Published November 2013 in *The Hennepin Lawyer*, membership publication of the Hennepin County Bar Association. Used with permission.
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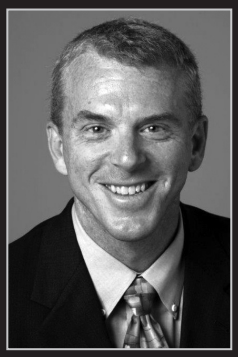
Issues in Minnesota Regarding Insurance Coverage for Attorneys

As lawyers, we all recognize that "to err is human." But many attorneys might be forgiven if they were to regard insurance as something other than divine. Yet as human beings, lawyers do make mistakes in the course of their practice. All attorneys should—and most do—pay premiums to insurance companies to insure them from the consequences of their mistakes or being sued in a misguided lawsuit. Hopefully, readers of this article will never need to call on such insurance. But in the all-too-likely event of a claim, understanding the basic principles of malpractice insurance coverage may help lawyers get the most out of their insurance, receive protection from at least some of the consequences of their mistakes, and lessen the chances of a dispute with their insurer.



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This article does not address broader issues in insurance coverage law, such as the distinction between the duties to defend and to indemnify, or the application of various rules of construction of insurance policies. These issues may nevertheless be relevant to some of the discussion, below; therefore, a reader who is not familiar with these concepts is encouraged to consult other sources and authorities.

Basic Elements of Attorney Professional Liability Insurance

Of course, insurance policies vary from company to company, and the facts of cases can vary widely. In every case, the specific language of the policy should be consulted in light of the specific facts. But generally speaking, policies issued to attorneys to protect them from professional liability have three basic components that must be established before the policy will apply:

- The attorney must be alleged to have breached a duty in the course of providing "professional services;"
- The breach must result in covered "damages;" and
- The insurer must be notified of the claim within the policy period.

A. Professional Services

Malpractice policies typically apply only to claims arising out of an attorney's professional work on behalf of a client. Thus, to claim the benefit of coverage under an attorney malpractice policy, it must be the case, first, that the claim arose out of the provision of (or failure to provide) professional services.

The term "professional services" is often broadly construed. Minnesota courts have stated that a

> professional service is one calling for specialized skill and knowledge in an occupation or vocation. The skill required to perform a professional service is predominantly intellectual or mental rather than physical.[1]

This definition has not been extensively tested in Minnesota cases involving "professional services" performed by attorneys. It has more often been applied in cases regarding other professions and occupations. The Minnesota Court of Appeals has held that making allegedly defamatory statements constituted professional services, when the statements at issue were made pursuant to a professional analysis.[2] Similarly, the Court

of Appeals has held that the inspection of a grain silo, and deciding whether to recommend repairs or maintenance, constituted "professional services."[3]

However, the broad construction often given to the term "professional services" has its limits. The Minnesota Court of Appeals has held that a lawsuit by a former agent against a life insurance company, which alleged wrongful termination of the agent's contract, did not fall within the scope of a professional-liability policy applicable to negligent acts, errors or omissions committed in the capacity of a life insurance underwriter.[4] The U.S. District Court for the District of Minnesota has held that a professional auctioneer's policy did not apply to a claim for intentional interference with business advantage in connection with claims arising out of the failed purchase of commercial real estate.[5]

Returning to the specific context of an attorney's professional services, it has been said that the attorney-client relationship is the easiest relationship in the world to form: All an attorney has to do to create such a relationship is say something about the law on which a reasonable person would rely.[6] Once the relationship is created, the lawyer has a variety of obligations. Under the Rules of Professional Conduct and other rules and regulations, attorneys have a wide spectrum of duties to clients, as well as third parties, much of which could be regarded as "professional services." Thus, while a lawyer-malpractice policy applies only to acts or omissions in providing "professional services," the wide scope of these services has been argued to affect the scope of coverage under a malpractice policy. In an older case, the Minnesota Court of Appeals held that the policy applied to a claim by a law firm against the firm's former partner to recover its share of fees which the former partner allegedly should have charged a client of the firm.[7] The policy's grant of coverage applied to any claim arising out of any act or omission of the insured in rendering or failing to render professional services for others in the insured's capacity as a lawyer.

The Court rejected an argument that the claim was merely a dispute over fees. Instead, the court stated, "[t]he dispute arose not over allocation of fees among partners... but over the amount Lyons had charged for his services in representing his client." Of course, the manner in which a lawyer bills the client is governed the Rules of Professional Conduct. Thus, the lawyer's professional obligations regarding fees charged to the client affected the court's coverage determination.

B. Damages

In some (but not necessarily all) policies, to establish coverage, it must also be the case that the claim arising out of professional services seeks covered damages. Nearly thirty years ago, the Minnesota Supreme Court held that a forfeiture of attorneys' fees arising from a breach of fiduciary duty is "monetary damages" within the meaning of the policy.[8] The court specifically noted that it was not presented with an exclusion precluding coverage for such "return of fees." No Minnesota case holds that such an exclusion would be void. Interestingly, the Court held, further, that it was against public policy to provide coverage to the individual attorney for such forfeiture; on the other hand, the court held that the law firm was entitled to coverage for the fee-forfeiture claim.

