ALPS Practice Management Pointers

General Lawyers' Professional (LPL) FAQs

Mark Bassingthwaighte, Esq.
mbass@alpsnet.com

What is a claims-made and reported policy?
A claims-made and reported policy provides coverage for claims first made and first reported to the insurance company while a policy is in force as long as the act, error, or omission upon which the claim is based occurred after the policy's loss inclusion date and the individual attorney's retroactive coverage date. In order for coverage to apply there must be a policy of insurance, or an extended reporting endorsement, in effect at the time the claim is first made and first reported to the company.

What is the difference between the loss inclusion date and the retroactive date?
The loss inclusion date is usually the inception date of the first claims-made policy purchased by a firm as long as there has not been a gap in coverage. If a gap in coverage, which is a period of time where no malpractice coverage is in place, were to occur this would result in the loss inclusion date being moved forward to the date new coverage is eventually obtained. The retroactive date is similar to the loss inclusion date except that it applies to an individual attorney rather than the law firm. Given that all work performed prior to a policy's loss inclusion date or retroactive date is uncovered, an attorney is well advised to have coverage in force at all times. This does mean that a policy must be purchased every year and you want to make certain that each annual policy that you buy along the way will cover your prior acts all the way back to your original loss inclusion date or retroactive date as the case may be.

Must I buy a policy right away?
With the exception of Oregon, no state requires that a practicing attorney maintain malpractice insurance. A number of states do have a mandatory reporting requirement meaning that practicing attorneys must report whether or not they have coverage to the state bar. In addition, several of these mandatory reporting states also have a rule requiring disclosure, meaning that practicing attorneys must disclose to their clients whether or not they maintain malpractice coverage. Check with your state bar for further clarifications as to this issue. Rules aside, the reason you would want to purchase coverage at the beginning of your professional career and maintain it throughout is that you can never go back and buy coverage for work done in the past. The first policy that you buy will set the policy's inception date as the loss inclusion date. This means that work done after the policy starts would be covered but all work done prior to the date the policy goes into force would not be covered. So, if you practice for two years before

you decide to buy malpractice coverage, you will forever be without coverage for the work that you did during those first two years.

Is coverage expensive?
Expensive is a relative term. In most situations for attorneys just starting out the costs are going to be much less than for those attorneys who have been in practice for a number of years. This is simply due to the fact that new practitioners have far fewer clients and have done far less work. Thus the odds of a claim arising from a new practitioner are much lower than from an attorney who has been in practice for ten years or more. For new attorneys the premium should start at a lower amount and increase annually for a period of years. Once an attorney has been in practice for a period of years, typically six years, the risk associated with the attorney is considered fully mature and the premium (as it relates to this risk) should stabilize.

How much coverage do I need?
This is arguably the most important decision to be made with coverage. Understand that the limit per claim and the aggregate limits are normally expressed in a per claim/aggregate manner. For example, policy limits may be expressed as $1,000,000/$2,000,000. This would mean that the covered attorney (or firm) would have up to $1,000,000 in coverage available for each claim reported in a given policy period with a total of $2,000,000 in coverage available for all reported claims during the policy period. For some, particularly new attorneys, this decision will be driven by how much coverage one can afford to buy. While some companies may offer minimal limits along the lines of $100,000/$100,000, and yes minimal coverage is better than no coverage, be aware that defense costs on claims can easily exceed $100,000 so something above this minimal amount would be a better choice. While there is no formulaic way to determine the proper amount of coverage one might need, you should feel comfortable in whatever limit you select providing an acceptable amount of protection in light of the type of work you perform and the amount of damage that could be imposed should you ever make an error.

Do I need to be concerned about defense costs?
Yes and defense costs can be deceiving so this is an important consideration. Make certain that you understand just what you are getting for the quoted price as lower quotes on seemingly comparable policies are often a signal that defense costs are inside the limits of liability. Policies such as this are often referred to as self-liquidating or cannibalizing polices. In short, if defense costs are inside policy limits, then for each dollar spent on defending a claim the amount available to pay any settlement or judgment will be reduced by one dollar. The end result is that a policy with defense costs inside limits really means that you are purchasing a policy that can result in drastically reduced amounts of available indemnity coverage. In other words a $250,000/$500,000 policy with defense costs inside the limits really isn't what it first appears to be because you will have less than $250,000 available to pay indemnity if a defense is required.

