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What Malpractice Insurance Renewal Questionnaires Teach About Law Firm Risk Management

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An odd side-effect of the primary layer of PLF coverage being mandatory in Oregon is that there is no annual renewal questionnaire. By contrast, Oregon firms that have excess coverage through either the PLF or a private carrier ordinarily complete an annual renewal questionnaire—often around this time of the year. Annual renewal questionnaires vary by carrier. Unsurprisingly, they ask about potential claims. More fundamentally, however, they also ask about a firm's practice areas and practice management systems. In this column, we'll focus on these latter two for what they tell us about law firm risk management. Put simply, if your carrier cares, you should, too.

Practice Areas

Renewal questionnaires typically ask firms to describe—often in percentage terms—their practice areas. The questionnaires then ordinarily probe specific areas more closely. These more detailed questions usually address practice areas that generate large dollar claims. Two staples in this regard are securities and intellectual property. According to PLF's annual report series, for example, securities and intellectual property are among the top practice areas in Oregon measured by the "severity" of claims.

The simple fact that a practice is relatively high-risk is not a reason in and of itself to avoid including that in a firm's strategic portfolio. Having a high-risk practice, however, counsels three fundamental risk management considerations.

First, the firm should have sufficient expertise to anticipate and guard against commonly recurring risks in the practice involved. Malpractice statistics nationally suggest that "dabblers"—those who dabble outside their primary areas of expertise—are more likely to miss critical substantive or procedural elements in highly technical areas. Significant expertise won't necessarily eliminate all errors, but it should lower the risks associated with the most common for a particular area because reasonable safeguards for known risks can be woven into the practice.

Second, the firm should have adequate depth on its "bench" to provide meaningful internal supervision. If only one lawyer at the firm has expertise in a high-risk area, it can be difficult to provide coverage if the lawyer is not available for reasons ranging from illness to being in trial elsewhere. More subtly, relying on only one lawyer in a high-risk area can mean that there is no truly informed internal peer review.

Third, the firm needs to balance the economic risk of the practice area concerned with enough insurance coverage that acknowledges the risk. This

analytical exercise can also foster a useful conversation within the firm on whether the economic benefits of a high-risk area justify the costs involved.

Practice Management Systems

Renewal questionnaires typically ask about three practice management systems: conflicts checking; engagement agreements; and calendaring. With each, the PLF has knowledgeable practice management advisors available to assist in tailoring commercial products to a particular firm's size and practice.

The Oregon Supreme Court in *In re Knappenberger*, 338 Or 341, 355, 108 P3d 1161 (2005), noted the regulatory obligation for lawyers to run conflict checks before taking on new matters. Conflict systems—as long as they are used consistently and adequate information is provided—should lower both the risk of discipline and disqualification. Identifying and addressing conflicts appropriately can also lower civil damage risk from claims for breach of the fiduciary duty of loyalty that parallels our regulatory obligations. Although systems vary by firm size and practice, conflict management at its heart records and analyzes the names and relationships of clients, opponents and related persons or entities.

Engagement agreements, in turn, are a central tool to confirm precisely who the firm is—and is not—representing. Defining the client can be important in

many situations. A commonly recurring scenario, however, involves representing an affiliate of a larger "corporate family." In *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (WD Wash Apr 22, 2016) (unpublished), for example, a law firm was disqualified in a major insurance coverage case for a long-time client in Seattle because its Portland office was already representing an affiliate of the carrier on the other side. When the Portland office opened the earlier matter, it did not use an engagement agreement narrowly limiting the client to the affiliate involved. The court in Seattle specifically called-out the lack of an engagement agreement in later finding that the firm had implicitly taken on the carrier's entire corporate family by representing the affiliate and disqualified the firm for an unwaived conflict. Engagement agreements also vary by firm size and practice, but they should generally define and limit the specific client represented, outline the scope of the representation and include the financial terms involved.

Calendaring is a deceptively simple task that can have devastating consequences if a key date—such as a limitation period or an appeal deadline—is either miscalculated on the front end or missed on the back end. The PLF annual report series also lists the top practice areas by frequency of claims. They include deadline-driven areas such as civil litigation, bankruptcy and family

law. As with the other systems noted, calendaring mechanisms vary by firm size and practice. Generally, however, the system chosen should both enter deadlines routinely and monitor them for compliance for the entire team handling the matter involved. To increase reliability, both entry and compliance should ideally be cross-checked by more than one person.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.