C. Claims-made Coverage

The third basic element of coverage in most attorney-malpractice policies turns on when the claim was made. Attorneys' insurance usually is provided on a "claims-made basis." That is, the policy in effect at the time the claim is made is the insurance that applies to that claim.[9] The corollary to this is that the attorney-insured must report the claim to the insurer within that same policy period (or an agreed extended reporting period, if applicable). Attorneys (and others) who are insured under "claims-made" insurance need to take care, then, that they report the claim to the insurer in the policy period in which the claim is made.

From the insurer's perspective, there are at least two rationales for this requirement. First, insurers want to know, from an underwriting perspective, what claims exist, and do not want to provide coverage for known problems. Second, many insurers

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believe—on the basis of good data—that early reporting of claims lessens the severity of the damages and may provide opportunities to engage in "claim repair."

Minnesota courts, both state and federal, have generally strictly enforced the claim-reporting requirement in claims-made policies. These cases have held that reporting the claim within the policy period is a condition of coverage. For instance, the U.S. District Court for Minnesota has stated that to establish coverage under a "claims-made policy," the claim must be made during the policy period and the policyholder must provide notice.[10] If the insured does not give notice within a contractually required time period, there is simply no coverage under the policy.[11] In a similar case, the Minnesota Court of Appeals held that before the inception date of the claims-made policy, the policyholder had knowledge of facts that could reasonably be expected to lead to a claim.[12] Thus, the court held that coverage did not apply.

Moreover, and again depending upon the exact language of the policy, an attorney who knows of circumstances that may lead to a claim but nevertheless fails to report the situation to the insurer may jeopardize the availability of coverage.[13] In a significant case, the U.S. District Court for Minnesota held that a lawyer's knowledge of issues regarding the drafting of municipal-bond documents was sufficient to put the lawyers on notice of a potential claim.[14] The firm had drafted the documents and then represented the issuing authority in litigation regarding the bonds. The court found the issuing authority liable on the bonds and made plainly-stated findings that the attorney made mistakes in drafting the bond documents. In the subsequent coverage litigation, the court stated that it "defie[d] belief" that the firm would not have foreseen that the error identified by the trial court might be the basis for a claim against the firm, especially when the trial court specifically criticized the attorney for improperly relying upon the work of a Texas law firm without adequately considering the effect of the language in the document. The court stated, "This was not a circumstance where a latent defect in draftsmanship, of uncertain legal effect, laid in wait of discovery." The firm reported one of the possible claims arising out of the documents to its insurer, but omitted notice of a second, much more serious error. The failure to report this error resulted in the denial of coverage.

However, there is case law that knowledge of one claim, or set of claims, would not necessarily support a finding that the policyholder knew of additional claims.[15] In a case involving a pastoral professional liability policy, the court held that the policyholder church had no knowledge of specific potential additional lawsuits arising from a pastor's sexual molestation of parishioners at the time it purchased the policy at issue, even though at when it purchased the policy it had knowledge of other claimants who had already asserted a right to recovery of damages. This case suggests that the notice of the unreported claim has to be reasonably specific in order to void coverage.

As to the content of the notice, Minnesota courts have been less strict. Assuming that notice was provided in a timely fashion and contained sufficient information to notify the insurer of the substance of the claim, it appears that Minnesota courts will find that the notice was sufficient even if the notice does not literally comply with all the policy provisions regarding the content of the notice.[16] However, the notice must contain details regarding the particular claim.[17]

Common Exclusions in Attorney Professional Liability Insurance Policies

Even if a claim arises out of professional services and is reported during the policy period, policy exclusions can still apply to preclude coverage. Some of these exclusions mirror the basic elements of coverage. For instance, most policies contain exclusions that specifically preclude coverage if a policyholder has prior knowledge of a claim. Other common exclusions include claims arising out of intentional, dishonest, criminal or fraudulent acts, claims arising out of investment advice or CPA services, claims between insureds, claims for return of fees paid, and claims arising out of participating in a business enterprise that does not fall within the definition of "professional services." Once again, the specific language of any given policy should be carefully consulted.

