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To Err is Human: A Guide for Attorneys on How to Manage Errors

That the confession of error runs contrary to self-interest and human nature, yet may be required, is simply a fact of fiduciary life. Unflinching loyalty to their interests is the duty of every attorney to his clients.

– *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 30 Mass.L.Rptr. 502, 507 (Mass. Supp. 2012).

Introduction

A day in the life of an attorney is not easy. Across all practice areas, they face rigid deadlines, packed calendars, and an endless stream of client demands with no boundary of "work hours". Even the most conscientious, hardworking and diligent attorney may make a mistake of significant consequence at some point in his or her legal career. The mistake may even be serious enough to lead to a legal malpractice claim or disciplinary action. However, the attorney's management of the mistake is often more important than the mistake itself and, if mishandled, can exacerbate the simple malpractice situation and give rise to disciplinary grievances or other claims and increased damages.

The political axiom "it is not the act but the cover up that causes trouble" applies to attorney errors as well. It is only natural to want to conceal or diminish mistakes. Lawyers may be embarrassed to admit to their clients and colleagues that they have made a mistake. However, attorneys have ethical and professional duties to disclose their mistakes to their clients.

This guide will address the relevant rules, laws and practice management steps that an attorney should consider when a mistake has been discovered. It will help in determining when disclosure to the client is necessary, how and what that disclosure should consist of, and how to manage conflicts of interest. Understanding how to respond when facing an error situation will help attorneys mitigate potential losses and preserve client trust.

Foundation of the Duty to Disclose

The duty of an attorney to disclose a material error is as old as the profession itself, and has its original basis in an attorney's role as a fiduciary. Part of the reason why the law mandates disclosure is to allow the client to make an informed decision as to how to handle the error. Additionally, the client may decide to terminate the lawyer's services in light of the error.

Rule 1.4(a)(1) of the American Bar Association Model Rules of Professional Conduct (hereinafter "ABA Rule") charges the attorney with promptly informing the client of decisions or circumstances where the client's informed consent may be necessary, and keeping the client reasonably informed about the status of the matter. Comment 7 to ABA Rule 1.4 adds that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience." Any *active* concealment of the error on the part of the attorney would run afoul of ABA Rule 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation. We will discuss the risks of fraudulent concealment later in this guide.

ABA Rule 1.7(b)(1-4), which requires an attorney to obtain the client's informed consent, in writing, in the event of a concurrent conflict of interest, provides an additional basis for the duty to disclose. Specifically, ABA Rule 1.7(a)(2) places restrictions on an attorney who seeks to continue representing a client where there is a significant risk that the attorney's personal interests will materially limit that representation – the "personal interest" in a potential malpractice scenario being self-preservation. The conflict-of-interest analysis that an attorney must undertake upon the realization that the attorney committed a substantial error will be discussed later in this guide.

The ABA's *Profile of Legal Malpractice 2020-2023* reveals that almost 40% of legal malpractice claims are due to administrative error. Attorneys and law firms must train support staff to seek clarification to avoid errors and to alert their supervising attorneys in connection with any errors that they may have made.

Steps to Take When an Error Has Occurred

Once an attorney realizes an error has occurred, a myriad of questions arise, such as:

- Must every error be reported to the client?
- When should the attorney report the error to the client?
- What should the attorney say when disclosing an error?
- How should the attorney disclose an error?
- Should the attorney discuss the possibility of a potential legal malpractice claim?
- Does the error require the attorney to withdraw from the case or matter?

The manner in which the attorney handles the aforementioned issues related to an error could be the difference between avoiding liability and paying a substantial judgment or settlement in a legal malpractice matter or facing disciplinary action.

Evaluate the Error

Most attorneys are aware of their duty to disclose serious errors to their clients. The difficult part is determining exactly which errors give rise to the duty. Several ethics opinions have attempted to provide clarity on this point, explaining that errors must be "significant," "serious," or "material," while leaving a sizeable gray area.

