UNDERSTANDING MALPRACTICE INSURANCE FOR NEW ATTORNEYS - AND EVERYONE ELSE

Typically for a new attorney starting a firm, high up on their to-do list is the task of obtaining professional liability insurance. Lawyers, especially new ones, have a healthy fear that one day they will be the subject of a malpractice claim. By obtaining insurance coverage, they can rest easier at night knowing that a missed deadline might not result in an expensive, out-of-pocket payout, during an otherwise unblemished legal career.

But often there is a lack of understanding by attorneys of how professional liability insurance works. Lawyers generally know they might need some indemnity when they day comes that something slips through the cracks and one of their clients has suffered a loss as a result of the lawyer’s mistake. But it usually isn’t until the error is reported that the lawyer starts to wonder about the limitations on their insurance, or depending on the timing of the mistake, whether there will be any insurance coverage at all.

Lawyers are not being overly cautious to assume they may encounter a malpractice claim (or two) over the course of their legal career. Industry statistics show that lawyers starting their legal career in private practice today are likely to have one to three claim matters during their professional career, and even more if their legal work involves a high-risk practice area such as plaintiff’s personal injury or real property matters.

Despite the large number of unwarranted malpractice claims against attorneys that are eventually dismissed or abandoned, just being labeled by your client as negligent can be extremely time consuming, as you and your insurer proceed to formulate the response to a meritless claim. The cost of your time can start to evolve into out-of-pocket expenses if an insurance deductible payment is involved and your insurer starts incurring legal expenses while proceeding with the goal of getting your claim dismissed.

By Todd C. Scott
VP Risk Management

“Reporting claims quickly ensures that the carrier will have ample opportunity to respond to the matter with all the resources at its disposal.”

Feelings of stress and anxiety that even a meritless claim can produce should never be discounted. The fear and worry experienced by lawyers who find themselves on the defense side of a malpractice claim can be extremely significant – sometimes debilitating – eventually affecting other legal matters being handled by the lawyer that have nothing to do with the subject matter of the claim. Such fear and worry adds additional strain to the relationships lawyers have with clients and staff.

While there seems to be no doubt that a malpractice claim, even a meritless one, can carry both monetary and emotional costs to the affected lawyer, many lawyers could benefit from having a better understanding of what they are getting when

(continued on page 2)
they pay their professional liability premiums. By not having a full understanding of what is covered by professional liability insurance, and some of the things lawyers sometimes do that can put their insurance coverage in jeopardy, lawyers are at risk of significant liability exposure, and possibly experiencing a very expensive, worse-case malpractice event. Here is a short list of some of the most important considerations for understanding your professional liability insurance policy and the coverage that comes with it.

Defining Matters: What is a Claim?

Since insured lawyers are generally required to report malpractice claims to their carrier as soon as they become aware of them in order to bind coverage, it is important to know what constitutes a claim according to the definition that can be found in your policy. Not understanding how your insurer defines a claim can create a significant problem if a matter that should have been reported to the carrier was not reported in a timely way.

Professional liability insurance policies may sometimes define a claim more broadly than a simple lawsuit naming the policyholder as a defendant. For example, rather than just defining the claim as a lawsuit against the insured a claim may be defined as, “…a demand or communication to the insured for damages or professional services,” in addition to a lawsuit served upon the insured seeking damages. Or “An act, error, or omission by any insured which has not resulted in a demand for damages but which an insured knows, or reasonably should know, would support such a demand.”

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By having a broader definition of what constitutes a claim, the carrier will have a better chance of knowing about the troubling matter at a time when there still may be options to get the matter back on track – avoiding additional and perhaps unnecessary claim expense. Insurance carriers call this concept “Claim Repair,” which is hiring an expert attorney early on in the process to assist the policyholder in correcting the situation, before significant damages are incurred and a malpractice lawsuit can no longer be avoided.

Claims-Made vs. Occurrence Policies

One of the most significant differences between a professional liability policy and a general liability policy is that professional liability policies are almost always written on a claims-made basis (as opposed to an occurrence basis) and it is the policy that is in force at the time when the claim is presented that pays the loss. For example, an error made by a policyholder in 2010, but discovered by the policyholder in 2014, should be reported to the carrier providing coverage for the policyholder in 2014 at the time the claim was discovered.

Professional liability insurance policies are typically written on a claims-made basis in order to acknowledge the unique way in which errors by legal professionals are often discovered long after the error was made. An attorney’s error may present itself in several different ways, including being notified of the error by a lawyer who has been newly appointed by the client, or after receiving notification of the error directly from the client.

