

**WHAT THE AGING ATTORNEY NEEDS TO KNOW ABOUT
PROFESSIONAL LIABILITY INSURANCE
(INCLUDING TAIL INSURANCE)**

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WHAT THE AGING ATTORNEY NEEDS TO KNOW ABOUT PROFESSIONAL LIABILITY INSURANCE (INCLUDING TAIL INSURANCE)

INTRODUCTION

As you get ready to transition to a more limited practice or retire altogether, the prospect of dealing with a malpractice lawsuit or disciplinary proceeding may be the last thing on your mind. If you are one of these lawyers, you may be confident that your experience makes malpractice claims unlikely; you may be less concerned about reprimands or disbarments than while you were building your practice. More likely, you may simply have other things to worry about and believe that your existing professional liability policy will take care of any problem that may arise.

While a professional liability policy may provide some protection, there may be gaps in coverage or conditions that you must timely perform in order to enjoy full protection. Failure to consider these pitfalls may cause unnecessary headaches, delay a much-anticipated retirement, or tarnish a reputation that you have diligently built over the years. The purpose of this paper is to serve as a guide and checklist for experienced lawyers to consider before making significant career transitions in the final years of practice.

Step One: Pull the Right Policy out of the Drawer

The focus of this paper is on professional liability (PL) insurance as opposed to the variety of other policies that a lawyer may have maintained over the years. PL insurance is limited to damages arising from the performance of professional services and will not cover, for example, claims from property damage or personal injury. Other types of policies that a lawyer may have are commercial general liability, workers compensation, surety bonds for a notary public, errors-and-omissions policies for fiduciary attorneys, or fidelity bonds for those who handle money. The distinctions between these types of policies may seem straightforward enough, but there may be occasional overlap among policies and uncertainty over what policy covers what type of claim. For example, the Dallas Court of Appeals held that a law firm's solicitation letter was not a "professional service" excluded by the firm's CGL policy.¹ In order to avoid any coverage gaps, spend some time reviewing what

types of firm activities are covered by what policies. When in doubt, discuss these issues with your agent, carrier, or coverage counsel.

Although some carriers and law firms may offer a "comprehensive business package" of insurance that includes some or all of these coverages, this package may not include PL insurance. A lawyer should therefore review the policy and talk to a trusted agent about the type of coverage that exists.

Your firm's partnership agreement or PL policy may also be good starting points to determine any ongoing indemnity or insurance obligations by the firm to its departing attorneys. Be sure to review any of these documents for headings entitled "Insurance" or "Indemnity" before you make a career transition.

Many experienced lawyers will already have some type of coverage available through their current practice, and making sure you are fully protected may simply require reviewing the policy or contacting your carrier for extended coverage products that are explained further below.

Step Two: Carefully Review the Policy

Once you have the right policy in hand, it is essential that you review the conditions, definitions, and exclusions that could create gaps in coverage or impose affirmative duties that the insured must comply with to trigger coverage. Discussed below are essential policy sections to review and some common coverage limitations contained in PL policies.

Declarations Page. This section, in addition to containing usual terms like the name of the insured and the policy term, may contain other terms such as prior-acts coverage or a retroactive date after which coverage is available. Prior-acts coverage (explained further below) is essential for lawyers who already have several years of experience. If the policy states a retroactive date, coverage will generally be available for prior covered acts that occurred after this date.

If no retroactive date is specified in the Declarations Page or elsewhere in the policy, there is generally unlimited prior-acts coverage. This type of coverage, however, will usually require that the insured did not know or could not have reasonably known of any prior act or omission that could give rise to a claim. In this case, the carrier will require you to specify in the application all potential claims that you are aware of, and failure to do so may forfeit your right to assert coverage if such claim ever arises. If you review your policy and find that you listed some potential claims but have since become aware of others not listed, make sure to contact your agent or carrier as soon as possible to include these other potential claims to avoid any disputes.

The Declarations Page may also contain a schedule of endorsements that may limit coverage. It is essential to make sure that any endorsements listed in a schedule are actually contained in the policy. Each endorsement will be identified by a specific endorsement number on the bottom of the page. Make sure that these numbers match the endorsement numbers listed in the Declarations or the Schedule of Endorsements.

Insuring Agreement. The next step in your policy review is to carefully read the insuring agreement, which specifies the type of coverage available. A typical insuring agreement may state:

The policy will pay on the behalf of the **Insured** any **Loss** arising from a **Claim** first made against the **Insured** during the **Policy Period** or, if applicable, the **Extended Reporting Period** and reported to the Insurer pursuant to the terms of this policy for any **Wrongful Act** committed or omitted by an Insured, on or after the **Retroactive Date**, whenever or wherever such **Wrongful Act** has been committed by the Insured in the rendering or failing to render **Legal Services** for others.

