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**THE SPECTER OF MALPRACTICE: WHEN LAW FIRM
GENERAL COUNSEL AND RISK MANAGEMENT
PROFESSIONALS ARE CONFRONTED WITH POTENTIAL
MALPRACTICE CLAIMS AND ETHICS VIOLATIONS**

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Legal malpractice law and ethics rules are some of the scariest bodies of law for attorneys of all skill levels. This area of law is exceptionally complex, and the consequences for its misapplication are grave. During the past two decades, more and more law firms have established a dedicated compliance role—usually a full-time attorney serving as a risk management professional, an ethics/compliance expert, or a law firm’s general counsel, assigned to handle these important questions.¹

In many circumstances, such as when an attorney steals money from a client, the ethical and professional obligations of a general counsel and risk management professional are clear. However, in instances involving less clear-cut violations of professional duties, the path forward quickly becomes complicated. Occasionally, a law firm’s general counsel or risk management professional might not know how to proceed after learning about circumstances that loosely suggest that malpractice could have been committed or an ethical duty could have been violated.

This Article discusses the most important initial steps and questions that a law firm’s general counsel or other risk management professional must address when hearing that serious mistakes or improprieties may have occurred—but without any concrete confirmation that something problematic has, in fact, happened.² Collectively, these circumstances are

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1. *The Lawyers’ Lawyers: The Emergence of the Law Firm General Counsel*, 5 PRACTICE (2019), <https://thepractice.law.harvard.edu/article/the-lawyers-lawyers/>.

2. For example, a firm’s general counsel may become aware that a relatively inexperienced associate has been tasked with handling a notoriously difficult matter, or that a lawyer has failed to respond to inquiries from colleagues on a matter for an extended period of time. Cf. MILTON C. REGAN, *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004) (telling the sad tale of a BigLaw lawyer who hid an Order to Show Cause from his colleagues).

referred to as the “specter of malpractice,”³ because a malpractice claim has not yet fully materialized (and it is not entirely clear that one will materialize), but enough risk factors have surfaced to capture the risk management team’s attention.⁴ Included among these important and difficult questions are:

- Could this type of mistake constitute an ethics violation or a future malpractice claim?
- What duty does a firm’s general counsel or risk management professional have to investigate the situation?
- What action is required with respect to the firm’s legal malpractice insurer and when should the law firm take that action?
- What action is required with respect to the law firm’s clients and when should the law firm take that action?

COULD THIS TYPE OF MISTAKE CONSTITUTE AN ETHICS VIOLATION OR A FUTURE MALPRACTICE CLAIM?

Like all humans, lawyers make mistakes, ranging in severity from a simple typo in correspondence to forgetting to file a claim before the statute of limitations has run. Identifying which mistakes might result in a malpractice claim, and preventing those potential claims, are the most important responsibilities of a law firm’s general counsel and risk management team. However, distinguishing between immaterial mistakes and those that could potentially result in a malpractice claim or professional sanction requires knowledge of countless rules and regulations governing these areas of law. To make matters more complicated, some mistakes trigger a contractual or an ethical duty to act (e.g., notify the malpractice insurer and/or the client), even if the error could never support a malpractice claim.⁵ The consequences for an incorrect assessment or classification can be severe, such as damages, loss of a client, or even loss of malpractice insurance coverage. Therefore, it is critical to understand when a lawyer’s mistake could form the basis of future sanction or liability, and when it could not.

The ABA Model Rules of Professional Conduct (hereinafter the “Rules”) and various ABA Ethics and State Bar Association opinions provide

3. The phrase “specter of malpractice” should be understood to encompass “ethical violations,” too, when both “malpractice” and “ethical violations” are not explicitly mentioned together as separate concepts.

4. An alternative, but equally appropriate, analogy for the circumstances that this Article aims to cover would be to liken these instances to a Schrödinger’s Cat for malpractice or ethics violations—the act occurred, but whether or not it could support a malpractice case can only be ascertained through investigating the matter or opening the proverbial box.

