

Dues Form Resource 4

The 2016 State Bar of New Mexico dues form, following this page, has been supplied to help the mentor explain its various sections to the new lawyer.

- Beginning with **section 1**, explain to the new lawyer that Rule 17-202 (A) NMRA requires every attorney admitted to practice in New Mexico to submit to the State Bar of New Mexico and to the Clerk of the Supreme Court, a registration statement with their address of record and the street address where client files related to the attorney's practice are located.
- Advise the new lawyer that keeping a current address on file is mandatory, and explain why.
- Review **section 2** on mandatory licensure fees, which include:
 - A license fee (\$185 for new lawyers; \$245 for lawyers with more than two years of practice)
 - A Disciplinary Board fee, which is collected by the State Bar on behalf of the Disciplinary Board
 - A client protection fund fee, collected by the State Bar on behalf of the Client Protection Committee
- **Sections 3 and 4** pertain to the voluntary fees associated with section memberships and voluntary bar associations. Talk with the new lawyer about the benefits of becoming involved in some of these voluntary organizations.
- **Section 5** mandates disclosure of professional liability insurance. While having liability insurance is not mandatory, disclosing whether one carries it is mandatory as stipulated by Rule 16-104 (C) NMRA.
 - Discuss why having professional liability insurance is important and how being uninsured can pose serious professional and personal risks to the new lawyer.
 - See attached articles: "What Attorneys Need to know about Professional Liability Insurance" and "Finding and Keeping Professional Liability Insurance, Some of the 'Bells & Whistles' and the Challenges by Briggs Cheney, 2006.
 - Access the Professional Liability Committee's webpage for insurance resources and in depth information at the following link:

http://www.nmbar.org/Nmstatebar/About_Us/Lawyers_Professional_Liability/Lawyers_Professional_Liability.aspx

- Review **section 6** on pro bono hours. Emphasize to the new lawyer that the reporting of pro bono hours is mandatory (Rule 24-108 NMRA) even though providing them is aspirational. Discuss what is realistic for the new lawyer and encourage him/her to set a goal for a certain number of pro bono hours each year.
- Review **Section 7** on the Trust Account Certification/IOLTA Compliance with the new lawyer.
 - Effective January 2016, all new lawyers are required to attend the daylong seminar, "Introduction to the Practice of Law in New Mexico," which includes the mechanics of trust accounts. Ask the new lawyer to provide you with a synopsis of what he/she learned about setting up and maintaining trust accounts.
 - Review Rule 24-109 NMRA and other relevant information with the new lawyer at: <http://www.nmbar.org/NmbarDocs/forMembers/IOLTA/24-109.pdf>)

**Prepared by the Lawyers Professional Liability and Insurance Committee (LPLIC)
Of the State Bar of New Mexico**

WHAT IS PROFESSIONAL LIABILITY INSURANCE?

In its simplest terms, professional liability insurance is special insurance that provides (a) a defense for claims asserted against a lawyer by an existing client, a former client, or a third party for an injury or damages arising out of the delivery or provision of legal services, and (b) for the payment of a settlement or judgement against the lawyer. Some policies may provide for, or reimburse a lawyer (after the fact) for the costs of defending a complaint filed against the lawyer with the Disciplinary Board. It is also known as "errors and omissions" coverage or "legal malpractice insurance."

Professional liability insurance is referred to a 'special' insurance because it is limited to damages arising out of the delivery of professional services. It normally does not cover property damage claims or personal injury claims such as emotional distress, assault and battery, and sexual misconduct. Like any insurance policy, professional liability insurance is subject to deductibles and exclusions, which are discussed in detail below.

Lawyers who maintain an office open to the public often have other forms of insurance that should not be confused with professional liability insurance. General commercial liability coverage is needed to protect the lawyer and firm from personal injury claims that include premises liability, advertising liability, slander and defamation, and many other traditional torts. Lawyers often carry fire and property coverage to protect the premises and the contents of their office. This type of coverage can be acquired whether you own or lease or rent the premises. When a lawyer or firm employs more than three people, it will need workers compensation coverage, and the firm may want to purchase coverage for employment-related claims. A surety bond is required for any person who is a notary public. Dishonesty or fidelity bond coverage may be needed for those who handle money. None of these types of insurance typically provide coverage for professional liability claims.

