

**Things to Consider When Choosing a
Professional Liability Insurance Policy
SUMMARY
March, 2021**

Purchasing or renewing professional liability insurance, while incredibly important, can be a tedious task at best. Research is performed. Telephone calls are made to friends for advice and copious cups of coffee are consumed while slogging through boilerplate language and technical jargon.

In an effort to provide a bit of relief, members of the Lawyer's Professional Liability Committee put their collective heads together to come up with, in no particular order of importance, the following list of 10 things to consider when selecting professional liability insurance.* They reflect trends and issues in professional liability insurance that the Committee has encountered and/or addressed over the last several years. In an effort to ensure this information is disseminated to the members in a clear and concise way that is both practical and convenient, the Committee would like to remind lawyers of its monthly tip column "Things to Consider When Choosing a Professional Liability Insurance Policy." The Column, originally published in the Bar Bulletin on a monthly basis, highlights the Committee's best practices list along with a brief explanation of each.

Every lawyer's insurance needs are different and the Committee's list of things to consider is by no means exhaustive; nor is this list or the column a substitute for independent research. However, the Committee hopes that both the list and the column will provide food-for-thought when it comes time to pour another cup of coffee and begin the important task of purchasing or renewing your professional liability policy.

**This list is provided to members of the State Bar of New Mexico for use when evaluating potential professional malpractice policies. This list is meant for use as a guideline only. It is not intended to nor does it constitute an endorsement of or recommendation for or against purchasing a policy from any particular insurer. Moreover, this list is not exhaustive and is not a substitute for independent research. Before purchasing a professional malpractice insurance policy, please carefully read the policy and all accompanying documentation; evaluate their contents for accuracy, currency, relevance, and completeness; consider your individual circumstances and needs; and, if necessary, obtain professional advice regarding the policy and the contents thereof.*

1. **Broad Definition of Legal Services.** Policy provides a broad definition of "Legal Services" to include mediation, arbitration, guardian ad litem, and personal representative services provided by the attorney.
2. **Appropriate Scope of Coverage for your Practice.** Company writes a broad range of coverage including specialty items as needed by the insured (e.g. class action suits, claims arising from estate planning, securities work, entertainment law, and intellectual property matters, etc.).
3. **Best Possible "Retroactive" or "Prior Acts" Date.** Especially when purchasing coverage either after a break in coverage or when changing insurers for whatever reason, a lawyer wants to carefully read the policy language to determine the proposed "retroactive" or "prior acts" date before purchasing the policy. The company should clearly identify the proposed retroactive date and although there may be no ability to negotiate with the insurer for a better retroactive date, that possibility should be explored by the lawyer with the company in an effort to obtain the best possible coverage for prior acts.
4. **Disciplinary Coverage.** The policy offers coverage for disciplinary matters an amount of at least \$5,000 and includes coverage for events occurring pre-Specification of Charges, such as retaining counsel to respond to a disciplinary complaint.

5. **How Defense Costs are Covered - Caution with Eroding Limits.** If the company offers a policy whereby defense costs erode total policy limits, the company will provide a separate letter/summary of coverage explaining the terms of the defense-within-limits coverage and a comparison of premiums/policy limits for defense-within-limits and defense-outside-of-limits policies, assuming that both are offered by the company.
6. **Pre-Claim and Non-Claim Coverage.** Policy provides coverage for pre-claim subpoenas and depositions.
7. **Innocent Insured Coverage.** Policy provides innocent insured coverage.
8. **Live Representatives Available.** Company provides contact with a live representative when requested.
9. **Extended Reporting Period or “Tail” Options.** The company offers the ability to purchase an extended reporting period or “tail” policy to provide coverage in a variety of circumstances, such as when a policy is cancelled, or when lawyer changes firms, closes a solo practice, dies or becomes disabled. In some cases such as retirement or the complete cessation of private practice, the company may offer a free tail policy after a minimum period of time with the same company.
10. **Financially Sound Company.** Company holds an excellent or exceptional or prime rating, or has been given a similar high rating from an established, well-recognized, credible insurance company rating agency such as AM Best, Fitch Ratings, Moody’s, Standard & Poor’s, Weiss Ratings, or Demotach.