Recognizing the confusion on this and other issues related to error disclosure, the ABA issued Formal Opinion 481 in 2018. In its opinion, the ABA explained that an attorney must disclose all "material errors" to the client, defining a "material" error as one that a disinterested lawyer would consider "reasonably likely to harm or prejudice a client" or "cause a client to consider terminating the representation even in the absence of harm or prejudice."

Not every adverse development in a case constitutes a material error. This is true even when the adverse development was based on a decision made by the attorney. Hindsight is 20/20 – an attorney whose actions are reasonable and diligent, yet ultimately unsuccessful, has not necessarily "erred" even where a more effective strategy becomes apparent after the fact. As the Colorado Bar Association explained in its Ethics Opinion 113, examples of potential errors that may later prompt regretful frustration but not necessarily an ethical duty to disclose to the client include:

- missing a non-jurisdictional deadline,
- missing a potentially fruitful area of discovery, or
- missing a theory of liability or defense.

Clients impose budgetary constraints, areas of law are unsettled, and a variety of other factors may contribute to unsuccessful, but entirely defensible, actions or omissions by an attorney. Where such a development is itself significant, the attorney has a duty to inform the client that it has occurred, but not that the attorney has made an error.

In some instances, an error may reside somewhere in the middle of the spectrum, an error that cannot clearly be labeled minor or substantial. Reasonable attorneys may differ on whether these "in-the-middle-of-the-spectrum" situations should or should not be reported to the client. Attorneys may have to make a difficult judgment call. In these situations, it may be necessary for an attorney to consult with outside counsel to receive a disinterested attorney's opinion before deciding whether or not to disclose the information.

Determine if the Error is Reasonably Likely to Harm or Prejudice Your Client

Let us assume that an attorney has committed an error – she has acted or failed to act optimally not because of forces outside her control, but because she misinterpreted the law, failed to adequately prepare, or lost her concentration in a way that a reasonable attorney should not. Even under these circumstances, the attorney may not be ethically required to explain to the client that she made an error. Is there a reasonable chance that this error will harm or prejudice the client? Perhaps failing to add a party to a cause of action will not carry any meaningful consequences for the client. Or maybe the error can be quickly and easily corrected in the underlying proceeding. Where an avenue is immediately available to correct the error without a substantial delay or added expense for the client, the attorney may attempt to do so before disclosing to the client that she made an error. Determining whether the corrective measures are quick and easy enough to avoid disclosure is a judgment call: how much extra time and work is required, and what are the odds that these measures will fail?

It's worth pointing out that the analysis of whether an error will harm the client may differ from the analysis of whether the client would have a viable legal malpractice claim. Flaws in the underlying case will inform the viability of the client's legal malpractice claim should the client choose to bring one, but, if the client's goals were hindered by the attorney's error, the attorney's ethical obligations remain the same. In short: the attorney's decision, and duty, to inform the client of an error does not hinge on the attorney's analysis of whether the client has satisfied every element of a legal malpractice cause of action.

Evaluate Whether the Error Would Cause the Client to Terminate the Attorney-Client Relationship, Even in the Absence of Harm or Prejudice to the Client

The second component of what the ABA considers a "material error" in Opinion 481 includes any error that would cause a client to consider terminating the representation, irrespective of harm or prejudice to the client. This is something of a catch-all – it's hard to imagine an error that would undermine a reasonable client's confidence in their attorney, but also pose no risk of harm or prejudice.

An attorney's actions can cause a client to question the attorney's abilities. Perhaps a client stressed to the attorney the importance of timing in relation to the legal issue for which they sought the attorney's advice, and the attorney's error, while causing only a minimal delay, led the client to call into question the attorney's ability to act promptly at later points in the representation. Or maybe the attorney's error resulted in added expenses or fees. Even if the amount is minor or the attorney agrees to cover the added expense, an especially cost-conscious client might worry about the attorney's ability to achieve the desired result while respecting the client's budget. Most errors, however, will fall squarely into both categories, or neither.

