RISK MANAGEMENT CORNER

Litigation—Let us Hope Your Participation is Not as a Recipient

by John J. Brandt

Virtually all legal malpractice policies are "claims-made" policies, as opposed to "occurrence" policies. Unlike the typical automobile policy, which uses the date of the accident or "occurrence" as the coverage date, a claims-made policy relies on two dates. For coverage to apply, the claim must be received in writing during the policy period and the error or omission must have occurred after the "retroactive date." A simple example will illustrate: Attorney Jones has a legal malpractice policy with the ABC Insurance Company, covering him for claims made from December 1, 2004, to December 1, 2005, with a retroactive date of January 1, 1980, when he first started practice. A claim is made against him on December 15, 2004, alleging he made an error in writing a will on February 17, 1980. ABC Insurance Company covers him for the claim.

Contrast that situation with the following: Attorney Jones used to be insured by the XYZ Insurance Company prior to his coverage with the ABC Insurance Company. When he insures with ABC, he realizes that he can save a good deal of premium if he sets his retroactive date as the first date of the policy, December 1, 2004. On December 15, 2004, he receives the first notice of a claim for an alleged error that occurred on June 1, 2004. Since he has a claims-made policy with the ABC Insurance Company, he presents the notice of claim to that company. However, ABC rejects the claim on the grounds that the claim took place before its December 1, 2004 policy period and retroactive date and therefore refuses to cover Attorney Jones. Attorney Jones then presents the notice of claim to XYZ, which also rejects the claim on the grounds that it has a claims-made policy and Attorney Jones did not receive notice of claim during its policy period." Unfortunately for Attorney Jones, both companies are correct and well within their rights under a typical claims-made policy.

What should Attorney Jones have done to protect himself from such a situation? He should have either assured himself of an appropriate retroactive date with his new insurer or purchased an extended reporting period endorsement, commonly referred to as "tail coverage," from the XYZ Insurance Company, which would allow him to continue to report claims during the specified extended reporting period. This coverage could have been purchased before Attorney Jones's coverage with XYZ expired, and many insurance companies list the cost for tail coverage in their policies and guarantee renewal each year at a declining premium.

When should an attorney notify his malpractice carrier? Certainly if he receives an actual notice of claim, *i.e.*, a law suit or letter of representation by another lawyer, then the attorney must immediately contact his insurer. However, most lawyer professional liability policies require that he contact his insurer if he reasonably believes that there may be a claim filed against him (see the policy section labeled "Conditions"). Admittedly, this is a more difficult situation for the attorney, and we are all reluctant to implicate ourselves in a claim that never materializes. In the last analysis, it calls for the exercise of prudent judgment in deciding whether a client is making a claim against his attorney. The typical carrier does not penalize a lawyer for reporting a possible claim if it never materializes.

There seems to be a consensus that "severity" and "frequency" play a role in an insurer's decision either to increase premiums or not to renew liability coverage at all. Every insurer has different underwriting guidelines. Some will not renew a policy if one claim has been reported. Others will add a surcharge to the premium and still others will look at certain thresholds of number of claims or dollars spent before they react. It is a good idea to ask the salesperson how an insurer treats claims before purchasing a policy. However, if an attorney draws a claim every year for five years running, his insurer's underwriting department is certain to question whether he is a good risk. The types of claims and whether they were successful or not will be evaluated.

Avoid the basic irritants that inevitably seem to lead to lawsuits against attorneys: failure to communicate and attempting to represent a client in an unfamiliar matter.

As a new year approaches, it would be a good idea to review our own risk management, which should prevent our having to worry excessively about legal malpractice claims. Do we have a good calendar system and do we have a backup? Do we return telephone calls in a timely fashion? Do we candidly inform a prospective client that we do not feel comfortable representing him/her in a matter with which we are not familiar? Are we overworked to the point where taking that one new case could lead to a disaster?

So, here's to a new year, and may any litigation in which we are involved always be in a representative capacity.