Tennessee Commission on Continuing Legal Education & Specialization

LAWYER TO LAWYER MENTORING PROGRAM

WORKSHEET Q

MALPRACTICE INSURANCE

Worksheet Q is intended to facilitate a discussion about the benefits to carrying malpractice insurance and lawyers' ethical obligations in the event of the failure to do so.

WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

_____

_____

Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

ACTIVITIES FOR TODAY

- Discuss a lawyer's obligation to act competently, work diligently, and communicate effectively with every client. See Tennessee Rules of Professional Conduct Rules 1.1, 1.3 and 1.4.
- Discuss the reasons for maintaining malpractice insurance and considerations for choosing the right policy. Discuss the attached *Checklist for Purchasers of Professional Liability Insurance* of the ABA Standing Committee on Lawyers' Professional Liability. http://www.abanet.org/legalservices/lpl/insurancechecklist.html
- Discuss the best time to involve a malpractice carrier into a claim against you for malpractice liability or ethical misconduct.
- Discuss the natural concerns and fears that occur when allegations of malpractice or ethical misconduct are made and share ways to overcome such fears. Read the attached article, E. Kendall Stock et al., *Not to Panic – Suits Happen*. http://www.abanet.org/legalservices/lpl/downloads/nottopanic.pdf
- When an attorney chooses not to carry malpractice insurance, discuss his or her obligation to disclose to clients that he or she does not carry malpractice insurance. See Tennessee Rules of Professional Conduct 1.4.
- Discuss the impropriety of asking your client to sign a fee agreement which provides for arbitration in the event of a fee dispute, malpractice claim or ethical misconduct allegation. Discuss the propriety of settling claims for malpractice with your client. See Tennessee Rules of Professional Conduct 1.8.

ACTION STEPS

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today's discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

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RESOURCES

TENNESSEE RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client to the lawyer or a person related to the lawyer, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation or direction in connection with the representation of a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by RPC 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless:

(1) each client is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction; and

(2) each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client or prospective client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless the lawyer fully discloses all the terms of the agreement to the client in a manner that can reasonably be understood by the client and advises the client in writing of the desirability of seeking and gives the client a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) [Reserved]

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

What Attorneys Need to Know About Insurance

By Billy Akin on Tue, 07/21/2009 - 9:42pm

Of course a corresponding declaration might be, "What insurance people need to know about the law and the legal system!" Ideally, enough professional humility might prevail that each profession can complement the other.

Having invested over a half century of my professional career in the property and casualty insurance business, the last decade being involved as a consultant and expert witness, I feel an urgency to mention a few areas that can be of help to attorneys. Although many principles of operation and practice overlap in the two major divisions of insurance, this article primarily involves the property and casualty business.

The insurance business, not unlike the legal profession, is intricate and technical. The insurance trade involves a wide variety of skills, varying degrees of professional involvement and experience. The range varies from minimum entry level and agency licensing requirements to graduate degrees and prestigious professional educational opportunities.

The complexity of the insurance industry must be realized. For example, the commonly used Comprehensive General Liability (CGL) policy contains 16 pages. A highly regarded book explaining the CGL policy has 238 pages of text and 100 pages of appendices. A reference publication on the policy has more than 1,500 pages. The complexity of the industry is too often unrecognized.

Expressed in the form of questions, here are a few basic areas with which, I feel, attorneys involving themselves with insurance cases should have a basic understanding. Let us consider each item separately:

1. What is the purpose of insurance? Is it not a form of gambling?

In the most basic form, the purpose of insurance is the transfer of risk from the individual (or company), known as the insured to a risk-bearing entity, known as the insurer. This system works successfully since the insured is able to transfer the risk for a relatively small payment (the premium), while the insurer facilitates the spreading of risk of loss by the application of the "law of large numbers." It is important that attorneys realize that all risk of loss is not transferable and that some risks are necessarily left with the insured, to be handled in some other manner. This is sometimes done by simply assuming the risk themselves, or transferring it in another manner, such as contracts or reduction of risk. Policy terms and exclusions are critical and most important. Incidentally, the principle of insurance is just the opposite of gambling. Gambling creates a risk of loss that did not otherwise exist. Insurance strives to transfer and thus minimize a risk of loss that is already present.

