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Legal Malpractice Insurers Looking Earlier To Sue Their Attys

By **Andrew Strickler**

Law360 (September 27, 2018, 11:53 PM EDT) -- The tripartite relationship is putting a tighter squeeze on lawyers retained by insurers to defend attorneys in legal malpractice cases, a group of experts said Thursday in Las Vegas.

On one side, lawyer-defendants are becoming more aggressive in suing insurer-appointed counsel for blunders that put them in line for above-policy-limit payouts or big-ticket judgments, even as those defendants wield more bad-faith allegations against carriers directly.

On the other side, professional liability insurers are increasingly looking to their retained defense counsels as targets of lawsuits for bad advice on potential damages or missed settlement opportunities, evidence of an ongoing breakdown of the historically collegial relationship many firms enjoyed with insurer "clients," the panelists said.

Meanwhile, even the source of potential claims resulting from the three-way relationship is becoming increasingly unpredictable as more excess carriers and third-party policy administrators weigh in on negotiations over who should bear what financial liability and threaten to bring their own ancillary claims.

Taken together, those pressures are injecting more caution on both sides of the firm-insurer relationship, said Alan Barbanel of insurance coverage and litigation firm Barbanel & Treuer PC in Los Angeles, and triggering plenty of hard feelings when a lawyer feels betrayed.

"It gets ugly and pretty sad, and a lot of times it's a law firm with a long-standing relationship with the carrier," he said. "Our sense from the depositions being taken is there are a lot of hurt feelings, a lot of emotions and anger."

The program, entitled "Tripartite Typhoon: Malpractice, Bad Faith and Stormy Seas," was part of the fall American Bar Association legal malpractice conference. The biannual meeting, which kicked off Wednesday at the Encore Las Vegas, drew about 320 professional liability lawyers and representatives from malpractice insurance carriers.

Much of the hour-long discussion about insurance work focused on the increasing wariness between all the parties involved in legal malpractice cases and coverage issues, and a trend towards "shifting responsibility" between the attorneys hit with the underlying case, lawyers hired to defend the case, and the carriers.

Panelist Nolan Knight of Munsch Hardt Kopf & Harr PC said the trend was borne in part of more "sophisticated" policyholders and greater awareness of the scope of potential claims

against insurers and other parties, including defense counsel. Those in turn draw more legal actions, and more sophisticated lawyers.

In terms of lawyer-targeted claims brought by carriers, Barbanel pointed to a range of triggers, many of them involving bad communication by appointed lawyers or a lack of clear lines around the lawyer's settlement authority or role in estimating damages.

In one scenario, Barbanel described a lawyer caught between a client who wanted to vigorously defend a malpractice case and an insurer who preferred to settle. When the case did come to a close, a secondary dispute arose when the lawyer-client claimed his counsel didn't warn him that his extended defense had eaten up his policy limit, leaving next to nothing for the insurer to pay out on the insured's behalf.

In another, he described a "surreal" situation in which a trustee for an insurer forced into bankruptcy by a judgment in a blown legal defense hired the plaintiffs lawyer in the underlying dispute to sue the lawyer who handled the case.

Those kinds of complicated dynamics, he said, have become far more normal over the last five or so years, and increasingly put lawyers in a position where they can't be sure who might be a potential legal adversary down the road.

The defense lawyer "has to be communicating very clearly, very often and thoroughly and in writing with both the carrier and the insured about what's going on and even raising the conflict issue and trying to work it out," he said.

Shannon Sprinkle of Carlock Copeland & Stair LLP, who moderated the discussion, joked that the mistrust between insurance lawyers and carriers had progressed to a "bad faith 2.0" situation in which appointed defense counsel were looking at their own policy limits before agreeing to take on an insurance case.

"What we're seeing now are claims [by carriers] or rumblings about something that was done wrong even before the case is even resolved," she said.

--Editing by Pamela Wilkinson.