It is not uncommon for insurance companies to provide a "comprehensive business package" of insurance. A lawyer should not assume that the word "comprehensive" means the policy includes professional liability coverage, because in the majority of situations *it does not*. There are, however, some companies that provide lawyers and law firms with comprehensive coverage that includes professional liability coverage.

Do Lawyers Need Professional Liability Insurance?

Approximately 55,000 lawyers in the U.S. are likely to face an allegation of professional liability in a given year. As the number of lawyers has increased, the incidence of claims has increased. It is estimated there is a 50% chance that a lawyer in private practice for 25 years will be the

subject of at least one disciplinary complaint or claim of professional malpractice. Every lawyer is at risk. Where you practice makes no difference. However, the size of the firm and the area of law in which you practice can increase your chances of being the subject of a complaint. Many complaints do not result in a settlement or judgment. Regardless of the outcome, handling a disciplinary or professional liability complaint can be expensive. It takes time away from family and the practice, it creates anxiety, and in the end it can cost you your license or greatly diminish your net worth.

Professional liability insurance can ease the burden of dealing with a claim by sharing the monetary risks (by providing indemnity for a judgment or settlement and providing a defense, or in the case of Disciplinary Board Claim reimbursement for part of the cost of the defense) and by shouldering much of the responsibility for professionally and impartially responding to and defending the claim. Nowhere else is the maxim: "He who defends himself has a fool for a lawyer," more appropriate.

How much professional liability coverage, if any, a lawyer purchases depends on one's personal philosophy about risk-taking, one's financial ability to bear such risk, the type of risks faced in the practice, and your responsibility to protect your clients in the event you make an error that causes them harm. If you need assistance, you should consult with a qualified agent or broker or a member of the LPLIC.

Many lawyers do not hesitate to protect their business, their family and their reputations by purchasing auto insurance, home owners or renters insurance, or general liability and property insurance to cover their investment in office space and equipment. They will provide health and disability insurance for themselves and their staff. They want to insure against these risks, and yet they question whether they need to insure themselves against professional liability claims. In the end, the decision to insure or not to insure is yours and yours alone. New Mexico does not require licensed lawyers to be insured.

While you do not need insurance to practice law in New Mexico, Rule 16-104 NMRA of the Rules of Professional Conduct does require a lawyer who does not have certain limits of liability coverage to inform the client of that fact at the time the lawyer is engaged to handle a matter. The Rule prescribes the acknowledgment form that must be used. For more information regarding this professional obligation, go to:

http://www.nmbar.org/Nmstatebar/About_Us/Lawyers_Professional_Liability/Lawyers_Professional_Liability.aspx

How Does a Lawyer Obtain Professional Liability Coverage?

The ABA has a website that provides a great deal of information:

<http://www.abanet.org/legalservices/lpl/preventionlibrary.html>.

The process for determining coverage contains six basic steps: (1) find one or more insurance agents; (2) determine the amount of coverage you need; (3) accurately and completely fill in the application for insurance; (4) survive the underwriting process; (5) get the policy, read it, and comply with its requirements; and (6) calendar a date nine to ten months in the future to start the renewal process.

Use One or More Agents: Some agents represent only one company while others are appointed by several companies. Agents do not issue insurance policies. Like life insurance agents, they earn a commission, and because of this they can be an advocate for the lawyer during the underwriting process. They may also promote a policy that provides them with a better commission, but the lawyer with less coverage. The New Mexico State Bar Association does not endorse any particular agent or insurance carrier. A list of agents and carriers who are known to write insurance for New Mexico lawyers is available on the State Bar website at:

http://www.nmbar.org/Nmstatebar/About_Us/Lawyers_Professional_Liability/Lawyers_Professional_Liability.aspx

Care should be taken in selecting agents. Like any good agent, they need to discuss with you all of your insurance needs. Experience has taught a number of lawyers that often an agent for a main line insurance company may not be aware of the differences between general commercial liability policies and professional liability policies. Sometime it can be a mistake to rely on a friend or relative who write auto or general liability coverage. Look at the agent as a professional expert you are hiring to testify. Check them out. Are they qualified? How long have they been in the insurance business? How long have they been writing professional liability coverage in New Mexico? Will they provide a list of references? Will they provide you with a written explanation of the differences in coverage between carriers?

