

CLAIMS DO'S & DON'TS

Preparing yourself for this stressful situation



BY CLAUDIA GAGLIONE

Many professionals believe that a claim is a lawsuit, meaning a complaint filed in court. However, most professional liability insurance policies define a claim both as a lawsuit and as a demand for money or services. In other words, a claim could also be a nasty letter. Someone is questioning your work or your conduct and asking or demanding that you do something or pay them some money.

It is important for all professionals to realize there might be other steps taken before that claim is made. You must be alert and aware, realizing that something you considered to be insignificant could actually be a red flag that far more serious action is being contemplated.

What to Do?

What if you receive notice of a complaint made against you to the state licensing board, to the Better Business Bureau or to the Department of Consumer Affairs? Whoever believes you made a mistake might want to see what these organizations think about their grievance before they decide to file a lawsuit. Or maybe that person/company wants someone else to do the investigation so they don't have to spend the time and money doing it for themselves.

What if the professional receives a subpoena to produce documents or to testify at a deposition? The parties (and their counsel) who are involved in an ongoing lawsuit might want to ask the professional some questions and look over their work file documents before they decide whether to add the professional as a party in the case.

If faced with one of these situations, how the professional reacts and responds is extremely important. His or her comments or conduct could either help to avoid a lawsuit or could virtually guarantee that a lawsuit will follow.

Tips for Complaints

If you receive a threatening letter demanding money, a Better Business Bureau complaint or a subpoena for documents, what should you do?

More importantly, what should you not do?

- **DON'T ignore the nasty letter, subpoena or complaint.**

It doesn't matter if the person complaining about you was not your client. It doesn't even matter that the letter or complaint is full of lies. In most cases, some kind of response is warranted. Ignoring something won't make it go away and often makes it worse.

- **DO deal with the situation as soon as possible.**

Any of these situations should be promptly reported to your client (assuming they are not the one complaining), to your insurer and maybe to your attorney. They can help you respond to a threatening letter and they can determine if it would be best to have an attorney go with you to that deposition. Handling a matter alone, even if you think it is nothing, is never a good idea.

- **DON'T talk to third parties.**

Resist the urge to call other professionals to ask if they received a similar letter or complaint. Remember that your work is confidential with the client and you should not be discussing that work or the claim with anyone other than your attorney, your client and/or your insurer.

- **DON'T admit liability or make promises you can't keep.**

When you stand accused of something, human nature often causes us to want to make things right. Despite the accusations, you might not have liability. Making admissions or suggesting that you will "fix" things could make it harder to defend you down the road and could also jeopardize your insurance coverage.

- **DON'T agree to return the fee or to pay any amount of money to make the problem go away unless it is handled correctly.**

There are situations that absolutely warrant agreeing to return the fee or to make a small payment to resolve a claim before it gets bigger; however, that is not something to be handled on your own. An offer like that should only be considered after discussing it with the client, your counsel and your insurance company to make sure everyone agrees with the approach.

Tips for Lawsuits

Perhaps the professional's first notice of a claim is when they get served with a summons and complaint. This is a lawsuit and it is a serious matter. If not treated as such, harsh consequences could follow.

- **DON'T ignore it.**

Putting the complaint in a drawer because it is too upsetting is not the way to deal with a lawsuit. Ignoring it will not make it disappear. Rather, the court might enter a default judgment against you and the insurance company might decline to provide coverage.

DO'S & DON'TS

- **DO note the day you were served.**

A lawsuit has to be responded to within a specified period of time. Your attorney needs to know when you were served so he or she know when to file an answer. Saying you were served “a few weeks ago” is not good enough. It will cost time and money to check the court file to determine when you were served.

- **DO notify your insurer promptly.**

Every insurance policy requires that the insured give notice of a lawsuit within a certain period of time. The insurer needs to retain an attorney so that an answer can be filed in a timely manner. Failing to notify the insurer within the time period required by the policy could serve to jeopardize your coverage.

- **DON'T respond on your own without an attorney.**

There are rules in place in every state that dictate how to properly respond to a lawsuit. Unless you are an attorney, it is foolish to try and handle a lawsuit on your own.

- **DON'T say something you might later regret.**

After being served with the lawsuit don't call the plaintiff's attorney to tell him that you did nothing wrong and should be dismissed. Don't call any of the other parties named in the case. Let your attorney do the talking. If you call these people, there is a chance you might say something that could be damaging to your case and to your defense.

- **DO get your work file and documents together and in order.**

Once you are served, it is important to have your documents available as your attorney will want to see them right away. You need to act quickly to locate the file or files that are at issue, pull them out of storage and make sure they are organized.

- **DO try your best to relax.**

Being served with a lawsuit is a difficult experience. You will have feelings of anger and worry. Try to maintain your composure and allow your attorney to do his or her job. You are crucial to your own defense and you will be of no use to your attorney if you are a mess and cannot think straight because you are so upset.

