THREE PRINCIPLES TO EFFECTIVELY ADDRESS AN ERROR

PRACTICE TIPS

by Rian Jorgensen, JD

The practice of law is extraordinarily difficult. No matter the area of practice, attorneys need to process a dizzying array of information, synthesize it in a coherent fashion, and then exercise sound judgment on behalf of their clients. While zero errors should be the goal, lawyers are (alas) human, and mistakes will be made.

Diligent practitioners will acknowledge this fact, and rather than engage in recriminations, consider how to effectively address an error.

First and foremost, the absolute worst thing that an attorney can do upon discovering an error is attempt to cover it up. While the temptation to do so can be strong (especially for lawyers in positions of power: see Nixon, Richard and Clinton, Bill), invariably, "the cover-up is worse than the crime."

Putting aside the strong ethical obligations, attempting to "smooth over" an error is a mistake even from a tactical standpoint. Doing so typically generates a separate cause of action (breach of fiduciary duty) that can dwarf the original malpractice.

There are three core principles that every practitioner should keep in mind in connection with the discovery of a potential error:

1. **Act promptly.** When a mistake is discovered, discuss it immediately with either a senior colleague, general counsel or outside counsel. (E-mails along the lines of "I think I may have screwed up…" are not recommended). Virtually all of the major malpractice insurance companies have in place complimentary ethics "hotlines" with reputable and experienced professional liability lawyers that are ideal for such consultations.

2. **Review all consequences.** There are potential ethical, civil liability and insurance ramifications to every discovery or allegation of error. While civil liability is usually at the front of lawyers' minds, giving short shrift to the ethical and insurance issues can result in severe disciplinary and coverage problems.

3. **Disclose.** Advising the client (but not admitting liability), along with the malpractice insurer should be the standard protocol (absent unusual circumstances). Unfortunately, we have seen lawyers unnecessarily "fall on their swords," telling clients in essence that "I screwed up and will make it right" when, in fact, the lawyer did not commit malpractice. Such admissions can make defense of a malpractice claim practically impossible.

A recent Illinois state appellate decision highlighted several of these issues, as described in "Insurer Must Defend Attorney Who Admitted Error" in the National Law Journal (Nov. 13, 2012). In this case a trust and estate attorney drafted a will, and apparently omitted language that decreased the beneficiaries' bequests. Without notifying his malpractice insurer, he wrote the beneficiaries that he "inadvertently omitted a provision" in the will. When they subsequently sued, his insurer declined to defend, averring that the lawyer had violated the policy provision stating that: "The insured, except at its own cost, will not admit any liability, assume any obligation, incur any expense, make any payment, or settle any claim without the company's prior written consent."

While this attorney was eventually able to secure coverage for the matter, it is likely that the dispute could have been avoided entirely if there had been more diligence at the outset regarding communications with the potential plaintiffs and the malpractice insurer.

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