2. Do insurance policies (contracts) fit into a similar mold?

Unlike a few decades ago, insurance policies (composed of a Jacket, a Declaration Page and related Coverage Forms) are now much less likely to have any uniformity. In years past most insurance companies subscribed to national rating organizations (such as Insurance Services Office) that prepare and have their forms approved by the various insurance departments, on behalf of the companies. Such is no longer the case. Even companies that belong to rating organizations often file for exceptions or use forms in areas of insurance that are not regulated. This requires close examination of each insurance policy and its related forms when analyzing insurance cases. The difference between forms may be as few as one or two words.

3. What is the difference between a broker and an agent?

Although the terms are often used interchangeably, an insurance broker is technically a person who is paid by an insured to evaluate risks and seek insurance coverage for an insured. In contrast, technically an insurance agent is an individual or company that represents an insurance carrier and receives a commission for placing business with that carrier. In some jurisdictions, a broker is licensed by the state, separate and apart from the licensing of an insurance agent. In actual practice, the distinction between broker and agent has been blurred, and both terms are used for those entities procuring coverage.

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4. What is expected of insurance agents?

Insurance agents are human beings, or companies comprised of human beings! Therefore, perfection cannot be expected. However, agents typically present themselves as experts in insurance coverages. Many factors are involved in the determination of whether an agent acted in a manner that he should, when it comes to placing coverage. One of the major factors involves the relationship between the agent and insured, and the length of time and the extent that the agent has in handling the insurable risks of a particular insured. In my opinion, agents do not receive their commission from the insurance companies they represent by simply being "order takers."

5. Do insurance agents have binding authority from their companies?

Contrary to popular understanding, all insurance agents do not have authority to bind all coverages, verbally or in writing, for companies with which they might place business. The "direct writers" (such as State Farm Insurance Company) generally have agents who are employed by their company and are given guidelines as to coverage that they can and cannot accept on behalf of their company. In contrast, "independent" agents typically represent many insurance companies and have a contract with each company specifying what and when coverage can be bound. Of course when a coverage is legitimately bound by an agent, that coverage is the responsibility of the appropriate insurance carrier.

Many agents have contacts with "Excess and Surplus Lines" insurance carriers (such as Lloyds of London), which are normally not licensed by state Insurance Departments, but are on lists of Approved Non-Admitted Carriers. Usually the more difficult business to place is with these carriers. Normally agents do not have authority to bind these carriers without prior approval. Typically, the local, independent agents have access to the "excess and surplus lines" carriers via a "broker" or "managing general agency" for that non-admitted carrier. This "middle-man" set-up sometimes makes it confusing in establishing fault when an obvious error has been made in the process of providing insurance coverage.

6. What difference does co-insurance make when settling a claim?

Most property losses are not "total" losses. To encourage an insured to purchase an amount of insurance that approaches total value, most property insurance policies are written with a co-insurance percentage. The insured has a lower premium for this provision. This means that, at the time of a loss, should an amount of insurance not equal the percentage shown times the value of the property, the corresponding adjustment is made in the claim settlement. Thus, the insured becomes a "co-insurer." This subject is often poorly understood. Sadly, many insurance agents do not understand the consequences.

7. What are excess insurance policies?

Especially with today's ever-increasing need for higher limits of insurance coverage, many insurance carriers (along with their reinsurers) are unable to provide adequate limits. To fill this gap, other companies offer "excess" insurance coverage, making available higher and higher limits, sometimes in multiple layers. Unfortunately, not all "excess" policies "follow form," that is provide the same coverage as the primary/underlying policy. This offers a special challenge to the insured and their agent and/or broker.

8. Are all application questions of equal significance to underwriters?

From decades as an underwriter and later underwriting vice president of an insurance company writing business in most jurisdictions of the United States, it seems to me that not all questions on an insurance application are of equal significance. Sure, the prospective insurance carrier prepares the application and must feel that the questions have some underwriting significance. However, whether their company should, or will, accept coverage is determined by their underwriters, who invariably put different weight of decision on various items. This gets into the legal question of "materiality." For example, whether or not a prospective insured had a small electrical fire six years ago does not carry the same weight in the decision-making process as whether the prospective insured is a convicted arsonist and asking for an amount of insurance twice the property's value!

