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Report Before you Replace: Protecting Coverage When Switching Malpractice Insureres

By Frank English, JD, Vice President of Lawyers Claims at PMA Companies and Sean Ginty, JD, Assistant Vice President of Risk Control

Switching legal malpractice insurance carriers may seem like a routine administrative decision, but it requires proper handling to protect the law firm's interests. Under a typical claims-made lawyers professional liability ("LPL") policy, attorneys are required to report known claims and potential claims to their current insurer within the policy period. This obligation becomes especially critical when transitioning to a new carrier and applies whether the change in insurance carriers is initiated by the law firm or results from the insurer's decision not to renew the policy or the insurer exiting the market.

Failing to report claims or potential claims before switching insurers can result in a complete loss of coverage—both from the outgoing and incoming carriers. In such cases, the law firm may be left to shoulder defense and indemnity costs on its own, which could amount to millions of dollars in high stakes matters. This article outlines the importance of timely reporting, explains key definitions under LPL policies, and provides scenarios to illustrate how law firms can protect themselves from costly coverage gaps.

LPL Reporting Requirements

Lawyers should carefully review their LPL insurance policies to gain a better understanding of their reporting duties with respect to claims and potential claims. Typically, an LPL insurance policy will define a "claim" as the service of a legal malpractice complaint, but also any demand for money or services arising out of an error or omission in the rendering of or failure to render legal services. Generally, notice of such claims must be made promptly or as soon as practicable to the law firm's current LPL insurance carrier.

"Potential claims" are defined as any act or omission that could reasonably be expected to form the basis of a claim. Circumstances that might be considered a potential claim include a client expressing dissatisfaction with the outcome of her legal matter or a lawyer realizing that he committed a serious error,even without any indication that the client is considering a legal malpractice lawsuit or making a monetary demand to the lawyer.

While potential claims, unlike actual claims, may not need to be made promptly[1], there are advantages to doing so, which may include "receiving pre-claims assistance from one of the insurance carrier's panel counsel law firms to help mitigate the exposure or prevent a claim from being filed. In the context of an impending change in LPL carriers, law firms should report in writing all potential claims to their current carrier during the coverage period as well as their new LPL carrier. The advantage of the law firm reporting a potential claim to its current carrier is that if the

[1] Most LPL insurers require law firms to report potential claims as part of the renewal process.

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Term	Definition	Examples	Reporting Requirement
Claim	A demand for money or services, or service of a legal malpractice complaint	• Service of malpractice complaint • Demand letter	Promptly or as soon as practicable
Potential Claim	Any act or mission that could reasonably be expected to form the basis of a claim	• Missed deadline • Client dissatisfied • Lawyer realizes error	A demand for money or services, or service of a legal malpractice complaint

potential claim develops into an actual claim, notice on the actual claim will be deemed to have been provided by the law firm at the time it gave written notice to the current LPL carrier of the potential claim. For example, let us assume that a law firm is moving to a different LPL carrier on January 1, and it provides written notice of a potential claim to its current carrier on December 1, one month before the switch of insurance carriers. If that potential claim later becomes an actual claim after the law firm has moved to a different LPL carrier, then the now former LPL carrier will be obligated to defend and indemnify that claim, subject to any other valid declination of coverage or reservations of rights. Lawyers and law firms are sometimes reluctant to report claims and potential claims for various reasons. A claim may seem meritless and not worth reporting. Conversely, a claim may be so consequential that the lawyer ignores the issue and the reporting duty mandated by the LPL policy, hoping that the problem will disappear. In other instances, a law firm may believe that reporting a claim or potential claim will sully its reputation or increase the premium payment for the LPL policy. None of these rationales constitute valid excuses for failing to report a claim, and they ignore the benefits of reporting, including the main one. By reporting the claim or potential claim, lawyers and law firms receive coverage for any subsequent defense and indemnity costs, which is why they have LPL insurance in the first place. And claims and potential claims that result in no legal expenses or indemnity costs for the insurer will not cause the law firm's premiums to rise.

Law firms should bear in mind that once the current insurer's policy period ends for reporting claims, no coverage from that insurer exists for claims that were unknown and unreported to that insurer. Moreover, the new insurer may decline coverage for claims or potential claims that the firm knew of but failed to report to its now former insurer.

Hypothetical Examples

The hypotheticals below offer examples in which a law firm knew or should have known that it had a reportable claim or potential claim but did not provide written notice of the claim to its current LPL insurance carrier before moving to a new LPL insurance carrier. While the following examples are hypothetical in nature, they incorporate elements of real-life claims. A critical question law firms must ask is: would an "objectively reasonable" law firm conclude that a particular set of facts and circumstances constituted a claim that required written notice to its LPL insurance carrier? If the answer to that question is "yes," the law firm should report the claim.