Agents are either "captive," meaning they work for one company or "independent," meaning they represent more than one company. All agents should be able to give you a list of the companies they represent, the types of coverage available from each, the premium structure, the exclusions, etc. If they recommend a particular company, ask them why they are recommending it over the others.

Many insurance companies write policies through preferred or captive agents. These are often out-of-state companies. Many of them are excellent in providing advice, service and coverage. Others are companies that want to get into the professional liability insurance business but may be here-today-and-gone-tomorrow. Check them out thoroughly.

For lawyers whose claims experience or areas of specialization make it difficult to acquire professional liability insurance, there are specialty line companies that write policies for the more unusual risks.

Decide the Type of Coverage You Need:

Commonly Covered Risks

Policy language varies, but there are common provisions and types of coverage. Generally, professional liability insurance provides a defense and indemnity for claims arising out of wrongful acts or omissions committed while rendering professional legal services. The policy covers non-licensed staff members who are under the lawyer's direction and supervision. It will often include errors or omissions arising out of services as a notary public, acting as a trustee or mediator, and while acting as an officer, director or member of a legal profession. The extent of the coverage provided by the policy can be negotiated, and through "endorsements" or amendments to the policy coverage can be expanded or reduced. The rule that "you get what you pay for" applies to coverage. The broader the coverage, generally the higher the premium you will pay.

What is the Definition of "Insured?"

Every insurance policy has one or more insuring clauses or provisions. They are often designated as Coverage A and Coverage B. If a lawyer believes they have a comprehensive policy that covers professional liability or the provisions of professional services, there should be a specific insuring clause. When policies have more than one insuring clause, the exclusions under the policy can relate to all of them or just one of them.

Some Typical Insuring Clauses:

To pay on behalf of the insured all sums in excess of the deductible amount stated in the Declarations, which the insured shall become legally obligated to pay as damages because of malpractice arising out of the rendering of, or failure to render, subsequent to the Retroactive Date indicated in the Declarations, the following professional services...

The Company agrees to pay on behalf of the Insured all sums in excess of the deductible that the Insured shall become legally obligated to pay as damages and claims expenses because of a claim that is both first made against the Insured and reported in writing to the Company during the policy period by reason of any act or omission in the performance of legal services by the Insured or by any person for whom the Insured is legally liable, provided that...

The following insuring clause does not provide coverage for legal malpractice. It is what is called Coverage B in a policy that provides coverage for both professional services and general torts:

(b) To pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to

pay as damages because of personal injury or property damage caused by an occurrence subsequent to the Retroactive Date indicated in the Declarations and arising out of the named Insured's business as a...

There are separate exclusions in Coverage B, and they include an exclusion for liability arising out of the rendering of professional services.

Remember, what the insuring clause giveth, the exclusions can taketh away. A very broad insuring clause can be whittled away to nothing by the exclusions in the policy. When shopping for coverage, do not hesitate to ask for sample policy forms so you can compare one policy to another.

The professional liability coverage should be scrutinized for specific issues like:

- Who falls within the definition of Insured for the purpose of professional liability (it should be everyone employed to provide professional services)? Does it include former members or retiring members of the firm? What about part-time employees or contract lawyers hired to work on specific matters? If you work as a contract lawyer for one or more firms, are you covered under your policy? Will the definition of "insured" include a group of lawyers, each with a personal professional corporation, but operating as a firm? Does the definition limit coverage to services rendered on behalf of the insured firm, thereby, excluding outside activities or work with a former firm?
- What is the definition of "professional services" used in the policy?
- What limits of coverage are available, and, given the type of cases that will be handled in the next year, how much coverage is needed?
- Are defense costs (generally, attorney fees and costs expended to defend a claim) "inside" or "outside" the coverage? In other words, do the defense costs decrease the amount of coverage limits?
- What deductibles are available? How does the size of the deductible impact the premium? Do the costs of defense erode the deductible, and if so to what extent?
- What are the exclusions under the policy?
- Does the policy cover prior acts?
- What are the notice requirements in the policy?
- Does the policy cover the handling or defense of Disciplinary Board complaints, and if so, how?
- Do I have a right to select or approve the lawyer hired to defend me?