**Things to Consider When Choosing a
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FULL VERSION
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#1 - Broad Definition of “Legal Services”

We all know that legal malpractice insurance covers claims against lawyers that alleging negligence in the practice of law. But not all actions taken by lawyers in the course of providing legal advice may be covered by your policy.

All legal malpractice policies include a definition of “legal services,” “professional services,” or otherwise “covered services” that determines what actions on your part may constitute a covered claim. All policies include in this definition a lawyer’s services performed in conjunction with an attorney-client relationship. Most also include services as a mediator, arbitrator, or other facilitator in an alternative dispute resolution process; and most also include services as an administrator, conservator, guardian, executor, personal representative, trustee, or other fiduciary capacity so long as the lawyer isn’t a beneficiary of the trust or estate.

In addition to these definitions, legal malpractice policies also exclude from coverage some specific actions taken by the lawyer. For example, some exclude investment advice, certain types of title work, actions taken as a public official, and actions taken as a director or officer of an organization. The exclusions can run the gamut.

The point is this: at a minimum, you should make sure your policy’s definition of legal services includes those services you and your colleagues regularly provide in the course of your practice, including any services as a mediator, arbitrator, guardian, trustee, etc. If the services provided are not in your policy, talk to your carrier. In addition, before taking on any unusual work, take a tour through your policy to see whether the services you provide are covered. If they are not, you need to notify your client that you are uninsured for those services, and you may need to evaluate the scope of your representation.

#2 – Appropriate Scope of Coverage for your Practice

Regardless of whether you or your firm are practicing in the areas of estate planning, intellectual property, securities, entertainment law, class action lawsuits, or some other specialized area, it is worth determining when you purchase your policy whether the insurer offers coverage for these areas. When you apply for insurance, you will be asked to provide a list of practice areas. If you indicate that you or your firm practice in some specialized areas, such as class action practice, intellectual property, securities, entertainment law, or estate planning, you may be required to submit additional forms and information. If you fail to indicate that you practice in one of those areas, then you may be denied coverage later on if a claim arises related to your practice in one of those areas. But even if you do not regularly perform work in one of those specialized areas, it may be worth ensuring that your carrier offers coverage in those areas. You may be provided opportunities during your policy period to participate in work that implicates coverage in those areas. If that happens, you should immediately notify your carrier that you intend to perform that work, and inquire whether additional coverage may be necessary.

#3 - Best Possible “Retroactive” or “Prior Acts” Date

Lawyer’s Professional Liability policies are now always “claims made” policies. A “claims made” policy covers the insured for all claims made and reported during the policy period, no matter when the alleged malpractice occurred. In contrast, an “occurrence” policy covers the insured for any claim, no matter when asserted, arising from alleged malpractice “occurring” within the policy period. If there was “occurrence” coverage in place, there is theoretically coverage for any alleged malpractice occurring during that policy period, forever. However, LPL “occurrence” coverage is simply not available.

Nevertheless, “claims made” coverage should theoretically protect an insured lawyer for any claim asserted while the “claims made” policy is in effect. There is a catch, however. Most LPL policies also have a “retroactive” or “prior acts” date, which excludes coverage for alleged malpractice occurring before the “retroactive” or “prior acts” date. For many lawyers, the “prior acts” date is not an issue. As long as a lawyer has been continuously insured throughout his or her career, the prior acts date will likely go back years, even to the date the lawyer started to practice law. However, if there has been a break in coverage—a period of even a few weeks or months in which the lawyer let his or her insurance lapse—the “prior acts” date on any new policy will likely be the date when insurance was reinstated. Anything occurring during or prior to the break in coverage will be excluded from coverage.

