Considerations in Purchasing Legal Malpractice Insurance, Part II: Coverages

In this article I will review some considerations regarding what a policy covers and does not cover. I will also look at important exclusions and considerations for other coverages.

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Previously we discussed some initial considerations when shopping for appropriate professional liability insurance including the amount of coverage, eroding limits as opposed to claim expenses outside limits, the stability of the insurance company in the market, and availability of an extended reporting period for the claims made policy. In this article I will review some considerations regarding what a policy covers and does not cover. I will also look at important exclusions and considerations for other coverages.

Reporting Requirements

An important consideration for any lawyers professional liability (also known as LPL) policy is how the policy defines a claim and what requirements the policy has for reporting claims and potential claims. Policies most often require "prompt" or "immediate" reporting of claims or use other language designed to encourage reporting as soon as a claim is known to the insured. Courts generally hold that insureds are required to provide notice in a reasonable time under the circumstances. The "claims made" element of LPL coverages generally requires reporting of a claim within the policy period. Most LPL policies will explicitly state that they are "claims made and reported policies." This means that in order to have coverage, the claim must both be made and reported within the policy period.

Significant differences among policies can be found in both how "claim" is defined and whether or not the insured is required to report "potential claims" within the policy period or risk losing coverage when a potential claim becomes an actual claim. Significant questions of coverage can arise when an insured provides a report of circumstances (sometimes "notice of circumstances") that may lead to, but have not yet resulted in a claim. Litigation regarding coverage can arise if there is a question of whether or not the notice of circumstances provided to the insurer was sufficient to put the insurer on notice of a potential claim. In other instances, coverage issues can arise if an insurer asserts an insured has notice of circumstances that could give rise to a potential claim, but did not provide notice to the insurer.

It is important to know whether your policy has a requirement to report potential claims as opposed to only reporting actual claims made. There may also be circumstances where the insurance policy does not require reporting of potential claims, but the policy application does. It is important for every attorney to review their policy to understand: the definition of a "claim" under the policy; whether the policy requires reporting of potential claims, or only an actual claim; and the notice of circumstance provision for the policy (if any).

There are also circumstances under which it may be beneficial to report a potential claim, even if there is no requirement to do so under the policy. Many carriers will provide some form of pre-claim assistance to insureds in order to prevent potential claims from becoming actual claims. Some policies are more explicit about the availability of pre-claim assistance than others. Often this assistance will be provided without requiring the insured to pay a deductible. Expenses related to pre-claim assistance may also be excluded from loss history. There can be substantial benefits both to an insurer and the insured in involving 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

It is important to know what your policy's definition of "insured" is. Most policies cover the firm and current and former attorneys. Policies may vary on the extent they cover contract lawyers or lawyers working as independent contractors. A broad definition of who is the "insured" is an important consideration in purchasing a policy.

Covered and excluded conduct can vary from policy to policy. Many LPL policies provide coverage of "professional services" or "legal services," but how those terms are defined can have significant differences. Attorneys can provide many different types of services. They can be administrators, guardians, escrow agents, trustees or other types of fiduciaries. Attorneys may serve as notary public, mediators, arbitrators, or discovery masters. In real estate transactions, attorneys can serve many different functions including closing agent or "approved attorney" for a title insurance company. Some policies can expressly exclude non-legal or non-professional services (inversely, many other types of policies specifically exclude coverage for harm resulting from the provision of professional services). A policy may specifically exclude coverage for service on a board of a company or entity (other than the covered law firm) or service as a public official. It is common for LPL policies to explicitly exclude coverage for provision of other professional services such as when an attorney also acts as a realtor, financial adviser, investment adviser, broker, or account-ant. It is important to review your LPL policy to make certain the definition of covered services provides coverage for all of the services you render in your business.

Some policies may exclude counter-claims following a lawsuit for recovery of attorney fees. Some policies may exclude fair debt collection practice claims. Definitions of "loss" and "damages" in policies are also important to review to determine types of damages that may not be covered. Policies may exclude punitive or exemplary damages, and many have language addressing personal injury damages. Many policies have "intentional acts" language that can limit coverage. The return of fees is often specifically excluded. Civil and criminal fines are also likely to be excluded.

Other Important Coverages

Policies can vary widely on whether or not they provide coverage for disciplinary actions brought against an attorney, as well as the amount of assistance provided. It is not unusual for the cost of responding to a disciplinary inquiry to exceed $10,000 even before the hearing stage. Obviously, no attorney believes they are going to have to respond to an inquiry from the Office of Disciplinary Counsel, but every year the Office of Disciplinary Counsel opens more than 4,000 cases. An average of 250 attorneys in Pennsylvania receive some type of discipline each year. Disciplinary complaint coverage is one of the most important supplemental coverages in any policy.

Policies may also provide coverage for responding to subpoenas. Whether it is a document request or a subpoena for a deposition, an attorney is well served to have professional assistance in responding to a subpoena. While it is usually insufficient for any substantive claim, many LPL policies now include some coverage for cyber incidents and data breaches. Some LPL policies may provide coverage for discrimination claims. If it is not covered by the primary policy, coverage for collections work may be available as a supplement. Some policies may provide coverage for dealing with public relations expenses or "crisis events." Some policies may provide a benefit for responding to a regulatory inquiry.

Different policies provide various benefits for quick resolution of claims or agreeing to mediation. Policies also vary greatly on whether they have a "hammer" clause to attempt to force insureds' consent to settlement.

While LPL policies may at first glance appear fungible, there are many differences between policies. It is better to have an understanding of what your policy does and does not provide before you need something only to find it is not there. Having a reliable, thorough, and comprehensive LPL policy and understanding its features is an important step in every firm's risk management.

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