**Don’t Get Ahead of Yourself with Firm Splits, Dissolutions, and Attorney Departures -**

**Seven Tips to Help You Avoid Tail Confusion**

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I have three stories to share, but first a reminder as to what a tail is and what it isn’t. Sometimes after hearing good things about ALPS, a lawyer will call in saying they are about to retire or leave their firm; and while their current coverage is with another insurer, he or she would like to buy a tail policy from us. Our answer is always the same. It’s no, because a tail isn’t a separate policy, it’s an endorsement to a policy. Their current insurer is the only one who can help them.

Whenever using the word “tail,” think ERE, which stands for extend reporting endorsement. EREs are unique to a claims made and reported insurance policy, which is what your malpractice policy is, because a lawyer continues to need insurance protection for professional services rendered up to the time the final malpractice policy expires in order to protect the lawyer from a subsequent claim arising from those services. So, all an ERE does is extend the time within which a claim may be reported under the terms and conditions of the final policy the ERE attaches to. An ERE is not a new policy, and it doesn’t bring any additional coverage with it. With this out of the way, time for the stories.

After practicing together for years, a husband and wife needed to make some changes because they were in the process of getting a divorce. The husband left the firm and purchased a new malpractice policy with no prior acts. Then the wife had the couple’s son join the firm with the intent of leaving the firm to him once the wife retired, which was to happen in the next year or so. Their son was excited about the opportunity to eventually have his own firm, but should he be?

The husband wasn’t concerned about prior acts coverage because he was comfortable relying on former attorney language under the policy the couple had in place when they practiced together; and since the wife, and eventually their son, will maintain continuous coverage with the firm the husband left, he wasn’t worried. Here’s the rub. Their son doesn’t realize that his parents weren’t doing him any favors from a coverage perspective. Again, understand that the wife and son will maintain continuous coverage, so the son will eventually be left with the liability and related premium costs for all the prior acts of his parents. Had the parents taken the time to come up to speed on the coverage issues and then really think this through, a better decision might have been to wind up their practice and purchase a firm ERE so mother and son could start fresh.

Another situation involved a two-attorney firm split. Someone told these two that after they split, they would both need to make sure they get predecessor coverage, which would provide coverage for any acts, errors, or omission that occurred at their now prior firm. Both agreed to do so. Shortly thereafter one of the attorneys applied for individual coverage with us. He asked for and received predecessor coverage after stating that he had acquired 51% or more of the assets and liabilities of the prior firm. Shortly thereafter, the other attorney applied for individual coverage also hoping to purchase predecessor coverage. Unfortunately, we couldn’t offer that coverage because there can only be one successor firm. Here again, there was a misunderstanding of how coverage works. The attorney who received predecessor coverage didn’t realize that he would be accepting the liability of all former attorneys and staff onto his new solo policy. This also meant the other partner didn’t have to pay to cover his prior acts on his new policy. This is when they both realized that what they should have done was to ask for separate prior acts coverage for each of them or purchase a firm ERE.

And finally, a small firm had a few partners retire in recent years. As a result, a few more of the remaining partners decided they too should retire which forced the rest who were not ready to retire to begin looking for opportunities elsewhere. A dissolution by default was coming into play. Unfortunately, no one was in agreement as to what to do about tail coverage, in part due to the reality that no one had a thorough understanding of what tail coverage is and how it works. Some thought they could purchase their own individual tail policy. Others thought they could pick the amount of tail coverage they wanted, individually or as a firm. Some were thinking about buying individual tails of varying lengths while others wanted a firm tail. It seemed that everyone had a different opinion based upon how much they thought their individual cost would end up being. Making matters worse, several firm attorneys actually made lateral moves without giving any serious thought to their prior acts exposure, apparently believing this was something that could be taken care of whenever they got around to it. In the end, the dissolution process dragged on much longer than it needed to, relationships were unnecessarily strained, and the partners who retired prior to all this happening were not even aware that decisions were being made, decisions that could have serious consequences.

For me, the common thread in these stories is this. In light of an impending firm split, dissolution, or attorney departure all the attorneys were making decisions without fully understanding the consequences of the decisions being made. They got ahead of themselves, and unintended consequences quickly followed. With this in mind, I share the following tips to help you avoid similar problems in your future.

1. When a firm split, dissolution, or attorney departure is on the horizon, contact your carrier early on to learn about and discuss your options. For example, while predecessor coverage is the answer sometimes with firm splits, at other times separate prior acts policies or a firm ERE coupled with a policy that has no prior acts coverage is the answer.
2. The cost of an ERE can be expensive, particularly for a firm that’s been in existence for decades; and understand that payment is typically due in full at the time of purchase. Plan well in advance and save for this eventual necessary expense to avoid ultimately having to make significant decisions based upon financial limitations.
3. Don’t allow your malpractice policy limits to drop if your firm downsizes in the last few years of its life. Remember that the remaining limits of the final policy the ERE will attach to need to be enough to take care of everyone who’s covered under the ERE for the duration of the ERE. Stated another way, the limits of an ERE don’t renew every year. It’s a once and done kind of thing.
4. Never run with any assumptions. Because the window of opportunity to purchase an ERE is short, often 30 days or less, prior to leaving a firm think carefully before making the common decision to rely on former attorney language to take care of your tail exposure. A decision to do so may be fine if the firm you are leaving maintains continuous coverage for at least the next five to ten years. If there’s a chance the firm may not do so, perhaps due to an unexpected firm merger or a not so unexpected dissolution, consider purchasing an individual tail as you’re departing because the opportunity to do so will pass quickly and sometimes the decisions firms make months to a few years after you depart can end up leaving you bare on your tail exposure. This can even happen to you after you’ve made a lateral move if the firm you moved to didn’t pick up your prior acts.
5. If your firm is dissolving and you plan to continue to practice on your own, don’t assume that you need to go out and buy a new policy that includes prior acts coverage. Check with the firm to see if it will be purchasing a firm ERE. If so, you don’t need to add prior acts coverage to your new policy, the firm ERE will take care of that exposure.
6. When you retire, remember that an ERE provides no new coverage. All it does is extend the time you can report a claim that arises out of any covered work done up to the date your final policy expired. If you happen to do a little work in retirement and a claim arises out of that work, well, all I can say is this one’s on you.
7. Decisions made during firm splits and dissolutions could leave previously departed attorneys without coverage for their prior acts if they left with a belief that they could rely on former attorney language to take care of their tail exposure. In these situations, the cleanest choice would be to purchase a firm ERE. Not only will this ensure that everyone’s tail exposure is covered, but any attorney who will remain in practice post firm split or dissolution can also move forward without having to worry about procuring their own prior acts coverage. I see that as a win/win.

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