

Basic Considerations Regarding Lawyer Professional Liability Insurance (From State Bar of Texas Law Practice Management Article)

Is professional liability insurance required?

Texas lawyers are not required by law to have insurance to practice law. A number of considerations may prompt lawyers to obtain insurance, however:

1. Professional liability insurance protects clients against errors that could happen to anyone.
2. The protections afforded by limited liability partnerships against vicarious liability require a minimum of \$100,000 in insurance.
3. Several lawyer referral services in the state require professional liability insurance.
4. Clients sometimes require professional liability insurance, particularly large corporations, banks and insurance companies.
5. Defense costs in legal malpractice claims are often high even when no error actually occurred.
6. Professional liability insurance protects individual lawyers against financial ruin from an adverse judgment. Lawyers are personally liable for their mistakes. Professional corporations and limited liability partnerships do not protect lawyers from liability for their own mistakes.
7. The lag time between an error and a claim can be quite long. Younger lawyers need to consider obtaining insurance early in their career so that they will be protected from early mistakes discovered after building up assets.

How much coverage do I need?

There is no magic formula for determining appropriate limits. Consider the following in determining appropriate limits:

1. The dollar value of transactions or suits that you work on.
2. The cost of defending a claim. About 1/3 of total payments under lawyers' professional liability policies are for defense costs. Even if you cannot afford coverage equal to the value of matters you work on, you can at least get the cushion that being able to pay defense costs gives you.
3. The value of assets you want to protect.
4. If you are in a firm, compare your coverage level to other firms with similar exposures.

Can I buy insurance and drop it as my financial position changes?

Most legal malpractice insurance is written on a claims made basis. This means that an insurance policy covering an error must be in place at the time the lawyer becomes aware of a claim. Having insurance at the time an error is made is useless if insurance is not in force when the claim is made.

Can I buy prior acts coverage for time periods when I didn't have insurance?

Most insurers no longer provide such coverage.

Can I buy insurance for myself if my firm does not have insurance?

Most insurers will not provide such coverage. When a lawyer works in a firm, they may have vicarious or supervisory liability for the acts of other lawyers.

If I leave a firm, what can I do to obtain coverage?

If the old firm continues to be insured, lawyers who leave the firm are usually defined as insureds under the old firm's policy for acts while employed by the firm. If the old firm does not continue to remain insured, due to dissolution or a choice not to carry insurance, prior lawyers are no longer insured under that policy. Successor law firms may be able to obtain coverage for predecessor law firms if the exposures are similar. Individual lawyers may be able to obtain coverage for work they did at a prior insured firm under a different firm's policy. A dissolving firm may be able to buy extended reporting coverage that provides additional time to report claims made against the dissolving firm.

Are all insurance policies the same?

Lawyers' professional liability insurance is not regulated as to form or rate in Texas. As a result, the differences in coverage between policies can be significant. Important differences can include the following:

- Deductibles may be either per claim or aggregate.

- Expense allowances for defense costs vary from policy to policy.

- Some policies may not cover DTP A or punitive damages.

- Some policies may not cover grievance expenses.

- Exclusions for particular types of practices, such as securities practice, are possible.

- Some policies give insureds control of settlement of the claim, but with a penalty that caps the maximum benefit under the insurance. Other policies allow a peer review of a contested settlement and do not penalize the insured.

- Some policies provide coverage to innocent insureds when another insured commits fraudulent or criminal act.

- Some policies exclude malpractice counterclaims in suits initiated by insureds for fees.

Are all legal malpractice claims handled in the same manner?

Claim handling varies significantly from insurer to insurer. Some insurers use nonlawyers to manage claims, while other use attorneys to manage their claims. Counsel employed by insurers varies as well. Some insurers use the same lawyers to defend legal malpractice claims that they use to defend automobile claims.



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Professional Liability Insurance Policies

Washington lawyers are not required to have professional liability insurance coverage. However, they are required to report to the Washington State Bar Association, on a yearly basis, whether they have coverage. They are not required to report the following:

- Who their insurer is, if they have malpractice insurance coverage.
- The limits of their policy.
- The amount of any deductible that the lawyer must pay before the insurance company is obligated to pay a claim.
- Any limitations on or exemptions from coverage. For example, most legal malpractice insurance policies do not cover claims against a lawyer that arise out of illegal conduct by the lawyer.

