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Staying Covered:
The PLF & Risk Management

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Since it was created in the late 1970s, the Professional Liability Fund has been a cornerstone of law firm risk management in Oregon. Given the PLF's role, two central elements of risk management for all Oregon firms are to ensure that firm members understand the scope of coverage provided and to meet any necessary predicates to coverage. In this column, we'll look at both aspects of firm risk management.

Scope of Coverage

Most lawyers know that the PLF provides base coverage of $300,000 per claim. What some either don't realize or forget is that the $300,000 total is typically the coverage limit (assuming no excess coverage) regardless of the number of firm lawyers who are involved in the same case or transaction gone sour. In other words, if a partner and an associate are working on a case in which they blow the statute of limitations, there is one $300,000 limit—not two. The PLF Plan, which is available on the PLF web site at www.osbplf.org, makes this plain through its broad definition of "same or related claims":

> "[T]wo or more CLAIMS that are based on or arise out of facts, practices, circumstances, situations, transactions, occurrences, COVERED ACTIVITIES, damages, liability, or the relationships of the people or entities involved (including clients, claimants, attorneys, and/or advisors) that are logically or causally connected or linked or share a common bond or nexus." (2011 Plan at 4.)

The Court of Appeals in *Oregon State Bar Professional Liability Fund v. Benfit*, 225 Or App 409, 201 P3d 936 (2009), found that this provision is unambiguous and applied it to two lawyers from different firms who were working on the same matter. The comments to the PLF Plan contain several examples of similar scenarios.

The significance for firm risk management is twofold. First, firms need to carefully consider whether the basic coverage is adequate for their particular practice areas. Second, firm lawyers need to understand how the limit works so they will be sensitive to the collective stake all firm members have in risk management.

Predicates to Coverage

We know that if we have an "event" that may lead to a claim we should contact the PLF. What lawyers sometimes forget, however, is that there is a significant "event" that requires PLF notification even *before* it happens: a business transaction with a client. Business deals with clients are always dicey because they potentially expose lawyers to both regulatory discipline and civil damage claims. Examples include co-investing with a client in a real estate transaction in which the lawyer is providing legal advice or taking stock in lieu of fees with a high tech start-up. RPC 1.8(a) permits business transactions with clients but puts a very high bar on the required advance disclosure. Under RPC 1.8(a), the disclosure must include a recommendation to seek independent counsel and the client's informed consent must be in writing and signed by the client. The comments to the PLF Plan put it aptly:

> "Because of the obvious conflict of interest and the high duty placed on attorneys . . . the attorney is nearly always at risk of being liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure, which includes a sufficient explanation to the client of the potential adverse impact of the differing interests of the parties to make the client's consent meaningful." (2011 Plan at 16.)

In light of these considerations, the PLF Plan generally excludes business transactions with clients from coverage unless the lawyer: (a) makes the predicate advance disclosure to the client; and (b) provides the PLF with a copy of the disclosure within 10 days of its execution. The PLF Plan includes a recommended disclosure form that, in turn, incorporates a paper by the OSB's Chief Disciplinary Counsel called "Business Deals Can Cause Problems." The comments to the PLF Plan note that a lawyer is not required to use its disclosure form, but that option comes at a potentially risky price: "YOU are free to use YOUR own form in lieu of the PLF's form, but if YOU do so YOU proceed at YOUR own risk, i.e., if YOUR disclosure is less effective than the PLF's disclosure form, the exclusion will apply." (2011 Plan at 16.) If providing the executed disclosure to the PLF would violate the confidentiality rule (RPC 1.6), then the lawyer must in the alternative (and within the same 10-day period) send the PLF a letter certifying that the lawyer has obtained client consent following disclosure meeting the requisites of RPC 1.8(a) and the PLF Plan. Given the risk of lawyer-client business transactions, lawyers who proceed nonetheless need to ensure that they meet both the requisites of RPC 1.8(a) and the PLF Plan.

ABOUT THE AUTHOR

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