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THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

FAILURE TO COMPLY WITH A MALPRACTICE INSURANCE POLICY "CLAIMS MADE" REPORTING REQUIREMENT COULD COST MICHIGAN LAWYER $770,000

In 1998 Kathleen King O'Brien, a trusts and estates lawyer, was retained to establish a family trust for the benefit of Silverio and Anna Vitellos' children. O'Brien was named as independent trustee responsible for managing the trust's only asset of a $1,000,000 Hartford life insurance policy. The Vitellos were to pay the annual premium of $25,000.

When Silverio died Anna became unable to pay the annual premium. In July 2008, after several accommodations by Hartford to keep the policy current, Hartford gave O'Brien notice that the policy would lapse unless the wife could triple premium payments. A second notice was sent in November 2008.

O'Brien failed to inform Anna or the children of the pending lapse or take any other action regarding the notices. This was a violation of the trust agreement terms requiring O'Brien to promptly notify the wife and children in writing of the amount necessary to pay the balance owed the insurance company to keep the policy from lapsing.

In May 2009 Anna moved to remove O'Brien as trustee alleging that O'Brien had failed to provide her a copy of the trust agreement or advise her with sufficient information to prevent a lapse of the policy. O'Brien resigned later that month and a new lawyer was appointed trustee.

In June 2010 O'Brien applied to renew her malpractice insurance coverage. In the application O'Brien answered "no" to the question whether she was "aware of any act, error or omission that could result in a professional liability claim being made." The policy was renewed for the period September 3, 2010 until an end date of September 3, 2011, and with a retroactive date of September 3, 1994.

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RISK MANAGING SOCIAL MEDIA CRITICISM OF LAWYERS

The problem for lawyers receiving vindictive and nasty reviews on Internet sites such as Lawyer Ratingz.com, Yelp.com, and RipoffReport is not new. What is new is the enormous increase in these reviews that once put on the Internet can pop up every time a potential client enters a lawyer's name in a search request. Since the Internet is now the most used method of finding a lawyer, it is imperative that Kentucky lawyers be well versed on the ethics issues when deciding whether to reply to criticism on the Internet or to bring a defamation suit.

This much is known about responding to online criticism:

- Lawyers may respond to criticism on the Internet, but must avoid revealing confidential information in violation of Kentucky Rule of Professional Conduct SCR 3.130 (1.6) Confidentiality of Information.

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FAILURE TO COMPLY

ALL LAWYERS' MALPRACTICE POLICIES INCLUDE THE REQUIREMENT TO GIVE THE INSURER NOTICE OF CLAIMS AND TO COOPERATE. THIS CONTRACTUAL REQUIREMENT IN NO WAY OVERRIDES THE PROFESSIONAL RESPONSIBILITY DUTIES OWED THE CLIENT.

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In May 2011 O'Brien was sued for malpractice by the beneficiaries of the trust. O'Brien notified the Hartford of the claim. Hartford denied coverage "… after concluding that, as of the effective date of her insurance policy (September 3, 2010), O'Brien could have foreseen (and did not disclose on her application form) that she would be subject to a malpractice claim for her performance as independent trustee of the Vitello trust."

In a state probate court action the judge ruled that the malpractice claim was covered by the policy and awarded the plaintiffs $770,065.42. The plaintiffs attempted to collect the judgment from Hartford by writ of garnishment in state court. Hartford removed the case to federal district court. There it was held that the Hartford policy did not cover the claim.

Upon appeal to the 6th Circuit, the court made short work of the coverage question with this clear analysis of how a Claims Made insurance policy should be construed:

