

LIABILITY LESSONS



"Whisper or scream, you have the same duty to report the matter to your professional liability insurance carrier when trouble comes."

Trouble Can Be Heard in a Whisper or a Scream

By Jonathan S. Ziss, JD

Insightful lessons can be learned by reviewing professional liability issues. With this in mind, Mather & Co., a division of Bollinger Inc., provides this column. For more information, contact Mather at philadelphia@bollingerinsurance.com.

When trouble comes close, often you can hear its noisy arrival. But to protect your liability insurance coverage, you need to listen for trouble both as a whisper and a scream.

The announcement of a lawsuit, for example, arrives with unmistakable noise: a sheriff serving a summons and complaint. That is heard loud and clear. More often, trouble first whispers to you, such as when a client calls and says, "Bob, I think we need to talk about how your office handled our 2004 returns."

Whisper or scream, you have the same duty to report the matter to your professional liability insurance carrier when trouble comes.

Claims-Made Policy

Often, professional liability insurance policies are written on a "claims made and reported" basis rather than an "occurrence" basis. The distinction is significant. An occurrence-based policy covers losses that occur during the policy period, regardless of when the actual lawsuit or formal demand for arbitration is made. Think of an auto policy, for example. Suppose that an auto accident in year one results in the filing of a lawsuit in year two. An occurrence policy that covered the year-one time period will cover that loss. With a claims-made policy under the year-two policy would be triggered because that's

when the lawsuit was filed, irrespective of when the loss occurred. One reason professional liability policies are written on a claims-made basis is that, given the nature of professional services, pinpointing an occurrence can be difficult to define.

Defining "Claim"

Another facet to consider in professional liability insurance coverage is what kind of "claim" will serve to trigger coverage? A civil lawsuit is a claim, for sure. With

freshly served lawsuit papers in your hand, your response plan is clear because it is easy to recognize the need to put your carrier on notice.

What about situations that are not so clear? Say an invoice is returned with a check for partial payment and a scrawled note stating, "Not paying for So-and-So's time due to audit." When you follow up, you're told, "Let's see how you make out with the audit, then we can talk about your bill." Should you consider this to be a potential claim, and go ahead and repor

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it, or is the whisper of trouble still too soft to hear?

When an engagement takes on an adversarial edge, consider the stakes. They might be quite high. You may only perceive a mere whisper of trouble, but it could be understood to be a "claim" within the meaning of your insurance policy. Failure to report that claim on a timely basis could lead to a denial of coverage if a lawsuit follows. Policies written on a claims-made and reported basis generally have strict reporting requirements that demand prompt notification.

The term "claim" is what makes matters perilous. In a claims-made policy, it is broader than the commonplace notion of a lawsuit. Many judicial opinions and learned articles have wrestled with determining when a claim is a "claim." Depending upon how a policy is written, so-called "demands for services" can serve

to trigger a "claims made and reported" obligation.

A "demand for services," however, is not crystal clear either. For example, a demand for a discounted fee after it has been billed, a demand for gratis work, or a demand for the return of fees paid because of dissatisfaction, might trigger the policy. A subpoena or demand to testify concerning one's professional services – even as a nonparty – could also trigger the duty to report. Because of this uncertainty, combined with the need to promptly report all "claims," there clearly are high stakes involved in mistaking a malevolent whisper for mere hot air.

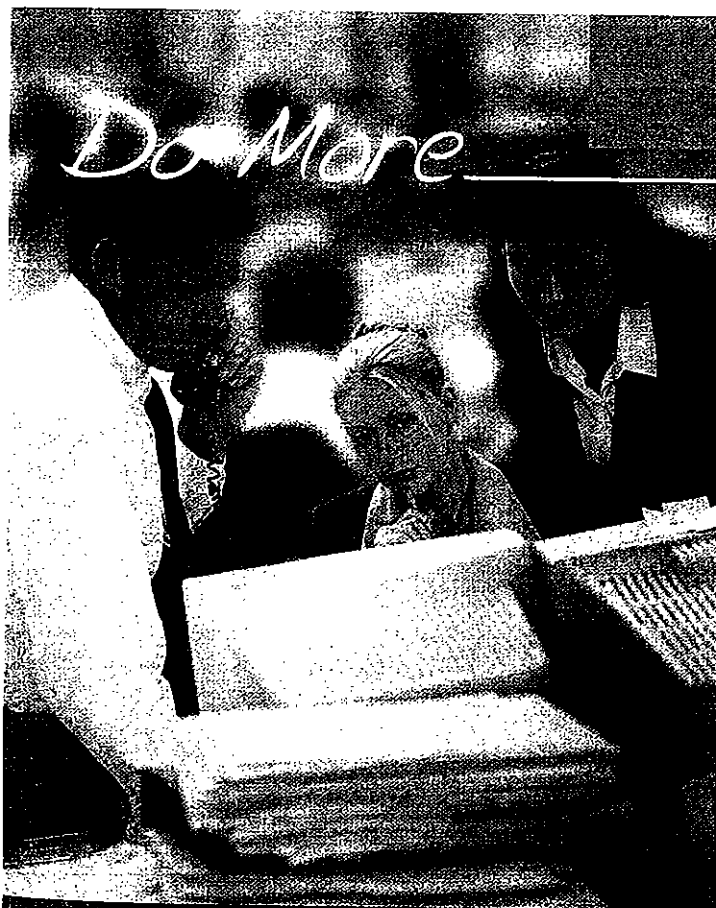
Sorting through the whispers requires you to use your intuition, or a "gut test." If, after you hang up the telephone and sigh, you feel in your gut that there's a problem brewing with a particular client, then there probably is.

Take Charge

The first step is to be honest with yourself, take charge of the situation, and acknowledge that there is a potential crisis. That is not as easy as it sounds. Too often, we think we are making something out of nothing.

Ask for independent guidance if you are uncertain. You may not need to get your insurance carrier involved. But if you dither and miss out on the possibility for early intervention, you risk the denial of insurance coverage should that whisper turn into a scream. ■

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