Managing Risk

Trends in Professional Liability Risk

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Association study of legal malpractice found that claims against lawyers surged 36 percent between 2004 and 2007 when compared to the prior three-year period. Many experts believe that the state of the economy over the past couple of years has only made the situation worse.

Understanding liability is a basic legal skill, and lawyers have significant expertise in analyzing liability exposures and understanding legal trends. However, when it comes to their own profession, some lawyers may not always be as well versed in the developing professional liability exposures that they may be facing while practicing law. By understanding emerging issues and how to best protect themselves, lawyers can make better insurance choices.

Three Trends and Key Coverages

The legal profession continues to experience significant changes driven by intense competition, business pressures within the current economy, and newer approaches to practicing law. These changes can be grouped into major trends that appear to be generating new types of professional liability exposures. Three of these trends are set forth below, along with some of the newest insurance coverages that have been designed to address these potential liabilities.

1) Technological advances. As the legal system and law firms continue moving into the electronic age, they are now fully embracing the newer technologies, such as electronic filing, mobile technology, digital storage of client data, and electronic communication with court systems and opposing counsel and clients.

Along with these new communications advances come new technology exposures, also known as cyber liability. For example, in a case from 2006, a law firm sued a large information technology company, alleging that one of the company’s employees invaded the law firm’s database and appropriated confidential information about firm clients. The firm apparently believed it had to bring suit to protect itself from potential liability to other firm clients. This type of lawsuit serves as an indicator regarding emerging liabilities.

New coverages. Legal professionals may want to consider cyber-liability insurance coverage that protects them in three key areas:

- inadvertent transmission of a computer virus that causes harm to the recipient;
- failure to meet a commitment to provide access or to prevent access to the firm’s network; and
- violation of privacy laws through the disclosure of confidential information.

A firm may incur unexpected costs to resolve problems in each of these areas, be hit with regulatory fines, or even be required to pay damages to other affected parties who relied on the firm to conduct its cyber activities responsibly. Finally, lawyers have a special fiduciary obligation to protect the privacy and confidential information of their clients. Considering all of these potential exposures, law firms should consider appropriate insurance protection in these areas.

2) Organizational reshuffling. According to the Bureau of Labor Statistics, more than 25,000 legal services jobs have been lost since the beginning of the current recession. Additionally, according to an estimate from the “Layoff Tracker” (a joint venture by the law blogs “Above the Law” and “Law Shucks”), more than 5,000 lawyers have lost their jobs at the nation’s largest law firms during this same time frame.

As former large-law-firm lawyers have moved into new associations with mid-size or smaller firms, or even gone out on their own, the ripple effect from their displacement is being felt throughout the entire profession. Additionally, the newly downsized larger law firms are reorganizing to handle their work differently, and small- and mid-size law firms are gearing up to compete with them, sometimes using...
more independent-contractor and of-counsel arrangements. Several firms have merged with or acquired former competitors, while yet others have broken into smaller practices. It all adds up to a significant amount of movement and disruption in the marketplace.

These changes can create possible liabilities that need to be carefully addressed. For example, when one firm merges with another to form a new entity, coverage for each predecessor firm becomes very important. Insurance agents should examine whether the new policy provides adequate predecessor-firm coverage, or whether "tail" or extended reporting period (ERP) coverage should be purchased from either terminating policy. Additionally, if an acquisition of a firm is made while an existing policy is in effect, adequate coverage must be arranged because this may be considered a material change in exposure or create other potential coverage gaps if the existing policy does not provide coverage for mid-term acquisitions.

Finally, when a law firm breaks up, or if one insurance policy is terminating and another is being purchased that excludes coverage for the dissolved firm, it is important to consider tail or ERP coverage that addresses liabilities that can emerge from past cases and actions. Many of these types of organizational-change coverages have specific time limits or require affirmative elections and additional premiums so that the appropriate coverage can be put in place. Law firms should seek counsel from their insurance agents to ensure they have the appropriate protection.

3) Practice expansion. With economic pressures pushing law firms into new areas to raise their firm profile or generate needed revenue, firms may need support from their insurers in ways they had not considered in the past. This may include taking advantage of risk management expertise, pre-claim mitigation advice, and coverages not included in traditional legal policies. For example, firms might want to address the following:

- Publishing liability if producing books, articles, and treatises. Lawyers' professional liability (LPL) policies often limit covered professional services to the practice of law, and if such writings are not considered part of legal practice, these activities may be excluded from coverage under a traditional LPL policy. If these activities happen to result in a lawsuit alleging defamation, plagiarism, or the unauthorized use of someone's name, likeness, or intellectual property, there...
may be an uncovered exposure, unless publishing liability coverage has been added.

- **Reputation management.** The pervasive, 24-hour news cycle and intense competition within the popular media have created significant demand for anything and everything controversial. Beyond reporting case law and legal decisions, there is now a specific media segment dedicated to reporting on lawyers and law firms. A law firm may want to ensure it is covered for the expenses of defending itself if a crisis emerges that could have a materially adverse effect on the firm's reputation.

- **Lost work time and defense costs.** Increasingly, clients are more willing today to bring complaints to legal oversight bodies or even bring malpractice claims as a response to fee collection lawsuits. A firm might want insurance protection against loss of earnings related to responding to these complaints or claims or reimbursement of defense costs in responding to disciplinary proceedings.

### Additional Pitfalls to Consider

In addition to understanding the insurance implications of these overarching trends, legal professionals will also want to make sure they avoid two common pitfalls.

1) **Prior-knowledge exclusion.** The first pitfall is when a firm switches from one insurance carrier to another and becomes subject to a prior-knowledge exclusion that affirms the firm is not aware of any potential claims. Examine this language carefully to determine how expansive the exclusion is. Under a broad exclusion, a firm in which even one person is later found to have knowledge that was not disclosed may be inadvertently exposed to a costly coverage gap. Some policies apply this exclusion to each subsequent renewal, creating potential coverage gaps for known claims or potential claims reported even a single day into the next renewal.

2) **Lack of standardized language.** The second potential pitfall involves the degree of variation or the lack of standardization of language employed by legal-professional-liability insurance carriers. With a slight change of phrasing or sentence construction, what was covered under a prior policy may be completely excluded under the replacement policy. A firm that is changing carriers needs to carefully examine not only coverage grants but also the list of exclusions in the new policy. Simply presuming that one policy will provide identical coverage to a prior policy may cause regret and recriminations later.

Lawyers may deal with liability every day, but when it comes to understanding their own potential exposures, it is good to maintain a relationship with a trusted insurance agent or broker.

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