

Managing Professional Liability Insurance Claims Before They Manage You

Despite their best efforts to reduce risk, most law firms will eventually face a claim arising from professional services that may be covered by insurance. Whenever such claims occur, firms must be able to manage them effectively to maximize insurance protection and minimize the impact on serving clients and on profitability. This *Information Alert* provides some practical advice for enhancing a law firm's chances of successfully navigating a claim.

Start with Pre-Loss Planning

Successful management of professional liability claims begins well before a claim occurs and involves several key steps, including:

- **Review your insurance policy.** Be sure you understand what constitutes a claim and the insurance policy's claim reporting requirements.
- **Establish and follow a process.** Develop and communicate internal procedures clarifying who should be notified of a claim and who will process/file a claim with the firm's insurer(s). Typically, firms will want all claims and notifications of potential claims to be handled by a designated internal general counsel or claims counsel to help establish attorney-client privilege.
- **Choose an expert outside attorney.** Maintain a relationship with a trusted expert professional liability defense law firm before any claims arise; ideally one already on the insurer's pre-approved defense counsel list.
- **Train key practice leaders/office heads.** Conduct training sessions/workshops with key practice leaders, office heads and the firm's support staff to help them understand your insurance coverages, claim preparedness, and pitfalls to avoid.

Larger law firms with some claim frequency might even conduct a conference call or meet in advance with their professional liability insurance claims representative to establish a relationship and clarify rules of engagement.

How to Report a Claim

Once you become aware of a claim (*see box on the next page*) or, for that matter, a pre-claim put your professional liability insurer(s) on notice. Almost all LPLI policies now allow for claim reporting via email; however, some still technically require formal hard copy reporting via 'snail mail.' In any event, be sure to retain copies of any confirmations of receipt.

The typical policy requires you to provide the insurer with notice of a claim "as soon as possible." The notice should include a description of the claim and/or alleged wrongful acts, the identity of the claimants and all attorneys involved at the firm, and any other relevant information about the claim (e.g., copy of the engagement letter). Enclose copies of any demands, notices or summons and establish a claim file. It is important to fully comply with the insurer's claim reporting requirements to ensure that the claim is fully covered.

What is a claim?

Most lawyers' professional liability insurance (LPLI) policies define a claim as "... a demand for money or services" or "... an oral or written demand made against the Insured for money or services, including the service of a suit or institution of mediation or arbitration proceedings...." The typical policy language does not require that a lawsuit be filed, but simply that a demand be made to trigger both coverage and the policy's claim reporting requirement. Further, many policies also define a claim as "... a written request to toll or waive a statute of limitations," even if related only to a potential claim.

Problems can arise when individual lawyers ignore such a demand (falsely assuming the requirement to report a claim is only triggered when a lawsuit is filed or that they "can handle the matter."). This can result in the claim being denied for untimely notice.

Another scenario that can create trouble: the lawyer acts to "fix an alleged issue" at the client's request without considering the insurance implications. If this fails to resolve the issue or results in a more substantial claim, the insurer may deny coverage either for failure to report the matter in a timely manner **or** because the insured violated the policy condition that the insured law firm do nothing to "...admit any liability or assume any obligation without prior written consent of the insurance company."

It is always better to notify your insurer early, before taking any action intended to resolve the matter. Also, be sure to get the insurer's sign-off on any efforts to settle or resolve the situation.

Besides knowing when a claim must be reported, there's the matter of who is required to make a filing and report a claim. The typical professional liability insurance policy, unless modified by endorsement, requires any "insured" aware of a claim to report the situation to the LPLI insurer in a timely manner.

Although larger firms may be able to modify the policy wording to limit this requirement to senior management, the general counsel, etc., it is prudent to have a process for all attorneys and employees who become aware of a problem and receive a "demand for money or services" to report it to the firm's general counsel or designated

claims attorney to assess if it should be reported to the insurer. Unreported circumstances that later become claims could result in coverage denials.

Post-loss management is key: Once you become aware of a claim or potential claim (see *box on next page which discusses pre-claim matters*), act swiftly to take control of the situation. Key steps after reporting a claim include:

- **Gather documentation.** Secure any internal documents (place a 'litigation hold' on any emails and other documents to avoid inadvertently destroying evidence) and begin gathering relevant information, including copies of contracts, etc.
- **Engage expert defense counsel.** Work with your insurer to engage expert defense counsel early in the process. Besides establishing attorney-client privilege this can help remove emotion from decision making about how to handle a claim.
- **Cooperate with your insurer.** An insurer's claim representative can be helpful in planning defense strategy and evaluating appropriate courses of action. Work to build a partnership with your assigned claim representative to garner their full support and learn from their experience.
- **Check for possible coverage extensions.** Review any insurance policy provisions that may help reduce costs (e.g., reimbursement for time spent attending depositions or trials) or that may result in reduced policy deductibles and retentions and enhance settlement opportunities, including mediation or alternate dispute resolution credits.

Keep in mind: Your insurer must approve any proposed settlement if you expect them to participate financially.