- Do I have the right to approve a settlement or can the company settle without my consent?
- If I do not agree to accept a settlement the company is prepared to pay, what rights does the company have? This is called a "hammer clause." The company may be allowed to take the position that because you didn't agree to settle, you will be personally liable for any judgment in excess of the settlement offer, and, perhaps, all of the costs of defense after the offer are rejected, if the judgment exceeds the offer.
- What are the cancellation provisions?
- What provisions are there for having coverage upon retirement or the closing of the office, usually referred to as Extended Reporting Endorsements or "Tail" coverage?

What is Not Insured?

There has never been an insurance policy of any kind that does not contain exclusions or exceptions to coverage. It is important to review the entire policy. Coverage is not taken away in just the Section called "Exclusions." There may be terms, conditions, requirements, and endorsements included throughout the policy that limit or void coverage. Pay particular attention to the definitions used in the policy. A definition of "damages" or "personal injury" may limit the coverage. Because of space limitations an exhaustive list is not possible in this paper, but here are some common examples of where exclusionary language can be found.

Notice of Claims. All forms of insurance require that the carrier be given notice of a lawsuit within a certain time period. Under a claims-made professional liability policy, there is normally a requirement that you give the carrier notice of potential claims within a certain time, not to exceed the end of the policy period. (Some policies allow for late reporting). If it is not properly given, the carrier can deny coverage. You should carefully consider how the policy defines a claim and the circumstances under which notice of a claim should be given.

Definitional Limitations. Policies are full of definitions, and the manner in which a term used in the policy is defined can have the effect of denying or excluding coverage. The definition of "damages" is often limited. The definition of "personal injury" can limit the scope of the personal injury coverage by listing only those personal injuries that are covered:

"Personal Injury" is an injury resulting from an act or omission arising out of false arrest, detention or imprisonment; wrongful entry or eviction or other invasions of the right of private occupancy; libel, slander or other disparaging or defamatory materials; a writing or saying in violation of an individual's right to privacy; malicious prosecution or abuse of process.

Not included in this definition are many other types of personal injury intentional or negligent infliction of emotional distress, mental anguish, loss of consortium, physical injury and more.

Common Exclusions. There can be one or more sections of a policy that contain exclusions. If different forms of coverage are provided under the same policy, each type of coverage may have its own exclusion section, and there may be exclusions that apply to all forms of coverage listed in the policy. It is not unusual for an exclusion to be stated, and then an exception to the exclusion will be stated. This is giving, taking, and partially returning coverage.

The following exclusions may be in a policy, but the list is not exhaustive:

- Criminal acts
- Intentional or malicious acts
- Punitive or exemplary damages
- Dishonest or fraudulent acts
- Services rendered to a business or enterprise that is owned or controlled by the insured lawyer or the law firm.
- A claim arising out of the service on boards of directors, where legal advice is given by the entity is not a formal client of the lawyer or the board.
- Services rendered as a fiduciary under the ERISA Act of 1974
- Claims against one insured against another insured in the same law firm.
- Bodily injury or property damage generated by a lawyer or the law firm. (This is why lawyers are advised to have separate general liability coverage and automobile coverage)
- Violations of statutes or ordinances – this can include a claim against a lawyer under the New Mexico Unfair Trade Practices Act, RICO, and similar statutes where damages can be trebled - which is covered by another common exclusion.
- Civil or criminal fines and penalties imposed by administrative agencies or tribunals.
- Economic and trade sanction conditions.

- Nonpayment of premium or deductible
- Violations of Title VII of the Civil Rights Act of 1969
- The multiple portion of multiplied award (trebling of damages)
- Material misrepresentations in the insurance application submitted to the carrier
- Claims from legal services rendered by lawyers or the law firm where the lawyer or the firm knew or should have foreseen the claim at the beginning of the policy period and failed to provide notice of the claim to the carrier as required the policy provisions.