Practical Considerations

These policy elements suggest several practical considerations. First and foremost, seek to work with a competent insurance broker who has experience in professional-liability coverage. Differences in policy language, responsiveness, and pricing do exist among insurers. Ask the broker to provide several options, discuss those options with your broker, and make sure you understand the coverage you are purchasing. These options include:

- *Limits of coverage*: Make sure you have enough coverage. Being a defendant in a claim that exceeds your liability coverage limits can be a distinctly unpleasant and risky experience, especially if liability is disputed and the insurer is reluctant to settle.
- *Deductible*: In many professional-liability policies, the expense of defending the claim—primarily, the attorneys' fees of your defense counsel—erodes the deductible. If the limits are small and the case is expensive to defend, you could find yourself in a situation where your coverage is exhausted.
- *Defense Counsel*: Most insurers have "panel counsel" to whom they will assign your claim, if you are sued. Often, insurers will provide policyholders with more than one option. Ask to see the list of panel counsel to make sure you have a degree of comfort with the names on the insurer's list. And in some policies, the insurer will allow the insured to choose counsel.
- *Disciplinary Proceedings:* Make sure the policy provides coverage for attorneys' fees incurred in responding to ethical complaints.
- *Subpoenas:* Also check to see whether the policy provides coverage for attorneys' fees and expenses incurred in responding to subpoenas.
- *Exclusions:* On rare occasions, it is

possible to bargain with insurers over particular exclusions.

- *Extended Reporting/Retroactive Dates*: If you are contemplating significant changes, such as adding partners, changing firms, or retirement, avoid gaps in coverage by discussing retroactive dates and/or extended reporting periods.

Above all, err on the side of reporting any and all possible claims to your insurer.

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[1] Ministers Life v. St. Paul Fire and Marine Ins. Co., 483 N.W.2d 88, 91 (Minn. Ct. App. 1992) (citing Marx v. Hartford Acc. & Indemn. Co., 183 Neb. 12, 157 N.W.2d 870 (1968)). In this case, the court held that the professional-services exclusion in a general liability policy applied to preclude coverage. But it would appear that the rationale would apply to determining whether services were professional in nature.

[2] *Id.*

[3] Western Nat'l Mutual Ins. Co. v. Structural Restoration, Inc., 2010 WL 1753336 (Minn. Ct. App. 2010), *rev. denied* (Minn. July 20, 2010). As in *Ministers Life*, the court was applying a professional-services exclusion in a general liability policy.

[4] Richards v. Fireman's Fund Ins. Co., 417 N.W.2d 663 (Minn. Ct. App. 1988), *rev. denied* (Minn. Mar. 23, 1988).

[5] St. Paul Fire & Marine Ins. Co. v. Nat'l Real Estate Clearinghouse, Inc., 957 F. Supp. 187, 188 (D. Minn. 1997).

[6] *See* Togstad v. Otto, Miller, Vesely & Keefe, 291 N.W.2d 686, 693 (Minn. 1980) (attorney-client relationship created when attorney made brief comments about merits of case).

[7] Lyons v. American Home Assur. Co., 354 N.W.2d 892, 894-95 (Minn. Ct. App. 1984), *rev. denied* (Minn. Jan. 9, 1985) (citing Cadwallader v. New Amsterdam Cas. Co., 396 Pa. 582, 152 A.2d 484 (1959)). The result in this case might be affected by exclusions often found in more contemporary policies which preclude coverage for suits between insureds.

[8] Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209, 212-13 (Minn. 1984).

[9] In "occurrence" policies, by contrast, such as homeowners' or auto liability insurance, the policy that applies usually is the policy that was in effect at the time the injury or damages occurred.

[10] F.D.I.C. v. St. Paul Fire & Marine Ins. Co., 993 F.2d 155 (8th Cir. 1993); *see also N.K.K. by* Knudson v. St. Paul Fire & Marine Ins. Co., 555 N.W.2d 21, 25 (Minn. Ct. App. 1996), *rev. denied* (Minn. Dec. 23, 1996) (for coverage to attach, claims-made policy requires that the insurer must be given notice of the claim during the policy period).

[11] *Id. See also* Esmailzadeh v. Johnson and Speakman, 869 F.2d 422, 424-25 (8th Cir. 1989), in which the court noted that claims-made policies only apply to claims "first made and reported" during the policy period, and that excusing a delay in providing notice within the policy period would alter a basic term of the contract. Thus, again, coverage did not apply.

[12] Buller v. Minnesota Lawyers Mut. Ins. Co., 648 N.W.2d 704, 711 (Minn. Ct. App. 2002).

[13] This article does not address the nature and scope of a lawyer's obligation to consult with the client regarding the lawyer's own potential malpractice, but under some circumstances such a duty may exist. *See* Minnesota Lawyers Professional Responsibility Board Opinion No. 21 (Oct. 2, 2009).

[14] National Union Ins. Co. v. Holmes & Graven, 23 F. Supp.2d 1057 (D. Minn. 1998).

[15] Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co., 567 N.W.2d 71, 78-79 (Minn. Ct. App. 1997), *rev. denied* (Minn. Oct. 1, 1997).

[16] Owatonna Clinic-Mayo Health Sys. v. The Med. Protective Co. of Fort Wayne, Ind., 2009 WL 2215002 (D. Minn. 2009) (court determined that the Minnesota Supreme Court would adopt "a substantial compliance standard to the notice content requirement in a claims-made insurance policy").

[17] Northwest Airlines, Inc. v. Federal Ins. Co., 1993 WL 729630 (D. Minn. 1993) (notice of a similar claim within the policy period does not constitute adequate notice).