

NEW CONSTRUCTS FOR ATTORNEY MALPRACTICE INSURANCE



THE NEW FRONTIERS

SERIES - 1 / ARTICLE - 21
JULY 20, 2023

By **Jeffrey Brochin, Esq.**

GreenPoint>
ESR

EXECUTIVE SEARCH AND RECRUITMENT

william.anderson@greenpointglobal.com | pranav.menon@greenpointglobal.com
International Corporate Center, 555 Theodore Fremd Avenue, Suite A102 Rye, NY 10580
www.gpesr.com

Among criticisms of the legal profession is that it is essentially a self-regulating profession whereby lawyers not only regulate the licensing of lawyers but also decide on the profession's rules, discipline their own miscreants, and otherwise serve as gatekeepers to make sure the public is well-served by the profession.

But what happens when the public—or at least a client—is not so well-served and is, in fact, harmed by a legal practitioner? Malpractice insurance is the mechanism by which lawyers have been protected against devastating financial ruin due to a mere misstep, and damaged clients have been awarded damages. Recently, legal malpractice norms have evolved as definitions of liability and accountability have expanded.

Mandatory versus Optional

Virtually all states recognize that lawyers have a responsibility to ensure that consumers of legal services are financially protected if the lawyer makes a mistake. However, not all states address that responsibility in the same manner. Some states make proof of legal malpractice insurance (or Legal Professional Liability—LPL coverage) mandatory as a condition of maintaining one's license, while others require disclosure as to coverage or not or require periodic CLE courses covering malpractice issues as an alternative to the purchase of a policy. Interestingly, a survey of the various rules and regulations pertaining to LPL coverage has revealed that most states do not make LPL mandatory.

Bigger Claims on the Rise

Last year's annual survey of lawyers' professional liability claims conducted by risk management consultants, Ames & Gough, revealed that the period beginning in 2019 through mid-2020 marked the worst two years on record for legal malpractice claim payouts. Nine of the 11 insurers surveyed had participated in a claim payout in excess of \$50 million; two paid a claim between \$150 million – \$300 million, and four paid a claim over

\$300 million. Overall, the numbers of claims resulting in multi-million-dollar payouts, and the amounts of those payouts, has increased year over year. Notably, the 11 insurers polled carry approximately 80% of the 'American Lawyer 250' law firms.

'Claim severity' is deemed to be a continuing upward trend, compounded by adjustments in business practices necessitated by law firms continuing to serve clients during the COVID-19 pandemic; however, the frequency of claims has remained flat, with one major insurer citing a 6-10% increase in claims and another reporting an 11-21% increase. In addition, the rise in claim costs has been attributed to such factors as higher legal defense costs due to court delays arising from the impact of COVID-19, aggressive tactics deployed by plaintiffs' counsel, and the greater complexity of malpractice cases.

Practices Driving Claims

Insurers pointed to three practice areas as the source of the largest numbers of malpractice claims: Trust & Estates, Business Transactions, and Corporate & Securities. The Trusts & Estates practice area seems to have taken first place simply due to the huge volume of attorney engagement in that area by baby boomers who

Executive Summary

> The Issue

What are the new constructs for attorney malpractice insurance areas?

> The Gravamen

Several factors are creating new trends in the field of malpractice insurance, including the need to address baby boomer and other generational particulars, the enduring effects of the pandemic, and the emerging cybertechnology climate for lawyers.

> The Path Forward

Although malpractice claims themselves are increasing incrementally, the claim amounts are soaring, and lawyers and firms must learn how to navigate this new LPL risk environment.

are undertaking the largest private transfer of wealth in U.S. history. In addition, various changes in state laws have enabled third parties, such as family members, to bring malpractice claims against attorneys for work performed on behalf of an elderly or sick client.

But aside from legal practice areas that are increasingly leading to malpractice claims, there are also business practice habits that are giving rise to such claims. These include the failure to know and/or properly apply the law; planning or procedural errors; inadequate discovery or investigation; failure to obtain client consent; and procrastination. In addition to the problem of not obtaining client consent, insurers have noted other communication failures such as poor documentation of a file, using outdated engagement letters, or even saying something derogatory about a client or fellow attorney, all of which have at least been contributing factors in legal malpractice claims.

Cybertechnology and Malpractice Risks

Among the 'newbie' areas of the legal business that can generate a malpractice claim is the increasing use of blogs by lawyers and law firms. In one California case in particular, a woman accused a colleague of sexual assault and filed a criminal harassment complaint. While that was pending, a Deputy District Attorney in Los Angeles County raised questions in his blog about the complainant's allegations, and a claim based on the blog content ensued.

Cybertechnology malpractice risks are on the rise as law firms become the responsible custodians of sensitive information that might be targets for cybercriminals. Ransomware attacks and exploitation of vulnerabilities in funds transfers are among the most frequent cyber risks presented to law firms. For many law firms, the COVID-19-induced switch to more remote and hybrid work frameworks, with less secure infrastructures, meant that large investments needed to be made for cybersecurity protections—but not all firms did so, resulting in data breaches and concomitant violations of client confidentiality.

Distressed Economy Boosting Claims

In a period of economic distress, claims against lawyers often grow in frequency. When a client is struggling financially, the lawyer becomes an easy target for resolving one's financial problems, and when the client is unable to pay his or her lawyer's fees and then faces a collection action, suddenly a malpractice claim appears to be the best 'defense' to offset the legitimate claim for fees. Along with an economic downturn comes an increase in bankruptcy filings, which—while a good thing for bankruptcy lawyers—poses a vulnerability to other practitioners and their insurers, who are often viewed as targets with deep pockets.