How Much Coverage Do You Need?

Once you decide that what you need is professional liability, aka legal malpractice or errors and omissions coverage, the next step is determining how much insurance you need. How much depends on a number of factors, including how much risk you are willing to carry on your own shoulders:

- *How experienced are you?* The less experience a lawyer has may increase the likelihood a mistake may occur. As a solo practitioner, less experience may mean a greater risk. As a lawyer in a large firm where you can tap the knowledge and experience of other lawyers, this may be less of a concern.
- *What types of legal matters do you handle?* Not only are there subject areas where the potential for lawsuits is greater (this is called the frequency of claims) there are subject areas where the exposure is greater (the size or severity of the claim). You have to weigh these factors in deciding how much coverage may be appropriate.
- *How large are the transactions or the damages in the majority of your cases?* A lawyer who misses the statute of limitations can be held responsible for the damages that would have been recovered had the case gone to trial. If you handle fender-bender cases, then you don't need a lot of coverage. If you routinely handle wrongful death cases, product liability cases, or other types of big dollar cases, you need more. If you handle wills and estates, how large are the estates? If you only handle criminal defense cases, what might a jury award to a client who is wrongfully convicted because of your malpractice?
- *What are your personal assets?* If you are sued and don't have insurance, a judgment can be collected just like any other judgment — garnishment, attachment, or judgment liens on real property in which you own an interest. If you own a 2001 car, rent an apartment, and have no savings, you may not need that much coverage. If you practice in the form of a LLC, LLP, PA or PC, you are still personally liable for your acts of malpractice, and in many jurisdictions there are coverage requirements in order to be able to limit your coverage through these entities.

- *Can you afford to defend a claim yourself?* The cost of defending a case can be enormous, and under all policies of insurance the company will defend the claim. If you hire another lawyer to defend you, you may incur defense costs that exceed the amount of the annual premium. If you decide to defend yourself, other than having a fool for a client, you have to consider how much of your time it will take to handle the case. This is time you cannot spend generating income by working on matters for clients. The value of the productive time you lose can quickly exceed what an annual premium will cost.
- *Can you afford the emotional, professional, and social costs of being uninsured?* There is an emotional and social cost to being sued, and not having insurance only exacerbates these costs. What is time with your spouse or your children worth? What if the case can't be settled and you try it and lose and the newspaper reports the result? Can you handle the stress that often accompanies being sued for legal malpractice?
- *What are single and aggregate limits?* Coverage is usually sold in blocks of coverage, designating an amount of money to cover a single claim and the total or aggregate amount of money available under the policy for multiple claims. A policy written for \$100,000/\$250,000 in coverage is a policy that will pay out no more than \$100,000 per claim and a total of no more than \$250,000 for more than one claim asserted during a policy period. A policy with \$1 million/\$3 million will pay up to \$1 million per claim, and \$3 million for all claims asserted in a policy period. Companies assign the levels of coverage and fix a premium based on the level. Lawyers seldom have the ability to dictate their own levels of coverage, but a number of different options will be available to you. Request quotes for multiple options to compare the costs.
- *How big a deductible do you need?* Almost all policies have deductibles (see the insuring clause examples listed above). Just as with your auto insurance, you can buy insurance with different sized deductibles and the larger the deductible the lower the premium. You should pick a deductible that you can afford to pay, not just one that lowers your premium to a level you prefer. Payment of the deductible is a precondition to the carrier being obligated to paying its limits. As discussed below, deductibles can be eroded by the cost of defense. This means That a policy may have a \$5,000 deductible and 50% of the cost of defending the case will be paid from the deductible. The result is you pay the lawyer hired by the carrier the first \$2,500 of defense costs and if the case settles or goes to judgment, you have to pay the remaining \$2,500 of the deductible before the company has to pay the rest.
- *Will the cost of defense diminish the coverage limits?* Many policies available to New Mexico attorneys provide that the cost of defending a claim will reduce or erode the coverage available under the policy. These are commonly called Pacman policies, because, like the old Pacman video game, the cost of defense gobbles up the coverage. Policies will refer to claims expense being "inside" or "outside" the policy or the policy limits. When claims expense is inside the limits, it erodes them. When it is outside the limits, it is in addition to them. It is better to have the costs of defense outside the limits. For some claims it may cost far more than the