> Michigan courts enforce an insurance contract's "clear and precise" terms as they are written. The terms of O'Brien's malpractice insurance policy were straightforward: Hartford agreed to indemnify O'Brien for any "damages" stemming from a "claim first made against" O'Brien "during the 'policy period' and reported in writing to [Hartford] immediately [.]" Here, in May 2011, the plaintiffs asserted against O'Brien a claim that fell in the middle of the contract's "policy period," which ran from September 2010 to September 2011. O'Brien then timely reported the claim in writing to Hartford for indemnification. The problem, however, is that the contract expressly disavowed indemnification for claims arising from an act or omission where the insured, "[a]s of the effective date of [the contract], knew or could have foreseen that such act, error, [or] omission could result in a 'claim' [.]" And when the contract took effect in September 2010, O'Brien had every reason to foresee that her nonfeasance as trustee of the Vitello trust – nonfeasance that resulted in her forced resignation in May 2009 – might give rise to a malpractice claim against her. Thus, in accordance with the plain terms of the contract, Hartford denied coverage. The district court was right to read the contract the same way that Hartford did. *Thomson v. Hartford Casualty Insurance Company*, U.S. Ct. of App., 6th Circuit., No. 15-1501, July 28, 2016 (*unpublished*)

WHEN SHOULD YOU REPORT A CLAIM OR POTENTIAL CLAIM TO LAWYERS MUTUAL?

All lawyers' malpractice policies include the requirement to give the insurer notice of claims and to cooperate. This contractual requirement in no way overrides the professional

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"A **DEPENDENT CLAUSE** IS LIKE A **DEPENDENT CHILD:** INCAPABLE OF STANDING ON ITS OWN BUT ABLE TO CAUSE **A LOT OF TROUBLE**.." *William Safire*

SOCIAL MEDIA CRITICISM

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- So far the exception to Rule 1.6 permitting the revelation of confidential information to establish a claim or defense in a controversy the lawyer has with a client has not been allowed for online negative comments.
- Defamation suits are an option to deal with online criticism, but lawyers are not often successful in these suits.

In the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee Formal Opinion 2014-200, *Lawyer's Response To Client's Negative Online Review*, the Committee concluded:

- While it is understandable that a lawyer would want to respond to a client's negative online review about the lawyer's representation, the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, must constrain the lawyer.
- A lawyer cannot reveal client confidential information in response to a negative online review without the client's informed consent.
- Any decision to respond should be guided by the practical consideration of whether a response calls more attention to the review.
- Any response should be proportional and restrained. For example, a response could be:

  "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

In the ABA's publication *Legal Ethics and the Social Media*, the authors Jacobowitz and Browning offer this best practice advice for responding to Internet criticism:

- "First take a deep breath before lashing out. Then if you feel you must respond online, keep in mind that your reading audience is not just your disgruntled ex-client, but also an online readership of countless potential clients."
- "Do not under any circumstances reveal confidential information about the client or the matter you handled for the client."
- "Consider addressing your former client with a gracious apology or expression of regret for his or her dissatisfaction."

The authors quote Josh King, the general counsel at Avvo, with this advice:

> By posting a professional, meaningful response to negative commentary, an attorney sends a powerful message to any readers of that review. Done correctly, such a message communicates responsiveness, attention to feedback, and strength of character. The trick is to not act defensive, petty, or feel the need to directly refute what you perceive is wrong with the review.

"IF YOU FEEL **YOU MUST RESPOND ONLINE,** KEEP IN MIND THAT **YOUR READING AUDIENCE** IS NOT JUST YOUR DISGRUNTLED EX-CLIENT, BUT ALSO AN **ONLINE READERSHIP** OF **COUNTLESS POTENTIAL CLIENTS.**"

"I DON'T WANT TO GET TO THE **END OF MY LIFE** AND FIND THAT I HAVE LIVED JUST THE LENGTH OF IT. I WANT TO **LIVE THE WIDTH** OF IT AS WELL." *Diane Ackerman*

CARELESS PHONE ADVICE CAUSES LAWYER DISQUALIFICATION

While John Murphey was representing the Village of Tinley Park on several matters, the Tinley Park Manager and Mayor called Murphey to discuss two suits unrelated to these matters brought against Tinley Park by a land developer and the Department of Justice. These suits involved the actions of Amy Connolly, the Director of Planning for Tinley Park, in making changes to the Tinley Park zoning plan to accommodate the "Reserve" development. The phone conversation lasted approximately 20 minutes in which Tinley Park claimed Murphey was provided with details regarding the Reserve development, the subject of both cases. This call ended with Murphey advising Tinley Park to settle the cases quickly.