In order to establish coverage on a claims-made policy certain, important conditions must be met by the policyholder. First, a policy must be in place at the time the claim is made. Additionally, the policyholder’s “retroactive date” or “prior acts date” must be dated at least as far back as when the services giving rise to the claim were provided. Finally, notice to the insurer of the claim must be given in a timely way, according to the claim reporting requirements defined in the professional liability policy.

The insured attorney’s “prior acts” or “retroactive” date is established at the time the policy is created, and always is clearly defined in the declarations page of the professional liability policy. For an attorney who sought insurance coverage at the time he or she first became licensed to practice law, and has had successive, continuous years of uninterrupted professional liability coverage, the prior acts date will typically go back to the first day of the lawyer’s first insurance policy.

Early Claim Reporting, Renewal Reporting, and Avoiding Gaps in Coverage

Professional liability claims are not like a fine wine, in the sense that they do not get better as they age. Therefore, it’s important that policyholders report claim matters to their insurance carriers in a timely way. Reporting claims quickly ensures that the carrier will have ample opportunity to respond to the matter with all the resources at its disposal, and the policyholder will lock in their insurance coverage. Since late reporting of claims can sometimes severely limit the claim handler’s options when trying to resolve the matter, policyholders are strongly encouraged to report anything that might be a claim as early as possible to their insurance carrier.

Policyholders will be asked at the time they are renewing their professional liability insurance whether they are aware of facts or circumstances that might lead to a malpractice claim. The reason for the renewal question about possible claims is so that the correct claims-made policy can be identified for providing insurance coverage. Once a particular policy ends, there is no coverage under that policy for claims that were unknown to the insured, or known but not reported in that policy year.

One of the more perilous things a lawyer can do to severely affect their insurance coverage is to allow for a gap in time between insurance policies. A policyholder’s prior acts date will typically

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go unchanged as the policyholder continuously purchases new, yearly policies – allowing the attorney to “build up coverage” over time. If however, the policyholder skips a year or two, and does not choose to have continuous insurance coverage, then later when they seek to purchase a new policy, their prior acts date will likely reset to the first date of the new insurance policy. Insurers do this to discourage buyers from waiting until they believe they might have claim exposure before purchasing a policy.

The risk of exposure to malpractice claims begins when the lawyer first starts giving legal advice. Therefore, it is important that new lawyers seek coverage for professional liability soon after they receive their license to practice. A new lawyer who is establishing a firm, and does not yet have any clients, may Sometimes choose to wait for his or her doors to open before binding coverage on their first policy. However, keep in mind that any opportunity to provide legal advice is also an opportunity for an individual to rely on defective information to his or her detriment. It is best to obtain insurance coverage early so you can have peace of mind that all your clients will be protected.

## LIABILITY OF PARTNERS AND SUPERVISING ATTORNEYS

**By Alice M. Sherren, Claim Attorney**

As attorneys, we live by the idea that “the buck stops here.” Regardless of what our clients or other litigants want us to do, we are ultimately responsible for using our own best judgment and acting ethically in all circumstances. The majority of the Rules of Professional Conduct focus on an attorney’s personal ethical responsibilities. This article addresses an attorney’s ethical responsibilities for the actions of other attorneys and staff under American Bar Association Model Rules of Professional Conduct 5.1-5.3.

**“The rules require that supervising attorneys make ‘reasonable efforts’ to ensure that the entire firm adheres to the rules of professional conduct.”**

Rules 5.1-5.3 are not complex in and of themselves: Rule 5.1 sets forth obligations of lawyers as supervisors of other lawyers; Rule 5.2 explains the responsibilities of subordinate lawyers, and Rule 5.3 discusses the supervision of and responsibility for non-lawyers. However, a lawyer may face discipline under Rules 5.1 and 5.3 when some other rule is violated by an attorney or staff who was not properly trained or supervised by the supervising attorney.

Supervising attorneys with “managerial authority” can also face discipline by simply failing to implement the systems and training required by the rules. Rules 5.1 and 5.3 require systems to address conflicts of interest, calendaring, client funds and general supervision of lawyers and staff for issues relating to confidentiality and technology.

Since it provides no mandates, Rule 5.2 cannot be “violated,” but its guidance is important for all attorneys to avoid violations of other rules. Basically, Rule 5.1 does not relieve a supervised lawyer of ethical duties, even though it places additional duties on supervisory lawyers, and Rule 5.2 explains that a supervised lawyer remains responsible for his or her own actions even if the lawyer acts at the direction of a supervisory lawyer. That said, in situations where the issue is “reasonably arguable,” a lawyer’s youth or inexperience may be a factor in determining whether the acting lawyer had the knowledge required to know that the supervisor had directed him or her to violate ethical rules.