If it is a Material Error, Notify the Client

Once the attorney has completed the evaluation of the error and determined that it is the type of error that must be disclosed, the attorney must inform the client of the factual circumstances surrounding the error and the consequences to the client's legal position in the current matter. The client may not fully appreciate the significance of even a seemingly straightforward error, so, in keeping with ABA Rule 1.4(b), an attorney should be thorough in explaining all pertinent details. Next, if the attorney has identified steps he or she could take to mitigate the loss, the attorney should discuss these steps with clients for consent to proceed, but alternatively inform the clients of their right to terminate the representation if they so choose. The attorney must also tell the client that it may be in their best interest to consult with independent legal counsel. The attorney may provide a referral to the client as long as the attorney is able to exercise impartial, professional judgment in doing so. Ideally, as a means to insulate the attorney from allegations of impropriety or a negligent referral, the referral should contain a list of several attorneys from which the client can choose.

A final part of this disclosure, and one that can cause problems for even the most well-intentioned attorneys, centers on what the attorney must say to the client with respect to the potential malpractice claim against the attorney. Jurisdictions are split on this issue. Some jurisdictions advise that the attorney only has to disclose the error and does not have to provide information to the client on any potential claim against the attorney.[1] Other jurisdictions that have considered the issue state that a lawyer has an ethical obligation to notify the client of the possible legal malpractice claim against the attorney.[2] The attorney disclosing an error should never attempt to dissuade a client from pursuing a legal malpractice action or explain why the underlying matter was likely to fail.

A middle-ground approach, proposed in Colorado's Opinion 113,[3] states that "the lawyer should inform the client that it may be advisable to consult with an independent lawyer *with respect to the potential impact of the error on the client's rights or claims.*" The Colorado approach integrates and balances the guidelines set forth by most other authorities, and, in the words of the North Carolina Bar, "appropriately limits the possibility that a lawyer will attempt to give legal advice to a client

1 North Carolina Bar, 2015 Formal Ethics Op. 4.
2 New York State Bar Ethics Op. 1092 (May 11, 2016)
3 Colorado Bar Assoc. Ethics Comm., Formal Op. 113 (2005)

about a potential malpractice claim against the lawyer."[4] Another advantage of warning a client about seeking the advice of independent counsel is that the client will be unable to bring a legal malpractice claim based on the attorney's failure to self-report.

Exactly what an attorney is required to say will vary by jurisdiction, so unfortunately there is no one-size-fits-all approach. Specifically, the Colorado approach would fall short of the disclosure requirements promulgated by the Supreme Court of New Jersey, which plainly states that its "Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim."[5] Consequently, attorneys should refer to local authorities for guidance on what they must disclose to the client on the issue of their own potential liability. Please see the Error Guide Flow Chart on page 7 of this Guide.

Make the Disclosure without Admitting Liability

While the majority of jurisdictions reflect the general consensus that an attorney must say *something* about the possible claim, they fail to provide any real guidance on what exactly an attorney is obligated to say. In light of the glaring conflict of interest, it's clear that an attorney cannot opine, even honestly, on any perceived weaknesses in the claim. On the other hand, the attorney must avoid admitting liability to the client. There's a critical line between admitting that you made an *error*, which ethical duty requires, and admitting *liability*, which exceeds any ethical duty and jeopardizes legal malpractice insurance coverage. As previously discussed, a wide variety of extenuating circumstances may exist that may prevent an error from becoming legal malpractice. "I made an error, here's what I did" is sufficient; "I made an error, I believe I was negligent," or "I believe you have a claim" is a problem, as is any assurance that the client will be provided a settlement or otherwise made whole, whether through insurance or any other means.

Acknowledging an error does not mean that the causation and damages elements of a legal malpractice claim have been established. Additionally, an apology, on its own, should not work against you in a legal malpractice case, and might actually be viewed favorably should you find yourself in a disciplinary hearing. But any statement admitting malpractice or comment as to the viability of a claim against the attorney risks waiving insurance coverage and may result in the attorney taking on undue liability where extenuating circumstances exist.