Tinley Park subsequently sued its now former employee Connolly alleging that she breached her fiduciary duties to Tinley Park when she pushed the change to Tinley Park's zoning plan through the Tinley Park Board. Connolly's defense was provided by the Intergovernmental Risk Management Agency. The Agency selected Murphey to represent her. When Tinley Park learned of this it requested Murphey to withdraw because of the privileged and confidential information he received during the 20-minute call. Murphey denied receiving confidential information and refused. Tinley Park then filed a motion to disqualify Murphey.

Murphey rebutted the disqualification motion by claiming he never established an attorney-client relationship with Tinley Park with respect to the DOJ case, and asserted that Tinley Park did not disclose during the call any confidential information to him during his discussions with them about the DOJ case. The court found that since Murphey was already representing Tinley Park on other matters, it was reasonable to believe Murphey was acting as attorney for Tinley Park on the DOJ case – especially since he gave legal advice during the call. Therefore, an implied attorney client relationship existed between Murphey and Tinley Park.

Since Tinley Park is now a former client of Murphey's, the court turned to ABA Model Rule of Professional Conduct 1.9 on former client conflicts to determine whether the DOJ case and the Connolly case were substantially related warranting disqualification. (*Kentucky Rule of Professional Conduct 1.9 is identical to the ABA Model with only minor differences in the comments to the rule*). The court noted that:

> "… Connolly has previously told this Court and does not recant or rebut in the opposition to this motion, the DOJ case and the present case are 'essentially the same' with respect to the core issues. Connolly described the two cases as dealing with the same amendment to the Village code, the impact and reaction to that amendment, and the issue of 'whether the Village's subsequent actions with respect to the amendment were legitimate or discriminatory.' Therefore, the Court finds that the two representations are substantially related, and the burden shifts to Connolly to rebut the presumption that the Village shared relevant confidential information with Murphey." (*citations omitted*)

The court then reasoned that:

> Murphey seems to assert that they had a phone call, and without reviewing the pleadings, defenses, or any other facts, he simply advised the Village to settle the case quickly based on what he had read in the press alone. Beyond being a poor way to provide advice to a client (or even to an associate simply seeking "insights"), it begs the question of what they discussed for twenty minutes. Therefore, the Court finds that Connolly has not rebutted the presumption that Murphey received relevant confidential information during the phone call.

The court having found an attorney client relationship with Tinley Park and a presumption that Murphy received confidential information within that relationship that is substantially related to the present case ordered Murphey disqualified. *Village Of Tinley Park, Illinois v. Connolly*. U. S. Dist. Ct, N.D. Ill., E.D., 2/15/18; 2018 WL 1054168.

Tinley Park involves the situation when a current client makes a cold call on a new matter. Murphey's handling of that call is an object lesson on how not to risk manage a cold call or a current client call on a new matter.

The risk management question is how does a lawyer reasonably learn enough information during a cold call to determine whether to enter an attorney-client relationship without risking allegations by former prospective clients or current clients with new matters of conflicts of interest or malpractice. What follows is a gloss of our answer to this question that appeared in prior newsletters and *Bench & Bar* articles. *

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"A REPUTATION ONCE BROKEN POSSIBLY MAY BE REPAIRED, BUT THE WORLD WILL ALWAYS KEEP THEIR EYES ON THE SPOT WHERE THE CRACK WAS." *Joseph Hall*