limits to defend the claim. With a Pacman policy, every dollar spent defending the claims reduces the amount of coverage available to pay a settlement or judgment. In New Mexico, an insurance regulation (NMAC 13-11-21) prohibits a policy with limits less than \$500,000 per claim from containing a Pacman provision. For policies providing coverage of \$500,000 or more, claims expense can only erode 50% of the policy limits. However, this regulation allows a carrier to issue, under certain limited circumstances, a policy that permits the cost of defense to erode all of the limits available under the policy. This type of policy is extremely rare.

- *Do I need retroactive coverage?* Professional Liability insurance is written on a "claims-made" basis, as opposed to an occurrence basis. Under a claims-made policy the claim must accrue and be made against the policy during the policy period (normally one year). If notice is given to the carrier, the claim is considered "made" at that time. Most professional liability insurance policies have a provision that provides for coverage as long as the claim and notice are made while *that* policy is in effect. As long as a lawyer or a firm stays with the same carrier, claims-made policies do not generally present a credible risk that a claim will not be covered (unless notice was not given as required by the policy). When a lawyer or a firm changes carriers, they run the risk that an unreported or latent claim of malpractice that accrued before the new policy period started may be asserted during the policy period. This claim could be denied. Because a client has four years in which to bring a legal malpractice claim (six years under a breach of contract theory), the actual assertion of a claim may occur long after the claim accrues or becomes known. Retroactive coverage extends the claims-made period backward in time for a fixed number of years. Claims resulting from occurrences prior to the policy's stated retroactive date will be excluded. The longer the period of retroactive coverage, the more protection it affords, and, therefore, the more expensive it may be. When changing carriers, it is always advisable to purchase retroactive coverage for at least 6 years. Estate planners, real estate lawyers, and others whose errors and omissions may not be discovered until a person dies or a piece of property is resold should have the longest period they can afford.
- *Do I need tail coverage?* Tail coverage is coverage for claims that are made after a claims-made policy is terminated. It extends the reporting or discovery period. A lawyer who retires or who goes into public service (becomes a judge or goes to work for an agency), should consider purchasing tail coverage. Some policies provide a free tail for retiring lawyers of the firm if the lawyer has been insured by the same carrier of a certain number of consecutive years.
- *What if I am changing firms or hiring a lawyer from another firm?* Lawyers changing firms (lateral hires) need to make certain that they will be covered under their old firm's policy for any errors or omissions that occurred while they worked there, and under their new firm's policy for any claims that accrue after they start working at the new firm. The amount of the deductible for coverage at the old firm needs to be compared to the cost to the new firm, if the new firm buys prior acts coverage or retroactive coverage for the lateral. One may cost less than the other. The issue of "claims defense" should be discussed with both the old and the new firm, particularly if open files are going with the lawyer.ⁱ A firm that is hiring a lawyer who worked at another firm should conduct its own due diligence and determine if any claims were

made against the lawyer at the old firm, if any claims are filed and pending, and whether the old firm's policy will cover claims that accrued while the lawyer was at the old firm but are not asserted until after the lawyer joins the new firm. The old firm should provide tail coverage for the departing lawyer and/or the new firm should obtain retroactive coverage under its policy. Because the prior firm may not always continue to provide such coverage, it is best for the individual attorney to have the new firm provide coverage in the event that the old firm no longer exists or no longer continues a policy that covers the former attorney. This may or may not be an option the new firm can or will provide, but it should be considered by the attorney and the firm.

- *What if I don't understand the terminology my agent spouts?* Any agent should be able to explain to you in language you can understand the nature of your professional liability coverage. For personal assistance regarding your questions, call the Ethics Hotline at 800-326-8155.

