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Five Ways to Fight Costlier Legal Malpractice Claims in 2017

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The Profile of Legal Malpractice Claims: 2012-2015, recently published by the ABA Standing Committee on Lawyers Professional Liability, confirms that the cost of defending professional liability claims can be high and that the number of claims with defense costs in excess of $100,000 has increased. Many expect this trend to continue and perhaps even to accelerate.

There are a number of concrete, practical steps that law firms can take to address the high cost of defending legal malpractice claims, both before and after a claim is made, including those discussed below.

1. Review your insurance program.

The time to review a law firm's professional liability insurance policy is before a claim is made.

Many policies include the cost of defense within a single limit of liability for defense and indemnity, meaning that defense costs reduce and could exhaust the insurance coverage available to pay settlements and judgments. Law firms must carefully consider whether their limits of liability are sufficient not only in relation to the magnitude of their likely exposure to clients and other claimants, but also taking into account that defense costs will reduce those limits. In other words, law firms should select a limit of liability that will provide adequate coverage for the likely range of settlements and judgments, *after* reduction of the limit by defense costs.

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Law firms can also tackle the problem of assuring that they have adequate coverage for settlements and judgments, following expensive litigation, by selecting a policy that provides for defense costs outside of a separate indemnity limit of liability. Some policies provide for unlimited defense costs outside of the indemnity limit. Other policies have a separate limit of liability for defense costs, which must be eroded in full before defense costs begin to erode the indemnity limit of liability.

Adequate limits of liability above and beyond the cost of defense put the law firm in a stronger strategic position when it comes to litigation. The firm can make smart decisions on the merits about whether to defend or settle a claim, and about how to conduct the defense. Inadequate limits may force a firm to settle a meritless claim that should be defended, simply because the cost of defense will leave the firm with inadequate coverage in the event of an adverse verdict.

In reviewing its insurance program, a law firm will also want to consider carefully how defense counsel will be selected if there is a claim. Many policies give the insurer the right and duty to defend, including the right to select defense counsel. Other policies give the insured the right to select defense counsel, and still others provide for the insured law firm and the carrier to agree upon mutually acceptable defense counsel.

When choosing a policy, law firms should think about how important it is to them to have the right to select defense counsel, and what that right is worth in terms of potentially higher premiums. And, as with all aspects of professional liability insurance, it is important for a law firm to conduct due diligence about potential insurers to be confident that the insurer selected will be a true partner in defending and resolving claims. Insurance professionals and lawyers who regularly defend professional liability claims are a good source of information about optional coverages and the reputations of various carriers. The cheapest option is not always the best option.

2. Choose the right defense counsel for the claim.

Speaking of selection of defense counsel, once a claim is made, it is important to make an informed decision about who to retain as defense counsel. It goes without saying that the lawyer (and it makes sense to pick the lead lawyer, not the firm) should have substantial experience defending lawyers' professional liability claims.

Within that category, however, lawyers and defense firms vary widely in terms of experience, areas of expertise and cost. Lawyers and law firms who provide equally high-quality representation can vary significantly in cost, which is a function of not only rates but also efficiency.

The same defense counsel may well not be the best choice for every claim. It is important to pick a lawyer who has the right amount of experience and expertise to litigate the particular case in a cost-effective manner. A case involving a blown statute of limitations in a personal injury case with relatively low exposure is very different than a claim arising from an underlying complex intellectual property matter with high dollars at issue. A law firm will want high-quality representation in both cases, but different lawyers (often at different rate structures) may fit the bill for each case. Ideally, defense counsel should be able to leverage a strong working knowledge of the relevant legal issues to be able to give practical, realistic advice from the beginning of the engagement.

The law firm should take an active role in selecting defense counsel, even where the firm's insurance policy gives the insurer the right to choose defense counsel. Most carriers have a number of firms on their defense panel from which they will permit the insured to select. Carriers also will sometimes consider consenting to retention of a defense counsel not "on the panel" if doing so makes sense in the particular case. And, even where the policy on its face gives the carrier the unilateral right to select defense counsel, the insured may be entitled in some states to select "independent counsel" if the insurer issues a reservation of rights.

Defense of a claim is typically most effective where the insured law firm and the insurer agree that the counsel selected is the best person for the job.

3. Budget for the entire case early and monitor fees carefully.

Law firms should insist that the lawyers defending them in a professional liability claim provide a budget for the case at the outset. The law firm client should ask probing questions about the budget and insist that it be a realistic one, not a best case scenario.

