

**Legal Malpractice Coverage:
Understand it or Lose it**

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Key Rules

- Rule 1:
 - A lawyer who represents himself has a fool for a client

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Key Rules

- Corollary to Rule 1:
 - If a lawyer can make a mistake which will void his malpractice coverage, he probably will.

Key Rules

- Rule 2
 - Read the entire policy.
 - Failure to do so will likely lead to a situation covered by the Corollary to Rule 1.
 - If a lawyer can make a mistake which will void his malpractice coverage, he probably will.

Claims-Made Issues

- Legal malpractice insurance is generally on a claims-made and reported basis
 - Key issues
 - What is a claim?
 - Reporting requirements
 - Prior knowledge exclusion/Notice of circumstances
 - Retroactive date/tail issues

What is a claim?

- Sample policy language:
 - **"Claim"** means a demand, including the service of suit or institution of any alternative dispute resolution proceeding, received by the **Insured** for money or services arising out of an act or omission in the rendering of or failure to render **legal services**.

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What is a claim?

- **“Claim”** means a written demand for monetary or non-monetary relief including, but not limited to, a civil, criminal, administrative or arbitration proceeding; provided, however, that Claim shall not include any proceedings before a state licensing board or similar authority, except as otherwise provided in Section V, Supplemental Coverages, of this policy.

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What is a claim?

- Letter asking for money?
- Letter asking for file or information?
- Letter indicating a conditional intent to sue?
- Letter asking that lawyer fix a problem?

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Reporting Requirements

- Insuring agreement: “and reported in writing to the Company.”
- Notice condition: requires written notice
- *Marlin & Edmondson, P.C. v. National Union Fire Ins. Co.*, 2005 WL 3508011 (Tenn. Ct. App. Dec. 22, 2005).
- *Ohio Bar Liability Ins. Co. v. Hunt*, 152 Ohio App. 3d 224, 787 N.E.2d 82 (2003).

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Knowledge of Circumstances Which May Give Rise to a Claim

- Are you out of the woods if no “claim” has been made?
 - No!!

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Knowledge of Circumstances Which May Give Rise to a Claim

- Prior knowledge exclusions.
 - Sample policy language:
 - This policy shall not apply to any claim based upon, arising out of, attributable to, or directly or indirectly resulting from;...any act, error, omission, circumstance or personal injury occurring prior to the effective date of this policy if any insured at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or personal injury might be the basis of a claim.

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Prior Knowledge Exclusions

- Third Circuit uses a two-prong test;
 1. Was an insured aware of the relevant facts.
 2. Would a reasonable lawyer in possession of those facts have had reason to believe that they might form the basis of a future malpractice claim.

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Prior Knowledge Exclusions

- *Brownstein & Washko v. Westport Ins. Corp.*, 2002 WL 1745910 (E.D. Pa. July 24, 2002).
- *Westport Ins. Corp. v. Law Offices of Marvin Lundy*, 2004 WL 555415 (E.D. Pa. Mar. 19, 2004).
- *James River Ins. Co. v. Hebert Schenk, P.C.*, 519 F.3d 917 (9th Cir. 2008), *amended and superseded by* 523 F.3d 915 (9th Cir. 2008).

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Prior Knowledge Exclusions

- *Nordquist v. Lumbermans Mutual Casualty Co.*, 2008 WL 2314102 (Wash. Ct. App. June 2, 2008).
- *Blum v. Travelers Indemnity Co.*, 2008 WL 2557538 (D.N.J. June 23, 2008).
- *Executive Risk Indemnity Inc. v. Pepper Hamilton LLP*, 2008 WL 4308148 (N.Y. App. Div. Sept. 23, 2008), *aff'd*, 13 N.Y.3d 313, 919 N.E.2d 172 (2009).
- *Foster v. Westchester Fire Ins. Co.*, 2011 WL 4382971 (W.D. Pa. Sept. 20, 2011)

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How do you get coverage for circumstances which may lead to a claim?

