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News Release

CONFLICTS OF INTEREST, EXPANDING AND COMPLEX PRACTICE AREAS TRIGGER MOST NEW LEGAL MALPRACTICE CLAIMS

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WASHINGTON, DC, June 26, 2018 – Inadequate safeguards by law firms to prevent or effectively manage conflicts of interest, along with challenges related to their participation in certain expanding and complex practice areas, are driving the latest wave of new legal malpractice claims, according to a new study by insurance broker Ames & Gough.

In its eighth annual survey of lawyers' professional liability claims, Ames & Gough examined the trend by polling nine of the leading lawyers' professional liability insurance companies that on a combined basis provide insurance to approximately 80 percent of the Am Law 200 firms.

Conflicts biggest cause of claims. In every year the survey has been conducted, insurers have cited conflicts of interest (including *perceived* conflicts) as the most common alleged legal malpractice error. This year, seven of the nine insurers surveyed cited conflicts as the first or second biggest leading cause of legal malpractice claims. Indeed, a law firm's representation of a client in the face of an actual or alleged conflict of interest is taken seriously by clients and courts, mostly because such actions are viewed as a breach of the *duty of loyalty*.

At the same time, the top four practice areas generating the largest number of claims are: business transactions, corporate and securities, real estate and trusts and estates.

Business transactions and corporate and securities. The growing U.S. economy has fueled increased workloads for law firms on mergers and acquisitions and corporate securities. However, when deals go bad, clients start looking to their lawyers. Allegations in these legal malpractice claims often include simple scrivener errors, inadequate representation, breach of fiduciary duty and conflicts of interest.

"Whether a company is in the process of formation, protecting its intellectual property, raising capital, going public or private, or embarking on a cross-border acquisition, its outside counsel must have the experience and know-how to guide the company through these complex and high-stakes challenges," said Eileen Garczynski, senior vice president and partner, Ames & Gough.

She added that managing these risks starts with making sure the attorney and firm have the requisite expertise, time and tools to accept the matter. Firms should be clear in the engagement letter, as well as in all client communication, about whom they do and do not represent. From the outset, they need to conduct thorough conflict checks, remain alert to potential conflicts that might arise during the course of the engagement, use conflict waivers when appropriate, and check all documentation for accuracy.

Commercial real estate. Given the increasing volume of commercial real estate transactions, many lawyers handling these matters are seeing a related uptick in malpractice claims. Typical issues include: errors in preparing a deed or mortgage/financing document; lease or loan guarantee language that doesn't properly protect the client's interests; creating conflicts, such as by answering questions from unrepresented parties at a closing, and errors involved in managing or maintaining adequate escrow fund balances.

Trusts and estates. This practice area sees a large percentage of legal malpractice claims, not only due to the high volume of transactions as the U.S. enters a period involving the largest transfer of wealth in its history, but also because it inherently involves personal and sensitive matters, which makes it uniquely susceptible to the potential for client dissatisfaction.

Overall claim frequency stabilizes, as severity continues to rise. Although seven of nine insurers in the survey reported claim frequency in 2017 was similar to or less than the prior year, claim severity remains on the rise. In 2017, all nine insurers surveyed had claims with reserves over $500,000. Five of the insurers reported having 21 or more such claims. The same number participated in paying a claim of $50 million or more, including one with a claim exceeding $100 million and one, over $150 million.

The survey traces the rise in claim severity to the continued increase in attorney's fees, along with rising e-discovery costs and longer tail claims.

"The potentially substantial cost of malpractice claims underscores the need for law firms to give careful consideration to the professional liability insurance limits they purchase," Ms. Garczynski noted. "At the end of the day, when a large claim occurs your firm needs to make sure it has adequate financial protection."

Cyber-related malpractice claims flatten. Although cybersecurity is among the biggest risks law firms face, only four of the nine insurers polled saw more cyber-related legal malpractice claims this year than in prior years (compared with five who did so in the 2017 survey). This appears due to the fact that more law firms have purchased stand-alone cyber liability insurance policies, rather than to rely on finding coverage under their lawyers' professional liability policy.

"There's no question that law firms have been seeing pressure from clients to invest in the protection as a result of a heightened focus on cyber risk," Ms. Garczynski explained. "More clients now require firms to upgrade their cybersecurity capabilities and to provide proof of cyber liability insurance coverage."

The insurers participating in the Ames & Gough survey were: AXIS, CNA, Huntersure, Ironshore, Markel, Travelers, Swiss Re, QBE, and XL/Catlin. Copies of the survey, *Lawyers' Professional Liability Claims Trends: 2018*, may be obtained free of charge by emailing requests to: info@amesgough.com. Those requesting the survey should include their name, title, affiliation, and phone number, and state "LPL Claims Survey 2018" in the subject line.

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About Ames & Gough

Ames & Gough, founded in 1992, has established itself as a committed, superior resource for law firms, design professionals, and other consulting firms and professional organizations and associations in need of professional liability insurance and risk management assistance. In recent years, the firm has expanded its capabilities to include management liability, employment practices liability, kidnap & ransom and related insurances; as well as more typical property and casualty insurances. The firm has offices in Boston, New York, Philadelphia, and Washington, DC. Visit the Ames & Gough website at http://www.amesgough.com/.