Deliver the News in a Professional Manner

Even for seasoned attorneys, disclosing an error to a client can be a daunting exercise. Regardless, disclosure must be prompt, and any delay that exacerbates damages or prevents a timely malpractice action will be attributed to the attorney. Ideally, the attorney should disclose the error in a face-to-face meeting or video call, or, where such a meeting would be unduly burdensome for the client, at least avoid providing initial notice to the client in a letter, email, or voicemail. Taking care to convey a sense of accountability and candor can go a long way toward minimizing the likelihood of a claim and salvaging a client relationship, especially in cases involving long-time clients. After the meeting, it is essential for the attorney to memorialize the disclosure in the form of a letter or email, both for the client's convenience and the attorney's protection should the issue of how, when, or what the attorney disclosed arise in subsequent malpractice litigation or disciplinary action. The attorney should exercise extreme caution in drafting such a letter, as it's likely that the writing will later become an exhibit in any subsequent legal malpractice or disciplinary matter. Please refer to the sample error disclosure letter included with this publication.

4 North Carolina Bar, 2015 Formal Ethics Op. 4.
5 *Olds v. Donnelly*, 150 N.J. 424, 442 (1997)

Furthermore, the attorney should consider whether the client is entitled to a fee reduction. ABA Rule 1.5(a) addresses unreasonable fees, and any charges to the client for legal work or expenses necessary to mitigate the consequences of the attorney's own error are prohibited. Beyond that, however, the attorney should examine whether other tasks contributing to or complicated by the error should be discounted or removed from the invoice under ABA Rule 1.5. Even if not ethically mandated, a discount in fees offered as a gesture of goodwill may dissuade a client from filing suit or terminating the relationship.

Settlement with the Client

Certain caveats apply to attorneys who attempt to settle an actual or prospective claim with a client. A proposed discount in fees or an offer of additional funds made in exchange for a release of liability must be handled properly or the attorney may risk losing insurance coverage and facing discipline. First, attempts to settle a claim before providing notice to the carrier jeopardizes insurance coverage as to that claim. We will discuss the importance of notifying an insurance carrier of a claim in a timely manner a little later in this guide. Second, attorneys may also face discipline if they fail to follow proper protocol for settling a malpractice suit with their own client. ABA Rule 1.8(h)(1) and (2) prohibits an attorney from settling an actual or potential malpractice claim with a client or former client unless the attorney first advises the client, in writing, of the desirability of seeking independent counsel. The attorney must also give the client a reasonable opportunity to consult with said counsel. In practice, this means ensuring a meaningful amount of time passes between the initial disclosure to the client, the settlement offer, and the client's acceptance of the offer, especially if the client remains unrepresented. Lawyers must check their relevant jurisdiction's professional conduct rule on settling potential or actual malpractice claims with clients since some jurisdictions' rules are more strict than ABA Rule 1.8(h)(1) and (2).[6] And although promulgated on a jurisdictional basis, the largely unanimous rule, whether through ethics rules, opinions, or case law, is that lawyers are outright prohibited from placing any limits on their clients' abilities to pursue disciplinary action.

Undertake a Serious Conflict of Interest Review

As discussed earlier, ABA Rule 1.7(a)(2) prohibits a lawyer from representing a client if there is a significant risk that the representation will be materially limited by the personal interests of the lawyer. A lawyer tempted to hide his or her mistake may be motivated by personal interests to settle the underlying case to avoid informing the client of the error. This may create a serious conflict-of-interest issue. The attorney is elevating his or her personal interests over the interests of the client.