In addition, if a lawyer or law firm is “non-renewed” by an insurer, then even when coverage is obtained from a new carrier the “prior acts” date on the new policy could be the starting date for the new policy. In that circumstance, “claims made” coverage amounts to almost no coverage at all, at least at the beginning, because there is only coverage for alleged malpractice occurring since the new policy went into effect. Over time, as the “prior acts” date recedes into the past, the protection provided by the “claims made” policy increases, notwithstanding the “prior acts” date.

Every lawyer should read his or her LPL policy, especially the declarations page, to be sure the information is correct and the lawyer knows what coverage is in place, for whom, the policy period, etc. This review should include identifying the policy’s “retroactive” date. It will likely be different for different lawyers insured under the policy. And especially when purchasing new coverage, either after a break in coverage or when changing insurers for whatever reason, the lawyer simply must determine the proposed “retroactive” date before purchasing the policy. Although there may be no ability to negotiate with the insurer for a better “retroactive” date, that possibility should be explored before agreeing to coverage that amounts, at least initially, to almost no coverage at all.

#4 - Disciplinary Coverage

Coverage for disciplinary matters in an amount of at least \$5,000 and including coverage for events occurring pre-specification of charges. Disciplinary coverage is like automatic windows and power locks—A bell and whistle you want to get when buying legal malpractice insurance.

Most insurance companies writing legal malpractice insurance in New Mexico offer a form of *disciplinary coverage*. It is separate and different from the coverage the policy offers for defense and indemnity for legal malpractice claims and can be described as *reimbursement coverage*. It comes in different variations, but generally it is capped coverage (\$2,500, \$5,000, \$10,000) and the insured lawyer can select his/her own lawyer to represent them, they pay their lawyer and submit the lawyer's bill and evidence of payment and the company will reimburse up to the cap under the disciplinary coverage. The defense retention or deductible seldom applies to disciplinary coverage.

It is that simple, but there are a couple caveats:

1. Most policies, whether you opt for disciplinary coverage or not, require the insured to notify the company of any disciplinary complaints, so if you are like many lawyers who think, "if I don't tell the company, my rates won't go up," think again. First, you have to report and, second, by reporting you may trigger coverage under your policy should a legal malpractice claim flow from the disciplinary complaint.
2. Disciplinary coverages can differ. Some coverages only provide reimbursement after specification of charges have been filed. A lawyer should carefully explore whether pre-specification of charges coverage can be obtained because a large majority of complaints are dismissed before formal charges are filed. Too often, lawyers who represent themselves responding to the complaint will unwittingly turn a meritless complaint into formal charges. Undoing the damage after specification of charges are filed is often not possible.
3. Another variation of disciplinary coverage provides reimbursement only if no discipline results from the complaint. More directly, if the disciplinary complaint is dismissed, the company will reimburse the insured lawyer for legal fees. Many lawyers might find this variation acceptable. If the disciplinary complaint has merit, the insured lawyer will still benefit from having independent counsel, even if the insured lawyer ends up having to pay for disciplinary representation. More often than not, odds are having counsel will probably make a bad situation better.
4. Disciplinary coverage is an *added extra* which will not increase your premium dramatically but *is* worth it.

#5 - How Defense Costs are Covered - Caution with Eroding Limits

A “defense-within-limits” policy contains a provision reducing the policy’s applicable coverage by amounts paid by the insurer to defend the insured. Such provisions are also referred to as legal defense offset, shrinking limits, wasting coverage, cannibalizing limits, eroding or Pac-Man provisions. The New Mexico Public Regulation Commission has allowed such provisions to be placed in legal malpractice policies where the policy limit is at least \$500,000. 13.11.2.9(B)(1)(h) NMAC.