CAREFUL PHONE ADVICE

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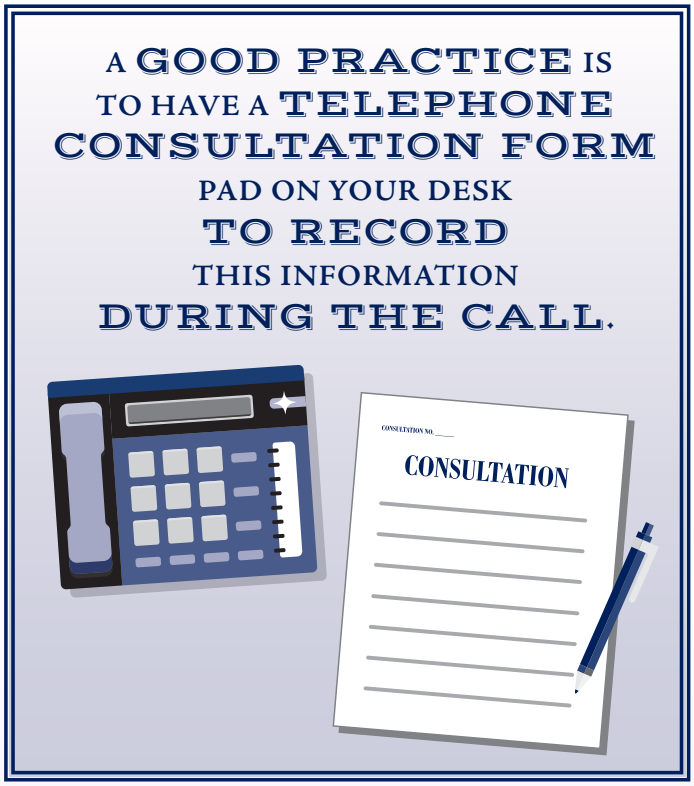
- There is an art to risk managing telephone calls to be sure that new business is encouraged, time is not wasted, and unintended attorney-client relationships with malpractice exposure are avoided. Michael M. Bowden in "How To Handle Phone Inquiries From Potential Clients" recommends office procedures that screen all incoming calls, get the caller's contact information, get the names of other parties involved in the matter, and establish when the inquiry becomes a consultation.
- A good screening technique is for a well-trained secretary or paralegal to weed out calls concerning matters the lawyer does not want to take, provide the caller with information of the type of service the firm offers, explain typical fee arrangements, and ask the caller to make an office appointment or schedule a return call from the lawyer. If the caller is interested, contact information and names of other persons involved in the matter are then obtained. It should be made clear to callers that they are not yet clients of the lawyer – only the lawyer can accept the matter.
- Lawyers receiving calls directly should first get contact information and the names of other persons involved before discussing any facts. Since a complete conflict check cannot be done until after the call, limit the initial discussion to the essential information necessary to evaluate whether to pursue the retention. A good practice is to have a telephone consultation form pad on your desk to record this information during the call. Assign each call a consultation number and file the consultation sheet chronologically in a binder. Send a nonengagement letter if you choose not to take a matter and file it with the consultation sheet.

Editor's Note: Lawyers Mutual's Website offers a Client Contact Sheet that can be filled in online. Go to **LMICK.com**, click on Resources, click on Risk Manager by Subject, under Checklists select Client Contact Sheet.)

- The hardest part is controlling when a prospective client telephone call turns into an attorney-client relationship. Since the relationship may be implied from the circumstances without express lawyer acceptance of a matter, it must be made clear to a caller that a matter is not accepted simply because the lawyer takes the call. Some lawyers never give advice in response to a cold call.



Others will if someone they know referred the caller or the caller is a current or former client. Sometimes you just have to go with your intuition, but complete the consultation sheet and get the contact information. Don't forget that advice given to a prospective client during a preliminary consultation exposes a lawyer to a malpractice claim even if it is later decided not to take the matter. Avoid giving statute of limitations advice. If it appears that some limitation period is about to expire, inform the caller of that possibility and urge consultation with another lawyer immediately. Keep advice to a minimum until you have accepted the matter.

- Always use letters of nonengagement for declined cold call representations that are best sent by certified mail, return receipt requested. A former prospective client with a complaint or claim never receives nonengagement letters sent by regular mail. A typical letter:
  1. Thanks the prospective or current client for calling.
  2. Includes the date and subject matter of the consultation.
  3. Provides clearly that representation will not be undertaken.