Other conflict situations may be more apparent. For example, if the attorney notifies the client of the error and the client expresses a desire to pursue a legal malpractice claim against the attorney, a clear conflict between the attorney and client has developed. It may be difficult, if not impossible, for the attorney to render impartial legal advice and services in the underlying matter when the attorney believes that the client will soon be an adversary. As a general rule, the greater the risk that the lawyer will face a substantial malpractice claim due to the error, the greater the likelihood that the attorney's personal interest and ability to provide impartial advice will be compromised and the representation of the client will be materially limited.

6 See, e.g., N.Y. Comp. Codes R. & Regs., tit 22, sec. 1200, Rule 1.8(h) which prohibits lawyers from prospectively limiting a lawyer's liability to a client even if the client has independent representation in connection therewith.

Per ABA Rule 1.7(b)(1-4), the attorney can continue to represent the client in the underlying matter only if the attorney "reasonably believes that [he or she] will be able to provide competent and diligent representation" to the affected client, among other conditions. Even if the attorney maintains such a belief where the attorney has committed a substantial error, the wiser course may be for the attorney to remove the threat of conflict altogether and withdraw from the representation. If the attorney withdraws from the representation, the attorney must seek permission of the appropriate tribunal when necessary and "take steps to the extent reasonably practicable to protect a client's interest."[7] See CNA's publication *Plan Your Route Before Getting Out: Attorney Withdrawal*.

If, on the other hand, the attorney decides to remain as counsel with the client's consent, extreme care must be taken in drafting the written consent for the client. The written conflict waiver may be subject to second-guessing and likely will be an exhibit in any subsequent legal malpractice or disciplinary matter. Additionally, if all relevant facts are not fully disclosed in the consent document, the client may claim that he or she would not have agreed to the conflict had they known all the facts. When possible, the attorney should consult with his or her insurance carrier and other counsel when drafting such a conflict waiver.

Informing Your Law Firm of the Error

Partnership agreements and other terms of employment may require attorneys to promptly notify their law firms of any mistake or error that could lead to a legal malpractice claim. Even in the absence of such a requirement, consulting with another attorney in the law firm is an effective way to avoid ethical missteps. Many firms designate in-house ethics counsel to provide this guidance. While this practice ensures that trusted advice is always readily available, attorneys must be aware of the risk that may flow from an in-house ethics consultation.

A primary issue is whether or not communications made to in-house counsel regarding a potential or actual error are protected by the attorney-client privilege vis-à-vis the client. The main arguments against applying the privilege to such communications are twofold. First, the client is entitled to receive or have access to such advice since such advice is ultimately for the client's benefit. Second, it would constitute an impermissible conflict of interest for the law firm to place its interest in keeping the advice secret over the client's interest in knowing what intra-firm advice was sought and offered.

The trend in recent case law,[8] however, protects communications with in-house ethics counsel so long as the law firm complies with following four basic criteria:

1. the firm must have designated a specific attorney or group of attorneys to serve as ethics counsel;
2. ethics counsel must not have performed any work on the client's underlying matter;
3. time spent consulting ethics counsel must not have been billed to the client; and
4. communications between the attorney and ethics counsel must have been made in confidence, kept confidential, and any documents memorializing those discussions must be marked "confidential and privileged."

See CNA's publication *An Overlooked Asset in Law Practice Management: Legal Counsel*.

7 ABA Rule 1.6(c) and (d)
8 *See, e.g., Moore v. Grau*, 2014 N.H. Super. LEXIS 20 (N.H. Super. Ct. 2014); *Edwards, Wildman, Palmer v. Superior Court (Mireskandari)*, 180 Cal. Rptr. 3d 620 (2014); and *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181 (Or. 2014).

Trends aside, attorneys should refer to the relevant jurisdiction's case law to determine whether their communications with in-house counsel might be discoverable in a future malpractice action. Moreover, attorneys should always exercise caution in their intra-firm communications concerning the error regardless of the status of the law with respect to privilege. In some instances, oral communications may be preferable to written communications. All attorneys and staff working on the matter should be reminded that any written communications should avoid admissions of liability and any gratuitous commentary that would harm the law firm's reputation if made public.