SCENARIO 1

Expert's Report Filed After Court-Ordered Deadline

Partner at Law Firm represents Plaintiff, owner of a boat slip, in a commercial dispute with owner of boat marina over lease terms and alleged noncompliance with other provisions of lease agreement. Partner is late producing the expert report by the court-ordered case management deadline. Opposing counsel files a motion for sanctions with remedies for either dismissal with prejudice or preclusion of the expert report. Judge orders briefing on the issue. As the matter is being briefed, Law Firm switches to a new professional liability carrier. No report has been made to either Law Firm's

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prior carrier or their new one. Following briefing and hearing, the court rules to preclude the expert report. Without the expert report, Law Firm is unable to properly present client's case, and the judge enters summary judgment against Law Firm's client.

Law Firm's client then sues Law Firm for loss of value of the underlying claim. Law Firm reports the claim to its new carrier. The new carrier disclaims coverage on the basis that prior to Law Firm's coverage with the new carrier, Law Firm knew or could reasonably foresee a claim resulting from the late expert disclosure. Law Firm counters that it did not believe a claim would develop because (1) the sanction of precluding the expert report would be draconian and unlikely to be entered; and (2) the insured had a longstanding good relationship with the client and did not believe client would pursue a claim against Law Firm. New carrier stands on its disclaimer and succeeds in a declaratory judgment action with a court finding that Law Firm's subjective beliefs as to whether the sanction would be entered and, if so, whether the client would pursue a claim, were objectively unreasonable. The court found that under the circumstances, a reasonable attorney would be on notice that a professional liability claim might result.

SCENARIO 2

Client's Assurance that No Claim Will Be Pursued

Law Firm represents Client as claimant in a personal injury action stemming from a motor vehicle accident. Law Firm contacts tortfeasor driver's liability carrier and negotiates a settlement for the full $25,000 policy limits of tortfeasor driver's policy. As Client's injuries are severe, the relatively modest $25,000 recovery is significantly less than what Law Firm believes Client should recover. Law Firm begins negotiations with Client's own auto liability carrier making a first-party claim under Client's underinsured motorist coverage. Client's carrier is slow to respond, switching claim adjusters regularly, and the deadline to file suit against Client's carrier passes without resolution. Recognizing this, Client's carrier refuses to continue negotiations. Law Firm informs client about the situation and Client assures Law Firm no claim will be pursued.

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LPL Insurance Carrier Transition Checklist

- ☐ Review your current LPL policy for definitions of "claim" and "potential claim" and all reporting requirements owed to the insurance carrier, including time frame and method of reporting.
- ☐ Identify any known claims and potential claims; talk to other attorneys and staff about any such claims; and emphasize the importance of reporting.
- ☐ Report all claims to your current insurance carrier in writing as soon as practicable.
- ☐ Report all potential claims to your current insurance carrier in writing before the policy period ends.
- ☐ Notify your new insurance carrier when switching policies of all potential claims as well.
- ☐ Contact your insurance agent if you are unclear about your reporting obligations or have any additional questions about the requirements of your LPL insurance policy.
- ☐ Retain documentation of all notices of claims and potential claims sent to both insurers.
- ☐ Err on the side of caution—report claims even if they seem meritless or unlikely.
- ☐ Remember that if claims and potential claims known before the switch in LPL insurance carriers are not reported, they may not be covered by either insurer.

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Law Firm switches carriers and does not notify its old carrier or new carrier of a potential claim in reliance on Client's assurances no claim would be pursued. Client changes her mind six months later after facing mounting medical bills and financial stress. Law Firm's carrier disclaims coverage on basis that Law Firm's subjective belief that no claim would be pursued was not objectively reasonable, as it was reasonably fore-seeable Client could change her mind.

SCENARIO 3

Beneficiary Challenges Late Changes to Will

Partner is a longtime attorney to Mom. Mom is elderly and ill and contacts Partner to make changes to her will and trust documents. Mom's spouse has predeceased her. As Son has recently upset Mom over his behavior, Mom asks Partner to modify the testamentary documents so that Son's inheritance is significantly reduced in favor

of other children and grandchildren of Mom's. Partner makes the requested changes and Mom dies shortly thereafter. Son, learning of his reduced inheritance, challenges the changes made to the testamentary documents, alleging Mom lacked capacity and was subject to undue influence. Partner is not named directly in the subject litigation and is also not concerned that she did anything wrong. No report is made to Partner's old or new carrier.

Eventually, after Son produces experts that will testify that Mom suffered from dementia and may indeed have lacked capacity for the changes made to her testamentary documents, the other beneficiaries begin suggesting they may seek to hold Partner responsible if the court finds in favor of Son. Partner then decides to notify her new and current LPL insurance carrier. Carrier reserves rights to disclaim coverage and eventually disclaims coverage when the court finds in favor of Son, and a claim is pursued against Partner. Carrier's basis for denying coverage is that Partner was reasonably on notice that a claim may eventually be pursued once learning that Son was challenging the modifications made to Mom's will and trusts.

Conclusion

Most private practice lawyers will face a claim during their careers. Instead of panicking or ignoring the allegations of professional liability, lawyers should exercise sound risk management protocols, which include but are not limited to assessing all relevant facts, maintaining all pertinent documents, and notifying all their insurance carriers that may provide coverage for such a claim. In many cases, prompt notice to an LPL insurance carrier can minimize or eliminate a law firm's exposure to a claim.

For more information, contact a Gilsbar representative at
800.906.9654 or at gilsbar.com/contact-us