What Not to Do: Besides knowing what to do, here's what **not to do** once you become aware of a claim or potential claim.

- **Do not** admit liability or responsibility for any alleged damages.
- **Do not** make any voluntary payments or incur any expense without insurance company approval.
- **Do not** provide comment or argument on any suit papers, letters, or memoranda.
- **Do not** attend any meetings or have any conversations arranged to discuss the claim.
- **Do not** sign or accept any settlements or releases.

Each of the above should state "... without insurer consent."

Which Insurer to Report Claims To?

While it is usually sufficient to report a claim only to the firm's professional liability insurer, there may be cases where other insurance policies might also be triggered. Whenever a claim is filed or a pre-claim report is considered, check if any other insurance policies might respond. A common issue involves data breaches that may be covered under the firm's cyber liability/network security insurance, as well as the LPLI policy.

Similarly, allegations of improper treatment of a client based on race, sex, age, etc., could trigger coverage under the firm's Employment Practices Liability Insurance if a third-party coverage extension was purchased. Likewise, a claim for defamation or libel may, depending on how the claim is cast, invoke coverage under either the management liability policy or the advertising and personal liability provisions of the firm's general liability policy. Or, certain claims may trigger the management liability policy, at least for defense costs.

In such cases, check with your insurance broker; as it may be best to inform both insurers. One reason: the cyber/network security insurance policy and/or the general liability insurance policy may be primary to the LPLI and have a significantly lower deductible.

Keep in mind, despite the potential for coverage, there often is a general liability policy "professional services exclusion" that would exclude claims arising from the practice of law.

Pre-claim matters matter:

Most lawyers' professional liability insurance policies let firms voluntarily report pre-claim matters, typically defined as: "any circumstance which may reasonably be considered to give rise to a claim in the future."

Voluntarily reporting such situations accomplishes two key objectives: One, any future claim arising from such circumstance is now covered by the insurance policy in-force when the circumstance was reported. Two, such a pre-claim report may trigger support services by the insurance company at no expense to the insured, which can help prevent further legal issues. These services are more typically provided free of charge for mid-size or smaller law firms. Larger firms are not provided as many of these "bells and whistles," but typically enjoy more freedom in selecting defense counsel and controlling the defense of claims.

Be sure to review your policy wording as certain LPLI policies require mandatory reporting of pre-claim matters. Accordingly, law firms should have procedures (this is often accomplished through firm-wide polling) to ensure such issues get reported. This is especially important prior to each policy renewal date, when the renewal application often contains a warranty statement that "all known claims and circumstances have been reported to the appropriate insurer" as of the date of the signature on the application. The importance of this step is heightened when changing insurers.

A recent court decision (*The University of Pittsburgh, plaintiff v. Lexington Insurance Company and AXIS Insurance Company, U.S. District Court for the Southern District of New York, September 16, 2016*) highlights the importance of complying fully with the insurance policy's pre-claim reporting provisions. In this case, the court held that insufficient details in the pre-claim notice to the insurer barred coverage under the policy for a subsequent claim.

Seeing the Claim Through

Once the claim is reported to the appropriate insurer(s) and counsel is retained, designate one person at the firm to oversee the claim process. This may be the general counsel or another in-house attorney, or in smaller firms, the managing partner. Whomever is designated must be authorized to make decisions on the firm's behalf. This individual also will ensure that the insurance company claims representative, your defense counsel, and insurance broker are kept informed and coordinated. The typical steps that occur in the weeks after a claim is filed are:

- **Develop a summary.** Key individuals involved in the matter or alleged error should prepare a detailed written summary of the circumstances surrounding the alleged claim with the assistance and involvement of counsel. Label materials "Attorney/Client Privilege Work Product" and create a timeline of all pertinent actions, including initial client contacts, engagement letter, correspondence, conference calls, etc.
- **Obtain a budget from defense counsel.** Often required by insurers, the budget will focus on direct expenses – typically, part of your deductible – such as legal fees, document reproduction costs, expert witness fees, travel for depositions, etc. Internally, you may want to track indirect costs, such as staff time to prepare for depositions.

- **Establish a defense strategy.** Ask your defense counsel for a litigation management plan outlining the strategy to defend the claim, including likely document production, depositions, motions, etc. Generally, money spent early on to organize evidence and review documents may prevent larger expenses later due to misjudging a case's circumstances.

Separately, develop an internal process to evaluate the claim and identify "lessons learned." What would you do differently next time? Do any procedures or policies need to be modified? Any additional attorney or staff training?

The broker's role: Your insurance broker can assist you with any lawyers' professional liability insurance claim. Notably, they can make sure your professional liability (or other) insurer is responsive and assists you with the claim. They can also be your advocate if an insurer drops the ball on a claim or denies coverage.

Conclusion

Simply put, claims do happen, even to good law firms and good lawyers. Having a clearly-defined approach in place can reduce the negative impact on the firm and increase the odds of a positive outcome. Remember: Be proactive, manage the claim and don't let the claim manage you.

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