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"IT IS A COMMON EXPERIENCE THAT A PROBLEM DIFFICULT AT NIGHT IS RESOLVED IN THE MORNING AFTER THE COMMITTEE OF SLEEP HAS WORKED ON IT." *John Steinbeck*

SNAIL MAIL REQUIRES RISK MANAGEMENT TOO

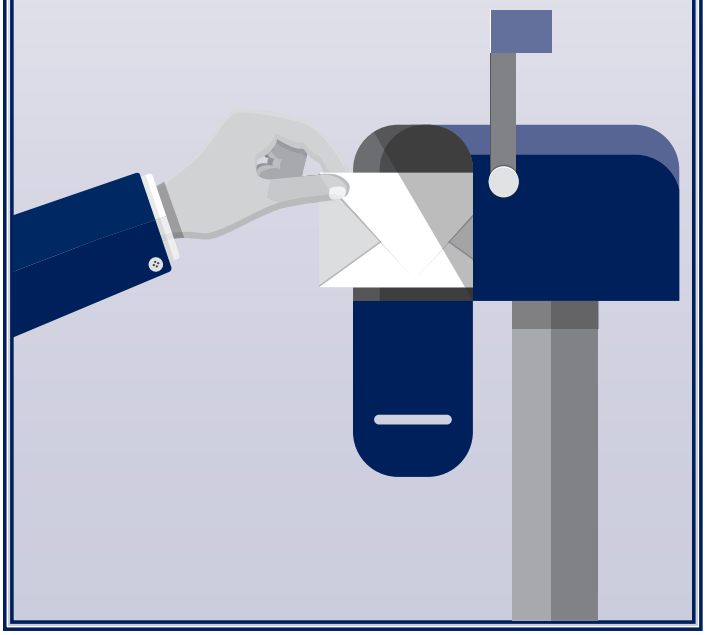
The Internet has become the communication service of choice for the legal profession. This has significantly reduced reliance on regular mail and delivery services for transmission of legal documents, court filings, and correspondence. Risk management emphasis is now on how to deal with email, the Cloud, and the ever-expanding number of e-devices available for use.

We hope this has not led to a relaxation of good risk management for regular mail and delivery services, but we continue to see cases of malpractice where lawyers failed to have good controls over mailed time sensitive documents. Consider the following questions to evaluate your mail risk management procedures:

- Do you take it for granted that your mail gets to the proper destination and on time if you mailed it with a reasonable amount of time to get there?
- Do you assume that the court clerk received and deposited your mailed filing fee and promptly filed the legal document accompanying the fee?
- Do you avoid using overnight, express delivery companies with Internet tracking service to cut down on costs?
- Are you familiar with the postage rates, weight limitations on mail, and restrictions on where mail can be dropped?
- Do you docket time sensitive mailings for follow-up to confirm arrival at the correct destination?
- Do you have an office procedure to confirm that mailed filing fees have been deposited in a timely manner?
- Do you use "Address Service Requested" on first class mail?
- Do you get the temporary address of clients who go south for the winter as part of your routine client intake procedures?

Good risk management requires constant attention to detail by docketing time sensitive outgoing mail for follow-up to assure that it was received in a timely manner by the right addressee and, when a filing fee is involved, that the fee was deposited. If the fee is not deposited in the regular course of business, you are on notice that something is amiss requiring prompt action. Never, never send by regular mail any time sensitive document when there is not enough time to get the irrefutable confirmation that it was received on time. Following this rule could save you from a malpractice claim and a major out-of-pocket expense.

GOOD RISK MANAGEMENT REQUIRES CONSTANT ATTENTION TO DETAIL BY DOCKETING TIME SENSITIVE OUTGOING MAIL FOR FOLLOW-UP TO ASSURE THAT IT WAS RECEIVED IN A TIMELY MANNER BY THE RIGHT ADDRESSEE AND, WHEN A FILING FEE IS INVOLVED, THAT THE FEE WAS DEPOSITED.



THE RISK MANAGER
PUBLISHED BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

DEL O'ROARK
Newsletter Editor

"MOTHERS, FOOD, LOVE, AND CAREER: THE FOUR MAJOR GUILT GROUPS.." *Cathy Guisewite*

FAILURE TO COMPLY

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responsibility duties owed the client. The three different types of insurer notice are:

- Duty to report claims or potential claims on the insurance application;
- A choice of whether to report potential claims as they occur – called "incidents" by Lawyers Mutual;
- Mandatory duty to report actual claims.

