



Magazine

## Steps to take if you are sued

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My last column ("When client dissatisfaction moves to E&O Claims," October 2009) addressed the perils of client complaints and "potential claims," the importance of carefully evaluating them and the considerations of when to report the complaints to your E&O carrier. Every once in awhile, however, it isn't just the client who knocks with a complaint. What if you open the door and see a process server or sheriff's deputy standing before you? That "potential" claim has become real. Now what?

t. Most agents take it personally, while others view it strictly as a matter of business. Whenever I represent a client who has been sued for the first time and is justifiably upset, I tell him there are two kinds of insurance agents: those who have been sued, and those who haven't been sued—yet. This statement is cold comfort indeed. We live in a litigious society, and it's why we carry professional liability insurance.

Still, it is difficult to think rationally or objectively when a plaintiff questions your professional integrity and ability. Your first reaction will probably be to read—and re-read—the complaint, perhaps shaking with anger and cursing your client while you do. Once this initial fury subsides, you must immediately forward the suit papers to your E&O carrier. Time is of the essence, because the moment you are served the clock starts ticking for you to file an answer or raise certain initial legal defenses. The faster your E&O carrier receives the suit papers, the faster it can assign defense counsel (assuming your E&O policy doesn't afford you the right to unilaterally select your own attorney), and the more time your attorney will have to preliminarily evaluate the claim and formulate a strategy to proceed. You should generally expect to be contacted by your defense attorney within a week or so.

### The first steps

In most of my initial telephone calls with insurance brokers who have been sued, they tell me they believe the claim is frivolous and they want to counter-sue for legal fees and costs. "Frivolous" lawsuits have garnered much attention from politicians and media outlets over the last several years, but the concept remains largely misunderstood. Some jurisdictions actually have measures in place to reduce so-called "frivolous" claims—particularly against licensed professionals—and require a plaintiff to file an "affidavit of merit" in support of such a lawsuit. This affidavit generally must be prepared by a similarly qualified professional (e.g., licensed insurance producer) and must state that the affiant has reviewed the claim and believes there is a proper basis for the plaintiff to file it. While this provides an added layer of protection, it is not a terribly difficult hurdle to overcome. And regardless of the jurisdiction, it is typically quite difficult to prove that a case is so frivolous to counter-sue. Like it or not, the American justice system favors giving litigants their days in court, and generally doesn't make them pay if they lose.

Shortly after receiving the defense assignment, your attorney will want to learn—either in person or on the telephone—your response to the client's allegations, and your attorney will want to retrieve all relevant claim and underwriting file documents from

you. You should provide your attorney with all requested information as quickly as possible, even if it seems she is requesting more than you think she needs. From the attorney's perspective, it is better to cast a wide net to identify all relevant documents, rather than discover 6 months later that important information was not initially provided.

### **How to plead**

She will then determine what type of pleading to file on your behalf in response to the complaint. Most often this document is an answer to the complaint, in which you respond to the client's allegations, raise affirmative defenses to the claim, and perhaps join or assert claims against other defendants (e.g., the insurance carrier who denied the client's claim). Sometimes the attorney may see a basis to file a motion in response to the complaint, and perhaps try to have the complaint dismissed at an early juncture. This is rare and is very difficult to do.

### **Discovering the facts**

The vast majority of cases move past this initial pleading stage and into the discovery phase of litigation, where most of the work is done. With the assistance of your attorney, you may need to answer written questions (interrogatories) posed to you by the client/plaintiff. You also may need to testify under oath at a deposition, where the plaintiff's attorney can ask you a broad range of questions, some of which you may not even feel are relevant. Keep in mind that the scope of discovery in litigation is very broad, as it is the parties' opportunities to discover everything they need to know to prosecute or defend the case. Depending upon the complexity of the case and the number of plaintiffs or defendants involved, the discovery period can last an entire year or more. The plaintiff will probably need to retain an insurance broker expert (often the same person who prepared the initial affidavit of merit), who will offer his opinions in the form of a report once all discovery is completed. Your attorney may retain a similar expert in support of your defense.

### **The end is near**

After all of this is completed, your attorney may try to have the claims dismissed by filing a summary judgment motion. Again, it is difficult to obtain such a dismissal, but it is often worth a try. If the case is not dismissed, the court will schedule it for trial. Throughout the pleading, discovery and pre-trial stages, your attorney will keep you and the E&O carrier abreast of litigation developments, how they impact your defense and how they change her litigation strategy. She will be mindful of settlement possibilities throughout the entire process, and may explore resolution through mediation. While your E&O carrier will want to aggressively defend you, litigation is less personal and more of a business decision. Your attorney likely will provide the carrier with a litigation budget at the outset of the case, and if the opportunity to settle for less than defense costs arises, it's something everyone should consider, even if it is a bitter pill to swallow. It is true that 90 percent of cases settle at some point before trial.

From the day you meet the sheriff's deputy to the day the jury foreman reads the verdict, the litigation process will generally last 18 to 36 months, excluding any appeals. It can be a taxing process and will be a distraction from your business, particularly if you are required to sit through a jury trial that may last an entire week or more (yes, 10 percent of cases do go to trial). Your attorney understands this and is there to help. Just try to keep in mind that at the end of the process the claim will be closed, life will go on, you probably won't be in jail or have lost your license and you hopefully can return to the job you were doing.

Now if you'll excuse me, I hear a knock at the door...