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Lawyers Must Take Stock As Malpractice Claims Escalate

By **Celeste Bott**

Law360, Chicago (March 4, 2020, 10:02 PM EST) -- Increasingly complex legal malpractice claims and rising defense costs make it essential for all attorneys to not just have professional liability insurance, but to be proactive in understanding their coverage and its limits, speakers at Hinshaw & Culbertson LLP's Legal Malpractice and Risk Management Conference said Wednesday in Chicago.

It used to be that lawyers got sued very rarely, but that's gone out the window, said Shelagh McCarthy Savino, assistant vice president of claims for insurer Berkley Select LLC, during a panel discussion on trends in insurance coverage for legal professional liability claims.

"The clients that you think are not going to sue you will in fact sue you," she said.

Trending risks and exposures for lawyers include claims arising from lateral hires, Savino said, where the ball may be dropped when case files are moved, or the culture at the new firm might be very different from what an attorney is used to, she said.

But there's also been a growing number of cyber claims, stemming from data breaches and leaks, ransomware, or phishing, when an attorney may transfer money based on increasingly sophisticated spoofing emails received from fraudsters pretending to be clients, she said.

"Lawyers, we tend to be a bit arrogant. We fall for these things really well," said Matthew Borillo, a claims attorney for the Oregon State Bar Professional Liability Fund. "But if it looks too good to be true, it is."

Oregon has a unique system — it's the only state in the country that has a mandatory malpractice coverage system, and most claims with few exceptions come through the fund, Borillo said. That allows them to capture data from an entire state's legal market, he said.

Based on their 2019 data, roughly 48% of malpractice claims stem from missed deadlines and about 21% come from filing an incorrect form, said Sharnel Korala Mesirow, also a claims attorney for the Oregon State Bar Professional Liability Fund.

The data also shows that the highest numbers of malpractice claims are filed against lawyers who have been in practice for at least 11 years. Mistakes aren't just made by inexperienced lawyers, but by attorneys who have other distractions and overwhelming outside obligations, such as children or elderly parents, Mesirow said.

Attorneys are often overworked and can help prevent potential malpractice issues by having a plan in place for emergencies, Borillo said, rather than assuming their firms will pick up the slack.

"It's the balance of work and life that creates this risk factor that we deal with every day," he said. "If I get depressed or if I have a heart attack or if I get hit by a car, who will watch things for me? You have to understand, what is my support network? Check before you need it."

Lawyers should also "always have a parachute on" and know when to end a relationship with a client that just isn't working, he said.

Other tips the panel offered to protect attorneys include diligent documentation of all advice given to clients and prioritizing communication with clients, remembering not to gloss over things that may be common knowledge for a lawyer but not necessarily for a client.

But legal professional liability insurance coverage is still the best defense, and attorneys should thoroughly scrutinize their policies, said Suzanne L. Jones, a partner at Gordon & Rees LLP.

Know if you need excess insurance, know the exclusions, know if the policy provides coverage for disciplinary proceedings, and know if you get to choose your defense counsel, she said.

Attorneys can also help themselves by reporting to their insurer when a claim is made or even anticipated, and maintain a good relationship and open lines of communication with their insurance carrier, Jones said.

--Editing by Bruce Goldman.

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