Not all lawyers maintain professional liability insurance. Some lawyers may make a responsible decision not to maintain insurance because the lawyer is an in-house or government lawyer, or because the lawyer may choose to be financially responsible (self-insured).

The Washington State Bar Association does not independently verify the insurance information provided by lawyers. There is no guarantee that a lawyer has maintained insurance coverage after the report date or will continue to maintain insurance coverage in the future. There is also no guarantee that a lawyer has adequate insurance limits to cover all potential claims or that a particular claim will be covered by the policy. Note that it is also possible that the information displayed was erroneously reported or incorrectly entered in the State Bar's database.

The following is a list of questions that a prospective client might ask before entering into a lawyer-client relationship with a particular lawyer:

- Do you presently maintain professional liability insurance coverage?
- What is the name of your insurer?
- What are the limits of your coverage? Have any of those limits been used in the payment of other claims?
- What is the deductible under your policy?
- Does your policy cover the type of work you are doing for me?
- What is the term of your current coverage?
- Will you advise me if you discontinue your coverage or change your limits?
- Could you provide me with a Certificate of Insurance (evidence from an insurance company that the lawyer is insured)?

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- If you do not maintain professional liability insurance, why have you made that decision?

Professional liability insurance policies provide insurance coverage for some but *not* all professional liability (malpractice) claims made against a lawyer. Most professional liability policies are written on a "claims-made" basis. This is different from the usual home-owners or automobile insurance policy. This means that the insurance company providing the insurance has agreed to cover claims that are made against the lawyer during the term of the policy. In other words, the policy that applies to a particular claim is the policy that is in effect at the time the claim is presented to the insurance company with a demand for payment - not the policy in effect when the lawyer's alleged negligence or mistake took place. Malpractice insurance policies typically limit the amount that the insurance company can be required to pay on each claim and the total amount that the insurance company can be required to pay on all claims made against the lawyer during the term (or effective period) of the policy. The maximum amount of coverage provided by a malpractice insurance policy is called the "limits" of the policy.

Frequently Asked Questions about Professional Liability Insurance

Why am I required to disclose whether I have Professional Liability Insurance?

Rule 26 of the Admission to Practice Rules (APR) provides that every active member of the Washington State Bar Association is required to disclose annually whether the lawyer maintains professional liability insurance.

What is the purpose of required insurance disclosure?

The purpose of the insurance disclosure rule is client protection. Under the Washington Rules of Professional Conduct, one of the basic principles of the lawyer-client relationship is that the lawyer will give the client sufficient information regarding material facts to allow the client to make an informed decision in matters relating to the representation. See, e.g., RPC 1.4; 1.7. Whether a lawyer maintains professional liability insurance may be a material fact for some persons in considering whether to hire a lawyer, and it should be easily available to a client or prospective client.

What does the rule require?

APR 26 requires that each active status lawyer certify annually on a form approved by the Board of Governors (a) whether the lawyer is in private practice; (b) if so, whether the lawyer maintains professional liability insurance; (c) whether the lawyer intends to continue to maintain insurance; and (d) whether the lawyer is a full-time government lawyer or house counsel and does not represent clients outside that capacity. The rule also requires notification to the WSBA within 30 days if the lawyer in private practice ceases to be insured. The rule does not require lawyers to have professional liability insurance.

Is failure to disclose a disciplinary violation?

Failure to comply with the disclosure requirement will result in administrative suspension from practice until the information is disclosed, in the same way that lawyers may be suspended for failure to comply with the continuing legal education reporting requirements, but it is not a disciplinary violation.

What is done with this information?

This insurance information is available to clients or prospective clients on the lawyer directory on the WSBA website or by contacting the WSBA. In practice, the availability of this information will operate similarly to the contractor insurance and bonding information available to the public through the Department of Labor and Industries by contacting the Department or searching the Department's website.

