

Insurance, Just in Case: Keep Yourself Covered

Professional liability insurance -- what it is and how to get it

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Lawyers across the Washington, D.C., area are finding that just because legal malpractice insurance isn't mandatory doesn't mean it isn't necessary.

Once upon a time, lawyers were less likely to need or to have professional liability insurance, which covers monetary loss and the expenses of an insured attorney or law firm for their errors and omissions. It was understood that a lawyer's diligence, attention to detail and attentiveness to clients provided protection enough against legal malpractice claims. In fact, some lawyers even believed that the insurance acted as a lightning rod to suits.

Yet the harsh realities and risks of law practice today -- as typified by the proliferation of suits in which corporate lawyers are sued for malpractice not by their clients but by third-party stockholders -- all dictate that law firms, regardless of size, take out lawyer liability insurance. Such coverage indemnifies the policyholder from claims arising out of, for example, inattentiveness to deadlines, failure to perform a title search properly, and other garden variety types of negligence, all the way to very complex and sophisticated forms of negligence, such as when public securities offerings go afoul because lawyers give improper advice.

So let's say that you're leaving a large firm today to hang out a shingle as a solo or to join forces with another big-firm refugee or two. How should you approach the issue of liability insurance?

"The first thing to do," says Reid Trautz, director of the D.C. Bar's Law Practice Assistance Program, "is to contact your former firm and see if it's going to provide what is known as tail coverage."

Like most professional liability insurance, lawyers professional liability insurance is a claims-made policy. This means that coverage is provided for all claims made during a specified period, regardless of when the incidents that gave rise to the claims occurred. This coverage takes the opposite approach of an occurrence policy, which protects the policyholder for any loss from an event that occurs within the policy period, regardless of when the claim is made. Most auto insurance is of this type.

Tail coverage -- or, in the lingo of the insurance industry, an extended reporting option -- extends coverage for a delineated period of time after the claims-made policy's expiration date. But while an attorney is covered for claims made after the policy has expired, any incident that triggers a claim must have occurred in the time period before the policy expired. The cost of the tail is based on the premium for the last policy year and varies depending on the number of years of coverage obtained.

"Many law firms cover departing lawyers for a certain period," says Trautz. "But you've got to ask," he admonishes.

Even if your former firm isn't going to take out this coverage, which commonly is offered for one-, two-, three- or five-year periods, the carrier may allow you to do so. Known as a retrodate exception policy, this coverage is often combined with a new policy issued by the carrier that is often cheaper than comparable coverage with another carrier.

Or you can try to strike a deal with a new carrier, asking for coverage that will cover you for prior acts. "Some will say yes. They want your business," says Trautz.

But how do you go about finding an insurer of your own?

The best place to begin looking for insurance is through your bar's endorsed program, says Trautz.

While most jurisdictions -- including Washington, D.C., Maryland and Virginia -- do not require that lawyers be insured (although Maryland has a reporting requirement), many bar associations act as clearinghouses.

"It's a good place to start," says Trautz, noting that a bar association has the ability to do the research and find good deals for members.

Dan Goldwasser, a partner at New York's Vedder, Price, Kaufman & Kammholz who practices insurance law and has written extensively on liability issues, suggests that you find an independent broker -- one that is not affiliated with a single insurance carrier -- and look around. "Go to multiple insurers. Get multiple quotes. Insurance companies are competitive," he says.

Goldwasser has found that insurers tend to fall into one of two camps.

Some carriers are more thorough about their underwriting and are usually more choosy about whom they'll insure. They're generally more helpful and accommodating should you have to make a claim.

Other carriers, he says, are less selective about insureds in order to maximize premiums. If these carriers have any basis to turn down a claim, he says, they will.

A good broker, Goldwasser says, will help you distinguish between the two.

According to William Healey, the professional firms product manager with Simsbury, Conn.-based Chubb Specialty Insurance, there are basically two kinds of policies available to small firms:

"Some carriers offer a policy that has a limited liability and that's payable only for the damages, the indemnity, to the firm -- the judgment, the settlement, the actual claim amount. It doesn't include defense expenses. Those expenses might be outside the limit.

"A policy that offers defense inside the limit is more common for a firm of some size."

Some policies offer a form of self-insurance known as the retention, which functions somewhat like a deductible and allows the insured to save premium dollars.

"Let's say that you're a small firm, a three-man shop, and you buy a million dollars of coverage, and you have a \$10,000 retention," explains Healey, who practiced law 15 years with Hartford, Conn.'s Gould, Killian & Wynne before joining Chubb in 2000. "There might be a claim or two that arises during the policy period that are nuisance claims, and you may decide because you don't want to get the carrier involved that you can handle it within your own retention. You may decide to settle with that aggrieved client."

How much liability coverage do you need?

To make this determination, Trautz suggests a two-part analysis. Ask yourself, first, how much of your assets you want to protect, and, second, how much coverage you need to protect your clients.

Most solos, Trautz says, seek policies with coverage ranging from \$300,000 to \$1 million. "It's been a little harder lately to get excess coverage over a million, but it's still possible," he says.

For the last two years, the insurance market has not been a good one for buyers. Insurance companies make their money in two ways -- by underwriting and by investing their premiums. The al-Qaida terrorists delivered a big hit to the insurance industry on Sept. 11, 2001. Its financial picture hasn't been helped by a sluggish stock market and the resulting downturn in investment income. Thus, insurers are taking a tougher look at potential insureds.

In this "hard market," not only is it more difficult to buy insurance, but also more costly than it used to be.

Trautz says that rates have increased in some cases by as much as 30, 40 or 50 percent since 9/11. The average solo practitioner today should expect to pay \$1,000 to \$1,800 for the first year of lawyers liability insurance. But insurance carriers consider a number of factors in setting premium rates, and it's possible that a lawyer's rates could be much higher.

The biggest consideration in determining rates is practice area. Among the higher-risk practices are personal injury, intellectual property, patent and securities law. These lawyers should expect higher premiums -- sometimes significantly higher, as much as double.

Another factor insurers consider is geographic location. According to Victoria Crowe, program manager of the Chevy Chase, Md.-based broker Capital Professional Insurance Managers Inc., Maryland lawyers tend to pay higher rates than Washington, D.C., lawyers because the loss ratio in Maryland is higher than in D.C., possibly because Maryland has fewer lawyers.

Other factors insurers take into account are claims history; outside interests of lawyers, such as directorships; firm management, such as intake procedures and screening, calendar, docketing and conflict-identification systems; and whether you sue clients to collect your fees.

Expect your premiums to go up each year for at least five to seven years before they start leveling off, says Crowe. An insurance company assumes more risk with every extra year a claims-made policy is in effect. As Crowe simply puts it, "More premiums for more exposure."

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