MORE HEAT IN THE HOTHOUSE

The Professional as a Client and Insured

Daniel J. Ripper
Luther-Anderson, PLLP
100 West ML King Blvd.
Suite 700
Chattanooga, TN 37402
423-265-4792
dan@lutheranderson.com

I. Introduction

II. Difficult Clients Make For Difficult Cases

a. Why Attorneys Get Sued

Any analysis of why an attorney is a difficult client must begin with an understanding of the reasons why professionals get sued and the type of services attorneys are asked to provide. Typically an attorney is asked to either insure a problem is avoided on the front end or to resolve a problem once it arises. Attorneys are asked to exercise their legal expertise and judgment to solve or prevent other people's problems. In the course of that work, malpractice errors can occur.

The American Bar Association addressed the reasons lawyers get sued for malpractice in its *Journal Law Practice: The Business of Practicing Law*, July/August 2010, Vol. 36, Number 4. Daniel E. Pinnington of Lawyers Professional Indemnity Company (LawPRO) analyzed LawPRO claims data as well as combined data and comments in the 2000-2003 and 2004-2007 ABA *Profile of Legal Malpractice Claims* studies, which he refers to as the LPL studies to provide an analysis of the specific types of errors that generate malpractice claims.

Substantive Errors

When grouped together, substantive-type errors account for over 46 percent of reported claims in the LPL studies. The most obvious error in this category is a failure to know or properly apply substantive law (i.e., a lack of sufficient or current knowledge of the relevant law on the matter the lawyer was working on). At 11.3 percent of claims, this is the most commonly reported error in the LPL studies.

Another rather obvious error is the failure to know or ascertain a deadline (as in a limitation period). Additional substantive-type errors include planning errors regarding

choice of procedure; errors in public record searches; failures to anticipate tax consequences; and inadequate investigation or discovery of fact.

Administrative Errors

Taken together, administrative errors—which include tickler system errors, clerical and delegation errors, lost file or document errors, and procrastination—account for 28.5 percent of reported claims in the LPL studies. A failure to file documents is the top administrative-type error in the studies (at 8.6 percent). A failure to calendar (i.e., a limitation period was known but not properly entered in a calendar or tickler system) is the fifth most common error in the LPL studies. A related, but less common error is the failure to react to a calendar system (i.e., the limitation period was correctly entered but missed owing to a failure to use or respond to the tickler reminder). Clerical and delegation errors include things such as simple clerical errors (e.g., filing a document in the wrong file), errors in mathematical calculations and work delegated to an employee that is not checked.

Intentional Wrongs

In the LPL studies intentional wrongs constitute 12.3 percent of claims. Intentional wrongs include fraudulent acts by the lawyer, malicious prosecution or abuse of process, libel or slander, and violations of civil rights.

Client Relations Errors

Client relations errors account for 12.3 percent of claims. There are several types of these claims which all tend to arise from lawyer-client communication problems.

The first type is failure to follow the client's instructions. The second type is failure to obtain the client's consent or to inform the client. The third type is poor communications with the client, which involves a failure to explain to the client information about administrative things like the timing of steps on the matter, or fees and disbursements. The fourth type would be Conflicts of interest. There are basically two types of conflicts malpractice claims, the first of which arises when conflicts occur between multiple current or past clients represented by the same lawyer or firm. The second type arises when a lawyer has a personal interest in the matter.

Pinnington, Daniel E. "Are You at Risk? The Biggest Malpractice Risks and How to Avoid Them." *Law Practice: The Business of Practicing Law*. July-Aug. 2010: Volume 36, Number 4.

Generalizing from this data, lawyers are most likely to be sued for negligence, breach of fiduciary duty and confidentiality, fraud, negligent misrepresentation or professional misconduct. From the perspective of the professional, then, the malpractice claim is a direct personal attack alleging that the professional is either inept, incompetent, dishonest or all of these.

b. What Makes the Professional a Difficult Client

A malpractice claim represents an open accusation that the attorney has done his job poorly, unethically or incorrectly. It is not uncommon that a malpractice claim will be accompanied by a disciplinary complaint and action with the relevant state bar or board of professional responsibility. This makes it a direct attack on the attorney's livelihood and potentially his continued ability to earn a living. At its heart, the malpractice claim is not perceived as "just business", it is taken to be a personal attack.

