

# THE MALPRACTICE CLAIM

## WHAT TO DO AND WHERE TO TURN WHEN YOU FACE THE MOMENT ALL ATTORNEYS DREAD

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There may unfortunately come a time in your career when you face the realization that you may have committed malpractice. Where do you turn in your moment of dread?

Many attorneys do not appreciate the breadth of coverage provided by their professional liability insurance policy and that coverage is available to assist them through such a moment in their career. It is a common misconception that the policy exists merely to protect a lawyer or firm in the event that they are named as a defendant in a legal malpractice lawsuit. But today's professional liability insurance policy has evolved into an all-encompassing risk management tool. To take full advantage of the broad range of protection afforded by your policy of insurance, you need to familiarize yourself with what your policy covers so that you can identify when a "covered event" has occurred. Once that "covered event" has occurred, it is time to trigger coverage.<sup>1</sup>

For purposes of this article, keep in mind the following hypothetical: a potential client seeks your representation six months after getting into an automobile accident. After an initial consultation, you execute a fee agreement. You instruct the client to continue medical treatment, and you docket the case to be filed prior to the expiration of the two-year statute of limitations applicable to personal injury actions in Ohio. One problem: the accident occurred and the cause of action accrued in Tennessee, which has a one-year statute

of limitations for personal injury cases, a fact you do not realize until it is too late.

### Pre-Claim Assistance

In recent years, more emphasis has been given to the "pre-claim" stage of an allegation of legal malpractice by professional liability carriers. There is a widespread belief that issues are more easily resolved in their infancy, prior to becoming full-blown lawsuits. Pre-claim assistance is now available in most professional liability insurance policies.

Pre-claim assistance allows a lawyer to provide notice to the insurance carrier when he becomes aware of circumstances that may potentially lead to a claim, rather than waiting for an actual claim to be made or suit being filed. Once the lawyer provides notice to the insurance carrier, pre-claim assistance can take a variety of forms, all designed to resolve the matter short of litigation.

In the hypothetical above, when the attorney realizes that the applicable one-year statute of limitations in Tennessee has expired for the client's personal injury claim and the complaint has not been filed, the attorney should obviously recognize that there is a potential claim for legal malpractice. This potential claim activates available coverage under the insurance policy, and the attorney should make the call to his insurance carrier or broker. If the underlying suit has been filed (albeit after the statute of limitations has expired), a professional liability attorney may appear (or work behind the scenes) in pending litigation as additional counsel. The professional liability attorney may focus on issues surrounding tolling or other avenues for defeating the statute of limitations defense of the underlying tortfeasor, allowing you as the primary attorney to focus on the prosecution of your client's case. The separation of these duties will assist in defeating any later assertions that the attorney was preoccupied with protecting himself to the detriment of the client's case.

If the underlying lawsuit has not been filed, the professional liability attorney may assist in resolving the underlying case short of litigation. Indeed, if the statute of limitations defense is not iron-clad, the professional liability attorney may be able to create enough doubt in the mind of the opposition that they become predisposed to resolving the underlying matter instead of litigating it. The extent of the professional liability attorney's involvement will be dictated by the situation, but the goal will always remain the same: avoiding a legal malpractice lawsuit and obtaining an outcome beneficial to the attorney and client.

### Claim Repair and Loss Mitigation

Claim repair is a concept closely related to pre-claim assistance and differs only by its dual purpose. Like pre-claim assistance, claim repair provides the support of a professional liability attorney for purposes of resolving a potential claim before it becomes a lawsuit. However, claim repair serves the additional purpose of preserving the relationship between the insured attorney and their client even in the face of a potential legal malpractice claim.

For instance, in the hypothetical, what if there is a long-standing attorney-client relationship between the attorney and client? If the client desires for the attorney to stay on the case, or preserve the relationship for future matters, they must proceed with a delicate balance between holding the attorney accountable for his mistake while not upsetting the mutual trust upon which the attorney-client relationship is based.

By taking advantage of claim repair, the attorney will have experienced counsel guide him through the difficult situation. The professional liability attorney will take on a role dictated by the situation, as with pre-claim assistance, but will act not only with the attorney's interests in mind, but also with the interests of the attorney's client. The obvious goal is for these interests to align into a mutually beneficial

outcome, and by working with both the attorney and client, the professional liability attorney will be able to help define what that outcome will be, and create the roadmap to obtain that mutually beneficial result for all concerned.

### **Risk and Practice Management Counseling**

Many professional liability insurance policies set aside a certain dollar amount to be used by the insured each policy period for risk management and/or practice management counseling on a “use it or lose it” basis. Often, this covers legal professionals hired by the insurance carrier partnering with the insured in an effort to develop loss prevention strategies. As part of this process, the insured’s policies and procedures pertaining to firm organization and management are analyzed, and a thorough review will include an assessment of the firm’s processes for new client intake, engagement letters and agreements, document retention and destruction, conflict checks, and docketing. Together, the professional liability attorney and the insured lawyer utilize the results of their analysis to fine tune the practices of the law firm in a manner that is calculated to minimize risk.

With respect to the hypothetical described above, risk and practice management counseling would not have helped the attorney after the fact. However, if the attorney had utilized

this service prior to the error, it could have prevented the statute of limitations mistake in the first instance. Risk and practice management counseling would have likely exposed the attorney’s insufficient means for identifying the applicable statute of limitations upon new client intake, and would have created new procedures to prevent such a problem. Following the advice of the professional liability attorneys regarding proper docketing procedures would have alerted the attorney in the hypothetical to the applicable one-year statute of limitations and likely would have prevented malpractice.

### **Making the Call**

Understanding your professional liability insurance policy is a vital part of the practice of law. A lawyer needs to know when to make the call to the carrier or broker. Whether a “triggering event” has occurred can be a debatable point, but do not be the judge and jury with respect to your own malpractice. Do not assume that coverage will not be provided, but rather, make the telephone call to your insurance company or broker and provide notice of the potential claim. The worst thing that can happen is you are advised that no coverage is available under the circumstances. Even then, you have protected yourself by providing notice, and in the event the situation ever turns into a claim, lack of notice will be negated as a defense to coverage.

Often coverage will be provided, as the insurance company will agree with your assessment that a potential claim or exposure exists. From there, the insurance company will retain trusted and experienced professional liability attorneys who understand the value of a lawyer’s reputation in the community, and they will work to formulate a strategy to prevent the filing of a contentious legal malpractice case. ➤



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<sup>1</sup> While this article focuses on coverage with respect to a claim for legal malpractice, attorneys should be aware that coverage is often provided in your professional liability policy for grievance and disciplinary matters as well.