A better choice would be to look for a policy that will provide a claims expense allowance. This basically means that defense costs are going to be outside of policy limits. The claims expense allowance will have set limits and policy terms will vary between insurance carriers, but significant defense costs will be paid by the carrier before the policy limits begin to self-liquidate. These policies will be more expensive because additional coverage comes with the policy. With these types of policies a limit of $250,000/$500,000 is just what it appears to be in all but the most costly of claims in terms of defense costs.

What deductible should I choose?
Beyond determining what deductible makes sense for you financially, make certain that you understand when and why you may have to pay your deductible because policies can be canceled or reapplications denied for nonpayment of the deductible. The amount that you select should be an amount that you can afford to pay were a claim ever to arise. Also look for policies that provide "first dollar defense" (otherwise known as loss only deductibles), which means that your obligation to pay the deductible will only arise if and when a settlement is reached or an adverse judgment is entered. Given that a majority of claims that have associated defense costs resolve without a loss payout, this can be an attractive benefit. Other options worth looking for might include reduced deductibles for claims resolved through mediation and a limit on the number of deductibles that must be paid in a given policy period.

Are there obligations under my policy?
Yes there are and you must understand your obligations because failure to follow through with them could result in the denial of coverage. Generally speaking, policies require that the insured provide timely notice of all claims and potential claims and this notice requirement is critical. The most important issue is to make sure that you understand what triggers your obligation to report because the obligation to report is often not limited to when someone has actually filed suit. By way of example, missing a statute of limitations deadline even absent client awareness typically triggers the obligation to report because you know or reasonably should know that this error is likely to be the basis of a claim. Other items worth looking for in a policy might include the following: Is there a requirement that you, as the insured, assist and cooperate with the carrier and defense counsel in defending claims? Are there other reporting obligations such as attorney arrivals and departures? Knowing your obligations up front may prevent a very serious problem from ever arising down the road.

Are there specific policy coverage features or concerns that I should be aware of?
Again, yes. It is extremely important that you know just what is and what is not going to be covered under your policy. Read your policy and make certain that every attorney in your firm reads it as well. While there will be differences in coverage definitions, most policies provide coverage for your services as an attorney, mediator, arbitrator, trustee, executor, and notary public. Note however, that coverage is often conditioned upon the service being provided to clients of the named insured which is usually the firm. For example, this would mean that coverage would be excluded for services that an attorney performs while moonlighting.

Does the policy provide coverage for work done on behalf of the firm by former attorneys? This is an important issue for departing attorneys. They need to know the answer so that they don't inadvertently lose the opportunity to purchase an extended reporting endorsement (a tail) in order to protect themselves from claims that might arise as a result of their prior acts while at the soon to be former firm. In a similar vein, new attorneys joining the firm will need to know if the policy will provide coverage for their prior acts.

Does the policy provide directors and officers coverage for firm attorneys who sit on corporate boards? In the for profit arena, the answer to this question is usually no. However limited coverage may be extended to attorneys who sit on not-for-profit boards. Look for this benefit if firm attorneys have a desire to give back to the community in this fashion.

A perk sometimes provided to solo attorneys is a free extended reporting endorsement in the event of death, disability, or full and permanent retirement if the solo attorney was continuously insured with the carrier for a given number of years prior to death, disability, or retirement. This benefit can result in significant savings and is worth factoring in when nearing retirement.

Is coverage available for disciplinary proceedings? Given the high number of disciplinary complaints made each year, don't run with assumptions. Many attorneys are surprised to learn that policies generally exclude coverage for disciplinary matters. That said, such coverage may be available and usually the cost is quite reasonable. If this is a concern, ask for it.

Is there innocent-insured coverage? Sometimes there is a bad actor within a firm and this individual commits a crime or fraud. While policies exclude coverage for such acts as they relate to the person who committed the act, claims can and will arise against all and protection may be available for the innocent members of the firm if the policy so provides.

Understand the policy's consent to settle clause. Is it what is commonly referred to as a "hammer clause?" Policy language typically requires that an insurer seek an insured's approval prior to settling a claim for a specific amount. If the insured does not approve the recommended figure however, a hammer clause will state that the insurer will not be liable for any additional monies required to settle the claim or for the defense costs that accrue from the point after the settlement recommendation is made by the insurer. In other words, such clauses tend to force an insured to accept the carrier's recommendation. Look for policies that have no hammer clause thereby allowing meaningful participation in settlement decisions. A policy that allows for input in the selection of mutually acceptable defense counsel would be similarly advantageous.

Risk Management Questions?

Mark Bassingthwaighte, Esq. is the Risk Manager for ALPS Property & Casualty Insurance Company. He is available to answer risk management questions and can be reached at 1-800-367-2577 or mbass@alpsnet.com.

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