9. What are some special insurance terms that should be understood?

Many insurance-related terms are peculiar to the industry ... some attorneys contending that the terms are peculiar to the English language! Nonetheless, these unique phrases must be understood as insurance cases are analyzed and processed. In addition to those items discussed in this article, there are several other terms that attorneys need to understand. These include such terms as

- "occurrence" vs. "claims-made" forms
- "double recovery"
- "loss of income"
- "all risk" vs. "named peril"
- "reporting forms"
- "audit provisions"
- "equity clauses"

- "depreciation" vs. "replacement cost"

Access to a hard copy and/or Web site dictionary of insurance terms is a must for attorneys and their staff when handling insurance cases. These sources may be enhanced by the use of persons with "hands on" insurance experience.

10. What is a "reservation of rights"?

Under a Duty-to-Defend policy, insurers are sometimes asked to provide a defense for lawsuits that include both non-covered and covered claims. Insurers usually provide a defense to their insured for the entire lawsuit, pursuant to a "Reservation of Rights" letter. This letter normally seeks reimbursement for defense cost that an insurer pays for claims encompassed within a lawsuit that are determined not to be covered under the policy. The specific provision(s) give an insurer the privilege of issuing a "Reservation of Rights" letter might vary from policy to policy. Without a "Reservations of Rights" statement, an insurer would normally assume payment of their legal costs and claim payment.

With what might be termed a "disclaimer," let me mention that these remarks are made with the realization that there are many exceptions to general rules and principles in the insurance industry. These thoughts are expressed in generalities, based on my past training and experience, and deal more with "Standard of Care" as well as "Custom and Practice" issues rather than statutes and legal precedent.

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Checklist For Purchasers of Professional Liability Insurance

How to Use this Checklist

This checklist is intended as a guide to be used in reviewing professional liability insurance applications and policies. The questions are divided into eight sections:

- **Application**
- **Declaration Sheet**
- **Definitions**
- **Coverage Agreements**
- **Exclusions to Coverage**
- **Defense and Settlement Provisions**
- **Limits of Liability**
- **Conditions of Coverage**

A policy may also contain attachments called "Endorsements." Endorsements change coverage on a firm-by-firm basis, either by adding, altering, or limiting coverage. This checklist treats endorsements under either Coverage Agreements or Exclusions to Coverage, depending upon whether the endorsement adds or excludes coverage.

Key issues to consider are listed under each policy section. These issues are followed by specific questions to answer for each policy that you consider.

Before using this checklist, read "Understanding Your Insurance Coverage" for a full discussion of the items included in the checklist.

MALPRACTICE INSURANCE CHECKLIST

Application

Key issues to consider:

Is the application made a warranty or a representation to the contract?
(That is, does the information contained in the application become a legal part of the insurance contract?)

Declaration Sheet

Key issues to consider:

What are the terms of coverage?

- What is the policy period?
- What are the limits of liability?
- What are the deductibles?
- Who is the "Named Insured"?
- Is there a retroactive date for prior acts coverage?

Does the declaration sheet:

Include a "retroactive date" (an effective date) for prior acts coverage (coverage for acts that occurred prior to the policy period)? (See endnotes.)

Definitions

Key issuers to consider:

- Is coverage provided for all person for whom the insured is legally responsible?
- Are individual lawyers or nonlawyers covered for services not preformed on behalf of the firm?

Do the definitions of the insured include:

- Named insured and predecessor firm(s)?

- Former lawyers, partners, officers, directors and shareholders?
- Current lawyers, partners officers, directors and shareholders?
- Automatic coverage for future lawyers, partners, officers, directors and shareholders?
- Former, current, or future non-attorney employees?
- Independent contractors?
- Attorneys in a "Of Counsel" capacity?
- Others, such as heirs, executors, administrators, legal representatives, or assigns of insured?

Coverage Agreements

Key issuers to consider:

- Is coverage provided for all legal services performed by the firm?
- Does the policy cover all prior acts of the firm and of all the individual members, including employees?
- Does coverage exist for acts for other than "acts on behalf of the Named Insured," e.g. pro bono or "cocktail party" advice?
- Are the activities of members of the firm as officers or directors covered?
- Does the policy cover other business pursuits with clients of the firm?
- Are acts in a dual capacity as a lawyer and officer, director or business partner with a client covered?
- Does the policy provided coverage for innocent partners in cases where one member of the firm has not complied with the conditions?
- Is the definition of when a claim is made sufficiently broad?
- Are optional extended reporting periods available?

