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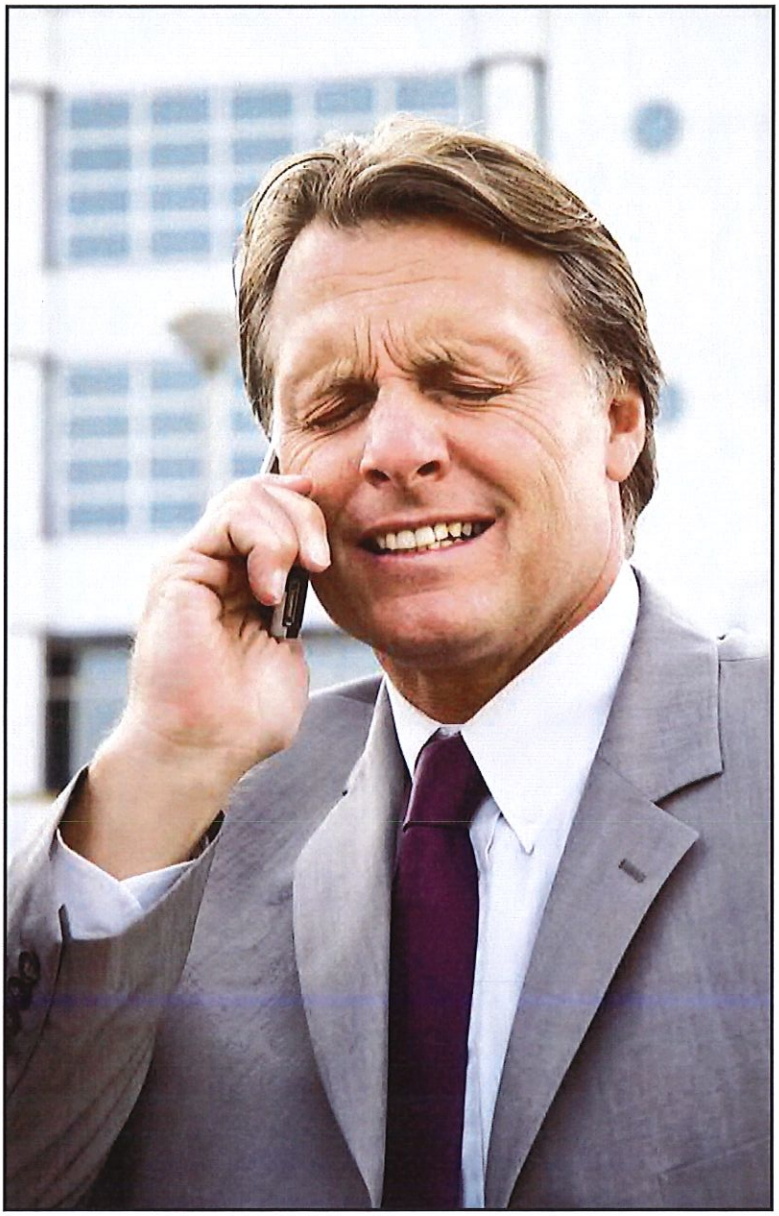
"Do I, Or Don't I, Call My Professional Liability Insurance Company?"

What Should the Lawyer Do?

By Briggs Cheney

Of course you call your insurance company when a claim is filed, but what about those situations that occur before a claim or a lawsuit is filed?

This article is not designed to be exhaustive but rather to address that fear which seems to pervade the bar: "If I call my professional liability carrier, my policy will be terminated or not renewed or my rates will be increased." After more than 39 years of defending attorneys and working with professional liability carriers, I can promise you that just making a call will not in and of itself lead to any of these results.



Three pre-claim occasions determine when a lawyer should consider calling his or her insurance company: (1) to ask a question of the risk management hotline; (2) to take advantage of disciplinary coverage; and (3) when the lawyer becomes aware of a possible or threatened claim.

Risk Management Hotline

Not all companies provide hotlines, but it is not uncommon. Almost always, these services are separate from the company's claim or underwriting departments and are often out-sourced to lawyers experienced in risk management and professional ethics. Such hotlines are a service to the insured, they are free and they are **confidential**.

A lawyer's professional liability policy is an asset.

Disciplinary Coverage

Many, if not most, professional liability policies will provide disciplinary coverage. This coverage comes in different forms and generally has a cap or maximum limit. It is often what might be called *reimbursement coverage*—the insured lawyer selects his/her own counsel, pays that counsel and the company reimburses the insured lawyer up to the cap. Other policies are more akin to liability coverage, and the company will pay the selected counsel directly. Again, payment is limited to the amount of disciplinary coverage provided.

