

PERSPECTIVES

Strategies to Manage Your Law Firm's Professional Liability Exposures

MSP L 03/06 "Practice Management Strategies Part 13: Claims and Claimants"

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Practice Management Strategies Part 13 Claims and Claimants

Multiple Potential Claimants

Be aware that the greater the number of potential claimants that there are on the horizon, the greater the professional liability risks!

Whenever you are representing a group of people who have similar interests, your professional liability exposure, in the event an actual error is made, increases exponentially. The main reason for this is that if there is a claim, it will most likely be brought by the whole group, all of whom will invariably be aligned against you and who will all support each other's testimony. Also, by definition, the group already exists, and the group usually will have the wherewithal to finance and pursue a professional liability claim.



A recent malpractice "horror story" illustrates the point. A lawyer representing a class of several thousand people claiming collective damages in the billions of dollars apparently failed to properly certify the class, resulting in the loss of the underlying action. A trial court malpractice verdict against the law firm for approximately \$200 million was the

result. Other common representations which involve groups who potentially could align against you include Boards of Directors, tenant association members, family members jointly filing a wrongful death claim, multiple beneficiaries under a trust or will, or stockholders.

In such settings, the recommended risk management strategy is to have an acute awareness of the heightened exposure, and accordingly to be extremely careful in making sure that all procedural and other necessary steps are properly taken and thoroughly documented.

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Non-Client Claims

Always clarify precisely which parties you are representing.

At the outset of a representation, it is crucial to identify and document with specificity the parties you are representing, and those you are not. The best place to do this is in the initial engagement letter. If there are multiple parties on the scene and you fail to make this clarification, each party can claim that he/she assumed you, as the lawyer, were looking out for her/his interests.

The classic scenario where these types of “misunderstandings” occur is when there is one lawyer for the transaction. When the transaction goes south financially, all of the parties claim they thought the lawyer was representing their interests, and they also align in testifying against the lawyer. Unfortunately, this leaves the lawyer in a very painful and unhappy situation, not to mention his/her professional liability insurer.

Beware of the possibility of claims against you by non-clients

In the “good old days,” it was next to impossible for a non-client to successfully sue a lawyer for malpractice. In today’s world, approximately 15% of all successful professional liability claims are

brought by parties who clearly were never clients of the lawyer. If your legal work product has a negative impact on a non-client and that impact was legally foreseeable by you, a potential non-client claim may exist.

For example, if you issue an opinion letter to the effect that a certain property has clear title, and it turns out that the title is actually clouded or defective, any foreseeable user of the opinion letter, who is acting in good faith with clean hands, may have legal recourse against you. This could include non-client buyers, sellers, or lenders who reasonably relied, to their legal detriment, on the information in your title opinion letter.

Beneficiaries under a will or trust almost always will have legal recourse against a lawyer who drafted the will or managed the estate assets, even if they were not clients of the lawyer. ✂

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