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This Week's Feature

I Have Been Sued—What Does a Lawyer Do Now?

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Every year, numerous attorneys in private practice are faced with the potential of having to defend against a legal malpractice claim. While, as with most litigation, the vast majority of these claims are settled, the associated expense can often be substantial. With legal malpractice claims and settlements reaching into the tens of millions of dollars, and with attorneys facing juries who are frequently hostile to their defenses, the practice of defending legal malpractice claims is one that provides unique challenges.

In legal malpractice suits, both the attorney accused of malpractice and the attorney defending the client/colleague have their traditional roles disrupted. The accused attorney, so often the zealous advocate for the client, takes on the role of a client and as such, his/her duties are to assist his/her attorney honestly in the preparation of a defense. These new duties run counter to his/her natural inclination to take control. The attorney representing his/her accused colleague, while retaining his/her traditional role as advocate, is faced with the special challenges associated with representing a client who not only has a detailed knowledge of the process, but who also has extensive personal knowledge from which to critique and question his/her attorney's performance. This unique relationship between the attorney accused of legal malpractice and the attorney who represents him/her provides the subject for this article.

I. Suggestions for Attorneys Who Are the Subject of Legal Malpractice Claims

While being sued is almost always an unwelcome and unpleasant experience, an attorney who is sued for legal malpractice faces particular challenges. Suits for legal malpractice, at their best, accuse the defending attorney of misjudgment and quite often go further into accusations of incompetence and lack of professional ability or integrity. These claims are often taken by the accused attorney as a direct attack on his/her ability to perform the required duties of his/her profession and are understandably, taken quite personally.

Lawyers who find themselves the subject of a legal malpractice claim first must understand that their accustomed role as advocate is drastically altered in their defense of legal malpractice claims. The first instance in which lawyers often fail to recognize this alteration of roles is at the very onset of the legal malpractice case. Absent unusual circumstances, attorneys do not usually anticipate suit being brought by their former clients. Faced with an unsatisfied client or, worse yet, service of a filed complaint alleging professional negligence, the initial reaction of most

attorneys is to contact their former client in an attempt to remedy what they assume is just a misunderstanding. This is often the attorney's first mistake in dealing with a claim for legal malpractice.

A. Inform Your Malpractice Insurer of Potential Claims

When presented with a potential malpractice claim, an attorney faces many difficult decisions; one of the most important decisions is deciding if and when the attorney should inform his/her insurer of a potential claim. Many professional liability insurance policies covering legal malpractice are of the claims-made variety. A claims-made policy does not cover a specific period of time relating to the occurrence of the alleged malpractice, but instead covers when a claim for professional negligence is actually made against the insured. Most claims-made policies require the insured provide written notice of the claim within a specified time after first learning of the potential claim. These policies also allow for the coverage of claims actually made after the expiration of the policy, as long as the insured attorney gave notice of the facts and circumstances that might give rise to the claim during the covered period. Prompt notification to the insurer of potential claims best ensures coverage.

To that end, assigned counsel for the accused attorney is concerned only with the representation of the legal malpractice client. This affords the attorney the same zealous advocate the plaintiff enjoys, without the accused being forced to directly assail his/her prior positions. Representation also allows the defendant attorney the advocacy of one who does not now, and has never owed duties to the plaintiff. While the defendant attorney may be procedurally relieved of his duties to the plaintiff in the current legal malpractice action, it is undoubtedly easier for the attorney's defense counsel to challenge the merits of the plaintiff's underlying claim.

B. Be a Good "Client"

It has been said lawyers make absolutely the worst clients. Because an attorney defending against a legal malpractice claim starts his/her defense with the burden of having to avoid many unflattering perceptions, it is important for all legal malpractice defendants to attempt assisting their defense counsel in whatever manner possible.

As a defendant in a legal malpractice claim, the attorney, like all defendants, best assists in his/her defense by fully and completely disclosing all available information to his/her lawyer and promptly responding to his/her requests. Although it may seem to be sophomoric advice, it is important for attorneys accused of legal malpractice to remember what kind of clients make their lives easier and what clients make the most positive impressions to the court, and particularly to the jury.

C. Do Not Attempt to Communicate or Settle Claim Directly with the Plaintiff

When faced with an actual or potential claim for legal malpractice, it is important for the accused attorney to recognize the seismic shift that has occurred in his/her relationship with his/her former client. While initially it is true that open lines of communication do much to avoid legal malpractice claims, it is important for attorneys to recognize once a claim for legal malpractice is threatened or filed, his/her relationship with the client has indeed changed. This realization is often difficult, as the attorney may feel the claim is simply a misunderstanding or a miscommunication between the parties that can be remedied by the attorney explaining the situation and persuading the plaintiff to withdraw

the claim. Although there may be a misunderstanding, it is likely too late for simple explanations to remedy the situation, and the attorney's attempts may do more harm than good. For example, the plaintiff may very well testify admissions of fault were made during the conversations.

II. Conclusion

Just recently, a survey indicated the number of claims against lawyers in 2011 is up 6 to 20 percent from 2010. While your initial reaction may be to attempt to extinguish a potential legal malpractice claim yourself, you are probably doing yourself a disservice, and, quite possibly, hurting yourself both emotionally and monetarily in the long run. As such, upon receiving notice of a claim/potential claim being filed against you, contact the proper individuals to help assist in navigating these murky waters.

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