

***Finding and Keeping Professional Liability Insurance
Some of the “Bells & Whistles” and the Challenges***

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I. Introduction

I have a message and it is the same message some of you have heard from me before – but I really mean it this time. The message is: Insurance companies are really paying attention to business and lawyers are not. The result has been that lawyers are beginning to find it difficult to find and keep professional liability insurance.

Lawyers make a living dealing with other people's problems and too frequently put off or ignore their own business. Lawyers are often (sometimes) good about the basics of their own businesses – their fees. And, on occasion, lawyers will even really get down to micro-managing their practices by getting involved in the lease for the copy machine – generally because the leasing company wants the lawyer's personal guaranty. But on the whole, I submit lawyers do not dedicate enough attention to *the business of practicing law*.

It is my premise that lawyers become consumed by their trying to help others (their clients) and are often hoodwinked by the notion that they are members of a noble *profession* and forget that they are businesses no different than a dry cleaning

establishment, a restaurant or any other entrepreneurial venture. Yes, we are “professionals” (a term which most of us would struggle defining if put on the spot) and I think many of us like to think as “professionals” we are above the mundane details of running a business; but, like it or not, we also are (we have to be) business people.

When it comes to professional liability insurance, rather than deal with it ourselves, we often delegate the task to the office manager or the legal assistant. And the “marching orders” to that individual is generally, “get quotes and find the cheapest price.”

II. If you need a reason to maintain professional liability insurance, here are two.

If you accept my premise that the practice of law is a *noble profession*, that lawyers help people with their problems, that we are care-givers, then it would seem to necessarily follow that a member of such a noble profession would make it a priority to have professional liability insurance to protect their clients from the lawyer’s mistakes. So I submit that *Reason Number One* for maintaining professional liability insurance – the *noble* reason - is to protect our clients. And a significant number of this state’s bar do maintain professional liability insurance; around eighty (80%) percent.

Unfortunately, too large a percentage of our bar is quick to forget this obligation when their office manager or legal assistant report back with the cost of insurance.

Reason Number Two for having professional liability insurance is that the lawyer cannot afford not to have it. If we shed the *goody-two-shoe* image of being a member of that *noble profession* for just a moment, it is important to remember there are two aspects to professional liability insurance. One is indemnity or protection for your client – the *noble profession* reason for insurance. The second aspect of professional liability

insurance is the insurance company's obligation to provide the lawyer with a defense when you have made a mistake and your client sues.

This gets back to my comment in the *Introduction* to this paper, lawyers are often good at paying attention to the "pocket book" items of their practices (fees or personal guarantees for office equipment) and if the pocket book is what motivates a lawyer, wait until you get sued and you do not have professional liability insurance and you have to hire ONE OF US – a lawyer – to defend you. You quickly understand why your clients have such a hard time paying your fees – lawyers are expensive. (See Attachment A.)

III. Professional liability insurance from the insurance company's perspective

I recently attended a meeting of the ABA's *Standing Committee on Professional Liability*. This meeting featured presentations from both the legal profession and the insurance industry. One presentation focusing on professional liability insurance from the insurance industry's viewpoint was of particular interest. The following is a synopsis of the message being sent by the insurance industry to the legal profession.

Lawyer Professional Liability Insurance as a commodity – it shouldn't be was the message. As was explained, there was a time when professional liability insurance was viewed more as a commodity; even by the insurance industry - but no longer. As one presenter explained, 'it's a "value-added" deal today. It's a "relationship."' And as he went on to explain, the lawyer, today, has to "earn his/her part in that relationship."

Echoing my comments above, it was noted that law firms continue to look for the "commodity price" when shopping for insurance and the insurance industry is trying to change that attitude.

Efforts by the insurance industry to change lawyer's attitude to professional liability insurance have come through company sponsored risk management CLE's which, when attended by their insureds, results in a discount on the lawyer's premium. At least one company will conduct law firm audits; meeting with the lawyers and staff and evaluating their risk management practices.

Unfortunately, the most effective "attitude changing" device has become a company's underwriting arm. I am not an expert in insurance, but simply put, "underwriting" is the process whereby an insurance company evaluates risk and sets rates which approximate those risks and which, hopefully, cover those risks and the cost of defending the lawyer and result in a profit for the company. More simply put, it is the process whereby an insurance company reviews a lawyer's application for professional liability insurance, decides if they want to insure that lawyer and how much they are going to charge in premium.

As professional liability has grown as a "risk," insurance companies have abandoned their past practices of underwriting on a regional basis and adjusting premiums across that region based on what the losses were regionally. Today, the companies are individually underwriting each insured. The result has been that lawyers and law firms are finding that because of their past claim histories or disciplinary complaints, companies often do not want to insure them or the rates for obtaining malpractice insurance are almost prohibitive and often the coverage is almost illusory. (Attachment B.)