Where can I find information on purchasing legal malpractice insurance?

The ABA Standing Committee on Lawyers' Professional Liability has a very helpful workbook entitled *Selecting Legal Malpractice Insurance*. The book provides easy-to-understand information about malpractice insurance policies, a glossary of terms, insurance policy checklists, a pull-out comparison chart to help you choose a policy, and a state-by-state listing of malpractice insurance carriers.

How should I fill out the Professional Liability Insurance Disclosure?

Mark the one box that fits your situation. If you represent clients in any capacity (whether it be *pro bono* or as a contract attorney) you should find out whether or not the organization for which you are providing services maintains and intends to maintain professional liability insurance and mark the appropriate box.

How should I notify the WSBA if my coverage lapses, is no longer in effect or terminates for any reason?

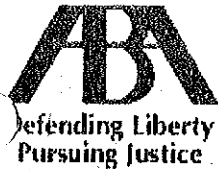
APR 26 requires written notification within 30 days if your coverage lapses, is no longer in effect or terminates for any reason. You can send a letter to the WSBA, attention Licensing Project Lead.

Click [here](#) for WSBA general counsel Robert Welden's June 2007 Bar News article on Malpractice Insurance Disclosure.

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Standing Committee on Lawyers' Professional Liability

Division for Legal Services

Understanding Your Insurance Coverage

Your insurance coverage can be broken down into the following elements:

- **The Application**
- **The Declaration Sheet**
- **The Insurance Policy**, composed of:

- Definitions
- Coverage Agreements
- Exclusions
- Defense and Settlement Provisions
- Limits of Liability
- Conditions

- **Endorsements**

Only those elements contained in the insurance policy itself make up the insurance "contract." The application must, in some way, be attached to the policy before it is considered an official part of the policy. However, many companies today expressly state that the application will be included as part of the insurance contract.

Insurance contracts are usually contracts of "adhesion." In other words, because the insurance company dictates the terms of the contract, in a dispute regarding coverage you, the insured, will be looked upon more favorably than the insurance company.

The wording in the insurance policy itself is intended to provide protection for the insurance company and to eliminate loopholes in coverage. This does not necessarily mean that coverage disputes will be adjudicated in favor of the insurance company. Policy wording is open to interpretation by the courts.

Each aspect of your policy coverage is discussed below.

The Application

In the application, you provide information about yourself and your practice. It is extremely important to complete all of the application; don't leave anything blank. Be truthful. The application often becomes part of the policy; if you withhold relevant information, the company may have grounds for voiding your

policy. If you encounter a broker who advises you to withhold information, get another broker.

If you have "high-risk" activities or claims and fear that these may preclude coverage, do not succumb to the temptation to avoid giving the underwriter complete information. The more information you give the underwriter, the better he or she can evaluate the risk and charge you a fair price. Cast your explanation in terms that show the underwriter why he or she should not be afraid to insure you. In other words, help the underwriter find a way to provide coverage, not decline it.

Disclose all past claims and explain any extenuating circumstances, mitigating factors, and remedies taken. Demonstrate to the underwriter an awareness of the problem and describe fully all steps you have taken to solve it. The rule of thumb should be "the more, the better."

The Declaration Sheet

The declaration sheet outlines the terms of coverage, specifies the beginning and end of the policy period, states your limits of liability on a per claim and aggregate annual basis, and specifies your deductible (either per claim or annual). The "Named Insured," which is identified on the Declaration Sheet, will be further defined in the insurance policy itself.

If the policy includes coverage for "prior acts" (that is, coverage for acts that occurred prior to the policy period), the date on which the prior acts coverage is effective (the "retroactive date") will also be stated on the Declaration Sheet. If not, look for an attached endorsement that will provide the policy's specific retroactive date.

The Insurance Policy

The insurance policy itself:

- defines terms used in the policy ("Definitions");
- specifies for what services, activities or actions coverage applies ("Coverage Agreements");
- states specific activities that are not covered ("Exclusions");
- explains your and the company's rights regarding settlement, such as whether or not your consent is required to settle and who has the right to select defense counsel ("Defense and Settlement Provisions");
- states what and how the policy will pay ("Limits of Liability"); and
- stipulates certain conditions to coverage ("Conditions").