This provision contains many defined terms that you should also review. These will often include terms such as “Wrongful Act,” “Insured,” “Legal Services,” “Retroactive Date,” “Extended Reporting Period,” and “Policy Period.” These are a few examples of most common terms that you should review in your analysis and not take for granted. For instance, the definition of “Insured” could include only licensed attorneys who were already employed with the firm at the time of the policy inception, could limit coverage of new lawyers to only work that they perform for the new firm, or could limit coverage for acts and omissions by support staff like secretaries and paralegals.

Because many PL policies may not cover contract attorneys, these attorneys should ask the firm about coverage before they begin a business relationship. If the policy does not cover contract attorneys, they ask the firm if they can purchase additional insurance through its PL carrier or shop around for insurance from another reliable carrier. If you are a contract attorney working for more than one firm, you must confirm whether each firm’s PL policy provides coverage for your acts on behalf of that firm.

Another essential defined term that will be explained further below is “Claim.” If a PL policy defines a Claim as only a “claim for monetary damages,” an insurer may successfully argue that suits

for injunctive relief, disciplinary actions, or fee disputes are not covered.ⁱⁱ

With regard to coverage for sanctions, disciplinary proceedings, and fee disputes, some policies may contain a supplementary-payments clause that discusses these types of damages.

In order to avoid any coverage gaps, look for a policy that defines “Claims” broadly, for example, as including all of the following: (1) a written and/or oral demand for monetary, non-monetary or injunctive relief; (2) a written and/or oral request to toll or waive a statute of limitations relating to a potential Claim against an Insured; (3) a suit; or (4) a Disciplinary Proceeding.

If the Policy does not define certain terms, they will be interpreted according to their ordinary meaning, applying traditional rules of contract construction.ⁱⁱⁱ

Limits of Liability. You should also review the limits of liability contained in the policy. This will generally be contained in the Insuring Clause, but review the policy to see if any other section or Endorsements states or modifies these limits. The limits will be set forth on a per-claim and aggregate basis.

The per-claim amount will be the amount for a single claim, which makes the definition of a “Claim” essential. One way that a per-claim limit could be affected is if a “Related Acts” or “Interrelated Wrongful Acts” provision is triggered, which may group several related acts or omissions together as a single “Claim” if they are causally connected.^{iv} Whether you need to purchase sufficient policy limits to protect against this scenario will depend on the nature of your practice. For example, a larger per claim limit may be advisable if you handle long-lived, complex cases—such as mass-tort litigation or commercial cases involving several parties—that may trigger a variety of claims from different persons over the life of the lawsuit or related lawsuits.

The aggregate amount is the total amount available for all claims during a policy year. Be sure to keep track of any other claims that the policy may have covered, as these claims may have depleted any remaining amounts.

Over the last few decades, PL policies have moved towards applying the costs in defending a covered lawsuit towards the policy limits, sometimes referred to as “Expenses within Limits” provisions. Look for these provisions when shopping for a policy. If you are in a practice area that involves a high frequency of malpractice lawsuits, such as personal injury plaintiff’s work, or a complex area that will require significant resources to defend, make sure that your limits of liability are high enough to satisfy both defense costs and the costs of settlement or judgment.

Another option is a “claims-expense allowance,” which will result in defense costs not applying towards policy limits until these costs have reached the allowance amount.

Step Three: When in Doubt, Report.

Many attorneys who have dealt with insurance throughout their careers may be accustomed to occurrence-based policies. An occurrence policy will provide coverage if the covered act or omission occurred during the policy, regardless of whether a claim is also made during this time. Although this form of coverage is common in consumer cases, property damage policies, or personal injury policies, it is rare in professional liability policies. Instead, most professional liability policies are written on a claims-made and reported basis. Lawyers who have practiced for many years should be particularly conscious of this distinction because many older PL policies were occurrence-based before carriers began transitioning away from this model.^v

Claims-made and reported policies require that a claim not only arise during the applicable period, but also be reported by the attorney. Out of an abundance of caution, you should always report even when a claim may seem remote.

Always defer to the policy’s definition of a “claim” when deciding whether to report, but note that it can generally extend to demand letters or sometimes even information demands. In *Precis*, for example, the Fifth Circuit easily found a claim in a demand letter by shareholders to a company for money for failure to allow them to exercise purchase warrants.^{vi}

There may also be disputes regarding the manner in which a demand must be made to constitute a “claim.” For example, the dispute in *Regency* was whether a claim was made “against the insured” if it was first made through a third party before the start of the policy period.^{vii} The federal court for the Eastern District found that this plain language (“against the insured” rather than, for example, “to the insured”) meant that a claim could be made through a third party if it was intended to impose liability against the insured.^{viii}

Although there is not much the insureds in *Regency* could have done about claims that happened before the policy inception, this case illustrates the types of arguments that insurers can make if an insured does not appropriately report a claim. Even if you doubt that a claim has been asserted because of the manner in which it was made, report anyway.