5. ABA Comm. on Ethics & Pro. Resp., Formal Op. 481 (2018) [hereinafter ABA Op. 481].

guidance about ethics violations and set forth a useful framework for making this distinction. Although a violation of a state's version of these Rules does not impose malpractice liability *per se*, it can help to establish the professional standard of care element for a malpractice action,⁶ using it as the baseline for expert testimony required by courts.⁷ For a law firm's general counsel and risk management team, the Rules can also offer a useful barometer to assess the specter of malpractice on a real-time basis, because sifting through the complex web of malpractice cases and factual implications for each error can be overwhelming and impractical. The Rules provide a relatively clear explication of general ethics law that serves as an appropriate proxy for determining the "seriousness" of, and potential liability for, a professional mistake.⁸

The ABA provides a framework for determining which errors are "material" in the context of describing which errors require self-reporting to clients. Material errors are ones that "a disinterested lawyer would conclude [are] (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that [they] would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."⁹ There are several practical aspects to this definition that a prudent general counsel or risk management professional should consider when assessing whether the specter of malpractice is merely an illusion or has transformed into something much more real.

First, a mistake can require action on the part of the law firm's general counsel or risk management professional *before* the client suffers damages. Although actual damages are required for a civil malpractice claim,¹⁰ an error is still material under the Rules if there is a reasonable likelihood of harm or prejudice.¹¹ For this reason, a mistake cannot be ignored simply because it has not yet caused damages, at least for determining ethics violations.

6. MODEL RULES OF PRO. CONDUCT pmb. cmt. 20 (AM. BAR ASS'N 2020).

7. *Grimm v. Fox*, 33 A.3d 205, 213 (Conn. 2012). This case was a civil action for recovery of attorney's fees in which the court held that the aggrieved plaintiff failed to proffer ample expert testimony to support his legal malpractice claim. *Id.*

8. Law firm general counsel and risk management professionals should consult their state's adopted ethics standards—we use the ABA Model Rules as generally applicable for purposes of this Article.

9. ABA Op. 481, at 4.

10. *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 780, 788 (Cal. Ct. App. 1997). Although a violation of a state's ethics rules only supports disciplinary action (as opposed to damages), the ethics rules often do set the standard and bolster an allegation that there has been a violation of the professional standard of care. MODEL RULES PRO. CONDUCT pmb. cmt. 20 (AM. BAR ASS'N 2020).

11. For example, some mistakes—such as filing a pleading in the wrong jurisdiction, long before a statute of limitations runs—are fixable and, once fixed, would not trigger damages (as long as the lawyer zeroes out any fees incurred for fixing the mistake).

Indeed, best practices in risk management revolve around early detection and preventative steps, not reactive measures taken only after there is a full-fledged mess.¹²

Second, a mistake may necessitate attention even if there is no threat of actual damages to the client. A mistake severe enough to cause a client to reasonably reconsider the attorney's representation is sufficient. This standard is highly individualized because the particularities of a specific client supplant normal materiality standards.¹³ Practically speaking, this degree of subjectivity may cause more risk-averse general counsel and other risk management professionals at a law firm to investigate, examine, and treat even less egregious missteps with greater scrutiny, as if they were more severe problems.¹⁴

Third, there may be other "soft" reasons for the firm's general counsel and risk management professionals to address less severe errors that fall within the specter of malpractice. For example, if a client is likely to discover an immaterial error, it is often prudent and beneficial to tell the client about the error simply for client-relations purposes, in order to preserve the client's confidence in the attorney's abilities and integrity or to promote open lines of communication, even if that error has no reasonable potential to harm the client or cause the client to terminate the relationship. Sometimes the "soft" reasons are the ones that tip the balance when it comes to the degree of investigation into and disclosure of the specter of malpractice.

WHAT DUTY DOES A LAW FIRM'S GENERAL COUNSEL OR RISK MANAGEMENT PROFESSIONAL HAVE TO INVESTIGATE THE SITUATION?

As a matter of sound business practice, a firm's general counsel or risk management professional should investigate all bona fide specters of malpractice to determine whether there are actual violations, to understand the potential liabilities to the firm, and to take remedial actions to limit liability. However, the legal imperative to conduct such investigations is

12. See Thomas L. Browne & Thomas P. Sukowicz, *Attorney Liability Risk Management*, in *ATTORNEYS' LEGAL LIABILITY* 16-9 (Thomas P. McGarry ed., 2018) ("Counsel should not make the mistake of failing to disclose a significant risk in the belief that the problem may never materialize. Problems addressed at the outset of representation often can be resolved. If the difficulties are of a type that cannot be initially resolved, they will only fester through time and neglect.").