Too often, lawyers do not avail themselves of this valuable coverage, thinking that telling the company that they have been the object of a disciplinary complaint will impact coverage or rates. This isn't a sound long-term analysis. If the lawyer will just think about the application he/she completed for the existing coverage and the renewal application completed with the same company or a new carrier, an applying lawyer is asked to disclose any disciplinary complaints. If the lawyer thinks a disciplinary complaint is going to be a secret, it will be a short-lived secret.

Companies make this coverage available for a reason—as a risk prevention tool. The company would prefer to head off a claim before it becomes a claim. The company also wants its insureds to have legal advice so they do not make the careless mistake of representing themselves, a mistake which may turn a defensible claim into an indefensible or more dangerous claim. Disciplinary coverage is a benefit to the insured and, ultimately, to the company as well.

The Potential or Threatened Claim

Almost without exception, every professional liability policy requires the insured to provide the company with written notice of *potential* or *threatened* claims. This requirement is often

overlooked or ignored by lawyers for a variety of reasons and it can have very serious consequences. But what is the distinction between a *threatened claim* and a *potential claim*?

A *threatened claim* is not difficult to understand and the insured lawyer generally knows when that happens. It would seem reasonable to say that a *potential* claim is something short of the client threatening the insured lawyer with a lawsuit. A potential claim might be an adverse ruling by the court, a sidebar comment by the judge, a question raised by opposing attorney on the record calling into question a decision or action by the insured lawyer, or a missed case authority or statute discovered only by the insured which might or might not play a role in what happens in the case. A host of other events are also possible which do not lead to or have not yet led to a client saying, "I am going to sue you," but which would arguably represent a potential mistake or misstep.

> The lawyer who does not report a potential or threatened claim... may experience an expensive lesson in insurance law.

Even with these examples in mind, it can be difficult to distinguish between a threatened and a potential claim, but struggling to make this distinction overlooks a more important point: the reality of claims-made coverage. For purposes of this discussion, the down-and-dirty explanation of claims-made coverage is that the company will only have responsibility for claims which are filed or **reported** during the policy period. When the term of the policy ends, the company is off the hook. That is where *potential* or *threatened* claims come into play. The lawyer who hesitates or equivocates can find himself or herself without coverage, even though he or she has maintained continuous coverage.

The lawyer who does not report a potential or threatened claim for whatever reason(s) (including arrogance, embarrassment, or fear) during the policy period[1] when the lawyer had notice of a potential mistake may experience an expensive lesson in insurance law, such as the one described in the hypothetical below.

"Joe Lawyer" is insured by XYZ Insurance Company under a claims-made policy whose term ends December 31, 2010. In August of 2010, Joe misses a deadline to disclose expert witnesses in a case set for trial in March 2011. Joe files a motion to extend the deadline for disclosing experts and is confident that the judge will grant him that relief. The hearing is set for January 5, 2011. Joe, confident his innocent mistake will be rectified at the hearing, says nothing to his client or the company before December 31, 2010, when his policy term ends, nor does Joe make any reference to this problem on his renewal application completed before December 31, 2010. The court denies Joe's request at the January 5, 2011, hearing and when the case goes to trial in March of that year, his client does not prevail due to a lack of expert testimony. Joe's client sues him for legal malpractice in October 2011. When he reports this claim to the company, they ultimately advise him that there is no coverage for the claim because he had failed to provide notice of a *potential claim* in August 2010. Joe's protestations that he "did not know" back in August 2010 are met with this response from the company: "Then, why did you file that motion to extend the deadlines? And why didn't you at least raise the issue on your renewal application?"

The above hypothetical actually happens. However, all Joe had to do in August 2010 was to write the simplest of letters to XYZ Insurance Company saying no more than the following: "I missed an expert disclosure deadline. I have filed a motion to extend the deadlines which I am confident will be granted, but if I am wrong, there could exist a potential claim against me. If I can provide further information, please contact me." The company then would have been on notice of the potential claim and likely would have just filed Joe's letter with no other response unless and until the potential claim was filed. In my experience, it is the rare occasion where such a letter will impact a lawyer's coverage or renewal of coverage. By writing that simple letter, Joe would have "triggered coverage" under his then-existing claims-made coverage with XYZ Insurance Company, and when the client sued him, he would have had coverage, not under his then-existing coverage, but under the policy which ended on December 31, 2010.

Conclusion

A lawyer's professional liability policy is an asset. It is like a computer or a legal treatise or any other asset the lawyer has purchased for his/her practice. If you do not make use of it, whether due to arrogance, embarrassment, fear, or something else, you are making a mistake. Don't be afraid of your policy. If you do make use of it (and advise the company of potential claims), it is also an asset which can "keep on giving" should a claim be filed beyond the term of the policy.

Endnotes

[1] Or, during an extended reporting period, but that is a topic for another day.

About the Author

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For more information on professional liability insurance, visit LPLI Committee's website at http://www.nmbar.org/AboutSBNM/Committees/LPL/LPL.html.