Further, the attorney likely has a financial interest in the claim. The law firm business model for most attorneys is more closely akin to that of a "mom and pop" business than it is to a large corporation. According to the LPL studies cited above, firms with 2-5 attorneys faced the highest number of claims. Lawyers in this size firm tend to have the most personally at stake when giving consideration to the payment of deductibles and other costs associated with malpractice claims as well as the types of insurance policies involved which includes policies with evaporating policy limits that may leave the insured firm or individual attorney exposed financially.

c. Types of Difficult Clients

It seems that there is a fairly standard reaction and response by lawyers to malpractice claims. Andrew Wexler developed the following fictitious series of communications with the attorney-client upon being sued for malpractice:

> *Attorney*: "I cannot believe this no good client whom I supported for years has the audacity to sue me. I knew I should have billed every minute that I worked for that client. Here are your instructions: No extensions, no professional courtesy to opposing counsel, and write a letter to counsel immediately promising we will sue them, their clients, and their client's kids all for malicious prosecution and sanctions. Make sure they know I will come after them."

Six months later -- Attorney: "I know the plaintiff is entitled to take my deposition, but I don't have time. Can't you ask them to delay it? I don't have time to let you prepare me for my deposition. I have been practicing for 20 years. I know how a deposition works. As for seeking my help with the discovery responses, just answer all the questions the best you can. I am sure the answers you draft will be accurate. No, I don't have time to review my files. I'm not the one getting paid here. You review the materials."

Two months before trial -- Attorney: "I just received your letter. I can't believe you expect me to devote so much time preparing for trial. Just tell the carrier to settle. I don't care what it takes. I will not give up one week of my time to sit at trial. Settle it!"

Thirty days before trial -- Attorney: "What do you mean the action has not settled? Tell your client, my insurer, to settle the action now and pay the demand. Otherwise, I will sue the insurer for bad faith."

Waxler, Andrew, *Think Early Resolution of Disputes*, County Bar Update, May 2004, Vol. 24, No. 5. This fictional dialogue, born from experience, clearly illustrates the life cycle of the attorney's interest in a claim ranging from initial indignation to ultimately just wanting the matter to disappear with no further time, effort or exposure on the attorney's part. In between these times, attorneys as clients run the gamut of types of difficulty they present.

James McElhaney identified four types of difficult clients in an article in the ABA Journal. McElheney, James W. *"Difficult Clients."* ABA Journal*,* 13 July 2004: American Bar Association. These categories illustrate the range of difficult clients that attorneys tend to be. McElheny's four types of difficult clients are 1) high maintenance clients, 2) micromanagers, 3) manipulators and 4) the obsessed.

The high maintenance client requires constant attention and care. You hear from him often and the communication tends to be redundant. The same issues are discussed *ad nauseam*, with little new ground being covered and few new ideas being presented. This client needs constant "stroking" and is typically emotionally or personally involved in the claim as opposed to maintaining any sense of professional detachment.

The micromanager tends to be the "Rambo client" who wants to engage in hardball litigation. They want to run the case but have the attorney take responsibility for what happens. This is the client that objects to every discovery request and encourages the attorney to refuse to extend even the slightest professional courtesy to the opponent. The attorney with this client may spend a lot of time explaining to the client how the proposed course of action will create more trouble for the client than what they are already in.

Manipulators may explain how a desired result was achieved by another lawyer in some other case in an effort to get the attorney to obtain an identical result in the current case. Unfortunately the client is frequently ignorant of the details of the other case and does not want to understand how the difference in facts or applicable law make such a result in his case impossible.

The obsessed are fixated on some strange principle or misperception that makes it difficult to deal with rationally. An example would be an attorney who has involved clients in a scam that he has become embroiled in himself, but who does not recognize the scam to be a scam. Instead he continues to believe the scam is a legitimate investment which just needs for certain conditions to be met.

Not specifically mentioned by McElheny, but frequently encountered when representing attorneys is the client who believes he knows more about how to properly handle his claim than the attorney who has been hired to handle the defense. This client often believes the defense attorney does not understand the law of the underlying case, and is therefore in constant need of instruction.

There is a wide range of difficult clients and insured when dealing with the attorney as a client. Each brings his own unique demands. Recognizing these clients and insureds and dealing with them effectively is the job of the attorney and claim handler.

d. How to Deal With Difficult Clients

Given the range of difficulty presented by the attorney as an insured or as a client, the attorney and the claims professional need effective strategies for dealing with this situation. While there is similarity in how the attorney and the claims professional need to deal with this situation, there are obvious differences also given the different interests and roles of each.

1. Dealing With the Difficult Insured

The claims professional has the first opportunity to deal with the insured concerning the malpractice claim. It is important to understand that the insurer needs to balance the insured's needs and goals with the insurer's interest in defending the case in the most efficient and economical manner. Postman, Barry. *Dealing With Difficult Insureds in All Aspects of Litigation*, October 3, 2011.