Each policy is written differently, and the items listed above may appear in different locations with different headings in each policy. However, by reading the detailed descriptions below, you should be able to locate them no matter where they are found within a policy.

Definitions

The definitions describe for who coverage is provided. Terms to look for include:

- **Named Insured.** The "Named Insured" is usually defined as the partnership, professional corporation or individual names on the Declaration sheet. Other lawyers covered by the policy are usually listed

as "additional Insures," or simply "Insures." Make sure that you have coverage for everyone who should be covered, and for acts on behalf of the firm (Named Insured) or without such a limitation.

- Predecessor Firms. If the term "predecessor firms" is included in the definitions, coverage applies to any predecessors of the existing firm.
- Former lawyers, partners, and shareholders.
- Current lawyers, partners, and shareholders.
- Future lawyers, partners, and shareholders.
- Former, current, or future non-attorney employees.
- Attorneys serving in an "Of Counsel" capacity.
- Heirs, executors, administrators, legal representatives, and assigns of the insured.

Coverage Agreements

Services, activities or actions that may be covered include:

- professional services as an attorney;
- services as a notary public;
- services as a title agent (sometimes by a special endorsement to the policy);
- an attorney or non-attorney who causes personal injury;
- an attorney acting as trustee or executor;
- pre-or post-judgement interest, appeal bonds, and related costs.

In addition, the policy may specify the following coverage:

- All prior acts of the firm and all members of the firm, including employees, when the insured, prior to the policy period, had not notified any previous insurer of any act and the insured had no reason to believe a breach of professional duty had occurred;
- Claims made and reported during the policy period;
- Claims made and reported no later than 60 days after the policy terminated.
- Claims first made after the expiration of the policy, providing that the insured;
(1) had reasonable knowledge that a wrongful act occurred and a claim might be made and
(2) reported the suspected wrongful act to the insurer during the policy period;
- An optional extended reporting period (additional coverage for claims reported after the expiration of the policy for errors committed within the policy period), usually purchased within 30 days of the policy's expiration for a specific time period and for an additional premium; and
- An optional retired or non-practicing attorney's extended reporting period

Exclusions

Whereas the coverage agreements provide coverage, the exclusions take it away. If an activity is in the exclusions section of the policy, you do not have coverage for that activity, no matter what the other sections of the policy state. It is up to the company if a defense (with no obligation to pay on behalf of) be provided.

Each company's policy differs, so it is extremely important to examine exclusions carefully. Listed below are exclusions sometimes found in professional liability insurance policies:

- dishonest acts
- fraudulent acts
- criminal acts
- malicious acts

(For the four categories above, however, coverage is usually afforded to innocent parties).

- vicarious liability (liability acquired by law or by contract for the acts, errors or omissions of others)
- claims made by or against a business enterprise owned or controlled by an insured (refers to claims by or against the business itself)
- claims arising out of or in connection with a business enterprise owned or controlled by an insured (refers to third-party claims)
- an attorney's activities as an officer, director, etc., of a business not owned or controlled by the insured)
- services as a fiduciary under the Employee "Retirement Income Security Act of 1974 (ERISA)
- RICO (Racketeer Influenced and Corrupt Organization Act) claims
- activities as an elected public official
- worker's compensation claims
- advertisers' liability
- loss sustained as a beneficiary or distribute of a trust or estate
- bodily injury or property damage
- real estate claims
- claims by regulatory agencies
- notarization of a signature without the physical appearance of the signatory
- claims involving an insured versus another insured
- discrimination
- sexual harassment
- prior acts (acts committed before the policy period) where the insured had knowledge of or should have foreseen the claim
- investment advice
- securities
- punitive damages
- fines, statutory penalties and sanctions
- business enterprises liable for contamination or pollution of the environment (often contained in an "Endorsement" to the policy)
- loss related to nuclear reaction, radiation or contamination (often contained in a Nuclear Energy Exclusion to the policy).

