



Putting the fire out:

Dealing with the stress of a malpractice claim

There is simply no doubt about it: making an error or having an action commenced against you is stressful, even for the most successful lawyers. And because almost half of Ontario lawyers in private practice will face a malpractice claim at least once in their career, at some point this stress will be a reality for many lawyers.

From my years of handling professional negligence claims, I have seen lawyers react to this situation in different ways including fear, anxiety, embarrassment, and even anger.

The initial call with a lawyer is one of the most rewarding parts of my job. I am often meeting someone for the first time, learning about their practice, their firm, their clients and their current issue. For my part, I try to assess whether there is a problem that can be fixed or made to go away quickly. For the insured's part, once they get over their initial fear and anxiety and realize they will be helped through the claim and defended as appropriate, they usually feel more comfortable.

Embarrassment

Many insureds experience anxiety over the potential of people finding out about the error or alleged error at issue. This can be tough, for example, in a major litigation file where the insured's error (or potential error) might be discussed in an endorsement or reasons. Worries over losing the client, unsupportive partners, or judgmental peers can be hard to balance with the ongoing practice of law – all while being named a defendant in a negligence action.

If it is some consolation... remember, almost everyone makes an error at some point. Given the statistics, insureds who are willing to confide in colleagues will likely find that they are not alone in having a claim.

Anger

Some insureds are angry that they have been sued or that there is a suggestion that they have made an error. This is especially the case in situations where, in fact, no error has been made. Most insureds get over this anger fairly quickly, but some remain intensely angry throughout the life of the claim. This makes, not only the initial call, but all subsequent calls, challenging. The relationship with the insured usually balances out once they realize that the matter is moving to a resolution and, angry or not, we will assist them.

However, this kind of reaction to a claim emphasizes why it is so important to report a claim or potential claim to LAWPRO. Anger can lead to bad decision making such as retaliatory steps or aggressive letters that might actually undermine the insured's position. Reporting the potential claim and allowing another professional to deal with the situation enables the insured to step back and take a break from the confrontation. Keep in mind that having a claim made against you does not mean it is a *valid* claim. In fact, almost 40 per cent of claim files are closed with no payment at all (including defence costs).

Fear

I have also worked with insureds who are so overwhelmed by the situation that they can barely relay the facts. Take Carol (name has been changed), for example. She negotiated the settlement of her client's divorce proceedings which included each spouse retaining equal share of their holdings in a company they owned together with another party. Only after the final Order was signed did Carol learn that, because the class of her client's shares was different than that of her husband's, there would be an unequal tax effect of \$750,000 each year going forward. Carol had \$2 million in insurance coverage, including excess insurance – far less than the many millions in potential damages. I could barely hear Carol at the end of our initial call when she whispered, “I am going to lose my house.”

Carol was often in my thoughts over the next few weeks. I wondered whether she was getting any sleep at all, and whether she had someone to confide in. In the end, there was good news: the matter was repaired and the file closed without any damages having to be paid and without Carol losing her house. That is another rewarding part of my job: telling an insured that their matter has been resolved.

Denial/Avoidance

All too often, I see cases in which insureds are so stressed about an error, that they can't bring themselves to report it at all or have waited a significant period of time before doing so. These insureds simply cannot deal with the situation. Once a report is made, some of these insureds avoid dealing with the matter and will not return our phone calls or correspondence. This, of course, makes an already difficult situation worse. The delay in reporting may result in circumstances where it is too late for LAWPRO to repair an error or defend an action. Failing to cooperate may also result in a breach of the insured's obligations under the Policy. Both situations can result in a denial of coverage.

Remember, no good will come from a delay in reporting a claim. Reporting a claim as soon as possible allows LAWPRO to provide early intervention and your best defence.

Making it through

The good news is that 83 per cent of LAWPRO's claims are closed with no finding of liability or indemnity payment. While dealing with a claim is stressful, we are here to help. If you are feeling overwhelmed by an error or a claim against you, consider taking the time to check in with a trusted friend or colleague. If you do not feel comfortable sharing your situation with someone you know, the Member Assistance Program provides confidential peer counselling. ■

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