again, it is imperative that you notify your malpractice company in accordance with the terms and conditions of the insurance policy. Your malpractice carrier will likely set up a claim file and monitor the situation to see whether anything develops from it.

C. Learn from it

While mistakes are a part of life, they often serve as useful mechanisms to reflect on what happened and what can be done to prevent future mistakes. Legal malpractice errors can largely

be grouped into three categories: administrative, substantive, and client relations. Recognizing these potential errors and maintaining best practices can help you avoid many of these pitfalls.

Administrative Errors

Administrative errors include procrastination or failure to follow up; losing a file, document, or evidence; failure to calendar properly; clerical errors; or failure to file appropriate documentation. Often, these types of errors can be prevented through having appropriate office management and organization systems in place. Especially in Minnesota, with the implementation of the new Minnesota Rule of Civil Procedure 5.04, it is imperative to have an appropriate calendaring system in place.² Whether it is elaborate office management software or basic calendaring, make sure you have some type of system in place that works for you, that provides useful reminders, and ensures that these types of potential administrative errors are caught. Employing organized and trained administrative support staff can also ensure that these types of errors are avoided.

Substantive Errors

Substantive errors include the failure to know or properly apply the law; inadequate discovery or investigation; error in judgment in handling the case; conflict of interest; or failure to know or ascertain a deadline. When taking on a new case, make sure you have an understanding of the relative complexity and specialized nature of the matter. Specifically, make sure you weigh this against your general experience and training and experience in the field in question. Beware of dabbling in an area of law that you are unfamiliar with, especially if you have only limited time or are not able to give the case the preparation and study necessary. If you are unfamiliar with the area of law or particular issue, you should look at whether you can refer the matter to, or associate with, a lawyer of established competence in the field in question. When you step outside your normal practice area, identify gaps in your own competence and take necessary steps to reach the requisite level of competence. Further, make sure to complete a conflicts check as soon as possible before beginning work on the case.

Client Relations

Client relations errors include failure to provide the client with sufficient information, failure to follow client instructions, and improper withdrawal. Make sure you consider the client's expectations for your representation at the outset. Does the client have a reasonable expectation of the value of the case and the time it will take to resolve the matter? Can the client afford your services? Beware of the client who gives you a bad feeling and trust your gut instinct before undertaking the representation. Remember to keep the client fully informed of the case status throughout the representation. Sending written correspondence to a client confirming oral conversations can also be beneficial. Adequate screening of prospective clients can help to avoid many potential claims.

² Minnesota Rule of Civil Procedure 5.04 states that any action that is not filed with the court within one year of commencement against any party is deemed dismissed with prejudice against all parties unless the parties within that year sign a stipulation to extend the filing period. This provision does not apply to family cases governed by Rules 301 to 378 of the General Rules of Practice for the District Courts.

For new lawyers, a mentor can be an invaluable resource. If your firm does not have a formal mentorship program, reach out to local bar or legal organizations as many of them have mentor opportunities available. Seasoned lawyers are often happy to offer their guidance and expertise to newer lawyers.

While no one is perfect, taking appropriate safeguards and precautions can help you minimize the likelihood of making future mistakes.



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