The claims professional should begin by establishing a relationship with the insured. This should include clarifying the role of the claims professional. The policy and any policy limitations should be discussed and clarified including any reservation of rights, payment of retention or deductible and wasting limits. Evaporating policy limits should be conveyed along with realistic costs of defense and repercussions of exceeding policy limits. The selection and role of defense counsel should be addressed including who has the right of selection of counsel. The benefits of using panel counsel should be addressed including experience, cost and familiarity with defense guidelines. There should be discussion of the insured's goals from the outset and these conversations should be followed up with an email or written letter. Postman, Barry. *Dealing With Difficult Insureds in All Aspects of Litigation*, October 3, 2011.

2. Dealing with the Difficult Client

For the attorney dealing with a difficult client patience and communication are the keys. Understanding why the client is reacting the way the way they are is helpful also. Therefore, it will be important to listen to the client carefully to understand their relationship with the former client who has now made a claim against them. It will be important to let the client vent and express all the reasons they should not have been sued.

After the initial meeting, keep the client updated on the case. Make certain the client is aware of and involved in any important decisions that need to be made. Be certain client understands your perspective on the case and has had his options realistically explained. It is very important to patiently manage expectations to insure that the client is aware of the likelihood and range of potential results. It will also be important to be proactive and responsive with this client

III. Defending under Reservation of Rights

The tension between an insurer's right to disclaim coverage where there is none and its obligation to defend the insured from claims that potentially may trigger coverage has led to the concept of "defense under reservation of rights":

> A reservation of rights is a statement by the insurer to the insured explaining what the insurer considers to be its rights and obligations under the policy. This statement typically comes in the form of either a reservation of rights letter or a nonwaiver agreement. A reservation of right notice is a unilateral statement by an insurer in writing notifying the insured of its intention to continue with the defense while retaining the right to press all issues that could lead to a finding of noncoverage. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP*, 336 F. Supp. 2d 610, 613 (D.S.C. 2004) (citing Black's Law Dictionary 1082 (7th ed. 1999)). A proper reservation of rights letter is one that allows the insured to choose intelligently between accepting the insurer's defense counsel and retaining his own counsel. *Safeco Ins. Co. of Am. v. Liss*, 2005 Mont. Dist. LEXIS 1073, at *25 (Mont. Dist. Ct. 2005) (citing Royal Ins. Co. v. Process Design Assoc., Inc., 582 N.E.2d 1234, 1239 (Ill. App. Ct. 1991)). Under either a nonwaiver agreement or a reservation of rights letter, the insurance company can preserve its option to later disclaim coverage during or after defense of the matter.

Dugoniths, Laurie E., *Duty to Defend*, ABA General Practice, Solo & Small Firm Division, Law Trends and News, Vol. 7, No. 4 (Summer 2011).

Reservation of rights raises a number of issues for the insurer and defense counsel. For the insurer, after reservation of rights, is the right to select counsel retained or has it been forfeited? Even if the insurer retains the right to select counsel, are there events which can trigger an insured's right to independent counsel? For defense counsel defending under a reservation of rights, what information obtained in the course of defense can be passed on to the insurer? For that matter, what does the insurer want passed on?

a. Choice of Counsel

Professional liability policies typically provide that the insurer retains the right to control the defense of a case. This would include the selection of defense counsel.

> Commensurate with the insurer's duty to defend is the insurer's right to control the defense. *Assurance Co. of Am. v. Lucas Waterproofing Co., Inc*., 581 F. Supp. 2d 1201, 1213 (S.D. Fla. 2008); *Monarch Plumbing Co., Inc. v. Ranger Ins. Co.*, No. S-06-1357

> WBS KJM, 2006 U.S. Dist. LEXIS 68850, at *11 (E.D. Cal. Sept. 23, 2006); see also *Cont'l Cas. Co. v. Jacksonville*, 283 Fed. Appx. 686, 689–90 (11th Cir. 2008) (applying Florida law); *Nutmeg Ins. Co. v. Employers Ins. Co. of Wausau*, No. 3:04-cv- 1762-BF (R), 2006 U.S. Dist. LEXIS 7246, at *47 (N.D. Tex. Feb. 24, 2006); *HK Sys., Inc. v. Admiral Ins. Co.*, No. 03-C-0795, 2005 U.S. Dist. LEXIS 39939, at *12 (E.D. Wis. June 24, 2005); *Hartford Cas. Ins. Co. v. A&M Assocs., Ltd.*, 200 F. Supp. 2d 84, 89 (D.R.I. 2002) (applying Massachusetts law). However, the insurer can lose that right when it wrongfully refuses to defend the insured or if the insurer does not accept the insured's reservation of rights. *See, e.g., Int'l Cas. Co*., 283 Fed. Appx. at 689 (applying Florida law); Nutmeg Ins. Co., 2006 U.S. Dist. LEXIS 7246, at *47; HK Sys., Inc., 2005 U.S. Dist. LEXIS 39939, at *12; *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1118 (Alaska 1993); *A&M Assocs.*, 200 F. Supp. 2d at 89.145. The right to control the defense generally entitles selecting and directing defense counsel, determining defense strategy, and, in many instances, deciding when and whether to compromise a claim through settlement. James A. Fischer, *Insurer or Policyholder Control of the Defense and the Duty to Fund Settlements*, 2 Nev. L.J. 1 (2002).