Treat the Application like a Supreme Court Brief

The members of the LPLIC are available to assist lawyers who have questions about coverage or need assistance securing it. While helping attorneys secure coverage, experience has shown that often the problem of getting coverage can be traced back to the application. Every carrier requires a lawyer or a firm to complete an application. This process should be given the same priority and level of importance as the preparation of a Supreme Court brief. Mistakes can be compounded and they can remain to influence later attempts to secure coverage.

Some agents, particularly independent agents who represent multiple lines, will often ask that you complete a single application, which the agent then presents to multiple carriers. If there is a problem with the application, it can result in being rejected by more than one carrier.

Assign the task to a responsible person

The task of completing the application should be carefully supervised by a lawyer; and if it is not completed by a lawyer, then it should be handled by an experienced staff person. This is not a task to assign to the student who is your part-time receptionist.

Copy the application and work on a copy. Study it carefully. If you need to assign specific tasks to individuals in order to complete the application, do so early and provide clear instructions regarding the tasks to be performed. If you are submitting applications to more than one carrier (through one or more agents) don't assume the applications will ask for the same information in the same format. Putting down information that you compiled for

Company A on Company B's application may result in inaccurate or misleading information being supplied to Company B.

Be Thorough

For reasons explained below, you need to gather prior policy applications, print out full copies of the web pages that described what the lawyers in the firm do and the type of work you handle, and gather paper marketing materials. Verify how all lawyers and non-lawyers calendar due dates, even if you provide calendaring software.

Answer every question and check every appropriate box on the application. Never guess, and always verify. When you are finished with the application you should keep a copy and all of the backup information on which you relied in completing the application in a single file for at least five years.

If you have questions about anything regarding the application, do not guess – call and question the agent and document the answer you receive. You should have available for review all prior policies and applications for the last 5 years. Refer to them as necessary in completing the new or the renewal application.

Applications ask for prior claims information. They may ask for disciplinary board actions. If you have listed claims in prior applications and those claims have settled or major defense motions have been granted, update the explanation you used for the previous policy. Be accurate when you are asked to describe the claim – the underwriter may actually check the docket and read complaint.

The application may require that you list the percentage of revenues or work the firm performs by legal subject area. Do not guess. Use your billing or accounting software to generate as accurate a report as you can. If your software can't track this information, set up a system that can.

Be Honest and Accurate.

Many lawyers make a mistake listing as subject areas what they would like to do, as opposed to what they actually do. Stating you represent plaintiffs in class actions, when you want to do it but really haven't, will probably result in a rejection, or, at the very least, a higher premium.

Your application will be reviewed by an underwriter for the carrier that will issue the policy. This underwriting person is not your agent and he or she may not be your friend. The underwriter may compare what you represent in the application to what you say on your website, your My Space or Face Book listing, what you represent in well-known law lists, in your blog, etc.

If you didn't list anti-trust work on your application but you represent to the world that you do it, you may be rejected. If the firm represents it handles certain work, but none of the biographies of the lawyers in the firm mention that work, you may be rejected. Anything that the underwriter believes is a material discrepancy may be the basis for a rejection. The underwriter is trying to assess the risk and if they are willing to insure you, what they will charge for a premium.

A problem with inconsistencies can arise when experienced lawyers leave the firm or laterals join the firm. Departing lawyers may take with them the "firm's experience" in a substantive field. New lawyers may bring experience in an area not covered before. If you hire or associate with a new lawyer, as part of your due diligence, thoroughly check the lawyer's prior claims experience.

Just as you would do with a brief to the Supreme Court, proof the application, cite check it (verify the source data used in the application is correct), and make certain it is complete and that it makes sense.

Dealing with Questions or Rejection during the Underwriting Process

Underwriters may have questions they need answered during the underwriting process. These questions may be funneled through the agent or they may call you directly. Make certain that any inquiries are expeditiously handled by the appropriate person. Your entire staff should be instructed to refer questions regarding the policy application to you or some other knowledgeable person. Again, you do not want secretaries answering questions about what the firm really does, or whether it uses a dual calendaring system, because they may not know the answer.

Don't guess. If you need to check records or verify information, tell the adjuster you want to make certain that you have the best current information and you will call them back – and do so promptly.

