

**The American Bar Association
Standing Committee on Lawyers' Professional Liability
and the
ABA Center for Continuing Legal Education**

Present

Controlling Legal Malpractice Insurance Cost and Availability in a Changing Marketplace

Controlling Legal Malpractice

By Jutta Kath

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What can lawyers do to affect premium costs?

Buying smart. What is the right limit?

Considerations:

- What are the risks and financial exposures handled?
- Structure of the firm (corporation, partnership, solo)
- Firm size
- Area of practice
- Assets: Every partner's personal assets are at risk
- Skills and experience of practicing attorneys (incl. of counsel)
- Number of employees (paralegals, secretaries)
- Which other parties are involved (potential plaintiffs, cross claimants)
- Which jurisdiction?
- Range of services (including, for example, title agents?).
- Minimum: Protect your assets.
- Maximum: Consider frequency as an issue for smaller firms and severity for larger firms
- Are you a potential deep pocket target (solo with highest limit in group of 5 co-defendants with lower limits)?
- Aggregate / per claim limit: Was available in the past, may not be in the future.
- Are you likely to be hit twice in one year?
- Defense costs : Are they part of your limit or not? They may reduce available limit. (See also deductibles.)
- Claims expense allowance available? Only after this is exhausted, defense cost will erode limit

Consider raising deductibles.

- Seems to be the reaction from bigger firms rather than to reduce the limit.
- Why: Because of financial exposure and trend to higher settlements.
 - Office manager with risk management functions are more aware of issues of change in exposure.
 - More conflict issues, more exposure
 - Bigger firms may have the advantage of having more resources available to handle a malpractice situation
 - For the smaller firms: Who gives you best advise on these issues?
- Put in relation to limit! A deductible of 10,000 USD and limit of 100,000 USD does not make sense.
- Check whether the deductible applies to both, indemnity and costs.
- Deductible vs. self insured retention: Maybe an option for a bigger firm if an office manager is available.

Upgrading Systems – Beyond the Technical Aspects

- Computerised systems for
 - Docket control
 - Checking conflicts
- Intake procedure for new clients and new matters. Conflict check (documented and saved) appropriate waivers (if necessary and allowed): Conflict of interest is not only an issue for big firms but also smaller firms in remote areas (is there another lawyer available?).
- Engagement letter needs to be signed.
- Partner / committee should be available that deals with ethics / malpractice questions.
- Make it part of CLE (ethics, professional responsibility and malpractice) for all attorneys at the firm's initiative.
- Improvement of practice.
- Supervision of young lawyers / other staff (also training issue).
- Intake of new lawyers (lateral hires).
- Improvement of practice record and record retention.

- \ Engagement letter
- | Invoices for costs and fees
- What** } Settlement authority
- | Misc. authorisation from clients
- / Settlement agreements and releases orders of dismissal

- How** } Set policy of record retention

Credits / Debits: How to look attractive on the application

What are the driving factors for credits and debits?

- Deductible: Size and whether it applies to limit or not (Unwillingness to take any deductible will result in higher premium).
 - Firm size
 - Ratio non-attorney / attorney : The more staff per attorney you have the higher the debit (2 and below normally does not affect the premium).
 - CLE can lead to credit
 - Retroactive data / prior acts coverage
 - Surcharge for prior claims depending on number of years back and size of claims
 - No claims bonus may be available
 - Part time (depends on billing)
 - Geography
 - Area of practice and percentage there of:
 - **Examples for debited areas of law (this may vary from carrier to carrier):** Collection and repossession, corporate law, estate/ trust, personal injury, patents, SEC, taxation, entertainment law
 - **Examples for credited areas of law:** defense, criminal and immigration law
- The volume of each area, however, also impacts the premium. For specialists in certain areas a separate policy may be available
- Other examples for debits: absence of clerical staff, commercial advertising and homepage presentation, incomplete and sloppy application, lack of office management, lack of new client screening , no continuity in the firm
 - Conflicts if interests
 - Other considerations: fee disputes (can be avoided by diligent client intake). Disputes over fees can lead to cross claims for malpractice
 - Equity interest in clients (even in form of stock options in view of fees)
 - D&O involvement (get separate policy)

Examples for credits: office management (full time), practice speciality, good reputation, of counsel ≤ 30 hours, docket control, continuous renewal, new client screening, limited practice, positive risk management assessment visit (if carrier offers that)

New: How is the internet used in the course of the practise (research tool) ?

Alarm Bells:

- Professional misconduct & criminal offence charge vs. private reprimand.
- Refused admission to bar
- Cancelled or not renewed
- Contract to guarantee result of any professional service rendered.
- Alcohol / substance abuse
- Claims frequency. 3 in 5 years > 100,000
- Mid-term increase in limits or change in deductible
- Late finance payments
- Cancellation for other reasons than non-payment
- Office sharing or true partnership: Hence the request for the letterhead (Danger of de facto partnership)
- Independent contractor (should have separate policy)
- Associations of law firms (should buy separately)
- Non private practice
- Various locations (back up?)
- Solo (back up?)
- Fee disputes
- Employment history
- Equity interests in clients (stock in lieu of fee)
- D&O Involvement (get separate policy)
- Rapid growth of firm

What happens if alarm bells go off?

- Refused
- Limited coverage

- Reduced limits
- Higher deductible

Consider limiting your areas of practice

Check what the driving factors are (see discussion above) and review your practise.

- Special products may be available: new admittee programme, smaller limit / set deductible.
- Immigration law, appellate work, criminal law
- Part - time
- Referral service only

Danger of coverage gaps in changing carriers

- Concept of claims made vs. occurrence ``The company pays damages resulting from claims first made against the insured and reported to the company during the policy period.
- Consider prior acts
- Get extended reported period
- Danger of laundry listing:
Clean with a new carrier but claims history needs to be reported
- Shopping around will have to be shown in application under insurance history (see also above: continuity of cover may lead to credit)

Aggressive Shopping

- How much time do you have for it?
- What is the potential benefit?
- Rather spend time for improving your practice
- Consider hiring an office manager
- Take advantage of services that help to improve your practise

How do you shop for a good carrier?

- Who addresses the issues I have with my practice best?
- Do I get support for improving my practice?
- Do they help to protect from potential claims?

- Professional staff?
- Knowledge of jurisdiction panel of defence attorneys
- Mouth-to-mouth propaganda
- Local bar association