In the practice of law, there may be times when mistakes are made that may or may not rise to the level of legal malpractice. There are obvious mistakes that definitely qualify as legal malpractice, missing a statute of limitations date, for example, and then there are mistakes that do not so obviously fall into the category of legal malpractice.

WHAT TO DO WHEN LEGAL MALPRACTICE ARISES

BY FELICIA GALATI, ESQ.

Legal malpractice can come in many forms. According to the American Bar Association's Standing Committee on Lawyers' Professional Responsibility studies (released in 2010), these were the top five mistakes leading to trouble for attorneys:

1. Failure to know or apply the law;
2. Planning error;
3. Inadequate discovery of facts or investigation;
4. Failure to file documents (no deadline), i.e. to perfect a client's interest; and
5. Failure to calendar.

This article is intended to provide basic, general information regarding legal malpractice and what to do about it.

Get Legal Malpractice Insurance

Although it is not required, you should have legal malpractice insurance. If you do have legal malpractice insurance, know what your policy covers and familiarize yourself with it so that you know what you are required to do and when. Generally, certain basic provisions are part of most policies, but you should be familiar with the specific language of your own policy.

Notify the Carrier of Any Claim

When an issue arises that might qualify as legal malpractice, contact the carrier and put it on notice of any potential legal malpractice claims. This is critical. Legal malpractice insurance policies, like other policies, require that you notify the carrier of potential claims within a certain time period. If in doubt about whether or not you need to report the matter, notify the carrier. It is always better to err on the side of caution and speak up when you are not sure if the matter should be reported,than to stay silent and have coverage issues later. This way, there will be no issues regarding your compliance with the policy terms. You should provide notice in writing, and as specifically required by the policy terms, so there can be no doubt that you provided appropriate notice of the claim.

Don't Represent Yourself

Some carriers and/or policies will allow you to choose specific counsel to defend you, or will at least consider a request to be allowed to make that choice. If you want a specific attorney to defend you in a legal malpractice case, let the carrier know, so it can determine if the attorney is approved counsel, and/or whether or not to otherwise consider your request. The same is true if you have an attorney defending you in a legal malpractice case and decide you want a new attorney if the circumstances allow it. What about defending yourself, you ask? Not a good idea. You have been representing the client for a period of time and have not been able to avoid problems; you likely have some personal feelings about the situation. For this, and other reasons, it is always best to have an objective third party representing you.

Get Advice Early

Don't wait until you get sued to seek advice. Getting advice when the issue first arises will give you an opportunity, with the guidance of counsel, to do whatever you can to potentially remedy the situation and avoid a legal malpractice claim.

If the Client Asks, Give Him or Her A Copy Of the File

When a legal malpractice issue arises and a client is unhappy with the services provided by the attorney, there is often an issue regarding the file. What do you do when the client asks for the file? There are a number of responses to that. Rule of Professional Conduct (RPC) 1.16(d) provides that, upon termination, a lawyer shall take steps, to the extent reasonably practicable, to protect the client's interests, including surrendering papers and property to which the client is entitled. However, you should keep copies of all papers relating to the client in order to defend yourself as needed. You should know that Nevada law recognizes charging and retaining liens. An attorney has a charging lien upon any judgment or settlement he or she obtains for the client. *See* NRS 18.015. A retaining lien allows an attorney discharged by a client to retain client papers, property or money until a court requires the attorney to deliver the items once the client furnishing payment or security for attorney fees. *Leventhal v. Black & LoBello*, 129 Nev. Adv. Op. 50, 305 P.3d 907, 909 (2013) citing *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 532, 216 P.3d 779, 782 (2009).

While a retaining lien is allowed, sometimes it is best to just give the client a copy of the file, especially if there are impending deadlines for which the client will need the file, and/or to avoid any other problems, including a bar grievance.

Settlement

On the issue of settlement, most policies are consent policies (i.e. the carrier must have your consent to settle the case). Again, specific policy terms should be consulted on this issue. Where the policy requires your consent, you should remember that, generally, the policy will require you to cooperate with the carrier. However, a refusal to consent to a settlement into which the carrier wants to enter could have consequences. There may be policy language that provides, for example, that if you do not consent and a judgment greater than the amount in question is obtained, you could be responsible for some or all of that judgment, plus attorney's fees and costs from a certain point going forward. The policy language will determine if this is the case.

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Discipline Cases

Some legal malpractice insurance policies provide coverage for your defense in disciplinary matters. Check your policy to see if that is the case in the event of a bar grievance. Sometimes, a former client and/or his attorney may pursue a bar grievance related to the conduct that is the subject of a legal malpractice claim and/or action. Some might view this as a way to pressure the attorney into resolving the claim in order to avoid a bar grievance. Also, inappropriate discovery efforts regarding the legal malpractice case might be attempted, on an expedited basis, through the grievance process, as an attorney has a duty to respond to state bar requests for information and documents, and to cooperate with the state bar. While I cannot speak for the state bar, if possible, it has allowed matters to run their course in court prior to dealing with the grievance, but that is not always the case. Waiting for the court to deal with the case can cause significant delay in the grievance process, which is always a concern. Depending on the outcome of the litigation, there may be a bar grievance file opened. However, you should know that you cannot make a deal with a client that involves withdrawing a bar grievance, because the state bar is the complainant in such matters, and you could end up with a misconduct charge. *See* RPC 8.4(d).

Avoiding Legal Malpractice

Unfortunately, certain practice areas are subject to more legal malpractice claims — personal injury, family law and criminal law, for example. The best way to keep such claims to a minimum is to be the best you can be in your area of the law. This includes keeping up on your practice area. However, in addition to that, there are some common practice problems that you should be able to easily address in order to keep legal malpractice claims and/or bar grievances to a minimum. They include:

1. A failure to communicate;
2. A lack of diligence;
3. Trust account problems; and
4. Investing with clients.

Regarding communication, it may seem trite to say, but you need to communicate with your clients, both in writing and by returning phone calls. It is common to hear that a lawyer being sued for legal malpractice did not communicate with or return the calls from the client. Regarding diligence, if you need to do something, or you tell your client you will do something, just do it and don't delay or miss any deadlines. Regarding the trust account, never take any shortcuts with, or deal improperly with, your trust account.

That means don't commingle funds, don't write checks from that account until the related check you deposited clears, do not pay your staff or other general expenses from that account, keep a trust account ledger, document every transaction regarding funds in that account, and do a monthly trust reconciliation to make sure there are no issues with those funds or the account. Regarding business transactions with current clients, make sure you comply with RPC 1.8 as it applies to your situation; for example, by making sure the transaction and terms are fair and reasonable (RPC 1.8(a)(1)), the client is advised in writing (RPC 1.8(a)(2)), and the client gives informed consent (RPC 1.8(a)(3)). Also, do not provide financial assistance to a client in connection with pending or contemplated litigation, except as allowed under RPC 1.8(e).

Substance Abuse and Mental Health Issues

If you believe a substance abuse problem or mental health issue is at the root of the legal malpractice claim or bar grievance, ask for help. There are many resources available in Nevada's legal community (including through the bar), that are confidential and can assist you in getting through the matter. NL

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