IV. The answer for lawyers – risk management/ practicing very carefully.

This CLE is not about risk management, but if you accept the premise stated above – that a lawyer wants to have professional liability insurance – if you want to be able to get and keep insurance, you need to be part of the relationship with the insurance companies. Today, insurance companies are evaluating the professional liability insurance market as a business and lawyers need to do the same thing.

Lawyers cannot afford claims or disciplinary complaints. Companies understand that “risk happens” and underwriters will understand “being in the wrong place at the wrong time” but when the lawyer is constantly in the “wrong place, all the time” that will be the end of the relationship; at least from the company’s perspective.

Lawyers need to have a genuine interest in risk management. A firm’s “risk management” should be “packaged.” It should be something that appears to be, and is, a program for avoiding risk which is followed by the firm. Just as an example, the package can include a real “conflict system”, a real “docketing and tickler system”, a real mentorship program, and the list could go on. And this “package” should be just that a “package” which can be given to the firm’s insurance professional who will, or should, use that package to market your firm to professional liability carriers in an effort to find the best insurance possible.

VI. Shopping for Insurance.

Attachment A is an article from a past New Mexico Bar Bulletin which discusses shopping for professional liability insurance.

VII. Bells and Whistles – Top of my list of things to think about in evaluating a prospective professional liability policy.

My comments should be prefaced by noting that a lawyer should rely on the lawyer’s insurance professional. I do not hold myself out as an expert on insurance or

insurance policies. However, I have represented lawyers for many years now and the following are just “some” of the things a lawyer should carefully consider in evaluating a policy.

- ***Claims made and retroactive date*** – Almost all professional liability insurance policies today are claims made. Simply stated, under a claims made policy a company agrees to provide a defense and coverage for claims made during the policy period. When the policy term ends, there is no coverage under the policy unless the insured has provided notice of a possible claim during the policy period – what I call “triggering” coverage¹.

A policy can also provide for a retroactive date for which the company will provide coverage for claims which are made during the policy period, but are claims which arose out of conduct predating the policy period.

Attachment B is an example of what I would characterize as almost illusory coverage.

- ***Disciplinary Coverage***
- ***Amount of Coverage***
- ***Defense within and without limits/ Pac Man***
- ***Exclusions*** – securities and class action exclusions
- ***Extended Reporting*** – Attachment C

VIII. Keeping your professional liability insurance – not an easy trick anymore.

Attachment D is an article which appeared in the New Mexico Bar Bulletin in 2004 and is entitled ***It's Time to Get a Little of That Ole' Time Religion***. It was written

¹ Generally, if a lawyer has given notice of a potential claim during the policy period and the claim matures into a claim after the policy period, the company will provide coverage.

for another reason and at a different time; a time before this presenter became more sensitive to the dilemma and almost Catch-22 situation which confronts lawyers today in terms of reporting potential claims. I attach this article because it outlines well the interrelationship between claims, disciplinary complaints and underwriting.

The dilemma is this: Today professional liability coverage is almost exclusively claims made. Simply stated, the company will provided indemnity and defense for claims which are made against the lawyer during the policy period (almost always a one year period). Most policies will also provide coverage beyond the policy period if the lawyer provides the company with notice of potential claims - provided that notice is given during the policy period (or sometimes a grace period following the termination of coverage). (See Attachment B, pages 1 of 8 and 5 of 8 for an example.) This is often referred to as *triggering coverage*. Even though a claim is not actually filed against the lawyer during the policy period, if notice is given to the company of the potential claim (triggering coverage) and suit is filed after the termination of that company's coverage, the company will (or should) provide coverage (and a defense) for that claim.

The difficulty is in identifying a "potential claim." Often a lawyer does not know if an incident or problem is going to turn into a claim. And even more often, the lawyer will be in denial that he/she has made a possible mistake or they believe they can correct the mistake – just given a little time. Unfortunately, this denial often results in the lawyer not *triggering coverage* under his existing coverage. Then when a lawsuit is filed after the lawyer's insurance coverage has terminated and there is a new policy in force (and this is true even if the new policy is a renewal), the company under the subsequent policy

takes the position that this was a claim which the lawyer had knowledge of and the company denies coverage.

Compounding the situation is the fact that insurance companies seem to be considering *notices of potential claims* when it comes to evaluating a law firm for renewal. Beyond the renewal situation, when a lawyer or law firm is applying for coverage with a new company, the application will require that the lawyer or firm disclose any potential claims. Even though those “potential claims” would not be a risk to the new carrier, the existence of such potential claims has resulted in the new company deciding not to provide insurance or adjusting the proposed premium upward.

So what does a lawyer do? Does the lawyer report every possible “potential claim” no matter how insignificant or in an effort to enhance future insurability, does the lawyer simply hope the “potential claim” does not turn into a lawsuit in the future? There is really no satisfactory answer to this dilemma and it all comes back to where we started – taking risk management seriously.