Dealing with any accusation, threat, demand or lawsuit can be frustrating and frightening. Taking steps to react and respond appropriately will help to keep a bad situation from getting even worse.

Tell Tale Claims

Read the following two examples to better understand some common mistakes in handling a claim.

In January of 2018, an appraiser prepared an appraisal for a lender in connection with a purchase money loan. The contract price was \$335,000 and the appraised value was \$312,000. The appraiser was never contacted by the lender and was never asked to reconsider her value. In May of 2018, the appraiser was notified that the seller had filed a complaint against her with the state licensing board. The buyer had agreed to pay \$315,000 for the subject property. The seller claimed the report was negligently prepared, thereby costing him \$20,000. The appraiser responded to the board complaint. She never notified the insurer and she did not discuss the complaint with her attorney. In July of 2018, the state board complaint was dismissed.

In September of 2018, the appraiser was served with a summons and complaint. The seller was not convinced by the state board decision. His lawsuit alleged the appraisal was negligently prepared thereby costing him \$20,000, plus attorney's fees. The appraiser hired her business attorney to handle the lawsuit. She did not disclose the state board complaint or the lawsuit to the insurance company until July of 2019, when she was completing her renewal application.

The appraiser was a bit annoyed that the lawsuit was still pending. She didn't understand why her attorney could not get it dismissed, since the state board had dismissed that complaint so quickly. She finally asked if the insurance company could help. Even though her disclosure of the lawsuit was late, the lawsuit was reported prior to the expiration of the policy period so the insurer did agree to provide coverage. A new attorney was hired by the insurance company. He got the lawsuit dismissed in a few months after arguing that the appraiser owed no duty to the seller. Unfortunately, the appraiser had paid her attorney over \$7,000 and all he did was file an answer. The insurance company had no obligation to reimburse fees the insured incurred prior to even notifying the insurer that the lawsuit had been filed.

COMPLAINT FORM

One day an insured appraiser got a phone call from a buyer/borrower. The buyer had recently received the appraisal prepared by the insured in connection with the purchase of the property. The buyer was upset and thought he paid more for the home than it was really worth. The appraisal prepared by the insured said the property was worth \$380,000 based upon 3,200 square feet. The contract price was \$365,000 but the buyer thought the home had almost 3,500 square feet.

The buyer went on to explain that the seller disclosure said the home had 3,490 square feet and the same figure was in the MLS. The MLS said this figure came from a prior appraisal. The listing agent said this was the square footage figure stated in the appraisal prepared five years earlier when the sellers had purchased the property.

The buyer was very upset and was thinking about suing the seller and the listing agent. Before he did that, he wanted the insured to come back to the house and to show him how he had measured the home for the appraisal. Even though the buyer was not the client, the insured went to the home and spent over an hour there. He measured the property, reviewed the sketch attached to the appraisal and explained to the

buyer how the GLA was one factor considered by an appraiser when estimating market value.

The appraiser suggested that the buyer ask the listing agent for a copy of the prior appraisal that had been relied upon when preparing the listing. The buyer could then compare the insured's sketch to the prior appraisal and see where the prior appraiser made his mistake.

While the insured did not encourage the buyer to make some kind of claim against the prior appraiser, he didn't discourage him either. In fact, he counseled the buyer to request the prior report and told the buyer how to review that report to figure out how that appraiser had determined his square footage figures.

A few weeks later, the insured got a call from the listing agent. She was yelling at the insured and questioning him about why he had told the buyer to sue everyone over the wrong square footage figure. The agent advised the insured that it was his appraisal that had been relied upon when completing the listing.

It turned out that the insured had appraised the property a little over five years earlier when the seller

had purchased the home. It was the insured who stated the home had 3,490 square feet. The insured's work file had been destroyed a few months earlier because it was more than five years old. The insured only searched back in his records for three years to determine if he had previously appraised the subject. The insured had appraised several homes in this subdivision, some of which were model match homes to the subject. He assumed that was why the home looked familiar to him. He had no recollection of his prior appraisal.

After essentially telling the buyer how he could point fingers at the prior appraiser, the insured tried to reverse himself and say that he owed no duty to the buyer and that the buyer had no right to rely on an appraisal that was done more than five years prior for a lender. The buyer was not convinced. He made a complaint to the state licensing board and he found an attorney to file a lawsuit against the insured, the seller and the listing agent alleging that they all misrepresented the true square footage of the subject property, causing the buyer to pay more for the home than it was worth. ☹️

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Claudia Gaglione is a partner at Gaglione, Dolan & Kaplan, and the National Claims Counsel for LIA's Errors & Omissions program. She graduated from the University of Southern California Law Center in 1982 and specializes in the defense of professional malpractice claims. Since 1987, Claudia and her colleagues have supervised over 8,000 claims and lawsuits filed against real estate appraisers, and other real estate professionals, across the country.