13. For the ABA's most recent opinion on attorneys responding to social media, see ABA Comm. on Ethics & Pro. Resp., Formal Op. 496 (2021) [hereinafter ABA Op. 496].

14. In the best light, clients are frequently quirky. In the darkest light, clients can be irrational when it comes to engaging or firing counsel, acting on subjective beliefs, talking to others about counsel's performance ("my attorney is awful!"), and even posting bad reviews on social media. See ABA Op. 496, *supra* note 13.

somewhat poorly defined, opening the door for less proactive professionals to ignore the responsibility to investigate potential problems. Prudence dictates that one should not be lulled into inaction by the opaque nature of the duty to investigate specters of malpractice and the temptation to brush uncomfortable situations under the rug: The consequences may be dire.

In the Rules, the primary mechanism that compels the investigation into specters of malpractice can be found in Rule 5.1, which states in part:

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.¹⁵

Comment 2 of Rule 5.1 supports the existence of an affirmative duty to investigate the specter of malpractice, which clarifies that Rule 5.1 requires “reasonable efforts to establish internal policies and procedures . . . [which] include those designed to *detect and resolve* conflicts of interest . . . and ensure that inexperienced lawyers are properly supervised.”¹⁶ This Comment explicitly calls for measures designed to proactively uncover a conflict (i.e., where a conflict of interest somehow negatively affects a client’s matter) and could logically support the principle that there is an affirmative duty to proactively and properly investigate every plausible specter of malpractice.¹⁷ Prime examples of how these ethics rules can impose additional sanctions for attorneys who inadequately investigate the specter of malpractice come from *In re Cohen*,¹⁸ *Attorney Grievance Commission of Maryland v. Kimmel*,¹⁹ and *In re Robinson*,²⁰ three disciplinary cases.

In *In re Cohen*, the court considered sanctions for a supervisory attorney for his subordinate lawyer’s transgression in erroneously filing an abandonment of a trademark application.²¹ The supervising attorney had no knowledge of the mistake, but the court held him accountable under Rule 5.1 because “attorneys supervising other lawyers must take reasonable steps to become knowledgeable about the actions of those attorneys in representing clients of the firm.”²² The court affirmed the duty to investigate potential

15. MODEL RULES OF PRO. CONDUCT r. 5.1(a) (AM. BAR ASS’N 2020).

16. *Id.* at cmt. 2 (emphasis added).

17. *Id.* Under the Model Rules themselves, conflicts need not cause any harm whatsoever to be considered ethics violations; however, the reality is that few bar counsel will pursue no-damage conflicts because the conflict issues will largely go undetected and/or will remain unknown to anyone other than the attorney and her client.

18. 847 A.2d 1162 (D.C. 2004).

19. 405 Md. 647, 955 A.2d 269 (Md. 2008).

20. 74 A.3d 688 (D.C. 2013).

21. *In re Cohen*, 847 A.2d at 1163, 1165.

22. *Id.* at 1166.

malfeasance, finding that “a lawyer of reasonable prudence and competence would have made the inquiry necessary to determine the status of the application proceeding.”²³ This case involves a particularly ethereal specter of malpractice because the supervising attorney had relatively little knowledge of the situation. Law firm general counsel and risk management teams should be careful to avoid a similar fate by ensuring that subordinates are properly supervised and by timely investigating situations involving specters of malpractice when inexperienced attorneys are handling matters more advanced than their experience would suggest is appropriate.

In *Kimmel*, a relatively inexperienced lawyer was tasked with opening a branch of a law firm in a new jurisdiction. When that task (quite predictably) went poorly, the court, in the context of a disciplinary action, found that the partners of the firm had violated Rule 5.1 because “a higher level of supervision may be indicated when an employee is new to the firm” and “[r]equests for help, however generalized . . . warrant investigation.”²⁴ This rationale led the court to recommend an indefinite suspension for the supervising partners at the firm.²⁵ When comparing this case to the specters of malpractice that a risk management professional might face at a larger firm, one should not take solace in the fact that this case deals with direct supervisory authority in a relatively small law firm. Senior attorneys in larger law firms have the same duty as their counterparts at smaller firms. Indeed, the practical reality of life in a larger firm and the scope of the risks and challenges posed by hundreds or thousands of lawyers places a greater burden²⁶ to create and uphold appropriate policies and procedures than does life at smaller firms.²⁷ For law firm general counsel and other risk management professionals in larger firms, the challenges are magnified, given the scope, volume, and complexity of matters (and attorneys) at larger firms.