Rejection is hard for anyone to accept and it is not an uncommon human response to try and

forget it and move on. Don't do this if you are rejected by a carrier. Either you or your agent should call the carrier's underwriter and professionally and calmly ask why you were rejected.

It is not uncommon for an underwriter to tell you why they rejected your application, and many times the reason given can be corrected. One real world example involving a member of the LPLIC involved a senior lawyer who joined a new firm after his old firm imploded. The lawyer had practiced law for 50 years and had handled every type of case you can imagine. He was involved in the General Atomic case, represented plaintiffs and defendants in class actions, and defended large antitrust claims. In the new firm, he did none of this. He was a mentor and friend to many of the lawyers. When the lawyer joined the firm, the office manager uploaded his resume to the firm's website and added his background and experience to the firms' resumes. The firm had both represented and had been insured by the same carrier for many years. The firm was shocked when the carrier declined coverage. When it called the underwriter, the firm learned that the application was rejected because the firm's application did not match the type of work that the firm's website represented the senior lawyer handled. An explanation letter from the senior lawyer and a quick fix to the website resulted in the policy being renewed.

Sometimes you can't immediately fix the problem that result in a rejection, but knowing the basis for the rejection may allow you to make adjustments. Perhaps you were rejected because you had a serious claim pending against you and during the year the claim is dismissed. Perhaps a lawyer in the firm with a bad claims experience has left. These changes in circumstances can be stressed when you apply again the next year.

Read the Policy and Comply with It

When you get the policy, do not file it away. Read it, and make certain it conforms to what you understood you would be getting. Check the definition of "insured" and all of the other definitions. Outline the exclusions and look at the exceptions to the exclusions. Make certain that all of the lawyers in the firm understand the exclusions and the claims notice requirements of the policy.

Prepare for the Renewal or Replacement

Most policies are written for a period of 12 months. It is not unusual for different types of policies to come due at different times. Unlike professional liability policies, other types of policies are often renewed automatically by the agent and do not involve the intensive application process that professional liability policies involve.

It is a mistake to wait until the last minute to start working on the renewal process. Do not assume you will be automatically renewed. Your current carrier may have stopped writing coverage in New Mexico, and you may have to start over, or your first attempt to get coverage may fail. Give yourself the time to handle the process.

Using a computer or paper calendar, set a date two to three months before the professional liability policy will expire to start working on renewing the policy or looking for

a new one. Go the file folder where you have saved letters from agents. Call your current agent. Request application forms. Gather the website materials, marketing materials, and previous applications.

Prepare to write the Supreme Court brief again.

Making Your Annual Report to the SBNM

At the beginning of every year, New Mexico lawyers must pay their Bar Dues and make certain certifications to the Bar. In addition to a certification regarding trust accounts, all attorneys must report whether or not they carry professional liability insurance. The certification is included in the Bar Dues form.

Pursuant to Supreme Court Rule, each attorney must:

- Certify whether or not he or she carried professional liability coverage;
- Provide the name of the carrier, not the agent;
- Provide the amount of coverage; and
- Provide the amount of the deductible.

This information is found on the Declaration Page of the insurance policy. If in doubt, call the agent.

The basic data from the dues form is used by the State Bar and the Supreme Court to evaluate the availability of insurance and the amount of deductibles being offered by insurance carriers. It is also used to determine the number of lawyers who do not carry professional liability insurance and where they practice. The LPLIC is not provided with information regarding specific lawyers or law firms.

¹ It is not a bad idea when a departing lawyer is taking open files to reach an agreement that the files being taken will be maintained exactly in the form in which they existed when taken, and that new files will be opened and maintained by the new firm. Firms often have different filing requirements or client numbering systems and the tendency is to convert or change the old files to the new system. If you do this, you cannot easily tell what work was done (or not done) when the file was at the old firm or after it was transferred.

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

**State Bar Center, Albuquerque
Wednesday, September 27, 2006**

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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 provide 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.

Lawyers Professional Liability and Insurance Committee (LPLIC)

Advises the State Bar regarding risk management activities.

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