Some Practical Tips When Applying for Professional Liability Insurance

In recent years buyers of lawyers professional liability ("LPL") insurance have been enjoying a "soft market" (many competing carriers and lower premium costs due to price competition). But it doesn't necessarily feel that way when the bill is paid each year. Malpractice premiums are still a large item of overhead for most firms and with some signs that the market is "hardening" it may be even larger in the next few years.

However, there are some simple, practical steps you can take to reduce your malpractice insurance premium without compromising the coverage you need. By presenting your firm in the best light on the insurance application you may be able to achieve significant savings on your malpractice premium. There are several important areas asked about, in one form or another, on virtually all LPL applications, including: 1) firm areas of practice; 2) internal procedures the firm uses to track deadlines, check conflicts and ensure effective client communication; 3) whether the firm sues for fees; 4) and, most critical, has the firm reported any claims or is it aware of any unreported claims or potential claims.

There are few things that rival completing an insurance application for tediousness. The temptation is to "get it over with" by copying over last year's application answers (which may have been themselves copied over from an earlier application) onto the new application or just "guesstimating." This may result in the firm paying a higher LPL premium than if it invested some time in gathering accurate information and treating the application as a chance to advocate for the firm.

Areas of Practice

Anyone who has filled out an LPL application is familiar with the grids that ask the applicant for a breakdown of its overall practice into the percentages of specific areas of law being practiced. But you may not have thought about the effect these percentages might have on the firm's premium. LPL underwriters see certain areas of practice as riskier than others. Historically: plaintiffs personal injury, intellectual property, securities, environmental and more recently real estate and estates & trusts are among the AOP's that are less favored. Others, such as criminal law, insurance defense, administrative law or immigration are perceived as safer, while the rest are neutral. Some insurance companies will include extensive AOP factors in their rate filings to reflect these differences while others will file for broad underwriting discretion to adjust the premium depending on the applicant's practice mix. Either way, overestimating the percentage of riskier AOP's or underestimating the safer ones, can result in a firm paying more than necessary for its LPL coverage.

Also, if the application does not specify whether the percentage is to be calculated on hours worked or gross revenue, use the hourly calculation. This is usually to an applicant's advantage because the safer practice areas tend to be straight billable hour work while some of the riskier areas might include contingent fee or bonus arrangements and this could inflate the riskier practice area percentages if the firm has a great outcome in a particular matter one year.

Tip: Review the firm's current practice by percentage every year if it has a mixed AOP profile and make sure it is accurate.

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Internal Systems

Most carriers have some minimum requirements for certain internal procedures that will help in avoiding claims. These include dual calendars with more than one person checking the system regularly, a systematic way of checking for conflicts before taking on a client matter, and the use of form agreements and letters that spell out the scope of representation or whether a client's matter is being closed out or the firm is declining representation. But many underwriters have discretion to assign additional credits for exemplary internal controls. So if the firm goes the extra step and, for example, has a procedure for current files where conflict checks are ongoing when new parties are added or changes to the scope of representation are committed to writing, then the firm should make this known to an underwriter.

Tip: Don't be reluctant to expound on the firm's excellent risk management internal controls in a separate narrative that can be attached to the application.

Fee Suits

Suing a client to recover fees should be avoided if at all possible. This has become a serious concern for LPL insurance companies to the point where some carriers are declining to insure firms that sue clients while others are putting endorsements onto their policies excluding malpractice claims that arise out of fee suits. Moreover, an underwriter may charge additional premium to cover the enhanced risk.

The firm should adopt procedures to minimize the need for fee suits: by vigilant billing, obtaining adequate retainers or even terminating the representation. But sometimes fee suits may be a business necessity. If the firm has made a business decision that a fee suits can't be avoided then this needs to be explained on the application. The firm should have a specific (ideally written) procedure for deciding whether a particular fee suit should be undertaken and it should involve more than just the billing partner whose fees are unpaid. If the firm has an executive committee or similar steering group the issue should be brought before them. The file should also be carefully reviewed (by a firm peer) to make certain that there are no potential grounds for a claim of malpractice that might have merit.

Tip: If the firm has sued for fees, provide a description of the careful way in which the firm approaches a prospective fee suit and the steps it takes to minimize the need to sue clients at all.

Claims

Of course, the single biggest impact on what a firm pays for LPL insurance is whether or not it has had claims, how many, and how severe. An adverse claims experience might mean that a firm cannot find LPL coverage in the "admitted" market (admitted carriers are those whose rates and forms are fully regulated by the New Jersey Department of Banking and Insurance). And it will be forced into the non-admitted (excess or surplus) market where rates are significantly higher and coverage more restrictive.

The best way, then, to keep your LPL premium down is obvious – don't have any claims. But that isn't much help. The fact is, most mid-size or larger firms will have occasion to report a law suit against them or a matter that might develop into a claim. How should this be dealt with on the application?

The first consideration is: does the matter have to be revealed on the application? If it is a renewal application and your current carrier is handling the claim (or knows of it from earlier applications) then it generally does not have to be included on subsequent renewal applications which only ask about previously unreported claims. But what if you are with a non-admitted carrier now and trying to re-enter the "admitted" market of LPL insurers, in an effort to find a lower premium?

Most applications for a new LPL policy (i.e., new to that company) will have a 5 year "look back" period for any reported claims. This generally means that claims reported more than 5 years before do not have to be included. Some applications may ask about a longer period (7 to 10 years). But the important point is the measuring point is the date of reporting not the date the matter was closed or settled.

If you do have a claim(s) within the 5 year window you will have to answer the claims question "Yes" and do a Claim Supplement. But this presents another opportunity to advocate for your firm. The underwriter will want to know the facts underlying the claim and be even more concerned with the remedial steps the firm has taken to avoid similar claims from recurring. So take the time to fully explain the matter and be sure to include any facts that might mitigate the firm's liability or otherwise make it unlikely that the claimant will succeed. And if the claim has closed and money was paid out to settle or even just to defend the matter, be certain to explain with specificity what the firm has done to avoid a similar claim in the future (Fox example, instead of saying that no remedial steps were possible because the client is "irrational" discuss how the firm has revised its client screening procedures to avoid problem clients).

Tip: If your firm is applying to a new carrier and has to reveal actual or potential claims, advocate for your firm. Prepare a persuasive narrative for the Underwriter telling why the firm is a good risk despite the claim.

For more information on potential way you may be able to reduce your firm's LPL insurance costs, please call USI Affinity at **1-855-USI-0100 PIN 607.**

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