Whether fully attributable to the COVID-19 pandemic or not, since 2020, the legal industry has experienced significant industry disruptions and upheavals, all leading to an

Action

1 Your State: Laws regarding mandatory malpractice coverage are being adopted by many state bars, and the practitioner must be aware of when LPL coverage becomes mandatory versus when mere disclosure as to coverage suffices.

2 Practice Risk Factors: Even if your firm has not carried malpractice insurance up to this point, if your practice morphs into one of the higher risk categories, such as Estates & Trusts, then purchasing LPL is a must.

3 Practice Policies: Because poor communication problems, poor documentation, and other business practices are leading causes of malpractice claims regardless of practice area, your firm should review its office policies to strengthen these areas.

4 Technology Upgrades: With cybersecurity risk exposure on the increase, your firm should consult with cybersecurity experts as to how to upgrade your cybersecurity in order to lessen the risk of malpractice claims resulting from such attacks.

upswing in malpractice claims. Lawyers and law firms will need to know how to navigate these profound changes in order to protect themselves from the resulting surge in claims related to errors and omissions.

“ALTHOUGH THE SLOWDOWN IN FREQUENCY MAY APPEAR TO BE A SILVER LINING IN AN OTHERWISE DIFFICULT YEAR FOR LEGAL MALPRACTICE CLAIMS, IT MAY JUST BE TEMPORARY, AND THE ECONOMIC DOWNTURN FROM THE PANDEMIC MAY LEAD TO MORE CLAIMS. IN ADDITION, LEGAL MALPRACTICE RISKS ARE BEING COMPOUNDED BY ADJUSTMENTS IN BUSINESS PRACTICES MADE BY LAW FIRMS TO CONTINUE SERVING CLIENTS DURING COVID-19.”

**—EILEEN GARCZYNSKI, SENIOR VP,
AMES & GOUGH**



Further Reading

1. <https://amesgough.com/law-firms-see-u-s-legal-malpractice-claims-costs-soar-as-they-rush-to-cope-with-rapid-change/>
2. https://www.americanbar.org/groups/lawyers_professional_liability/resources/faqs_on_malpractice_insurance_for_the_new_or_suddenly_solo_attorney/
3. <https://news.bloomberglaw.com/legal-ethics/avoiding-accountability-the-rise-of-mandatory-legal-malpractice-insurance-and-disclosure>
4. <https://www.attorneys-advantage.com/Resources/Blog/Blog-Content/The-Why-and-How-of-Tail-Coverage-for-Legal-Malpractice-Insurance>
5. <https://www.libertyspecialtymarketslatam.com/article/industry-disruptions-drive-surge-in-legal-malpractice-claims>





Jeffrey Brochin, Esq.

GREENPOINT STAFF COUNSEL AND
CONTENT EDITOR

After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions.

Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



William H. Anderson, Esq.

MANAGING DIRECTOR

William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



Sanjay Sharma, PhD

FOUNDER AND CHAIRMAN



Pranav Menon, Esq.

LEGAL RECRUITMENT MANAGER
AND DATA PRIVACY SPECIALIST –
LAW & COMPLIANCE | GPESR



About GreenPoint Executive Search and Recruiting

- Founded in 2001, GreenPoint Global offers a blend of proprietary technology and US-trained lawyers to provide advanced legal solutions to our clients. As part of GreenPoint Global, the GPESR team draws upon a deep knowledge base across multiple disciplines including Legal, Publishing, IT, Finance, and numerous other industries.
- By virtue of our unique methods and a proven history of providing top-tier legal services to our clients, the GPESR team is capable of supporting a diverse client base both in the US and globally. From solo practitioners to AmLaw 100 firms, legal publishers, Fortune 1000 companies, and in-house law departments, our team offers legal staffing solutions to suit any business needs. GPESR provides skilled attorneys in either permanent placements or temporary contracts through a selective recruiting process. Adherence to quality, value, and flexibility are hallmarks of our offerings.
- Ensuring privacy and security of client data is a critical component of our business. GreenPoint has instituted rigorous physical, administrative, and technical safeguards to protect the integrity, security, and privacy of client data, all of which comply with the most stringent US and global standards and regulations.

About GreenPoint Law & Compliance

- GreenPoint Global was founded in 2001 and since that time has faithfully served an expanding roster of clients. GreenPoint leverages a unique combination of US-trained attorneys and proprietary technology to deliver a unique offering of skill and flexibility to meet client needs.
- Our core team of experienced US attorneys is based in Israel and works US hours. The breadth of experience of our attorneys ensures high-quality, cost-effective results across a wide range of legal, compliance, and regulatory matters.
- GreenPoint's methodology and proven track record of achieving client objectives has resulted in a broad base of clients in the United States, ranging from Fortune 500 insurance companies to solo practitioners, law firms, in-house law departments, and legal publishers. GreenPoint attorneys are selectively recruited and deployed based on possessing demonstrable subject matter expertise covering a broad spectrum of substantive US laws and regulations. The work product of our attorneys is thoroughly vetted internally before delivery to client. Adherence to quality, value and flexibility is at the core of our foundation.