UNDERSTANDING CLAIMS MADE REPORTING REQUIREMENTS

Too many lawyers delay too long in reporting claims or potential claims to their insurance company for fear of increased insurance cost or from simple denial of the problem. To appreciate the danger in delayed reporting, it is crucial to understand that the Lawyers Mutual's policy is a standard lawyers professional liability policy. It is a one-year in duration, "Claims Made" policy. Claims Made means that the policy in effect at the time the malpractice claim or potential claim is first known by a lawyer covers that claim. If a lawyer fails to report the claim or potential claim to the insurance company while that policy is still in effect or on application for the next year's policy, insurance coverage for that claim or potential claim is lost at policy expiration even if a new policy for the following year is purchased.

This is the teaching point of *Thomson v. Hartford*. Had O'Brien reported the nonfeasance as a potential malpractice claim on her 2010 application for a new policy, she would have been covered by Hartford for malpractice in 2009. The only way to assure compliance with the Claims Made feature of a legal malpractice insurance policy is to report claims and potential claims promptly and always be mindful of when a current policy is due to expire. Always carefully complete application forms for the next year's coverage by including any known claims or potential claims.

REPORTING A CLAIM OR POTENTIAL CLAIM

Lawyers Mutual encourages early reporting of claims and potential claims for the purpose of helping in assessing the merits of a claim, assisting in notifying the client, and having the earliest possible opportunity to conduct claims repair. At Lawyers Mutual error reporting costs nothing. Neither your deductible nor your annual premium will be affected in any way by reporting claims and potential claims in any number. Help from our claims counsel is policy service at no charge to insured lawyers.

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LAWYERS MUTUAL ENCOURAGES EARLY REPORTING OF CLAIMS AND POTENTIAL CLAIMS FOR THE PURPOSE OF HELPING IN ASSESSING THE MERITS OF A CLAIM, ASSISTING IN NOTIFYING THE CLIENT, AND HAVING THE EARLIEST POSSIBLE OPPORTUNITY TO CONDUCT CLAIMS REPAIR.

CARELESS PHONE ADVICE

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4. Repeats any legal advice or information given -- making sure that it complies with the applicable standard of care.
5. Advises that there is always a potential for a statute of limitations or notice requirement problem if the matter is not promptly pursued elsewhere. *Providing specific statute of limitations times should be avoided because of the limited information typically received in a preliminary consultation. If, however, it appears that a limitations period will expire in a short period of time, the declined prospective client or current client should be informed of this concern and urged to seek another lawyer immediately.*
6. Advises that other legal advice be sought.
7. Avoids giving an exact reason for the declination, why the claim lacks merit, or why other parties are not liable.
8. Encourages the person to call again.

* *Summer 2000 Newsletter, Fielding Telephone Inquiries; KBA Bench & Bar Prospective Clients – Neither Fish Nor Fowl, Vol. 67, No. 3, May 2003.*

"COLLEGE: A FOUNTAIN OF KNOWLEDGE WHERE ALL GO TO DRINK." *Henny Youngman*

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FAILURE TO COMPLY

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All insurance policies contain provisions on when and how to report a claim or potential claims. While telephonic reports are useful for immediate assistance, claims should be reported in writing as well. Requirements for written reports are names of claimants, date the alleged error was discovered, summary of the circumstances, estimate of the potential liability, copies of relevant documents, and the insured lawyer's views on defenses or claims repair that may be available. Lawyers Mutual's insured lawyers should go to lmick.com, click on Claims & Incidents, and follow the instructions there for reporting a claim or potential claim.

EARLY REPORTING OPTIMIZES COVERAGE

An additional benefit of early reporting is the claim or potential claim will be covered by the policy limits of the policy in-force at the time of the report. This is more important than you may realize because our policy is an annual claims made policy. If a claim is paid or an incident ripens into a claim in a later policy year, it will be covered by the liability limits of the policy in-force at the time the claim or incident was reported. Any payment will not reduce the limits of the later policy. The result is that claims and potential claims reporting increase the limits of coverage available to pay claims.

CONCLUSION

Your goals when a claim or potential claim occurs should be to fix the problem, meet ethical requirements of client communication, treat the client fairly, and keep the client with your firm. Early error reporting is a strong first step in meeting all these goals.