Protecting Your Practice: Importance of informing your malpractice insurer early

Dina Cox March 25, 2015

Lawyers are humans, too. We make mistakes. Because mistakes happen, we protect ourselves from potential claims and suits by investing in malpractice insurance. But unless you read your policy closely and comply with its provisions, you run the risk of being denied coverage and having to pay the entire cost of an expensive mistake. Here are some tips to help you avoid finding yourself in that predicament.

First, determine whether your malpractice insurance is an “occurrence” or “claims made” policy. “Occurrence” policies link the coverage date to the date of the tort rather than to the suit. “Claims made” policies link the coverage date to the claim and notice rather than the injury. Thus, if you have a “claims made” policy, and do not notify your carrier of a claim or potential claim during the policy term, you may very well be denied coverage. See Paint Shuttle, Inc. v. Cont’l Cas. Co., 733 N.E.2d 513 (Ind. Ct. App. 2000); Ashby v. Bar Plan Mut. Ins. Co., 949 N.E.2d 307 (Ind. 2011).

Second, verify your notice provisions. Most require you to promptly notify the insurance company of possible covered losses, not just actual losses or claims. Compliance with these provisions is a condition precedent to coverage, and courts have allowed insurance companies to deny coverage to attorneys who have failed to comply with this material provision in the contract. See Paint Shuttle, Inc. These notice provisions may also require you to notify your insurer again at the time suit is brought.

Third, immediately report any possible error or omission to your carrier. When contacting your carrier, provide as much information as possible. Your notice provision will state how the carrier would like notification – written or by the telephone, what type of information is required, and what type of claims require notification. Take note of this and comply diligently. Regardless of how you report your claim, keep a copy of your notice in case there is a question about when and how you reported.

Fourth, inform your client. Some attorneys are reluctant to notify their clients when becoming aware of a mistake, but this reluctance can be dangerous and costly. It is essential to “take the bull by the horns” and own up to the situation as soon as possible. The first priority must be minimizing any harm to your client, as your primary duty is to the client. This must include an honest and prompt conversation with the client in which you fully disclose the mistake and the steps you can take (if the client consents) to rectify it.

It is crucial to keep in mind that you cannot resolve the potential claim without advising your client in
writing to speak with independent counsel of his or her choice as to the desirability of settling the claim against you. Rule of Professional Conduct 1.8(h) provides:

“A lawyer shall not:

...

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.”

Comment 15 of Rule 1.8 clarifies that “Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.”

Whatever you do, never try to cover up a mistake or make a misrepresentation concerning the possible error. Doing so risks turning what may have been a malpractice suit into a potential disciplinary matter. Lawyers are rarely disciplined for honest mistakes, but lawyers are almost always disciplined for lying to clients, courts and opposing counsel. Furthermore, intentional misrepresentation or other deliberate conduct could cause you to lose coverage.

Finally, take seriously any potential or theoretical claims near the end of your policy period and report them to your carrier for protection. In a California case, an attorney had a claims made policy. Three days prior to the policy period ending, a former client filed a malpractice suit against him, and a legal journal called the attorney asking for his reaction to the suit. The attorney thought the call was a possible prank or hearsay and ignored it. Two days after the policy ended, the attorney read the legal journal, which described the malpractice suit filed against him. The attorney notified his previous carrier, who denied coverage due to failure to report. The subsequent carrier also denied coverage stating the telephone call gave the attorney a “basis” to believe that his representation of a client would lead to a claim. The California Court of Appeals ended up “saving” the insured from what could easily be called “one of the worst nightmares” that an insured can face. Root v. Am. Equity Specialty Ins. Co., 30 Cal. Rptr. 3d 631 (Cal. App. 4th 2005). Despite the ultimate positive outcome for the attorney, this case should be a warning to all attorneys to take great diligence in promptly notifying malpractice insurance carriers.

Keep in mind that disclosures of circumstances that could give rise to claims are also required in applications for insurance and for insurance renewals. In Koransky, Bouwer & Poracky, P.C. v. Bar Plan Mut. Ins. Co., the 7th Circuit Court of Appeals allowed the malpractice insurance company to deny coverage to the law firm because the firm knew, or should reasonably have known, of a potential claim during their renewing process and failed to disclose this claim to the company. 712 F.3d 336, 341 (7th Cir. 2013).

Practice note: Check your policy and know your notification requirements! Further, notify your malpractice insurance as soon as you recognize that you have made a potential mistake. The risk of one report too many is less than the risk of losing coverage altogether.
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