Defense and Settlement Provisions

Issues covered in this section of the policy include:

- whether the insurer has the right to select defense counsel in the event of a claim. The policy language may explicitly state the right of the insurer to select defense counsel (for example, "Selection of defense counsel will be at the prerogative of the Company"). Alternatively, the right to

select defense counsel may be implied in the right to defend a claim (for example, "The Company shall have the right and duty to defend any claim");

- whether the insured has a right to select defense counsel (the opposite of the situation above). In this case, however, the insurer may have the right to approve the choice of defense counsel in advance or the right to require the insured to revoke the selection;
 - whether the insured's consent is required to settle a claim. If the insured's consent is required, policies often place a limit on what the insurer will pay if the insured refuses to settle.
-

Limits of Liability

In this section of the policy you will find the following:

- The specific limit of liability of each claim.
 - The aggregate liability on a firm basis (the total limit of liability for all claims).
 - The per claim deductible (that is, the deductible applies to each of every claim separately) or the aggregate deductible (the total deductible to be paid in a single year). If is possible for a policy to include both types of deductible, when there is a per claim deductible and a ceiling on the total deductible to be paid in a single year.
 - Deductibles may also be available for "damages only" which means you pay your deductible only in the event of a settlement (loss) or judgement. This type of deductible, also known as a "loss only deductible," may be purchased on a per claim or annual aggregate basis.
 - Whether claim expenses (defense costs and other expenses) are included in the limits of liability. Keep in mind that claim expenses are not often included within the limits of liability. The means that the cost of defending a claim, even if the claim is eventually dropped, reduces your limits of liability, effectively shrinking the amount of coverage you actually have.
 - Whether the policy provides a "claim expense allowance." This provision, which is becoming more prevalent in the market place, provides an allowance (e.g. \$50,000) for claim expenses, in excess of the deductible, and aggregate for all claims. Using this example, this means that after paying the deductible, you would be allowed \$50,000 in claim expenses before your limits of liability are drawn down to pay for claim expenses.
 - Whether two or more claims arising out of a single act or series of acts are considered a single claim. If they are considered a single claim, the policy may state that the policy year in which the first act is reported is considered the claim reporting date.
-

Conditions

The section of the policy may include:

- a requirement that the insured provide timely notice to the insurer of all claims and potential claims;
- a requirement that the insured assist and cooperate with the insurer (including examination and interrogation by a representative of the insurer, attendance at hearings, depositions and trials, assistance in effecting settlement, securing and giving evidence, and obtaining the attendance of witnesses);
- a requirement that the insured assist and cooperate with the insurer (including examination and interrogation by a representative of the insurer, attendance at hearings, depositions and trials, assistance in effecting settlement, securing and giving evidence, and obtaining the attendance of witnesses);

- a provision that, in the event the insurer makes a payment under the policy, the insurer is entitled to any rights the insured has to recover what was paid (subrogation);
- provision of coverage in excess of other available insurance. Since all insurers claim that their coverage is in excess of other coverage, defacto "sharing" arrangements exist by which each company takes a pro rata portion of the coverage when policies overlap;
- provisions regarding the arbitration of claims. Arbitration may be required or permitted, or it may be prohibited without the insurer's consent;
- at least a 30-day notice of cancellation of the policy by insurer.

Endorsements

Endorsements change coverage in some way on a firm-by-firm basis. Insurers use endorsements to change coverage on a selected basis, without changing the policy for everyone. Endorsements can either add coverage (e.g. to include coverage for work as a title agent), change coverage (e.g., to place defense costs within the limits of liability), or limit coverage (e.g., to exclude a specific lawyer from a firm's coverage or to exclude claims resulting from nuclear reaction, radiation or contamination). Typical endorsements exclude coverage for business enterprises liable for contamination or pollution of the environment and for loss due to nuclear reaction, radiation or contamination.

To evaluate specific insurance policies, see the Checklist for Purchasers of Professional Liability Insurance.

If you have any questions please call the Legal Malpractice Insurance Hotline at (312) 988-5754, (312) 988-5755 or (800) 238-2667 ext 5754 or ext. 5755.

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