Does the policy provide coverage for:

- Professional services as a lawyer?
- Services as a notary public?
- Services as a title agent?
- An attorney or non-attorney who causes personal injury?

All prior acts of the firm and all members of the firm, including employees, when the insured, prior to the policy period, had not notified any previous insurance company of any act and the insured had no reason to believe a breach of professional duty had occurred? (See endnotes.)

Does this coverage include:

- Prior acts of attorneys for professional services before joining the firm?
- Prior acts of attorneys and the firm for professional services with the firm before inception of the policy?
- An attorney acting as a trustee, executor, administrator, guardian or conservator?
- Investment advice?
- Pre- or post-judgement interest, appeal bonds, and related costs?
- Claims first made and reported during the policy period?

If so, does the policy provide coverage:

- Regardless of when the error occurred? Or
- Only if the error, as well as the claim was made during the policy period?
- Claims first made after the expiration of the policy, assuming that the insured:
  (1) had reasonable knowledge that a wrongful act occurred and a claim might be made, and
  (2) reported the suspected wrongful act to the insurance company during the policy period?
- An optional extended reporting period?
- If so, for what period(s) of time is the extended reporting period available?
- Is there a separate, additional limit of liability?
- Are there limitations on the types of persons eligible?
- Are there stipulations that the extended reporting period option is exercisable only by the named Insured and not by "Other Insureds")?
- Within what time period after expiration of the policy must this option be exercised?
- Is the premium and availability of the extended reporting period guaranteed?
- Is the extended reporting period available if an insured's license to practice is revoked?
- An optional retired or non-practicing attorney's extended reporting period?
- If so, for what period(s) of time is the extended reporting period available?
- Is there a separate, additional limit of liability?
- Are there limitations on the types of persons eligible?
- Are there stipulations that the extended reporting period option is exercisable only by the Named Insured (and not by "other Insureds")?
- Within what time period after expiration of the policy must this option be exercised?

Exclusions to Coverage

Key issues to consider:

- Is the coverage excluded for any services crucial to the firm (e.g. securities, real estate)?
- Are the activities of members of the firm as officers or directors excluded?
- Does the policy exclude other business pursuits with clients of the firm?
- Are acts in a dual capacity as a lawyer and officer, director or business partner with a client excluded.
- Does the policy exclude coverage for claims brought by regulatory agencies?

Is the coverage excluded for:

- Dishonest acts?
- If so, is coverage afforded to innocent parties?
- Fraudulent acts?

- If so, is coverage afforded to innocent parties?
- Malicious acts?
- If so, is coverage afforded to innocent parties?
- Vicarious liability (liability acquired by law or by contract for the acts, errors or omissions of others)?
- Claims made by or against a business enterprise owned or controlled by an insured? (Refers to claims by or against the business itself)
- Claims arising out of or in connection with a business enterprise owned or controlled by an insured? (Refers to third-party claims)
- Activities as an officer, director, partner, trustee or employee of a business not named in the policy? (Refers to an insured's activities as an officer, director, etc. of a business not owned or controlled by the insured)
- Acts in a dual capacity as both a lawyer and as an officer or director?
- Acts involving business pursuits with clients?
- Services as a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA)?
- RICO (Racketeer Influenced and corrupt Organization Act) claims?
- Activities as an elected public official?
- Worker's compensation claims?
- Advertisers' liability?
- Loss sustained as a beneficiary or distributee of a trust or estate?
- Bodily injury or property damage?
- Real estate claims?
- Claims by regulatory agencies?
- Notarization of a signature without the physical appearance of the signatory?
- Claims involving an insured versus another insured?
- Discrimination?
- Sexual harassment?
- Prior acts (acts committed before the policy period) where the insured had knowledge of or should have foreseen the claim?
- Investment advice?
- Securities work or SEC claims?
- Punitive damages?
- Fines, statutory penalties and sanctions?
- Business enterprises liable for contamination or pollution of the environment?
- Loss to nuclear reaction, radiation or contamination?