In order for a defense-within-limits provision to be valid, the policy must not allow more than 50% of the policy limit to be eroded by defense costs. 13.11.2.10(A) NMAC. But that limitation may be omitted by the insurer if the policy allows the insured to select or consent to appointed defense counsel, participate in and assist in the direction of defense of the claim, and consent to a settlement. 13.11.2.10(C) NMAC. In other words, if the insurance policy allows significant participation by the insured attorney, the insurer may issue a policy allowing any amount of erosion of policy limits by defense costs. Depending on the policy and the claim, an insured may face a situation where he or she has to choose between adequately defending a claim and maintaining enough of the policy limits to reach a settlement or protect his or her assets in the event of an adverse judgment.

The Lawyers Professional Liability and Insurance Committee recommends looking closely at a potential policy to determine whether it contains a legal defense offset provision and speaking with your agent or insurer to determine whether this is the best choice for you. If your chosen policy does allow for defense-within-limits, however, we recommend obtaining higher limits of coverage to offset that portion of coverage eroded by defense costs and, in any case, where defense costs cannot erode more than one-half of policy limits. Particularly if your policy provides for your significant participation in the defense of any claim, pay attention to any defense-within-limits provision. This could be important if you are sued and want to make sure you maintain enough coverage to pay or settle a claim while.

Regardless, if the policy is a defense-within-limits policy, the company should provide a separate letter/summary of coverage explaining the terms of the defense within-limits-coverage and a comparison, in terms of premiums and limits, between defense-within-limits and defense-outside-of-limits policies assuming both are offered by the company.

If an insurer intends to place a legal defense cost offset provision in your policy, the application must include such provision on its face in bold type. 13.11.2.11(A) NMAC. Further, any policy containing such a provision must contain a statement signed by the insured, in which the insured acknowledges the existence of the provision and its effect on coverage. 13.11.2.11(B), (C), and (D) NMAC specify what such signed statement must say. Nevertheless, the Lawyers Professional Liability and Insurance Committee recommends that you specifically ask your insurance agent or company whether any

proposed or existing policy contains a legal defense offset provision. If so, look closely at the content of the provision and evaluate whether it suits your needs.

#6 - Pre-claim and Non-Claim Coverage

It's not unusual for a lawyer to be subpoenaed for his or her deposition in a lawsuit in which the lawyer, the law firm, or the company employing the lawyer isn't a party. Lawyers also can receive subpoenas for documents in cases where the lawyer isn't a defendant. Sometimes these subpoenas are part of a genuine fact-finding mission and others they foreshadow a nascent malpractice claim. Whatever the motivation prompting the subpoena, the lawyer who is a third-party witness is faced with a host of confidentiality, privilege, and other issues that should prompt the lawyer's deliberate actions in response.

Consider contacting your carrier as one of those actions for a couple of very practical reasons.

- First, depending on the circumstances and the content of the subpoena, the receipt of a subpoena may clue you in to a potential claim against you. Most, if not all, policies obligate you to immediately give your carrier written notice if you become aware of facts that could reasonably be expected to be the basis of a claim against you. They also require the same disclosure when the policy is renewed. If a subpoena puts you on notice of a possible claim, you need to notify your carrier. Plus, by asking your carrier for assistance in responding to a subpoena, you may also trigger coverage for a potential claim under your existing policy.
- Second, and irrespective of whether you believe a claim against you may be forthcoming, many legal malpractice policies include some type of subpoena assistance coverage that is available to the lawyer for even if the lawyer is not a named defendant in the lawsuit. The details of this type of coverage vary, but they all require that the subpoena be related to the lawyer's provision of legal services. Some provide that the carrier will engage the lawyer for you and pay him/her directly without any deductible and in addition to the other policy limits. Others provide capped coverage of, say, \$2,500 or \$5,000 that will reimburse you for attorneys' fees and other expenses incurred in responding to the subpoena.

If your policy doesn't include subpoena assistance, check with your carrier to see if they offer it. Having a lawyer help negotiate the complex issues that can arise when you receive a subpoena relating to your work for a current or former client can be invaluable. Check your policy for this added perk.

