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Where do you turn when you make a mistake?

It can happen to the best attorney. A docketing mistake, a clerical mistake or, simply, a human mistake. The first moment of realization is perhaps the worst. How to respond in that moment is often critical. What are the immediate options for the lawyer who realizes that he or she has made a mistake?

The insurance carrier: Law firms should inform the carrier of any material mistake. Most professional liability policies are written on a claims made and reported basis and will exclude coverage for any claim that the insured could have reasonably foreseen prior to the policy period's inception. Examples of prior knowledge language found in claims made and reported policies are as follows;

This policy excludes any claim

> *based on or arising out of any act or circumstance which took place prior to the date shown in the Declarations if, prior to that date, any Insured knew or could have reasonably foreseen that such act might reasonably be expected to be the basis of a claim…*
>
> *occurring prior to the inception date of this POLICY if a) the WRONGFUL ACT had previously been reported to any other insurance company or b) if the INSURED at the effective date of this POLICY knew or could have reasonably foreseen that such WRONGFUL ACT might be expected to be the basis of a CLAIM…*

Prior knowledge exclusions are included in claims made and reported policies as insurance carriers are not in the business of insuring known risks. At the policy inception date, both the insurance carrier and the law firm should have equal knowledge regarding the possibility of a future claim. By reporting the potential claim or mistake to the carrier, the prior knowledge exclusion is one less issue with which the lawyer or law firm will be forced to contend in the event of a mistake.

Further, lawyers should not confuse a "prior acts date" with the duty to report potential claims under a claims made and reported policy. While a prior acts date allows the insured to report claims that arise out of past legal services, a carrier may still deny a claim (regardless of when the legal services occurred) if the insured had prior knowledge of the claim prior to the policy period's inception

Further, individuals handling lawyer claims are generally very experienced and, many times, are attorneys themselves. They have likely seen similar situations, and are a great resource for assistance and guidance. If the client should be told of a mistake, the insurance carrier can often times provide guidance. Further, some carriers provide pre-claims counsel who can also offer assistance as talking to an outside attorney may sometimes be helpful in more complicated scenarios.

Consult with an outside attorney: While the law firm should advise the client of the material mistake in a timely manner, it may not, however, be prudent to talk to the client first for numerous reasons. As indicated, the carrier may offer assistance and may recommend outside counsel who may be helpful in formulating the plan ahead. First, the insured lawyer may be mistaken about the mistake. Often a second set of eyes will discover that there is in fact an extra day to file the motion, there is another avenue to add a defendant to a complaint, or that the contract language is not as unfavorable as first believed. Second, in the midst of discovering a mistake, the insured lawyer may find it difficult to objectively analyze the importance of certain facts under such a stressful situation. Some lawyers are frustrated or fearful, and others may be defensive or angry about the mistake. These emotions may impact the insured lawyer's ability to determine the most appropriate plan ahead. The consulting lawyer may be able to assist in viewing the mistake in more objective and realistic terms. Further, the consulting attorney may assist in formulating a letter to the client or the report to the carrier when the handling lawyer may be tempted to hedge, omit certain facts, overly explain or apologize. The consulting attorney can assist the handling lawyer with sticking to the objective facts.

Talk to the client: The client should be told about material mistakes in a timely manner. But what constitutes a material mistake? Many mistakes are negligible and/or correctable and easily and quickly fixed. Many, however, are not so easily and quickly fixed and can substantively impact the case or the transaction.

In April of 2018, the ABA's Standing Committee on Ethics and Professional Responsibility weighed in on this issue. Formal Opinion 481 concludes that the rules "require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation." The ABA Opinion finds that, "an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."

While ABA Opinion 481 may be helpful in the analysis of whether to inform a client of an error, firms should keep in mind that if the client learns that his or her attorney has been attempting remedial measures, only to have them fail, they may feel misled if they were not informed of the error straight away. If an attorney loses the client's trust, any subsequently asserted claim may be very personal in nature. If, however, the lawyer informs the client of the mistake in a professional and timely manner, even if the client ultimately files a claim, the client may be more inclined to be reasonable when moving towards resolution. Further, if it is still possible to repair the mistake, some clients may request that the lawyer continue to attempt to do so. Under these circumstances, however, the lawyer may be in a conflict of interest situation. For this reason, a written and knowing conflict waiver from the client is recommended. (Lawyers should check with their applicable jurisdictions conflict rules.)

Keep the consult privileged when discussing internally: Attorneys should be aware that when consulting with an in-house attorney in regard to a mistake concerning a current client, the consultation may not be privileged from the current client. Federal courts, in particular, may find that the fiduciary relationship with the client overrides any in-house attorney-client privilege subsequently asserted. State courts have been more inclined to make a factual determination regarding whether an in-house attorney-client relationship exists and to rule, if it did exist, that the communications are privileged.

Consequently, to the extent that it is possible, law firms should strive to create an environment to support the assertion that in-house discussions about the mistake are confidential and subject to the attorney/client privilege. For example, firms may consider: 1) consulting with the firm's designated general counsel, ethics counsel or claims counsel (or at least an attorney who is uninvolved with the day to day handling of the file); 2) conduct the consultation in a confidential manner (closed door); and 3) keep the consultation confidential (no water cooler discussions).

Finally, it may be helpful for law firms to get into the practice of advising clients in retainer agreements that the firm may, at times, need to discuss issues internally. The client may be asked to agree that the client will not challenge the privileged nature of these in-house attorney-client discussions. While the privileged nature of the discussion will still likely be a fact question, such a provision in a retainer agreement may certainly be helpful.

Conclusion: Mistakes can happen to the best of attorneys. Often times, however, it is how those attorneys respond to a mistake that can make the difference. Again material mistakes should be reported to the carrier and, ultimately, likely the client after carefully formulating a plan in that regard.