In re Robinson likewise provides insight into what constitutes an appropriate investigative reaction to the specter of malpractice. In that case, the respondent was found by the District of Columbia Disciplinary Board to have violated Rules 1.15(a) (negligently misappropriating client funds), 1.15(b) (failing to promptly deliver funds to a client), and 5.1(a) (failure to assure firm compliance with disciplinary rules).²⁸ These violations resulted in the mishandling of client funds by a junior attorney at the respondent’s law

23. *Id.* at 1167.

24. *Kimmel*, 405 Md. at 676, 678, 955 A.2d at 286, 288.

25. *Id.* at 687, 955 A.2d at 293.

26. And, certainly, the risk of exponentially larger damage payouts.

27. *In re* Anonymous Member of S.C. Bar, 552 S.E.2d 10, 13, 14 (S.C. 2001).

28. *In re* Robinson, 74 A.3d 688, 690, 692 (D.C. 2013).

firm.²⁹ That junior attorney also happened to be the respondent's son-in-law.³⁰ The respondent's son-in-law improperly commingled client funds and the firm's operating funds, in contravention of ethical rules.³¹ The respondent learned about these missteps when the firm's financial institutions notified him and D.C. Bar Counsel of an overdrawn account.³² Notwithstanding this first transgression, the respondent simply asked his son-in-law to "find out what had happened."³³ The respondent did not thoroughly investigate the situation, provided no further oversight or training to his son-in-law, and took no remedial measures.³⁴ The problem repeated itself, to the detriment of respondent's clients.³⁵

Upholding the Disciplinary Board's findings and a seven-month suspension from the practice of law, the D.C. Court of Appeals stated, "once the alarm bell of an overdraft rang, the matter was too important to be left to a subordinate without at least diligent follow-up of any investigation by the subordinate into the apparent flaw."³⁶ Specifically, merely asking an attorney who may actually be involved in the specter of malpractice to investigate the root of the problem is not sufficient to absolve the supervising attorney of ethical liability.³⁷ When a situation smacks of the specter of malpractice, a firm's general counsel or risk management team must be able to offer concrete evidence that steps were taken to effectuate a diligent investigation into the matter to meet the minimum standards and expectations of the courts, based on applicable case law.

A separate basis for the duty to investigate the specter of malpractice, but one that does not require a risk management professional to be classified as a "supervisory attorney," comes from Rule 1.3, which states that a reasonable lawyer, acting as a fiduciary of the client, must exercise diligence when representing a client.³⁸ Failing to investigate the specter of malpractice is likely to fall below that standard of reasonable diligence, as demonstrated in *In re Dickens*.³⁹

29. *Id.* at 692.

30. *Id.*

31. *Id.* at 693.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 697.

37. *Id.* at 696; see also Nancy B. Rapoport, *The Curious Incident of the Law Firm that Did Nothing in the Night-Time*, 10 LEGAL ETHICS 98 (2007) (reviewing MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004)) (high-profile case in which a senior attorney was held criminally liable for failure to disclose a conflict of interest). For more information regarding this attorney, see REGAN, *supra* note 2.

38. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020).

39. 174 A.3d 283 (D.C. 2017).

In *In re Dickens*, Mr. Dickens unduly delayed the execution of a will for the law firm's client.⁴⁰ The court determined that Ms. Luxenberg, a more senior attorney at the firm who was tangentially involved in the matter, violated her fiduciary duty of diligence under Rule 1.3 because she ignored "clear warning signs"⁴¹ that Mr. Dickens could no longer be trusted, by virtue of his long delays in correspondence and his frequent travel.⁴² The court explained that Ms. Luxenberg was effectively "on notice" and failed to make "reasonable efforts" to ensure that Mr. Dickens' behavior conformed to the Rules of Professional Conduct.⁴³ Ultimately, Ms. Luxenberg was suspended for six months for her transgression.⁴⁴ *In re Dickens* underscores that any law firm general counsel or risk management professional who ignores the proverbial warning signs puts his or her professional life, and the firm, in peril.