Defense and Settlement Provisions

Key issues to consider:

- Who selects defense counsel?
- Is the insured's consent required to settle claim?
- Is the agreement to defend claims sufficiently broad to offer full protection?

Does the policy provide for:

- Selection of defense counsel by the insurance company or by the insured? (See endnotes.)
- If the insured has the right to select defense counsel, does the insurance company restrict this right in any way (e.g. by retaining the right to approve the choice of defense counsel in advance or the right to require the insured to revoke the selection)?
- The insured's consent required to settle a claim?
- If so, does the policy provide for a limit of payment by the insurance company if the insured refuses to settle?
- Arbitration of a coverage dispute between the insurer and the insured?

Limits of Liability

Key issues to consider:

- Are claim expenses included in the limits of liability?
- Are limits of liability per claim or annual aggregate?
- How are two or more related claims treated?
- How are claims against multiple Insureds treated?
- Are deductibles per claim or annual aggregate?
- Is a "loss only" deductible option available?

Does the policy provide:

- That claim expenses are included in the limits of liability?
- If so, does the policy provide a claim expense allowance?
- Limits or liability for each claim?
- Annual aggregate liability on a firm basis?
- That two or more claims arising out of a single act or series of acts are considered a single claim with a single set of limits?
- If so, does the policy provide that the policy year the first act is reported is considered the claim reporting date?
- That if a claim is made against multiple Insureds, all sets of limits form all applicable policies apply (rather than just one set of limits)?
- A per claim deductible?
- An aggregate deductible?
- That the deductible applies to:
- Loss payments only? Or
- Claim expenses and losses?

Conditions of Coverage

Key issues to consider:

- Is there a requirement to give notice to the insurance company of claims or potential claims?
- At what point does your claim get reported and to whom?
- Are there requirements concerning changes in the firm?
- Is the carrier experienced in professional liability claims administration?

Does the policy:

- Require timely notice to the insurance company of all claims and potential claims?
- Require the assistance and cooperation of the insured?
- In the event of any payment by the insurer, transfer the insured's rights of recovery to the insurance company (subrogation)?
- Provide coverage in excess of other available insurance?
- Provide coverage for innocent attorneys in cases where one member of the firm fails to meet the conditions of the coverage?
- Cover changes in the firm automatically until renewal?
- Provide for arbitration of the underlying malpractice claim?
- Is arbitration required?
- Is arbitration permitted?
- Is arbitration prohibited without the insurance company's consent?
- Provide at least a 30-day notice of cancellation by the insurance company?
- Provide at least 60 days notice of intent not to renew?
- Provide, if the policy is canceled by the insurance company, that the premium returned will be figured on a "short rate" or "pro rata" basis?
- Provide, if the policy is canceled by the insured, that the premium returned will be figured on a "short rate" or "pro rata" basis?

Endnotes

Prior Acts Coverage: In order to have a retroactive date on the Declaration sheet, you must have prior acts coverage. Prior acts coverage is an extremely important item. Make sure that, if at all possible, your policy covers all prior acts of the firm and of all of the individual members, including non-attorney employees. Your prior acts coverage may also be limited to acts on behalf of the Named Insurer only.

Right to Select Defense Counsel: The policy language may explicitly state the right of the insurance company to select defense counsel (e.g. "Selection of defense counsel will be a the prerogative of the Company"), or the right may be implied in the right to defend (e.g., "The Company shall have the right and duty to defend any claim").

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Not to Panic—Suits Happen

Bring your malpractice insurance carrier into the case upfront

BY E. KENDALL STOCK
AND DONNA D. LANGE

Face it: In today's law practice environment, the chances are good that a disgruntled client is going to sue you for legal malpractice.

Once lawyers accept the possibility, if not probability, of being sued, they can become better prepared to respond appropriately when the possibility becomes reality.

As any client could tell you, it is almost impossible to plan for the onslaught of a suit. But at the very least, you should be familiar with your professional liability insurance policy. When the lawsuit is already in hand is not the time to pull out the policy to see what it says.

At least be familiar with these policy elements: the limits of liability, the deductible amount, whether the deductible applies to claims expenses and costs, whether the cost of defense is included in the limits of liability, whether fines or sanctions are covered, and whether prejudgment interest is covered.

