**When Facing a Malpractice Claim, Please Don’t Make Things Worse Than They Already Are.**

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For over 27 years now, I have worked for an insurance company that insures lawyers for their malpractice. Trust me when I say I get it. There are going to be times when an insured doesn’t necessarily agree with every decision the company must make in trying to resolve his or her claim. That’s going to happen. What I don’t get is when an insured decides to prevent us from helping at all. Here’s one particularly memorable story.

Sometime ago we were put on notice of a claim by an alleged former client of an insured. We repeatedly tried to contact the insured via multiple channels in order to obtain a copy of the file and any claim related communications between our insured and the former client that might be out there. Without this information, there is no way to properly evaluate the claim. Yet, despite of being the recipient of a policy limit demand, this insured refused to even acknowledge our efforts to contact her. I can’t help but wonder why money was wasted on paying the premium if this was going to be her end game. It should go without saying that this lawyer’s complete refusal to work with us made matters far worse than they otherwise would have been.

While this lawyer’s response to a malpractice claim was atypical to the extreme, the actions or inactions of many other lawyers have ended up making it more difficult for us and defense counsel to effectively work the problem. With the hope of helping you avoid making matters worse should a claim ever arise, here are several practical dos and don’ts that are worth keeping in mind. Taking them to heart will help your insurer and defense counsel best help you when you need them the most.

**1)** Never fall on your sword and promise the client your insurance carrier will take care of this by paying some stated amount because liability may not be as straight forward as you think it is. Acknowledging that a client may have a claim against you in light of missing a statute of limitations filing deadline is one thing. Promising your carrier will pay the $500,000 this client had coming is something else entirely. If you aren’t sure about what to say to your client, call your carrier first. They’ll guide you.

**2)** Don’t try to hide the misstep or ignore the situation. Immediately report the claim and share any insights you might have. If the claim happens to involve a specialized area of the law, help the carrier begin to evaluate the claim by sharing your thoughts on the merits and valuation of the claim. Be honest, forthright, and also prepared to promptly follow up on this initial reporting by providing a clear, concise and appropriately detailed statement of the underlying matter to include the current status of the matter. Identify the key parties, relevant dates, and any important procedural information. This will help jump start the evaluation process.

**3)** Once the claim has been reported, do not talk to the client, your friends, or anyone else about the case. You should only talk with your carrier and defense counsel, that’s it. And don’t make it hard. Return calls from your carrier or defense counsel in a timely manner, and for heaven’s sake don’t put staff in the middle. If the carrier or defense counsel needs to speak with you, they mean it. They need to speak with you, period.

**4)** Secure the entire file and, yes this must be said, do not alter it in any way! Work with your IT folks if necessary. You need to make sure you have everything, to include all email; text messages; voicemail; recordings; and documents (digital and paper) to include drafts, notes, and all correspondence. Don’t make the mistake of excluding items like email or notes that were for internal use only. Securing the entire file means gathering together everything, not just what you or someone else at the firm thinks is relevant. That’s called cherry picking, and trust me, that can prove to be a really bad idea down the road. If it helps, remember that the file is being prepared for use by your carrier and defense counsel, not the opposing party.

**5)** Unless instructed otherwise, provide a complete copy of the entire secured file to your carrier. While this process may take a few weeks, never let it get beyond that. The carrier and defense counsel need to know the good, the bad and the ugly up front, so again, provide everything. If they don’t need certain things, they’ll be returned.

**6)** Cooperate with defense counsel and treat him or her as you would have your own clients treat you. I know this can be hard but remember in this situation you are the client not the lawyer. If your lawyer would like you to do a little research, she’ll let you know. Finally, be forthright at all times because 99 times out of 100 an inconsistency will come out in discovery.

**7)** And also cooperate with your carrier. For example, if everyone agrees that settlement is the way to go, don’t change your mind at the last minute and refuse to settle. This will create a conflict for defense counsel, and you’ve just made your claim much more difficult to resolve. Help them help you. After all, their help is what you purchased with your premium dollars.

**8)** Last but not least, try to not let your emotions get the best of you. Dwelling on anger, embarrassment, guilt, or fear will prevent you from moving forward. Remember that your carrier and defense counsel have been through this process more than a time or two. They know what they’re doing. Be the professional that you are and choose instead to focus on delivering quality legal services to the rest of your clients knowing that this too shall pass.

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