Although these examples dealt with disciplinary proceedings, the risks associated with failing to properly investigate the specter of malpractice extend far beyond license suspensions. Malpractice liability to clients is an ever-present risk. Legal malpractice insurers also may have a basis for denying coverage claims for risk management professionals who do not adequately investigate specters of malpractice or ethics violations.

WHAT ACTION IS REQUIRED WITH RESPECT TO THE FIRM'S LEGAL MALPRACTICE INSURER AND WHEN SHOULD THE LAW FIRM TAKE THAT ACTION?

Contracts with malpractice insurers can vary greatly from policy to policy and from state to state. But it is fair to assume that nearly every insurance policy requires a law firm to undertake some investigative activities once the specter materializes. For example, most insurance renewal forms include a question asking whether the firm has reason to believe that it might be subject to a liability claim. If the firm has knowledge, pre-dating the policy, of "circumstances, acts, errors, and omissions that [it] could have reasonably expected to be the basis of a claim or suit[.]" then the insurer may be absolved from providing coverage for those claims.⁴⁵ One court described the knowledge requirement as depending on whether or not "a reasonable lawyer in possession of such facts would have had a basis to believe that the

40. *Id.* at 298.

41. *Id.*

42. *Id.* at 303.

43. *Id.* (citations omitted).

44. *Id.* at 307.

45. *Joseph v. Certain Underwriters at Lloyd's London*, 844 S.E.2d 852, 854 (Ga. Ct. App. 2020).

insured had breached a professional duty.”⁴⁶ The court in *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.* provides clarity around this reasonableness standard, holding that a belief that a legal malpractice claim had expired does not absolve a lawyer of the responsibility to report the potential claim to the insurer.⁴⁷ Generally, this reasonableness standard is one for juries to determine,⁴⁸ so risk management professionals should take the decision out of the jury’s hands and investigate and report specters of malpractice as they occur.

In addition to understanding renewal notice requirements, it is essential to be familiar with ongoing notice requirements to a malpractice insurer. Malpractice insurance policies often set a standard for giving notice to the insurer that is different from the standard for giving notice to a client. For example, provisions sometimes require a lawyer to report any potential claims upon “becoming aware of any negligent act, error, omission or [p]ersonal [i]njury . . . which could reasonably be expected to be the basis of a [c]laim.”⁴⁹ Insofar as the specter of malpractice triggers a reporting obligation to a malpractice insurer, an investigation into problematic behavior by the general counsel and risk management team is not only prudent but also required.⁵⁰ If that reasonable investigative step has not been taken, and no potential claim is reported (when appropriate), the firm’s malpractice policy may not cover the cost of the malpractice suit.⁵¹ Inaction can be costly.

WHAT ACTION IS REQUIRED WITH RESPECT TO THE CLIENT AND WHEN SHOULD THE LAW FIRM TAKE THAT ACTION?

The duty to self-report potential malpractice claims and ethics violations to clients is another reason for general counsel and risk management professionals to be careful when dealing with specters of malpractice. The duty to self-report potential malpractice claims (the specters of malpractice) to the client is derived from Rule 1.4, which outlines the responsibilities of a lawyer’s communications with a client.⁵² The duty also stems from the lawyer’s role as a fiduciary. The most direct reference to the self-reporting duty comes from Comment 7 to Rule 1.4, which states that “[a] lawyer may

46. *Selko v. Home Ins. Co.*, 139 F.3d 146, 152 (3d Cir. 1998).

47. *See Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302 (3d Cir. 2001).

48. *Joseph*, 844 S.E.2d at 857.

49. *Sirignano v. Chicago Ins. Co.*, 192 F. Supp. 2d 199, 202 (S.D.N.Y. 2002) (emphasis omitted).

50. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS’N 2020); *In re Dickens*, 174 A.3d 283 (D.C. 2017).

51. *See, e.g.*, *Bellefonte Ins. Co. v. Albert, P.C.*, 99 A.D.2d 947 (N.Y. App. Div. 1984).

52. MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS’N 2020); ABA Op. 481.

not withhold information to serve the lawyer's own interest."⁵³ ABA Ethics Opinion 481 specifically interprets Rule 1.4 to obligate "a lawyer to inform a current client if the lawyer believes that he or she *may* have materially erred in the client's representation."⁵⁴ ABA Ethics Opinion 481 requires disclosure even if an attorney has not reached an absolute conclusion that a material error occurred.⁵⁵ The opinion further defines the standard requiring client disclosure as whether or not 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."⁵⁶ The invocation of a "reasonable lawyer" standard in this definition places the burden on attorneys to exercise reasonable diligence when self-reporting.⁵⁷ As previously discussed, reasonable diligence involves investigating specters of malpractice and ethics violations as they arise, so failing to investigate a specter of malpractice (and failing to notify the client of its existence) would violate the self-reporting duty.

General counsel and risk management professionals should also generally be aware of other features of this self-reporting requirement for purposes of determining when to investigate specters of malpractice:

- A lawyer may consult in-house counsel or an insurer before disclosing a mistake to a client.⁵⁸
- A delay in notifying the client (and therefore a delay in conducting an appropriate investigation into a specter of malpractice) carries the potential for damages to be incurred, and therefore increase the size of the potential lawsuit.⁵⁹
- The duty to self-report only applies to current clients; if a potential malpractice claim is discovered after a client has terminated the attorney-client relationship, then there is no duty to disclose, according to ABA Ethics Opinion 481.⁶⁰
- A firm must disclose the mistake and ramifications to clients, but there is a jurisdictional split on whether the firm must also disclose that a potential malpractice claim exists (e.g., New

53. MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 7 (AM. BAR ASS'N 2020).

54. ABA Op. 481, at 8 (emphasis added).

55. *Id.*

56. *Id.* at 2.

57. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020).

58. ABA Op. 481, at 5.

59. *See In Re Hoffman*, 883 So. 2d 425, 433–34 (La. 2004); *McAlister v. Slosberg*, 658 A.2d 658, 660 (Me. 1995).

60. ABA Op. 481 at 7.

York requires disclosure of the potential claim,⁶¹ but Colorado does not).⁶²

A lawyer who becomes aware of the specter of malpractice may be additionally obligated to take remedial action with respect to his or her client. Rule 5.1(c)(2) states that a lawyer is to be held responsible for another lawyer's violation if the lawyer has "direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but *fails to take reasonable remedial action*."⁶³ This Rule directly imposes an affirmative duty for lawyers in certain circumstances to take remedial action. Although the knowledge standard included in the Rule may not directly apply to the awareness of the specter of malpractice, the court in *Kimmel* considered the attorneys' remedial actions when determining the length of suspension.⁶⁴ In addition, because malpractice cases are generally limited to the amount of actual damages incurred by the client,⁶⁵ there may be compelling business reasons to take remedial action. However, where the remedial action could potentially result in additional, irreparable damages, general counsel should consult with the firm's malpractice insurance carrier to ascertain the limitations on any ability to take remedial action.

KEY TAKEAWAY

As the primary parties responsible for managing malpractice risk and ethics violations, a law firm's general counsel and risk management professionals should take great care when they become aware of the specter of malpractice. Although the path forward after any transgression might not be clear, there are multiple obligations that arise even before the potential or actual mistake has matured into a formal complaint of malpractice or a state bar disciplinary proceeding. Chief among these responsibilities is the duty to investigate potential malpractice claims and ethics violations, to provide notice of potential infractions to the malpractice insurer, and to self-report mistakes to the client. Failure to properly respond could lead to additional professional liability or loss of malpractice insurance coverage. The adage that "an ounce of prevention is worth a pound of cure" is particularly apt here.

61. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 734 (2000).

62. Colo. Bar Ass'n Ethics Comm. & Continuing Legal Educ. in Colo., Inc., Formal Op. 113 (2005).

63. MODEL RULES OF PRO. CONDUCT r. 5.1(c)(2) (AM. BAR ASS'N 2020) (emphasis added).

64. Att'y Grievance Comm'n of Md. v. Kimmel, 405 Md. 647, 687, 955 A.2d 269, 293 (Md. 2008) ("Because of [r]espondents' intense, immediate, and largely effective recovery efforts, however, we ultimately conclude that they may apply for reinstatement no sooner than 90 days.") (citation omitted).

65. *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 780, 788 (Cal. Ct. App. 1997).