- Give written notice of circumstances which may lead to a claim.
 - **DO NOT EVALUATE LIABILITY!!!**
 - Carriers strictly enforce notice requirements.
 - Policy limits issues.

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Retroactive Date Issues

- What is a retroactive date?
 - Concerns when changing malpractice insurers.
 - Concerns when changing firms.

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Definition of Damages

- Damages means any monetary award by way of judgment or final arbitration, or any settlement, **but does not include:**
 - punitive damages, fines or sanctions
 - Injunctive, declaratory, or other equitable relief, or costs or fees incident thereto; or
 - Restitution, reduction, disgorgement or set-off of any fees, costs, consideration or expenses paid to or charged by an **Insured**

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Definition of Damages

- Courts enforce this definition
 - Focus is on the damages sought, not the legal theory under which they are sought
 - Should not exclude costs of client retaining new counsel

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Definition of Damages

- Something new:
 - “Any amount for which an **Insured** is absolved from payment for reason of any covenant, agreement or court order”

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McAfee v. Wilmer Hale

- *McAfee, Inc. v. Wilmer, Cutler, Pickering, Hale and Dorr LLP*, E.D. Tex. 4:08-cv-00160-MHS-DDB
- Claim: over-billing by charging 12 million dollars for a one-defendant criminal conviction of McAfee's former CFO.
- Allegations that Wilmer had over 100 timekeepers, including 16 Partners, 34 Associates, 10 Paralegals and 49 Staff Billing on the file.

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McAfee v. Wilmer Hale

- What is covered?
 - Covered causes of action
 - Excluded causes of action
 - Covered relief
 - Excluded relief

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McAfee v. Wilmer Hale

- Causes of action
 1. assumpsit
 2. fraud
 3. theft
 4. negligence
 5. gross negligence
 6. breach of fiduciary duty
 7. fee forfeiture
 8. exemplary damages
 9. attorneys fees

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Intersection of Malpractice Insurance and the Ethical Rules

- Cooperation clauses
 - “The **Insured** shall not, except at its own cost, voluntarily make any payment, assume or admit any liability or incur any expense without the consent of the **Company**”.
 - Some policies except matters which can be completely resolved within a large retention

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Intersection of Malpractice Insurance and the Ethical Rules

- A lawyer has a duty to advise the client when the lawyer commits malpractice
 - PA Rule of Professional Conduct 1.4 (a)(3)
 - A lawyer shall...keep the client reasonably informed about the status of the matter

Intersection of Malpractice Insurance and the Ethical Rules

PA Rule of Professional Conduct 1.7 (a)(2):

A lawyer shall not represent a client if there is... a significant risk that *the representation of one or more clients will be materially limited by... a personal interest of the lawyer*

Intersection of Malpractice Insurance and the Ethical Rules

- A lawyer may have an ethical obligation to advise a client that he or she might have a claim against that lawyer, even if the advice flies in the face of the lawyer's own interest.
- See e.g., *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 662 A.2d 509 (1995).

Intersection of Malpractice Insurance and the Ethical Rules

- Query: Does advising a client that you may have committed, or did commit, malpractice breach the "no admission" condition of the malpractice policy?
 - Answer: It should not
 - Be careful what you say in order to avoid coverage problems.

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Other Businesses

- Most policies exclude liability “based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Insured’s activities or their capacity as”
 - An officer, director, etc. of an unnamed business enterprise or non-profit organization
 - a public official, employee or agent of a governmental body, subdivision or agency (other than in the context of rendering professional services to it)
 - a fiduciary under ERISA

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Other Businesses

- Protect yourself if you have a dual role as a lawyer and business person
 - Note breadth of exclusion:
 - based upon
 - arising out of
 - directly or indirectly resulting from or in consequence of
 - or in any way of involving any **Insured’s** activities or their capacity as . . .

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QUESTIONS?