Former Clients

When the attorney discovers the error and the status of the client upon discovery of the error are two important factors in determining your duty to disclose. Most attorney errors will become apparent during the representation, not long after it took place. Situations may arise, however, in which the attorney discovers the error after the representation has already ended. The attorney might discover a drafting mistake while digging through a closed file, looking to use a previously drafted document as a template for a new client. Or perhaps a former client contacts the attorney directly, inquiring about unanticipated tax obligations or an unsatisfied lien on their property. Is an attorney who uncovers a mistake after-the-fact obligated to inform their former client that they've made an error? According to the ABA: No.

Prior to ABA Opinion 481, whether the duty to disclose an error extended to former clients wasn't entirely clear. Attorneys, of course, owe duties to former clients in other contexts. The fiduciary obligations of loyalty and confidentiality continue beyond the end of the representation. These duties are codified in ABA Model Rule 1.9, which prohibits an attorney from taking on certain new matters which would conflict with the interests of a former client, revealing confidential information about a former client, or using such information to the disadvantage of that client. ABA Rule 1.16(d), as well, requires attorneys to protect a client's interests upon and immediately after the representation by providing reasonable notice of termination, transferring the file and returning any unearned fees. Attorneys that fail to follow proper closing matter protocol or withdrawal from a representation may open themselves to legal malpractice or disciplinary actions.

However, the bases of an attorney's duty to disclose – ABA Rules 1.4(a)(1) and 1.7(a)(2 – concern communication and conflicts of interests only with respect to *current* clients. Rule 1.4 is completely silent on former clients, both in the comments and the rule itself, and nothing in the legislative history of Model Rule 1.4 suggests that the drafters intended the rule to apply to prior representations. From a practical standpoint, requiring attorneys to update clients on developments affecting their legal interests after the representation has ended, and after the client has stopped paying fees, would not be realistic or particularly fair.

Rule 1.7(a)(2), as well, discusses former clients only to the extent that the representation of a former client might conflict with the interests of a current client. Additionally, the component of Rule 1.7(a)(2) that provides a basis for error disclosure—that a personal interest of the lawyer would interfere with the interests of the client – does not have a corollary in Rule 1.9 that would extend these same principles to a former client. Again, from a practical standpoint, prohibiting an attorney from acting in their own interest when it conflicted with the interests of any former client would be unrealistic.

The distinction between a current and former client, therefore, is critical. Exactly when this transition occurs will usually be obvious, but not always. When an attorney formally withdraws, completes the objective defined in the engagement letter, or is fired by the client, the representation's end will have been, or should have been, reasonably apparent to both attorney and client. If the relationship is ongoing – such as if the attorney agreed to handle all legal matters for a client, or all legal matters in a specific practice area – the attorney must consider the client "current" as far as error disclosure despite the absence of any pending matter or project. A scenario where the client completed their initial objective, but subsequently sought and received legal advice and never received any correspondence confirming the representation ended could go either way. Written engagement letters and closure letters are thus vital to ensure that your former clients know they're former clients.

So, what can you say when a former client calls you to inquire about a problem with your previous engagement? Attorneys should look to ABA Rule 4.3, which concerns an attorney's interactions with an unrepresented person. If it's clear that the client misunderstands your role – they may believe you still represent them – you should make reasonable efforts to correct that misunderstanding. In light of the potential conflict, you may not provide your former client with any legal advice, other than the advice to secure other counsel.

Notification Obligation to Legal Malpractice Insurer

Attorneys should consider their duty to the client first and foremost in the event of an error, but an attorney must also be mindful of their duty of reporting to their insurance carrier. An attorney who fails to properly notify their carrier of a claim or potential claim risks waiving coverage and faces the prospect of financing litigation, and any ensuing damages, all on their own. The terms and conditions of a policy will, of course, vary from carrier to carrier, but many professional liability policies share the same basic requirements.

