HOW I LEARNED TO STOP WORRYING AND LOVE MY INSURANCE POLICY

By Alton Stephens

As responsible lawyers, we all recognize the paramount importance of professional liability insurance to the health and safety of our law practices. What some of us may not recognize or may need to be reminded of is that the process of selecting the "right" or the "best" policy is nowhere near as simple and straightforward as might first appear. This can be true even of experienced consumers of LPL insurance. I am a little more seasoned in my understanding of LPL insurance now than I used to be, and I want to pass on some of what I have lately picked up.

I write from my perspective as a retired professional liability defense lawyer and as a present LPL insurance agent with an agency specializing in this field. My aim is to illuminate a few of the not-readily-apparent but important features that I have learned may be found in an LPL policy, and that might bear directly on which policy is "right" for a specific law practice. Asking the "big three" questions (what are the limits, the deductible, and the premium) and then, without more, accepting a policy that an insurer will sell you can, more often than not, be perilous. There are reasons why.

Before turning to a few of these things a prudent and diligent lawyer can do to improve the "fit" of his LPL insurance to his practice, a preliminary point should be made. It is a common misperception that a legal professional liability insurance policy is just "legal malpractice insurance." LPL insurance means more than that. Yes, it provides protection against claims by clients or former clients (i.e., those with whom the lawyer is in privity), which are "malpractice" claims, but the policy also provides protection against "third party" claims arising from a lawyer's professional activities. These claims are made by a claimant not in privity with the lawyer (or by one in privity but claiming on a theory not requiring privity.) These claims are not malpractice claims, but they are professional liability claims. "Third-party claims" is a good way to refer to them. Understanding these risks and what protections your policy provides against these outlier claims is just as important as understanding how your policy protects you against privity, or breach of standard of care, claims.

These broader protections may derive, like the in-privity claims, from the Insuring Agreements, from the Definitions in the policy, from Additional Benefits or Supplementary Payments provisions in the policy, and from the Endorsements. Examples include coverage for defense of disciplinary proceedings and loss of earnings. It is, however, not the purpose of this article to address these protections beyond simply mentioning them. Rather, this article limits itself to discussing several notably important provisions in LPL policies that were news to me when I began my second career as an insurance agent.

Turning now to some of these notable policy provisions and some considerations with respect to them, they are:

1. Notice conditions, and in particular the sometimes present "Awareness Provision."

2. Disciplinary defense coverage, and in particular when it "kicks in" and whether it is inside or outside limits.

3. Extended Reporting Periods, and in particular retirement/disability lifetime tails.

NOTICE

It is not news to professionals that their professional liability policies are typically written on a claims made and reported basis, meaning that unlike occurrence-based policies, a claims-made

policy is "triggered" when a claim is made, and not when the alleged act of malpractice occurred. Claims-made and reported policies require an insured to provide notice to the insurer during the policy period of any claim made during that same policy period. The only exception to this rule is when an extended reporting period is in play. What is a sometimes overlooked is a provision commonly referred to as the "Awareness Provision" found in the Reporting section. The Awareness Provision usually reads somewhat like this:

> *If during the policy period or any applicable extended reporting period the insured becomes aware of any circumstance that may reasonably be expected to give rise to a claim, and if the insured chooses to give written notice thereof to the insurer, then any claim subsequently made will be deemed to have been made at the time notice of the circumstance was given.*

Again, standing alone, this provision is routine. But, it comes into play from my perspective as a defense lawyer when a lawyer calls me with a potential issue which DOES NOT give rise to an obligation on the insured lawyer to report it. Many lawyers are reluctant to give notice of a potential claim if there is no obligation under the policy to do so, for the reason that they are concerned about the report counting against them at the next renewal.

This concern is short-sighted, and not just because insurers encourage reporting and will not hold a potential claim against the insured if it does not become a claim. This is reason enough, but there is a more subtle reason to report even the most seemingly insignificant circumstance, for if what seemed so insignificant at the time of the report leads to a real claim even years later, the AWARENESS PROVISION will cause the years-ago discretionary report of a "circumstance" to trigger the earlier policy! The importance of this can hardly be overstated and is reason enough to never be wary of reporting something to an insurer even if reporting is optional.

What is more, the AWARENESS PROVISION should especially be a consideration when a lawyer is considering a change to a new insurer; anything reported to the earlier insurer during its policy period and before a new insurer comes onto the scene will remain protected under the earlier policy! The importance of the AWARENESS PROVISION has only recently emerged in my mind with such emphasis, and you really should know what your policy has to say on this subject.

DISCIPLINARY DEFENSE COVERAGE

Disciplinary defense coverage is something of a recent phenomenon, and is a real enhancement to a professional liability insurance policy. But it can be tricky; there are two somewhat obscure facets to this coverage. The first is: WHEN does the coverage kick in? Is it when a grievance is first made or not until a disciplinary complaint is filed after investigation of the grievance? If the coverage does not kick in until a disciplinary complaint has been filed, the insured lawyer has been left to deal with the investigation phase on his own. Because the lawyer involved should never defend his own grievance for obvious reasons, the crucial investigatory phase may be mishandled and a disciplinary complaint that could have been avoided may get filed. This is not only to the detriment of the lawyer but also to the insurer. This quirk in the coverage is largely disappearing, but no lawyer should sign on to a policy of LPL insurance without knowing the answer to this question.

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The second thing to be aware of with respect to disciplinary defense coverage is whether or not the (separate) limits for such coverage erode the policy, i.e., is the coverage inside or outside the limits of liability coverage? In some policies the answer is "yes," in others "no." Finally, must a deductible be satisfied in connection with this coverage?

EXTENDED REPORTING PERIODS

Extended reporting period provisions are intricate and are bound up with the notice provisions. Most policies have a feature of which I was unaware before becoming an agent, to the effect that if an insured lawyer has been insured with the same carrier for a certain number of renewals, he has earned a "free" retirement tail after a certain minimum age so long as he fully retires from the practice of law. This can mean a lot, particularly to a more senior lawyer. That is, the "retirement" tail is more important the nearer a lawyer gets to retirement. Such a lawyer should be cautious if he desires to switch to a new carrier if he has earned or is near to earning a retirement tail.

CONCLUSION

Your LPL insurance policy can be a wonderful thing if you dig into it and get to know it. Start reading it from the last page to the first. While doing that, give some thought not just to specific provisions in isolation, but also to how all the policy provisions work together to provide seamless coverage. You'll learn some things that may be valuable to you someday.

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