A Short, Basic Outline of Attorney Errors and Omissions Policies

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For attorneys to be educated on issues of attorney liability and ethics issues, it is important that they know the basics about their errors and omissions insurance coverage ("E&O"). My practice is about equal part representing attorneys and other professional and insurance coverage advice and litigation. That coverage practice includes dealing with coverage issues of claims made E&O policies, including the subset of attorney liability policies. The need for this inclusion is made clear by my practice. Many attorneys either do not understand their own insurance coverage or act in ways that undermines their own coverage when they need it.

The Application

Let's start with the first step in getting E&O coverage, the application. Taking the time to accurately complete your application (and any renewal applications) must be a priority. It is easy to overlook important details about your practice or your knowledge of potential claims. Misrepresenting those facts in a policy application is much riskier to your future coverage needs than not disclosing these facts, even if it means a slightly higher premium. All too often, insureds fail to disclose a known risk or simply quickly complete the application and forget to provide necessary information. Either mistake can be costly when a claim comes.

Don't let your coverage disappear

The most common misrepresentations in an attorney E&O policy application include not disclosing a risky practice area, not disclosing a prior claim, or not disclosing knowledge of facts that could support a claim in the future. These withheld facts often come to light after a claim arises. The risk of a voided policy is simply not worth a potential increased premium price.

A Georgia insurance policy may be rescinded (voided at inception) due to a material misrepresentation in the policy application. It matters not if the misrepresentation was intentional or mere oversight. Thus, an insurer would not need to prove that the misrepresentation in the policy application was intentional. The application process should not be treated lightly.

Rescission is a much more serious remedy for the insurance company than mere denial. When a policy is rescinded, the policy becomes void and "never existed." This is significant for two very important reasons. First, under rescission, there is no longer a policy and thus no claims will be covered, whether related to the policy misrepresentation or not. Second, although many policies cover "innocent insureds," a rescinded policy will not cover anyone in the firm.

Rescission is best avoided by fully disclosing all facts requested in a policy application. Attorneys should be careful to not take the policy application lightly, and should never intentionally hold back information with high hopes that a known potential claim will not surface.

Claims Made Policies

It is possible that a lawyer has an E & O policy that is an occurrence policy, but I am unaware of a lawyer E & O policy on the market today that is an occurrence policy. Thus, chances are any E&O policy a lawyer or law firm might have is a claims made policy. The distinction is very important.

The Claims Made Distinction

The seminal Georgia case describing the difference between claims made policies and occurrence policies is *Serrmi Products, Inc. v. Ins. Co. of Penn*, 201 Ga. App. 414, 415, 441 S.E.2d 305 (1991). A claims-made policy is a policy where coverage is effective typically when the allegedly wrongful act is discovered by the insured and brought to the attention of the insurer within the policy period. See e.g., 7A Appleman 312, cited in *Gulf Ins. Co. v. Dolan Fertig & Curtis*, 433 So.2d 512, 514 (Fla. 1983) (cited with approval in *Serrmi*, *supra*.) Changing or giving extensions of time to receive or report claims "negates the inherent difference between the ['occurrence' and the 'claims made'] contract types. Coverage depends on the claim being made and reported to the insurer during the policy period." *Serrmi*, 201 Ga. App. at 415. To change the timing of when a claim must be made and reported is "tantamount to an *extension of coverage* to the insured gratis, something for which the insurer has not bargained." *Id.* (emphasis in original). To allow such an extension would not be merely changing a condition but would in effect rewrite the contract between the two parties. *Id.* (citing *Gulf Ins. Co.*, *supra*).

Timely reporting provides the protection you purchased

What all this usually means, applying the language I see most often in such policies, is that if facts become known to the attorney such that the attorney reasonably believe that a claim could be made, then the attorney needs to report it to the insurance carrier within the same policy period as

when those facts are known. A delay in reporting the claim may result in a loss of coverage. Thus, by way of example, assume a policy if effective from February 1, 2015 through January 31, 2016. Under a straight claims made policy, if a claim is made or the attorney becomes aware of facts that reasonably could be expected to result in a claim (this language may vary policy to policy) during the policy period, AND if the claim is then reported to the insurance company during the same policy period, then the claim will be covered by that policy, even if the alleged wrongful conduct happened prior to the policy period and even if the claim is not asserted until a future policy period.

The Retroactive Date

The policy may contain any number of terms or conditions affecting the general description for a claims made policy. For example, the policy may have what is known as a "retroactive date." That date serves as a limit to how far back the wrongful conduct may go back. This date may be negotiable with the carrier, obviously costing more the further back in time the retroactive date goes. When an attorney begins coverage with a new insurance carrier, the carrier may have a recent retroactive date. Usually, the retroactive date will not change as the policy is renewed since the carrier has already agreed to cover risks for the time period in question. For an increased premium, the retroactive date may be eliminated or moved back in time. Obviously, this may make it economically advantageous to the attorney to stay with a carrier with an extended period of time, but a claims history may change these economics. Still, the longer one is with a specific carrier, the less of concern the retroactive date becomes.

The Extended Reporting Period

The policy may also have what is known extended reporting period. This will allow the attorney to report a claim that is made *during the policy period* for some time frame after the end of the policy period. Sometimes these terms will allow a 30 to 60 day extended period to report a claim. Sometimes the extended reporting period will only apply if the claim is made towards the end of the policy period in

order to allow an attorney a reasonable amount of time to report the claim. In the absence of an extended reporting period, however, the claim must be reported within the policy period in which it is made. That means that a claim made on the last day of the policy period will have to be reported that very day absent such extended reporting period in the policy.

What Is A Claim

A claim is typically defined as an oral or written demand for monetary or non-monetary damages, including the filing of any judicial or administrative proceeding. Not all policies have this exact language. If the claim arguably arises out of or is related to legal services, the claim will need to be reported timely.

There is often a provision in the definition of a claim, the insuring agreement or an exclusion that essentially requires reporting knowledge by the attorney of facts that would reasonably be expected to support a claim, even if no claim has yet been made. Thus, the absence of a claim does not mean there is no duty to report, because a failure to report may mean the next policy will exclude coverage, and old policy will not have coverage because the claim was not reported.

When A Claim is Certain or Made; Report; When In Doubt, Report

Having a claims made policy means knowing your policy period and not procrastinating on reporting claims when they become known or the facts that would support a claim become known, even if they are not in suit and, sometimes, even if the claim has not been asserted by the potential claimant. Many attorneys risk or lose their coverage because they wait to report claims, hoping they will somehow be resolved or simply go away. Optimism in this case is the attorney's enemy. Some attorneys will also delay reporting a claim or potential claim due to fear of a premium increase or later non-renewal.

Reporting a claim is seldom the wrong choice. The stringent reporting requirements of claims made policies makes ignorance of what to do when a claim arises a potential disaster for an insured. The

insured is obligated to report a claim or potential claim to the carrier. Many professionals, and lawyers especially, often try to handle claims internally to avoid reporting to the carrier. This delay in reporting jeopardizes coverage. Professional liability policies are very explicit on how and where to report a claim. The reporting requirements cannot be stressed enough because the failure to comply with the policy provisions can bar coverage for an insured. "Prejudice" is not an issue for the insurer. The reporting requirement is like the policy period of an occurrence policy. A late reported claims means that the claim is simply not covered within the policy period. This happens all too often.

One uncovered claim could cost a law firm hundreds of thousands of dollars in defense costs alone, and there is the indemnity issue. Many, though not all, carriers will not punish a firm for reporting a potential claim that never materializes into an actual claim. If the claim is made and pursued, then coverage for that claim will almost always be better than a few dollars saved on later premiums.