Dugoniths, Laurie E., Duty to Defend, ABA General Practice, Solo & Small Firm Division, Law Trends and News, Vol. 7, No. 4 (Summer 2011).

Various jurisdictions have considered whether an insurer's issuance of a reservation of rights creates a conflict that would require the insurer to relinquish control of the defense to independent counsel. The conflict issue arises when an insurer issues a reservation of rights letter asserting there is no coverage as to all or part of a claim. A majority of the jurisdictions considering this issue have held that just because the insurer has issued a reservation of rights, the insurer is not necessarily in conflict with its insured such that it has to provide the insured with independent counsel. Dugoniths, Laurie E., Duty to Defend, ABA General Practice, Solo & Small Firm Division, Law Trends and News, Vol. 7, No. 4 (Summer 2011) (internal citations omitted).

However, circumstances may arise that trigger an insured's right to have independent counsel, so the determination of whether the insured has a right to independent counsel is always fact dependent, and may change due to circumstances that arise during the course of litigation. As one court has said:

> "If there is a reasonable possibility that the manner in which the insured is defended could affect the outcome of the insurer's coverage dispute, then the conflict may be sufficient to require the insurer to pay for counsel of the insured's choice. Evaluating that risk requires close attention to the details of the underlying litigation. The court must then make a reasonable judgment about whether there is a significant risk that the attorney selected by the insurance company will have the representation of the insureds significantly impaired by the attorney's relationship with the insurer.

Armstrong Cleaners, Inc. v. Erie Ins. Exch., 364 F. Supp. 2d 797 (S.D. Ind. 2005). Examples of issues that may impair the ability of counsel selected by the insurer to properly represent the insured may include the following:

> First, if the insurer knows that it can later assert non-coverage, or if it thinks that the loss which it is defending will not be covered under the policy, it may only go through the motions of defending: it may offer only a token defense … . [I]t may not be motivated to achieve the lowest possible settlement or in other ways treat the interests of the insured as its own. Second, if there are several theories of recovery, at least one of which is not covered under the policy, the insurer might conduct the defense in such a manner as to make the likelihood of a plaintiff's verdict greater under the uninsured theory. Third, the insurer might gain access to confidential or privileged information in the process of the defense which it might later use to its advantage in litigation concerning coverage.

CHI of Alaska, Inc. v. Employers Reinsurance Corp., 844 P.2d 1113, 1116 (Alaska 1993). In general, based on these standards, many courts do just as the Southern District of Indiana said in Armstrong Cleaners – they pay close attention to the details of the underlying litigation and then make a reasonable judgment whether there is a significant risk that the representation of the insured will be significantly impaired by the attorney's relationship with the insurer. If so, the insured is entitled to independent counsel at the insurer's expense. Maniloff, Randy, *Insured Entitled To Independent Counsel Even When Being Defended WITHOUT A Reservation Of Rights (Court Rejects ALI Draft Principle)*, Coverage Opinions, Volume 3, Issue 8 (May 7, 2014)

b. Confidentiality and Communicating With the Insurer

The most common scenario in which a defense attorney faces a potential conflict after a reservation of rights is where he learns of information regarding potential coverage defenses. Ethical opinions in New York provide that a lawyer retained by an insurance company to represent an insured may not, unless the client consents, give the insurance company information the insurer can use to deny coverage to the client. Under the recently enacted New

York Rules of Professional conduct, the requirement of the supreme allegiance to the insured client remains intact. specifically, 22 NYCRR Part 1200, Rule 5.4 (c) states a "lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain confidential information of the client under Rule 1.6." Based on an attorney's ethical obligations, he or she should not report matters that will harm the client by jeopardizing insurance coverage, and the insurer should not require such disclosures as a condition of representing the insured client. 22 NYCRR Part 1200, Rule 2.3 (b). Judd, Jonathon A., *Defending Under A Reservation of Rights: A Potential Minefield of Conflicts,* The Defense Association of New York (Spring 2010). It should be noted that New York is a dual representation state where the attorney is deemed to represent both the insurer and the insured.