#7 - Innocent Insured Coverage

Lawyers Professional Liability insurance policies—legal malpractice policies— typically exclude coverage for “Intentional Acts.” These are claims arising from any dishonest, fraudulent, criminal or malicious act or omission or intentional wrongdoing by an insured. Many policies, however, include an exception to this exclusion so that coverage will be provided to an insured who did not personally commit the intentional wrongful act, and was unaware of it. Thus, if one of the lawyers in a law firm or law practice committed an “intentional act” giving rise to a claim that is excluded from coverage, other lawyers in the firm who did not personally commit the wrongful act and were unaware of it will still be covered under the policy. When purchasing LPL insurance coverage, you should insure that it includes “Innocent Insured” coverage.

Unfortunately, there is typically not “Innocent Insured” coverage where the issue is a failure to give timely notice of a claim, resulting in a denial of coverage under the policy. All current LPL policies are “claims made” policies. There is only coverage for claims made and reported during the policy period. If a claim is made (or circumstances that could give rise to a claim are learned) during a policy period, but that claim is not reported during that policy period, the insurer will likely deny the claim if reported during a subsequent policy period.

Thus, if a lawyer in a firm or law practice learns of a claim or circumstances that could give rise to a claim but hides that fact from the other lawyers in the firm or practice so that no one gives a timely notice of the claim to the insurer within that policy period, the insurer will likely deny coverage to the firm and all of its lawyers if the claim is reported under a subsequent policy. There is no “innocent insured” protection when it comes to failure to give timely notice of a claim.

#8 – Live Representative is Available

When you are shopping for insurance and once you have decided which insurance product you want, it is valuable to be able to speak with a representative of the company to answer your questions. While email is not a poor method to get questions answered, it should not be the only way that an insurance company will communicate and answer your questions.

As important as the method of communication is, whether responses to your questions are timely and accurate is equally as important. In any event, you should insist on being able to meet or talk with an adjustor or other trained claims person to respond to your questions about a potential or actual claim or, possibly, how to deal with a pending situation which could avoid a claim altogether.

#9 - Extended Reporting Period or “Tail” Options.

Insurance companies providing policies for professional liability coverage for lawyers typically offer such policies on a claims made policy. Under a claims made policy, the act or omission giving rise to a potential claim must have occurred subsequent to the retroactive date of the policy, and the claim must also be made and reported during the policy period, after the inception date and prior to the expiration date. Typically, extended reporting coverage is available as an endorsement for an additional premium for an extended period of time for claims to be reported after the expiration date of the policy.

Some situations that warrant a review of this type of additional coverage—and at the very least a call to the insurance company or agent to inquire about options—include:

- When a professional liability policy is cancelled or non-renewed
- A lawyer closes a solo practice
- A lawyer changes law firms
- A lawyer dies or becomes disabled
- When a lawyer retires from the practice of law

This extended reporting coverage, also known as “tail” coverage, can be purchased for an additional premium which is significant, usually some multiple of the annual premium for professional liability coverage. Most insurance companies allow for some limited time for extending reporting of claims beyond the expiration of the policy, typically for 30 or 60 days following the expiration. However, the extended “tail” coverage is often for periods of several years. For retiring attorneys, some insurance companies offer free “tail” coverage as long the attorney is entering into full retirement and has been insured with the company for a number of years, usually from three to five years. This is something that a retiring attorney should discuss with the insurance company or agent and review the potential for free or reduced cost “tail” coverage so that if a claim is made, the attorney is not without coverage or at risk for losing retirement savings.

#10 - Financially Sound Company

It is important to evaluate the financial strength and security of your chosen insurer. One way is to determine if the company has been rated as excellent, or exceptional, or prime, or given a similar high designation or rating by an established well-recognized, credible insurance company rating agency such as AM Best, Fitch Ratings, Moody's, Standard & Poor's, Weiss Ratings, or Demotach. Additionally, performing some internet research concerning the company and/or its parent company to determine if the latest company news is positive and if the company's outlook for the future is positive may be worth considering.