Any claim made by a client, whether in the form of a demand for money or services, or an actual malpractice or disciplinary complaint, must be reported as soon as possible. A short passage of time to consider whether to file a claim is understandable, but any attempt to respond to or settle the claim prior to the carrier's involvement may void coverage.

Attorneys may, in fact, be better served by notifying their insurance carrier of the error prior to informing their client. In certain instances, the insurance carrier may assign counsel to assist the attorney in exploring ways to mitigate a potential claim and advise the attorney on what to say when disclosing the error to the client.

Danger of Fraudulent Concealment

An attorney's failure to disclose a mistake to the client may constitute fraudulent concealment. Fraudulent concealment is the act of withholding facts or information necessary to a cause of action for the purpose of preventing a plaintiff from bringing that action in a timely fashion. Established in most jurisdictions either by statute or common law, fraudulent concealment is an equitable doctrine that tolls the applicable statute of limitations in order to prevent a party with superior knowledge from depriving a plaintiff of an otherwise meritorious claim.

With respect to most torts, the plaintiff must establish that the defendant took active steps toward concealing the cause of action. However, in light of the fiduciary relationship between attorney and client, silence alone, accompanied by the client's reasonable failure to discover the error that is the basis of the malpractice claim, is enough to toll the statute.

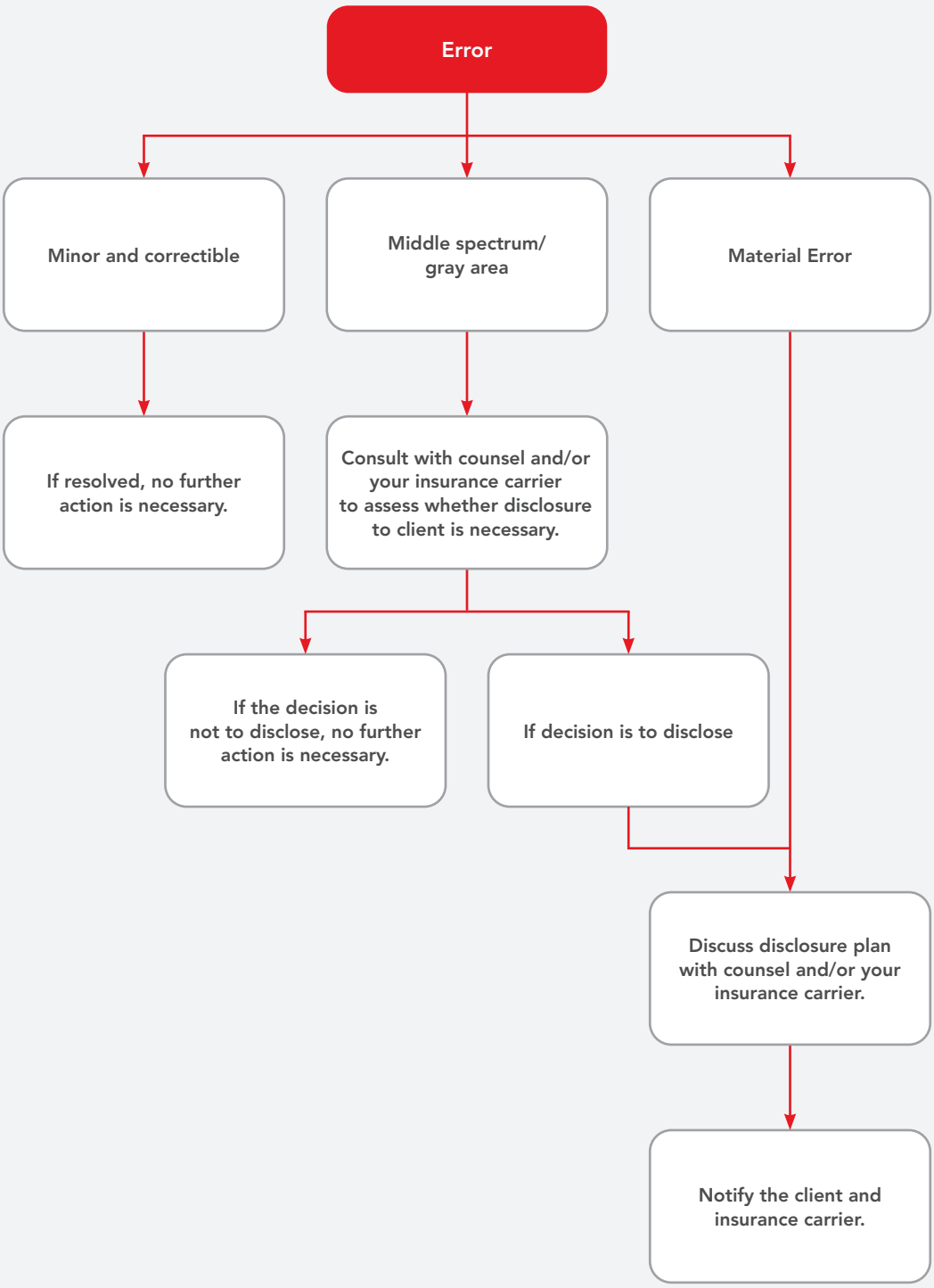
The precise effect of a client's successful claim of fraudulent concealment will vary. Some jurisdictions toll the statute of limitations until the client discovers the cause of action, while others simply prevent the attorney from asserting a statute of limitations defense. Either way, an attorney who fails to inform the client of an error that may be the basis of a potential malpractice claim is merely delaying the inevitable and will likely face harsher consequences down the road. Those adverse consequences can include disciplinary sanctions, exposure to additional causes of action, increased damages, loss of reputation, and loss of insurance coverage.

