

# The Buck Stops Where?

It's bad business to hide potential malpractice claims from insurers

BY DAVID A. GROSSBAUM

If there's one thing that's worse than getting sued for malpractice, it's failing to have coverage when it happens.

Unfortunately, this occurs all too often because lawyers fail to promptly tell their insurers about policy owner claims.

Granted, it is not easy to acknowledge a potential claim of malpractice. If you are an associate, it means telling your reporting partner. If you are a partner, it means telling your peers and, in some cases, telling the client, who may not yet be aware of it.

However, keeping quiet about it can result in the loss of coverage for the entire firm as well as for the lawyer who must defend the action.

## Obligation to Report

The potential claims you are obligated to report include situations in which a client has accused you of malpractice, regardless of whether there is any merit to the accusation.

In addition, you may know of a situation in which you realize or your adversary is arguing that you missed a deadline, waived a defense or claim, failed to include a crucial provision in a contract, or otherwise acted in a way that may cause harm to your client in the future.

Taking remedial steps, such as an appeal, to cure the problem does not relieve you of the duty to tell the insurer. These steps may not be successful, and even if they are, the time and expense in doing so may be viewed as an element of damages in a later malpractice claim.

There are three situations in

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which the failure to disclose potential claims can result in the cancellation of a policy. They involve material misrepresentations, acting reasonably and prompt notice.

Virtually every application and renewal form asks point-blank: Are you aware of any

be made, even regarding the entire firm or other partners who are vicariously liable for your practice.

Many legal malpractice policies require that you notify the insurer as soon as you become aware "of any act or omission which would reasonably be expected to be the basis of a claim or suit" covered by the policy, even if no one has made a claim against you. If a claim is later made, this policy will provide coverage.

Under "claims made" policies, the failure to give required notice during the policy period is fatal to coverage, even without a showing of prejudice to the insurer.

This rule applies even if you have back-to-back, one-year policies with the same insurer that were in effect both when you learned of the potential claim and when you gave notice.

## Reduction of Risks

There are several ways to minimize the risk of having no coverage.

One is to take stock of your cases before you apply for insurance. If you discover an incident that you believe may give rise to a potential malpractice claim, notify your current carrier immediately.

That way, even if you disclose the potential claim on an application to a new insurer and that insurer specifically excludes it from coverage on your next policy, you will be covered under the expiring policy.

Another safeguard is to have each member of the firm sign a questionnaire that asks them if they know of potential claims. This will at least force them to sit down and contemplate the question, and give a thoughtful and complete response.

Most importantly, you can only expect complete candor if you make everyone feel comfortable disclosing these issues without fear of ostracism, embarrassment or loss of a job. ■

