MASSACHUSETTS
LAWYERS WEEKLY
November 24, 2003 www.masslawyersweekly.com

Reporting Ethical Claims To Liability Carriers

BY ERIN K. HIGGINS

FOCUS ON Professional Responsibility

An application for professional liability coverage typically requires the applicant to identify not only past or pending claims, but also circumstances known to the lawyer that could give rise to a claim.

One of the most difficult issues facing any lawyer is the determination of whether a client grievance, or a potentially negligent act or omission, must be disclosed in response to these inquiries.

Unfortunately, the reported decisions in Massachusetts provide little guidance. Consider the following two cases:

- A lawyer who had represented a client in certain securities transactions received two letters from a law firm advising the lawyer that he was a potential target of legal action. The lawyer subsequently submitted an application for professional liability coverage, indicating that he had no "reasonable basis to foresee" that any claim would be made against him. Seventeen days after the new policy went into effect, the lawyer received a further letter indicating that a malpractice claim was being made against him. The Appeals Court affirmed the entry of summary judgment on the insurer's claim for rescission of the policy. *TIG Ins. Co. v. Blacker*, 54 Mass. App. Ct. 683, 688 (2002).

- In another case, a dissatisfied client had registered a complaint against a lawyer with the Board of Bar Overseers. The lawyer failed to disclose the BBO complaint on an application for professional liability coverage. The Appeals Court affirmed the denial of the insurer's summary judgment motion seeking rescission of the policy, holding that the lawyer reasonably had believed that the BBO matter would be resolved without any claim being brought against him. *Chicago Ins. Co. v. Lappin*, 58 Mass. App. Ct. 769, 778-79 (2003).

The difficulties extend beyond the question of what needs to be disclosed in an application for coverage. A lawyer also must consider whether to report a grievance to an existing carrier, where reporting the complaint could ensure coverage but also might unnecessarily drive up future premiums.

Professional liability coverage usually is provided on a "claims-made" basis. A claims-made policy is intended to cover all claims made within a specified policy period, regardless of the date(s) on which the events occurred giving rise to the claims.

This is in contrast to an occurrence-based policy, which provides coverage for claims that arise out of acts or omissions that occurred during the policy period, regardless of when the claim actually is made.

Claims-made policies typically cover only claims made *and* reported within the applicable policy period. Thus, if a claim is made against the insured in one policy period, but not reported until a later policy period, the insured may not have coverage under *either* policy.

There are no reported cases in Massachusetts addressing this issue, and the caselaw in other jurisdictions provides little guidance. A U.S. District Court judge for the District of Massachusetts did address the issue in an unreported 1997 decision.

In that case, an attorney defending a client in a lawsuit arising out of a transaction in which the attorney had been involved was asked during his own deposition whether he had malpractice insurance, and whether he had put his own carrier on notice.

Although the lawyer considered the deposition questions to be nothing more than an aggressive litigation tactic, the federal judge found that the questions were sufficient to put the attorney on notice of a potential claim, barring coverage under the policy in effect at the time a third-party complaint was filed against the attorney.

Because decisions like those summarized above inherently are fact-based, the courts have struggled to articulate standards by which to judge whether a lawyer's knowledge regarding an unreported claim should result in a denial of coverage. This type of case generally implicates one or more of the following:

- *Questions in the application for coverage.* The usual form of the question is as follows: "After inquiry, does any lawyer know of any act, error or omission that could result in a professional liability claim, or have a reasonable basis to foresee that a claim would be made?"

- *Coverage provisions in the policy.* A typical provision states that coverage is provided on a claims-made basis, provided that "prior to the effective date of the policy, the [insured attorney] had no reasonable basis to believe that the insured had breached a professional duty, or to foresee that a claim would be made . . ."; or

- *Exclusions in the policy.* A typical exclusion precludes coverage for any claim if the insured, prior to the effective date, "knew or could have reasonably foreseen that such act, error, omission or injury might be expected to be the basis of a claim."

Erin K. Higgins, a trial partner at Conn, Kavanaugh, Rosenthal, Peisch & Ford in Boston, concentrates her practice in professional liability defense and commercial litigation. She is a co-chair of the Boston Bar Association Professional Liability Committee.

In interpreting these or similar provisions, a few jurisdictions appear to have adopted a subjective standard, focusing the inquiry on whether the insured attorney knew or believed that there had been a breach of duty that was likely to give rise to a claim. See *Estate of Logan v. Northwestern Nat'l Cas. Co.*, 424 N.W.2d 179 (Wis. 1988); *Jobe v. International Ins. Co.*, 933 F. Supp. 844 (D. Ariz. 1995).