Even though claims-made and reported policies will impose specific time periods in which to report,

the policy may still require claims to be reported “as soon as possible” or “as soon as practicable.” If the insured unreasonably delays reporting for several months, an insurer can successfully argue that the claim was not reported “as soon as practicable.”^{ix} Although many jurisdictions will require an insurer to show prejudice from the delay, Texas courts may not require a showing of prejudice if they find that prompt reporting is a condition precedent to coverage.^x

EXTENDED TAIL COVERAGE AND OTHER OPTIONS

Even though a PL policy is set to expire, an extended-reporting period—also known as “tail” coverage—will provide protection for claims that arose during the policy by giving you the option to report a claim within the extended period. When analyzing the mechanics of this provision, policy definitions such as Retroactive Date become essential, because the incident giving rise to the claim generally must have occurred *after* the policy’s retroactive date but before the primary policy period lapsed. The Retroactive Date is often the date that you or the firm first purchased the current policy. The Extended Reporting Period is the period of time during which a claim arising from acts or omissions prior to the policy inception can be reported and covered. (As a caveat, note that these terms are discussed as they generally apply in PL policies, but you must *always* review your policy’s own definitions to see if they differ).

A typical extended-reporting period provision may provide:

The Named Insured shall also have the right to have an endorsement issued extending the reporting period for this policy to an endorsement issued unlimited period following the effective date of such cancellation or non-renewal upon his or her retirement from the private practice of law and the payment of additional premium for this option will be waived if:

- a. The named insured is an individual and has been continuously insured by the Company under a claims-made Lawyers Professional Liability Insurance policy for at least:
 - i. Seven consecutive years prior to such cancellation or non-renewal and is at least fifty-five years of age at the time of retirement; or

- ii. Six consecutive years prior to such cancellation or non-renewal and is at least fifty-six years of age at the time of retirement; or
 - iii. Five consecutive years prior to such cancellation or non-renewal and is at least fifty-seven years of age at the time of retirement.
- b. Written notice of this election is given to the Company within sixty days after termination of this policy; and
- c. All premiums and deductibles due the Company have been paid in full.^{xi}

Most professional liability policies allow attorneys to purchase tail coverage. The premium for this coverage may depend on the length of the extended reporting period. If premium payments are required, they will generally be calculated as a multiple of the regular policy premiums, e.g. 100% of the annual premium for a one-year extended reporting period, 175% of the annual premium of a three-year extended reporting period, etc. Tail coverage is generally not available as a “stand alone” product, but is instead sold with a claims-made policy.

As shown in the provision cited above, some policies may provide this additional coverage at a discount or at no charge, provided that certain conditions are met such as retirement from law practice or a certain number of years insured. If this is the case, make sure to review whether “retire” or “retirement” is defined, as it may require nothing short complete cessation from the practice of law and not allow for limited solo practice.

Whether you have extended-tail coverage and how long this coverage exists depends on the policy language. Many policies, for example, may provide for an automatic yet limited period of time to report a claim, e.g. 30, 60, or 90 days. A typical policy with this coverage may require that the claim be made during the primary policy period but reported during the extended-tail period. If your policy contains one of these shorter, automatic extended periods, you must also act promptly to purchase any additional extended coverage before the automatic extended period lapses.

If you are thinking of retiring or changing firms in the near future, you should plan ahead by reviewing your current PL policy and determining by what date you must call your agent or carrier to purchase extended coverage if it is not yet available.

When shopping for the right length of an extended period, there are a few factors to consider. The area of law you practice can impose certain limitations periods or the nature of the practice can lead to longer

gestation periods for a claim to arise and become apparent. For example, bankruptcy law probably requires a shorter extended reporting period than wills-and-trusts practice. An estimate of how many malpractice claims you have had in the past may also serve as a good barometer of the likelihood of future claims.

Professional Liability Coverage presents special issues for lawyers moving to another law firm or retiring. If a lawyer was covered under a firm’s policy, this coverage may cover claims arising from the lawyer’s services rendered at the firm. In other words, a lawyer who is at a new firm and receives notice of a claim for work at the old firm may take advantage of the previous firm’s PL coverage as long as it has not lapsed or is subject to an extended-reporting period. This lingering coverage may be important because the new firm’s carrier may limit new PL coverage for the lawyer’s acts or omissions at the new firm and exclude prior acts.