Conclusion

It's a difficult task owning up to a mistake, and it's certainly no easier when your confession could trigger a lawsuit or disciplinary action. Nevertheless, an attorney who has committed malpractice has only one path forward: face the client, disclose the mistake, learn from the experience, and move on.

Attorneys should always be honest and straightforward. They should not bury their head in the sand and ignore the problem. In addition, attorneys should never attempt to cover up the mistake or falsify documents. The best approach is to swiftly take appropriate action. Oftentimes, by honestly confronting the mistake, it can be remedied entirely, or the potential damage reduced. At a minimum, by taking direct action, an attorney can confine the result of an error to just a malpractice claim. One blown deadline or drafting error can ruin a client relationship, but failing to respond ethically can ruin a career.

Error Response Flowchart



Sample Disclosure Letter – Material Error or Omission

Dear Client ABC:

This letter confirms our law firm's recent discussions with you regarding the status of your matter and our disclosure of [our actions/error(s)] which occurred during our firm's representation of you in connection with your [description of matter/scope] matter.

As you recall, on [date], [individual lawyer names] spoke with you [method of communication] and informed you of our firm's actions related to your [matter description] and the current status of that matter. We informed you that _____

_____

_____

_____ [summary of act/error/omission].

We also informed you that as a result, _____

_____

_____ [summary of consequences of actions].

We discussed your potential options going forward, including our possible withdrawal from representing you, as well as _____

_____ [summary of other discussed options],

and you informed us that _____

_____

[summary of client's position as of time of discussion and/or client's current stated position].

Although we regret this occurrence, we are informing you regarding this situation and wish to ensure minimal disruption, if any, to your matter going forward.

You may wish to consult with an independent lawyer or law firm with respect to the potential impact of our law firm's [actions/errors] on your potential rights or claims that you may have.

[*Certain jurisdictions require that lawyers inform their clients if/when they may have a malpractice claim against the law firm. Please be sure to research the specific requirements of your state/jurisdiction to determine whether or not disclosure of the error to the client also requires disclosure of the existence of a malpractice claim.* If your state/jurisdiction has such a requirement, substitute the previous sentence with this sentence: You may wish to consult with an independent lawyer or law firm with respect to a potential legal malpractice claim against our law firm.]

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com