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Legal malpractice claims on the rise Preparing for a claim is critical

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The economic meltdown has brought many new challenges and hurdles to the marketplace. For lawyers, these come in the form of an increase in legal malpractice claims.

According to a study by the American Bar Association that looked at legal malpractice claims filed between 2004 and 2007, the total number of claims during that time period increased by more than 36 percent compared to the previous three-year period. However, the ABA attributes much of that increase to the fact that more law firms and insurers reported malpractice cases to the researchers. Additionally, it is important to note that these latest ABA numbers don't reflect the current recession. However, history shows that there is a direct correlation between a down economy and an increase in legal malpractice claims.

One reason for the uptick in malpractice claims is that like many right now, lawyers may be exploring ways to reduce costs and increase income. As a result, many lawyers assume risks they would avoid in a more stable climate, such as taking on cases outside of their areas of expertise. Some experts note that taking on personal injury cases makes a lawyer more likely to be sued.

In turn, clients may be more litigious. During economic downturns, business deals may be more risky. The results a client expected may not materialize. When clients are feeling the pinch of the economy, they often blame their lawyers.

Lawyers should prepare themselves to respond appropriately when they are hit with a legal malpractice claim. One way to prepare is by obtaining professional liability insurance. Lawyers that already have professional liability insurance should refamiliarize themselves with the type of coverage they have to ensure they are fully covered in all circumstances.

A new California law makes it mandatory for an attorney to disclose to a client if they do not carry malpractice/professional liability insurance. This new law alone may increase the desire for insurance coverage, which is not mandatory for California attorneys.

Whatever the reason for coverage, it is important to understand the basics regarding professional liability insurance. Such a policy covers an attorney's legal liability resulting from professional services and personal injury arising out of the delivery of legal services. Services covered may include providing legal advice for a client; acting as a mediator, arbitrator, notary public or a title agent; acting as an administrator, conservator,

executor, guardian, trustee or receiver; or acting in any similar fiduciary capacity, provided that such services are performed in connection with and incidental to an attorney's practice of law.

Lawyers should consider several factors when determining how much liability coverage to secure:

¥ Specific area(s) of practice -- Certain areas have higher frequency of claims than others. For example, personal injury (plaintiffs) and real estate attorneys often have the highest amount of claims.

¥ Monetary value of the firm's cases -- Consider the potential damages if a claim arose from a big case. The personal assets of those within the firm may also determine coverage limits.

¥ Current economic climate -- The recession may have changed a firm's scope of services and profitability. Personal assets may also have changed and/or attorneys may be less willing to put those at risk. Reviewing your policy terms at least once a year is important, especially when malpractice claims are rising and the economy is unstable.

¥ Law corporations and limited liability partnerships -- Firms established as such should review "Law Corporation Rules" of the State Bar of California, which requires certain limits based on a firm's size and structure.

Although there are many aspects of a professional liability policy that an attorney should be aware of, noted below are a few important provisions:

¥ Definition of a claim: Some policies define a claim as a written demand for money or services while others may only require any type of demand that would include those of a verbal nature.

¥ Discovery provisions: "Notice of potential claim," "awareness" or "incident reporting provisions" allows an insured to trigger coverage under a policy for potential claims. This provision is designed to allow the insured the opportunity to report any act, error, omission or circumstance that the insured has a reasonable basis to believe may turn into an actual claim.

¥ Named insured: It is important to understand who is a named insured under a policy. Does it automatically include predecessor firms or do they have to be named on the declarations page? How about successors to the named insured?

¥ Claims made and reported: For a claim to be covered, it must be asserted against the insured party and a written notice must be received by the insurance company within the policy term (or stipulated reporting period) in which the firm first became aware of the claim.

¥ Full Prior Acts Coverage: Provides coverage for a claim that resulted from services rendered since the named insured's inception date. This date is normally the date the firm first purchased professional liability insurance, provided it has been continuously insured.

¥ Retroactive date provisions: Retroactive date provisions preclude coverage for claims caused by wrongful acts that took place before the retroactive date -- even though the claim is made against the insured during the policy period.

¥ Extended reporting periods: ERPs give an insured the right to report claims after a policy has expired or been canceled. These policies are typically evaluated when a firm dissolves, merges with another firm or is cancelled by its insurer and unable to obtain prior acts coverage.

¥ Exclusions: Make a point to review the exclusions section of the policy. This will give you a good idea of what the insurer does not want to provide coverage for.

While obtaining or refamiliarizing oneself with professional liability insurance may seem daunting, working with an insurance brokerage firm that has access to multiple insurance carriers can help. An insurance brokerage firm can help you determine what type of coverage you need, compare rates as well as help you through the application process. Also, check with your local bar association. Many offer special policies specifically for attorneys who have only practiced a few years.

Ahern, RPLU, is CEO and president of Ahern Insurance Brokerage, one of the largest independently owned insurance brokerage firms specializing in the insurance needs of law firms. AIB presently insures over 2,500 law firms and is the Endorsed Brokerage of the San Diego County Bar Association.