Rule 5.3 addresses supervision of non-attorney staff, including paralegals, administrative assistants, investigators, debt collectors, clients and involved friends of clients. Private admonitions under Rule 5.3 are common, but generally include violations of some other ethical rule. Since lawyers are subject to discipline, but non-lawyers are not, it is very important to delegate appropriately and only after sufficient training. Especially in situations where non-attorneys either intentionally or inadvertently breach confidentiality, it is important not to ratify that misconduct, for example, by using evidence unethically obtained by others and provided to the attorney. While many firms delegate responsibility for financial aspects of the practice to accountants or other non-lawyers, it is especially important to maintain active involvement in trust account management so as to not violate ethical rules.

The rules require that supervising attorneys make “reasonable efforts” to ensure that the entire firm adheres to the rules of professional conduct. For small firms, informal supervision may suffice, but larger firms or firms practicing in areas where difficult ethical situations frequently arise may need to implement more elaborate measures. Situations that may require heightened supervision include firms with inexperienced attorneys, offices in a foreign jurisdiction, virtual law offices, high case loads, and departing lawyers or staff.

In conjunction with Rule 1.4 regarding “reasonable communication,” Rules 5.1-5.3 require disclosing the problem to the client and taking steps to rectify the situation. In situations involving serious misconduct, Rule 8.3 may also require reporting a lawyer’s misconduct to the lawyer’s board for that state. Supervising attorneys must be careful not to ratify misconduct, whether negligently or intentionally, and may be found in violation of the rules if they know of misconduct within their firm and fail to take reasonable remedial action.

Many firms benefit from designating a partner or partners to address ethics questions within the firm. When employees of the firm know where to turn with ethical concerns, the firm is better able to avoid misconduct, and to more swiftly address misconduct should it occur.
WHAT TO INCLUDE IN A FIRM’S ELECTRONIC USE POLICY

By Todd C. Scott, VP of Risk Management

In a survey conducted in 2007 by the American Management Association (AMA) and the ePolicy Institute, 84 percent of responding organizations revealed they let employees know that the company is monitoring their computer activity. Previous surveys by AMA have revealed that only 31 percent of employers have a policy regarding instant messaging (IM) in the workplace, 27 percent have a policy involving personal cell phone use at the office, and only 9 percent have a policy regarding the operation of personal blogs on company time.

Although many employers have acted upon and established policies addressing their concerns regarding e-mail and Internet usage, many other common forms of electronic usage that can disrupt employee workflow or corrupt company data are often ignored or forgotten.

Also, because technology innovations change so rapidly, what may have been a good and thorough electronic use policy two years ago is likely to be stale and out-of-date today. The sheer speed of change in communications and e-tools, including social networking formats, smart phones, and personal blogging sites, may be one major reason why so many employers that have electronic use policies don’t address common technology matters found in the workplace today.

A good electronic use policy should address the acceptable use (and prohibitions) of all electronic tools, devices, and formats accessible to employees in the ordinary course of their workday. This is not easy to do, and the ever-changing nature of technology is one important reason why the policy should be reexamined every 12 to 24 months.

When writing an electronic use policy today, employers should consider including the following topics: business e-mail decorum, personal use of business e-mail, personal e-mail accounts, instant messaging, text messaging, business phone etiquette, personal use of business phones, personal use of business cell phones, use of personal cell phones, appropriate use of Internet, web posting, personal websites, blogging, mass storage devices (such as flash drives and iPods), portable computer equipment, adding and deleting software, security and password maintenance, and file sharing.

The policy should also clearly provide employee notice that the employer intends to review any and all traffic in the system including messages, attachments, websites visited, files downloaded, and cell phone records including text messages, and that such monitoring can occur at any time without prior notice.

Any specific technology that is prohibited by the company policy should also be listed in the document. For example, a common practice for organizations concerned with the unauthorized transfer of company information is to prohibit access to private e-mail servers such as AOL and Hotmail and to restrict the use of mass storage devices such as flash drives and portable transfer devices, including iPods.

It is important to craft an electronic use policy that is right for the firm. Many small law firm practitioners confess to never having an electronic use policy in place because the need for it never seemed apparent. Perhaps excessive personal use of the firm technology is something more likely to happen in a large firm environment where employee anonymity can sometimes exist.

Nevertheless, even the most basic electronic use policy that outlines prohibited activities is a good reminder to the staff that the firm’s electronics belong to the firm. Moreover, it may prevent a difficult and painful experience if ever the firm is involved in employment litigation. Such a policy would be paramount to helping guide the firm through a difficult time.

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