If a lawsuit is filed against you, your initial response will be crucial. Your first step should be to locate your file on the underlying case, organize it and protect it. Second, prepare a statement of the facts as completely and as objectively as you can. Finally, notify your insurance carrier as soon as possible.

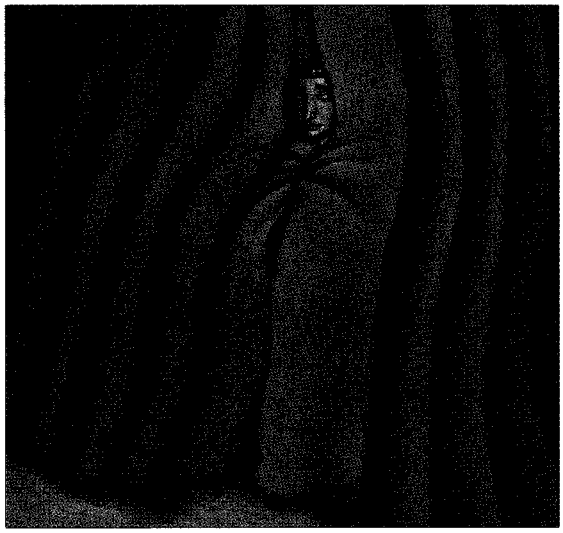
During this emotional and traumatizing time, it is essential to remain calm and objective. Do not try to deal with the claim yourself. Under no circumstance should you discuss this matter with the plaintiff—even though that party is (or was) a client—or the plaintiff's attorney. Your insurance company's counsel should deal with them.

E. Kendall Stock chairs the board of directors for American National Lawyers Insurance Reciprocal (Risk Retention Group), the endorsed professional liability carrier for the Arizona, Hawaii, Tennessee and Virginia state bars. Lawyer Donna D. Lange is the group's assistant vice president of marketing. Stock, a solo practitioner in Leesburg, Va., is on the ABA Standing Committee on Lawyers' Professional Liability.

Above all, do not ignore the suit because it will not go away.

Reporting the claim immediately provides opportunities for repair or mitigation. Reporting should be done with a telephone call to the carrier followed by a confirming letter.

Report as much detail as possible, even if some of the information



in your file is adverse to your case. After you have reported the lawsuit to your carrier, cooperate with it in preparing your defense.

Stay Involved in Your Case

Lawyers have a tendency to either completely avoid involvement in their cases or to become overly involved. Neither response is productive.

Instead, discuss with your insurance company who your defense counsel will be and whether you have any say in the selection. You are entitled to copies of pleadings and correspondence. The insurance company should not object to your input if you think your representation has been sloppy or inadequate.

On the other hand, do not assume that your defense counsel cannot handle your case because he or she has not practiced in the area of the underlying matter. An experienced malpractice defense lawyer will rely on you and experts to explain the underlying intricacies.

You should be closely informed of any serious settlement discussions. You should also be aware of the impact of a settlement on your rights and responsibilities under your malpractice insurance policy.

For instance, does the insurer need your approval to reach a settlement, or do you have a right to reject it? What is the impact of a "hammer clause" in a policy (which provides that, if you do not agree to the settlement, the proposed amount of the settlement becomes the new policy limit)? Can a carrier's decision to settle be appealed? How will a settlement affect your future premium costs or insurability?

If the claim against you alleges vicarious liability arising out of dishonest acts of a partner, most policies cover you as an innocent partner.

You need to take steps immediately, however, to prevent further actions by this partner, and review all of his or her files for further exposure. If there has been publicity on the case, other former clients of the partner may file additional claims alleging dishonest acts, and there even may be some frivolous claims of negligence.

Obviously, such an occurrence affects your insurance record, and you may consider purchasing an extended reporting endorsement.

An extended reporting endorsement designates some specified period of time after the termination of the policy during which a claim can be reported. In all cases, the professional services that give rise to the claim must have occurred prior to the termination of the underlying policy for the insurer to defend it.

The extended reporting endorsement, or "tail" coverage, is, however, one of the aspects of your malpractice insurance policy that should be evaluated before a claim makes it an imperative.

By addressing questions about your policy coverage before any claims are filed, you may not be able to avoid a claim, but at least you will be prepared for it. ■

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