In an ethics opinion of the Kentucky State Bar, the issue was addressed as follows:

> The contract of insurance does not, however, define the ethical duties an attorney hired by an Insurer to defend an Insured owes to the client Insured. KRPC 1.4 states that the attorney should keep the client "reasonably informed" and that the attorney should "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Thus, the attorney hired by the Insurer to defend the Insured should, at the beginning of the client-lawyer relationship, explain to the client the nature and requirements of the Insurer and Insured contract. As part of this explanation, the attorney should point out to the client that in order for the Insured to abide by his or her obligations under the insurance contract, that the attorney will be in communication with the Insurer about the defense. Having informed the client of the client's rights and obligations, and assuming that the client consents to the arrangement, including the usual and customary disclosures to the Insurer, the attorney may, throughout the defense have such usual and customary communications with the Insurer. Those communications are consistent with KRPC 1.6(a) as being communications done with actual or implied authorization.
>
> However, an attorney defending an Insured must be ever cautious with regard to any information "relating to the representation" that might be disadvantageous to the client if it were disclosed to the Insurer. As was stated in KBA E-340 (1990):

> Counsel should resist any [Insurer] 'demand' that might put the insured at risk. It is also clear that any intrusion into the attorney/client sanctum should be permitted only with the informed consent of the client.
>
> When such potentially damaging information is revealed to the attorney, the attorney must consult with the client and obtain the client's consent before disclosing the information. If the client directs the attorney to refrain from disclosing, the attorney must follow the instruction of the client as long as KRPC 1.2(d), which forbids assisting the client in a crime or fraud, is not implicated.

Kentucky Bar Association, Ethics Opinion KBA E-410, September 1999. Clearly, information acquired by counsel retained by the insurer that is known to have a negative impact on coverage may not be transmitted to the insurer.

IV. Issues in Resolution

The relationship between insurers and professional insureds is one fraught with peril in the best of times. The time of settlement enhances the potential for even greater differences in interests to be evident. The insured wants to protect the interests he sees as most important while the insurer is most interested in controlling defense cost and protecting the insurer's financial interests.

1. Consent Clauses and Control of Litigation

In most insurance policies consent to settle is retained by the insurer. The right of an insurance company to settle a case goes hand in hand with the duty to defend. However, a provision is often found in professional liability insurance policies that require an insurer to seek an insured's approval prior to settling a claim for a specific amount. If the insured does not approve the recommended figure, the consent to settlement clause states that the insurer will not be liable for any additional monies required to settle the claim or for the defense costs that accrue from the point after the insurer makes the settlement recommendation. This is frequently called a "hammer clause".

2. Counterclaims

Professional liability claims, particularly legal malpractice claims, most frequently arise in the context of an attorney suing his client for fees. Although this is frequently discouraged, attorneys still feel the need to sue clients to recover unpaid fees and these filings almost always result in the filing of a counterclaim for legal malpractice. On the other hand, if the attorney is

sued first and has any fees left unpaid, one would certainly anticipate the attorney would make a counterclaim at that point for his unpaid fees. Either scenario raises an interesting situation at settlement.

Assume that an attorney filed suit to recover $150,000 in fees which he claims are owed to him by the client. This draws a counterclaim from the former client for malpractice. After appropriate discovery, the case proceeds to mediation. At mediation the attorney does not want to give up his claim for attorney fees and the claimant believes he should not have to pay the attorney's fees. At the same time he believes he should recover something for malpractice and the attorney who filed suit for his fees is happy for insurer to pay the former client to insure there is money available to pay his fees. At this point, counsel for the attorney is put in an awkward spot when his attorney client asks him to encourage the insurance company to provide funds to the former client sufficient to pay his fee by way of settlement of the legal malpractice case. This is awkward situation is made even worse when it arises during the context of a mediation as there may well be little time to evaluate the conflict created and the obligations it imposes on counsel including withdrawal and recommending the appointment of independent counsel.

V. Conclusion

Not only can professionals make difficult clients and insureds solely by virtue of who they are, they also bring within a variety of policy and ethical issues that make them difficult insureds and clients as well. Only by careful handling of these cases giving due consideration of all of the issues presented by the client and the insurance policy, and by engaging in a thorough analysis of all the factors associated with litigation and settlement, can one safely emerge from the hothouse is a beautiful bloom.