Other jurisdictions have applied a more objective analysis, taking into account whether a "reasonable attorney" would have foreseen a claim. *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302, 306 (3rd Cir. 2001); *National Union Ins. Co. of Pittsburgh, P.A. v. Holmes & Graven*, 23 F. Supp. 2d 1057, 1068 (D. Minn. 1998); *Mt. Airy Ins. Co. v. Thomas*, 954 F. Supp. 1073, 1080 (D. Pa. 1997); *Wittner, Poger, Rosenblum & Spewak, P.C. v. Bar Plan Mut. Ins. Co.*, 969 S.W.2d 749, 754 (Miss. 1998); *Putney School, Inc. v. Schaaf*, 599 A.2d 322, 329 (Vt. 1991); *International Ins. Co. v. Peabody Int'l Corp.*, 747 F. Supp. 477 (N.D. Ill. 1990).

In *Lappin* and *Blacker*, the Appeals Court has described its analysis as an "objective-subjective" approach, focusing on what a reasonable lawyer would have foreseen, given the insured attorney's actual knowledge at the pertinent time. *Lappin*, 58 Mass. App. Ct. at 778-79; *Blacker*, 54 Mass. App. Ct. at 688.

In *Lappin*, however, the Appeals Court left open the possibility that an attorney, once put on "inquiry notice" of a possible problem, might thereafter be charged with "actual" knowledge of any matters that a reasonably diligent investigation could have uncovered. *Lappin*, 58 Mass. App. Ct. at 779.

Thus, the "objective-subjective" approach, at least as articulated in *Lappin*, may not be substantially different than the pure "objective" approach adopted in certain other jurisdictions.

Although the Supreme Judicial Court has never had occasion to rule on this issue, it likely would adopt the standard articulated by the Appeals Court, as it has held in other insurance-related contexts that a determination of "reasonableness" calls for application of an objective standard. See *Demeo v. State Farm Mut. Auto. Ins. Co.*, 38 Mass. App. Ct. 955 (1995); *Heller v. Silverbranch Constr. Corp.*, 376 Mass. 621 (1978).

Regardless of the standard applied, each of the cases cited above easily can be distinguished from all of the other cases, as no one legal-malpractice case is ever exactly like any other. It is therefore difficult to formulate any definitive guidelines to be used in determining whether a client grievance, or a potentially negligent act or omission, should or must be disclosed to a new or existing carrier.

Common sense suggests, however, that every law firm or association of lawyers should take the following steps:

- Charge a particular attorney with the task of preparing the firm's applications or renewal applications each year. Prior to sending in any application, that attorney should circulate a memorandum to all attorneys in the firm that asks for updated information regarding any past reported claims, and for information regarding any acts or omissions that potentially could give rise to a claim. This memorandum should provide a general summary of the requirements of a claims-made policy, and should advise all attorneys of the consequences of failing to report a grievance, act, or omission that later turns into a claim;
- This same attorney also should be designated as the "go-to" attorney for anyone who has a question as to whether a particular grievance, act or omission should be reported to an existing carrier;
- Emphasize to the firm's attorneys the importance of promptly reporting to a client any act or omission that potentially could prejudice that client's rights. Mistakes happen, and while it is always tempting to believe that one will be able to rectify a mistake before actual prejudice results, an attempt to conceal a mistake from a client may be viewed by a carrier, and ultimately by a factfinder, as evidence that an attorney subjectively believed a serious mistake had been made. Further, failure to report such an act or omission to a client could lead to disciplinary action. See Mass. Rules Prof. Conduct 1.4(a) and 7.1.

Moreover, while there is considerable "gray area" in terms of the types of client complaints that must be reported, a lawyer should not delay in reporting any type of communication that contains a threat of litigation, express or implied, even if the communication, because there is no demand for money or services, would not otherwise fall within the standard policy definition of a claim.

Further, to the extent a lawyer's act or omission has impacted negatively on the client's ability to bring or maintain a suit (e.g., failure to institute an action within the statute of limitations, dismissal of a lawsuit for failure to prosecute, failure to take a timely appeal), that act or omission must be reported promptly to the lawyer's existing carrier, and disclosed on any applications for future coverage.

Finally, it is important to remember that "[s]tatements made in an application for insurance are in the nature of continuing representations." *Lappin*, 58 Mass. App. Ct. at 780 (quoting *Ayers v. Massachusetts Blue Cross, Inc.*, 4 Mass. App. Ct. 530, 536 (1976)). Thus, a lawyer should advise a carrier promptly if new facts become known between the date an application is submitted and the date on which the policy becomes operative.

MLW

It is difficult to formulate any definitive guidelines to be used in determining whether a client grievance, or a potentially negligent act or omission, should or must be disclosed to a new or existing carrier.