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ARE YOU COVERED?

Is Buying Legal Malpractice Insurance Always a Good Business Decision?

BY MARK BASSINGTHWAIGHTE, ESQ.

As a risk manager for a legal malpractice insurer, I suspect many of you reading this could venture a good guess as to what my answer to the above question would be for most law firms, regardless of size. But note that the question is asking if it is *a/ways* a good business decision. That's worth thinking about. Before I tell you my answer, however, let me share the reasons I hear that some firms, most often solo and small firms, end up bare.

In my experience, a majority of the time it is a choice, and the rationalizations run the gamut. Some try to justify the decision by declaring that malpractice premiums are beyond affordable. They'll tell me, "just look at what doctors have to pay." Others have decided if they ever get sued, they'll just declare bankruptcy in order to avoid the loss. Then there are those who choose to self-insure, thinking that the premium savings will more than offset any possible loss. I have even had attorneys

tell me they have chosen to protect their assets in other ways. And then there's this one: "Having a malpractice policy simply invites claims. No insurance means no one will ever sue me because there's no deep pocket." I just shake my head over the naivety of that belief, because it simply is not true.

My response to the above rationalizations always starts here. Remember that as a lawyer you are to protect the interests of your clients. Knowing that lawyers and those in their employ can and will make a mistake from time to time, what might the fallout be should a significant

misstep ever occur on one of your client matters?

I invite you to think about the answer as a member of our learned and honorable profession. Clearly if and when a significant misstep occurs, the client will be harmed in some fashion. Now put yourself in the client's shoes, and ask yourself who should be held responsible, particularly if a financial loss is part of the equation? You know darn well what the answer is. After all, if a lawyer representing you on a personal injury matter blew a statute that resulted in a lost opportunity for any kind of recovery, you would expect to be made whole, and you know it. You see, insuring for malpractice isn't about protecting yourself. It is about protecting your clients should something go wrong, and that's the way it's supposed to be.

Next, I will pass along the following information as another thought-provoker. While numbers will vary among the states and over time, approximately 4 to 5 percent of lawyers practicing in the U.S. will face an allegation of malpractice in any given year. I will admit that a significant number of those allegations will resolve without any loss being paid, but I will also suggest this does not mean those claims have no impact. Time and money are going to be in play. Claims can

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easily take six to 24 months to resolve, and defense costs on a claim with any merit at all can break the \$25,000 mark before you know it.

But that's not all. Lawyers who are sued often see their income drop for a period of time, particularly if they're self-insured and forced into devoting precious time and money defending themselves, or because new business has dropped off in light of the situation making it into the local news. Making matters worse, if the claim becomes something of a topic among the local bar and part of the story is that the involved lawyer was bare, it's pretty much a given that good referrals from other lawyers are going to drop off. All of this helps explain why legal malpractice claims for uninsured lawyers actually are a leading cause of lawyer bankruptcy.

Then, if pertinent, I'll address the affordability issue in this way. While I get the term "expensive" is relative to one's financial reality, legal malpractice insurance premiums are nowhere near as expensive as some medical malpractice insurance premiums, nor are they as expensive as defense costs and subsequent loss payments can be in non-frivolous claims. In addition, understand that the initial premium is going to be much lower than what lawyers who have been in practice and insured for a number of years are charged. This difference is because coverage will start from the date a policy is first purchased. In other words, newly insured lawyers have limited exposure, because they don't yet have a substantial amount of covered legal work under their belts. Thus, the odds of a covered claim arising from a newly insured practitioner are going to be much lower than those for a lawyer who has been insured and in practice for 10 years or more. Yes, premiums will rise for a period of years as a newly insured lawyer does more and more work. But all things being equal, it should stabilize about six years in and will still be affordable for most lawyers.

Finally, if I need to focus on the financial risks and realities in order to

address those who buy into the de facto self-insure approach, I will ask this question: are you religiously setting aside whatever you would have spent on premiums to deal with an allegation of malpractice? In terms of an answer, all I can say is that I have never come across a situation where that was happening. And truth be told, unless that pool is well into the six digits, it is not going to be enough to put on a good defense, let alone cover a sizeable loss in any non-frivolous claim.

Having now shared how I try to address what I often hear as the reasons for going bare, I feel I have already presented a pretty good case that the purchase of a malpractice policy is a good business decision. But is it always? I am guessing I need to go a bit further in light of the word "always." Hopefully the following list of a few additional benefits that come with putting coverage in place with the right insurer will help me get there.

- **It is a cost-effective way to protect your assets.** Think if you were to try to self-insure your entire exposure. Most firms, regardless of size, will never be able to build a pool of funds that would come close to the amount of coverage that a smaller percentage of those same dollars could buy.
- **It can help with client acquisition.** When asked if you are covered, you certainly want to be able to answer in the affirmative. And know this, certain potential clients will not hire a firm unless the firm is able to document that they have an acceptable level of malpractice coverage in place.
- **Coverage includes ready access to professionals who handle malpractice claims every day,** particularly if you purchase coverage from an insurer who staffs the claims department with licensed attorneys, as opposed

to claims adjusters. Besides, the idiom "Doctors make the worst patients" holds true for lawyers as well. You really don't want to be in charge of trying to handle a malpractice claim on your own.

- **In some of the states that require lawyers to disclose whether they are insured, other lawyers can and will check to see if a lawyer is insured before they refer a client or co-counsel.** If the answer is no, that's a lost business opportunity an uninsured lawyer will never know about.
- **Even good lawyers and the competent staff in their employ make mistakes.** It happens. And when it does, well, all I can say is I've never been told the peace of mind the lawyer had knowing coverage was in place wasn't worth the expense. In fact, I often hear quite the opposite.

Taken together, I hope it now comes as no surprise that, in my opinion, the purchase of a malpractice policy is always a good business decision as long as the insurer you ultimately purchase a policy from is financially stable and does not have a history of going in and out of various geographic markets. Maybe it is just me, but I always want to work with an insurance company I can trust will have my back for the long haul. That's how I see it anyway. **NL**



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