Clients should also question the assumptions in the budget. How many lawyers really need to be involved in the case and what is the role of each? How will the defense team avoid duplication of effort and excessive staffing? Far too often, clients find that the cost of defending a professional liability claim is far more than had been anticipated. Sometimes that results from unforeseeable developments, but often it results from a lack of careful and realistic budgeting at the outset.

Monitoring and controlling legal fees and expenses as a case develops is as important as having a realistic budget at the beginning. It is important for law firm clients to review the budget as the case develops, and to think critically about each task in the litigation.

For example, does it really make sense to incur the time and expense to file a motion to dismiss that has a 10 percent chance of success? Do we really need to depose 10 witnesses when three of them have the key information? It may well make sense to undertake those activities, but the decision should be a conscious and carefully considered one, not a knee-jerk reaction to do everything that possibly could be done. In making these kinds of decisions, it is critical for the defense lawyer to know that the law firm client will not later second-guess an informed, mutual decision not to undertake certain activities based on a cost-benefit analysis. Trust is a two-way street. The point is not to defend cheaply; the point is to defend smartly.

4. Evaluate cases early and on an ongoing basis.

Too often, the defense team jumps into full litigation mode without considering whether a claim can and should be resolved early on. Law firm clients and their defense counsel should consider whether settlement makes sense beginning when the claim is first asserted, including before suit is filed.

Good defense counsel typically love taking cases to trial; a lawyer who is afraid of going to trial is almost never a good choice to defend a claim. Some cases should be defended through verdict, and, if necessary, appeal, as a matter of principle or for other reasons; that is a key reason for being sure long before a claim

is made that insurance limits are adequate, taking cost of defense into account.

In other cases, however, it is in the best interest of the law firm client to seek an early resolution, if one is available on reasonable terms. When a law firm is able to settle a claim that should be resolved on terms that make economic sense without suit ever being filed, the law firm is spared not only the expense of litigation but also the potential adverse publicity coming from the mere filing of a legal malpractice suit against it.

It makes economic and practical sense to evaluate settlement on an ongoing basis beginning before suit is filed (if the claim surfaces presuit) and continuing through final judgment and appeal. Again, that doesn't mean every claim should be settled, but rather that every claim should be carefully evaluated for potential settlement on an ongoing basis from day one rather than waiting until the parties are on the courthouse steps, with the defense having spent large sums on litigation expense that could have gone toward settlement.

Law firm clients should resist the notion that defense counsel must take reams of discovery in order to evaluate a case, and the best defense counsel will so counsel their clients. Typically, there are diminishing returns to additional discovery. Law firm clients should ask defense counsel for an early case assessment that spots the issues and makes recommendations regarding an order of priority for additional legal and factual development. At the presuit stage, for example, some limited informal exchanges of information may not be sufficient to permit a full evaluation of liability and potential damages. It may be sufficient, however, to determine whether the case is likely to be a candidate for resolution by dispositive motion or would require trial, and to permit sufficient evaluation to place potential damages within a range that allows informed settlement discussions. In other cases, some basic document discovery and one or two depositions may provide the information necessary for defense counsel to place a value on a claim, without waiting for completion of the additional depositions and other discovery that would be needed if the case were to go to trial.

Cost of defense should always be considered. As noted above, sometimes a case should not be settled despite high defense costs. In other cases, however, it makes sense to put some dollars that would go toward defense into a settlement. Once again, the point is to make smart decisions tailored to the particular claim.

5. Select the right person, within your firm, to act as client representative.

For firms of sufficient size to allow for it, the firm should assign as the client contact a lawyer who was not involved in the underlying representation at issue in the malpractice case. This designated lawyer can then take the lead for the law firm client in supervising defense counsel and making decisions on settlement and defense strategy.

It is much easier for an uninvolved lawyer to make the kind of smart, unemotional decisions required of clients in defending significant professional liability claims. And, regardless of who is supervising the claim for the client, it is important to select defense counsel who will provide excellent, cost-efficient representation, and whose advice will take into account all relevant considerations including liability, potential damages,

reputational issues and cost of defense.

Conclusion

Law firms need to take account of the high cost of litigation both before and after a professional liability claim is made. The first step is to make certain that the firm's professional liability policy has adequate limits to protect the firm from a substantial adverse verdict or settlement late in the litigation, taking into account the defense costs that will be incurred along the way. Once a claim is made, the key is for the law firm client to make a wise decision in selecting defense counsel, and then to work closely in collaboration with that defense counsel to manage defense and potential resolution of the claim. The goal should not be to be cheap, but to be smart.