What to Think About When Deciding on Legal Malpractice Insurance

PLUS Blog
Posted on September 12, 2022, by plushq
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Is Lawyers' Professional Liability Insurance Needed?

Lawyers' Professional Liability (also known as "LPL") insurance is the more formal name for legal malpractice insurance. While states vary on what requirements they have for disclosure of LPL insurance, currently only Oregon mandates LPL insurance. Even if not mandated, the prevalence of legal malpractice cases makes it necessary. The American Bar Association has reported that in any given year, attorneys have a 4 to 17 percent-age chance of being sued and that four out of five attorneys will be sued during their careers. Defense costs for these matters generally exceed $50,000, and can easily exceed $100,000.

Any attorney in private practice is vulnerable to legal malpractice. Lawyers make mistakes, but can also be liable for partners, associates, or staff. Other cases are meritless and therefore could not have been prevented. LPL insurance can also provide valuable supplemental coverages discussed below.

How Much Insurance is Needed?

The answer depends on the value of the cases/transactions you are involved in and your appetite for risk. In the litigation context, legal malpractice claims are generally valued by the "case-within-the-case." A claim for legal malpractice is worth as much as the value of the underlying claim that was lost due to the attorney's alleged negligence. In non-litigation contexts, the value is the loss suffered by the client. Therefore, the amount of insurance needed is at least the value of your best case gone bad, the value of the largest real estate transaction you are involved with, the value of your wealthiest client's estate, the value of your client's patent, or the value of the merger/sale of your biggest client. In most areas of practice, there is a significant risk of claims that could have a value in excess of $1,000,000. It may be tempting to maintain a minimal amount of insurance, but that is a very risky decision.

Eroding Limits and Hammer Clauses

Many insurance companies offer LPL policies with eroding limits, also know as defense costs inside limits. This means the costs of defense "erode" the limits of the policy. Therefore, if you have a policy that provides limits of $300,000 per claim, and a claim with defense costs of $100,000, only $200,000 remains to pay a potential judgment or settlement. Eroding limits policies can be attractive because they are cheaper than policies with claim expenses outside the limits (CEOL) policies. However, eroding limits policies can easily put you in a situation where defense costs exhaust the policy leav-

ing you to pay for settlement of a judgment out of pocket.

A feature of most, if not all, LPL policies is a consent to settle clause. This allows the attorney to make the ultimate decision on whether to settle or not. Some companies do not offer CEOL policies because they can make the defense of a legal malpractice claim very expensive when combined with a consent to settle clause. Some policies include "hammer" clauses to encourage insureds to consent to settlement. Before purchasing an eroding limits policy, make certain that you are purchasing a policy with sufficient coverage so that the costs of defense do not leave you without funds for settlement or a judgment or force you to settle a claim you wish to defend.

Staying Power of Insurance Companies

Insurance companies frequently enter and exit the market, and when looking at policies, it is important to consider whether your company will still be operating in your state when you need it. It is also worth considering the experience the company has in the market. If the company has significant experience in your state, it will know the players in the legal malpractice community, both on the plaintiff's side and the defense side, and may have better insights into true value (if any) of the case against you. A relationship with your county or state bar association can be a good indicator of knowledge and stability.

"Claims Made" and "Extended Reporting Period"

Most, if not all, LPL policies are "claims made," rather than "occurrence" policies. Claims made policies are triggered by a claim made or the insured providing notice of a circumstance which could lead to the existence of a claim in the future. Definitions of what constitutes a claim vary as do requirement for reporting potential claims. Generally, a claim is a specific demand for relief.

Claims made policies generally expire at the end of the policy period. When changing insurance carriers attorneys determine whether their policy covers "prior acts." When purchasing coverage from a new carrier, changing firms, or retiring, find out what the retroactive/retrospective date for prior acts is under the policy and determine if it is necessary to purchase a coverage "tail."

Reporting Requirements

How the policy defines a claim and what requirements the policy has for reporting claims and/or potential claims is an important consideration. Courts generally find notice must be provided in a reasonable time under the circumstances. The "claims made" element of LPL coverages generally requires reporting of a claim within the policy period. LPL policies are often "claims made and reported policies." In order to have coverage under these policies, the claim must both be made and reported within the policy period.

There are differences in both how "claim" is defined and requirements for reporting "potential claims." The requirement to report potential claims is significantly different from a policy that only requires reporting of claims

made. It is important to understand: 1) the definition of a "claim" under a policy; 2) whether the policy requires reporting of potential claims, or only an actual claim; and 3) the notice of circumstance provision for the policy (if any).

There can be benefits in reporting a potential claim, even if there is no requirement to do so under the policy. Carriers may provide pre-claim assistance to prevent potential claims from becoming actual claims. This assistance may be provided without paying a deductible. There can be substantial benefits both to an insurer and the insured in involveing a third-party attorney to help the insured resolve issues with a potential claim and/or mitigate the potential risk of loss.

Covered People, Conduct, and Important Exclusions

Definition of "insured" can vary. Most policies cover the firm and current and former attorneys, but vary on the extent they cover contract lawyers or lawyers working as independent contractors.

Definitions of covered "Professional Services" or "Legal Services," also vary. Policies may exclude non-legal or non-professional services. Policies may exclude coverage for service on a board of a company or entity or service as a public official, or for provision of other professional services.

Policies may exclude counter-claims following a lawsuit for recovery of attorneys' fees. Definitions of "loss" and "damages" also vary among policies and many exclude punitive or exemplary damages. Policies generally have "intentional acts" language that can limit coverage, and return of fees is often specifically excluded. Civil and criminal fines are also likely to be excluded.

Supplemental Coverages

Disciplinary complaint coverage is one of the most important supplemental coverages in any policy. The coverage available can vary widely from policy to policy. Policies may also provide coverage for responding to subpoenas. While not a substitute for actual cyber insurance, many LPL policies now include some coverage for cyber incidents and data breaches. Other supplemental coverages can include discrimination claims, public relations expenses or "crisis events," and/or responding to a regulatory inquiry. Policies can provide benefits or discounts for quick resolution of claims, agreeing to mediation, and even for having a retention letter in the file.

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