If you are transitioning from a firm to a smaller firm or to solo practice, you should also consider Individual Prior Acts Coverage or Career Coverage, which may be available through your current PL policy. Most insurers will seek to add a “retroactive” or “prior acts” date to coincide with the start of your new practice. But the further back you can get the retroactive date, the better. This coverage will generally require that you had no prior knowledge a possible occurrence that could lead to a claim.

Whereas most professional liability policies for a given law firm will limit coverage to claims arising from a lawyer’s work at that law firm, Career Coverage will protect an attorney for acts at a specified point beforehand. This is true regardless of where the attorney worked. But this type of endorsement may not be made available for new attorneys to a firm if the firm’s carrier does not wish to take on this additional risk.

FIRM CHANGES

Continuing coverage under a former firm’s PL policy may not be an option, however, if the firm subsequently divides or dissolves. Furthermore, if a firm dissolves and funds are allocated elsewhere to creditor claims or to satisfy partnership accounts, there may be nothing left to satisfy premiums for extended coverage, or there may be disputes as to whose obligation it is to maintain this insurance.

Some policies may also contain provisions that will allow the insurer to adjust premiums or decline to insure new risks altogether if there is a significant change in firm membership. Such a “material change” provision may read as follows:

If, during the Policy Period, the total number of lawyers in the Firm, increases or decreases by more than 15% the Firm must within 30 days of such increase or decrease give the Insurer written notice thereof, and the Insurer will be entitled to impose such additional coverage terms, adjust the premium or decline to insure the new risk(s) as the Insurer may require.

If the Firm shall consolidate with, merge into, or sell all or substantially all of its assets to any person or entity or group of persons or entities acting in concert, or if any person or entity or group of persons or entities acting in concert shall acquire Management Control of the Firm, the Insurer will be entitled to re-underwrite the policy and impose such additional coverage terms, adjust the premium or decline to insure the new risk(s) as the Insurer may require.

In other words, a material change that could affect or terminate the policy could involve a conversion of the entity form, a merger, a spin-off, or a change in the management and partnership structure.

In order to avoid a termination of coverage, it is important for lawyers to be conscious of any changes to their previous firms and, if necessary, to purchase extended coverage.

CONTROL OF DEFENSE

Many lawyers, especially those with many years of experience, may wish to maintain close supervision of any litigation that arises. Others may wish to begin enjoying retirement and to leave any defense up to the carrier's choice of counsel. Regardless of your preference, there will be a policy provision that deals with the defense in the event of a covered claim and how the defense will be handled.

Virtually all PL policies will allow the insurer to select defense counsel, but policies may give insureds various roles in the selection process. Because of your experience, you may understandably wish to at least have the opportunity to suggest counsel.

You may also be concerned about the qualifications of the counsel selected or the possibility of malpractice by the chosen attorneys (whose own malpractice, ironically, may not trigger vicarious liability of the selecting insurer according to the Texas Supreme Court).^{xii}

The defense provisions will also deal with an insurer's right to settle the claim. Although some policies will allow the insured the option to consent or

reject a settlement, they may include a "hammer clause," which may make the insured liable for any amounts later awarded that were in excess of the amount for which the insurer could have settled the claim.

CHOOSING A RELIABLE CARRIER IN A CHANGING WORLD

If you have gone through these steps and realized that the policy does not contain desired coverage, you should either discuss this issue with a carrier that you have worked with and trust, or search for a trustworthy carrier that can tailor a policy to your needs.

Professional liability insurance has fluctuated greater over the past few decades, with many carriers inexperienced in PL insurance leaving the market as abruptly as they entered.^{xiii} At the very least, carriers have sought to reign in their liability under these policies, such as by transitioning from occurrence-based to claims-made policies.

Fortunately, there are still reliable and trustworthy insurers who offer PL policies that will cover all the gaps as long as you do your homework, and ask around. If you follow these tips, you may avoid having to unwillingly extend your law practice into your retirement.

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^v Ronald E. Mallen et al., *LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE*, Section 1.1 (Ronald E. Mallen ed., 2002).

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^{vii} *Regency Title Co., LLC v. Westchester Fire Ins. Co.*, No 4:11-cv-390, 2013 WL 6054820, at *1-2 (E.D. Tex. Nov. 15, 2013).

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^{ix} *Precis*, 184 Fed. Appx. At 442.

^x *Id.*; see also *Hirsch v. Tex. Lawyers' Ins. Exch.*, 808 S.W.2d 561, 565 (Tex. App.—El Paso 1991).

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