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# Lawyer, Know Your Safety Net: A Malpractice Insurance Primer for New and Experienced Lawyers

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# Lawyer, Know Your Safety Net: A Malpractice Insurance Primer for New and Experienced Lawyers

## I. Introduction

Any reasonably competent lawyer knows how to file claims, construct arguments, and represent clients, but few lawyers have been trained to or have even thought extensively about how to protect themselves from client claims against them. As detailed below, claims against lawyers for malpractice happen all the time and are steadily increasing. Even a single claim can cause the loss of one's savings or job, a suspension from practice, or a disbarment. Years of education and a carefully-constructed professional reputation can disappear faster than kibble served to a hungry dog. In fact, clients (and even non-clients) may bring malpractice claims whether the lawyer made a mistake or not. Consequently, while careful practice habits may decrease the likelihood of malpractice claims, it is not wise to rely on care alone. Nearly all, if not all, large firms and the majority of small firms and solo practitioners, choose to purchase malpractice insurance.[1]

While Oregon is the only state that requires lawyers to purchase malpractice insurance, many states require lawyers to disclose, either to their clients or to the state bar, whether they carry malpractice insurance.[2]

Given all those factors, it is surprising how little most lawyers know about the coverage a malpractice insurance policy provides. Most lawyers just assume that their firms or insurance agents will choose the right policies for them. Because the stakes are so high, the logical choice is for lawyers to be proactive and well-informed on insurance policies.

This article offers a short manual on malpractice insurance. It provides a brief description of what constitutes legal malpractice and describes the lawyer errors that most frequently result in malpractice claims; explains the common terms, exclusions, and conditions in malpractice policies; summarizes the process by which insurers set premium rates; and concludes by suggesting some ideas to help lawyers reduce their malpractice premiums, avoid malpractice, and minimize claims if they are sued by clients.

## II. What Constitutes Legal Malpractice

When an individual asserts that her lawyer has caused harm by committing professional misconduct, the claim is known as legal malpractice.[3] Clients file a variety of causes of action for malpractice, including claims for intentional misconduct or breach of contract, but the most common claims allege breach of fiduciary duty or negligence.[4]

A fiduciary, as lawyers know, is an individual in a position of trust; lawyers owe their clients a number of professional duties, including a duty to place clients' interests above their own.[5] The fiduciary duties that a lawyer owes to her client include: avoiding conflicts of interest, representing the client in good faith, informing the client adequately, safeguarding the client's confidential information and property, and abiding by the client's instructions.[6] If a lawyer violates one of those duties, the client may successfully bring a claim of malpractice based on a breach of fiduciary duty.

A lawyer is negligent when she fails to exercise the proper professional knowledge, care, or skill that is sufficient and appropriate for the particular matter at hand.[7] Failure to exercise proper professional care is different from a lawyer making a mere error in judgment; mere errors in judgment alone will not suffice to sustain a successful malpractice claim.[8] The Kansas Supreme Court has held that it is a lawyer's duty to provide his client with an informed judgment.[9] Thus, a lawyer is not negligent if he makes an error that he believed in good faith was informed and in the best interest of the client.[10] However, the Court found that if the error could have been avoided through ordinary research, the lawyer cannot "avoid legal malpractice liability by claiming the error was one of judgment."[11]

Other examples of a lawyer's professional malpractice include; failing to prepare or file the proper legal documents, failing to act diligently, stating the law or facts incorrectly, missing deadlines, failing to inform a client of the statute of limitations, or failing to properly advise the client.[12] The conduct must have caused the client some type of harm in the matter for which the client originally hired the lawyer.[13] Additionally, the client must show that the harm would not have occurred but for the lawyer's professional misconduct.[14] Possible remedies for the plaintiff in a malpractice suit include damages, an injunction, altering or canceling legal documents, and returning the plaintiff's property.[15]

Occasionally, clients will bring a malpractice claim under breach of contract rather than a tort action. Usually, this choice stems from the fact that, in many states, the statute of limitations for breach of contract claims is three years whereas the statute of limitations for tort actions is only two.[16] Although some jurisdictions are divided on whether a malpractice claim falls under tort or contract, Kansas is not. In Kansas, unless a claim involves a specific contractual provision, malpractice claims are tort actions.[17]

**Footnotes**

1. *See* Lisa R. Bliss, *States Weigh Disclosure of Liability Insurance Status to Clients*, Litigation News, Oct. 20, 2009.

2. *See id.* (stating that seven states require a lawyer to disclose liability insurance status to their clients, and 18 states require disclosure of insurance on the annual bar registration). *But cf.* K.S.A. 40-3402 (2012) (requiring physicians to obtain medical malpractice insurance); *see also* American Medical Association Advocacy Resource Center, State Laws Mandating Minimum Levels of Professional Liability Insurance 1 (2012) (stating Kansas as one of seven states that requires a minimum level of liability insurance for physicians).

3. *See* Lisa G. Lerman & Philip G. Schrag, Ethical Problems in the Practice of the Law 36 (Erwin Chemerinsky et al. eds., Aspen Publ'g 2005).

4. *See id.*

5. *See* Ronald E. Mallen & Jeffrey M. Smith, 5 Legal Malpractice §15:2 (2012 ed.).

6. *See id.*

7. *See* 7 Am. Jur. 2d *Attorneys at Law* § 168 (2012).

8. *See* 14 Am. Jur. Trials *Actions Against Attorneys for Professional Negligence* § 2 (updated in 2011).

9. *See Bergstom v. Noah*, 974 P.2d 531 (Kan 1999).

10. *See id.* at 555-56.

11. *Id.*

12. *See* 14 Am. Jur. Trials, *supra* note 8.

13. *See* Lerman & Schrag, *supra* note 3, at 36-37.

14. *See id.*

15. *See id.* at 37.

16. *See Pancake House Inc. v. Redmond By and Through Redmond*, 716 P.2d 575 (Kan. 1986).

17. *Id.* at 578.

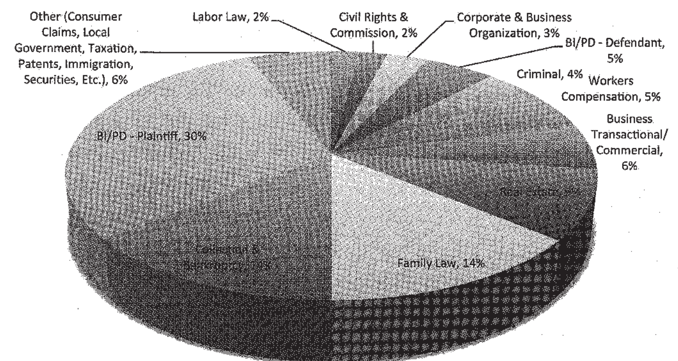
Thus, state bars assert that malpractice law increases the quality of the legal profession by forcing lawyers to be precise and meticulous.[18] On average, 6 percent of all practicing lawyers will have a malpractice claim brought against them.[19] For the past several decades, there has been increasing growth in the number of legal malpractice claims and lawsuits.[20] During the 1980s, the reported number of legal malpractice lawsuits tripled from the previous decade, and the 1990s saw a 155 percent increase from the 1980s figures.[21] The majority of malpractice claims arise out of lawyers' handling of personal injury or real estate matters.[22] Other areas of law that are high risk for malpractice claims include intellectual property, patent, and securities law.[23]

Explanations for the growth in malpractice claims include an increase in litigation, lawyers becoming more willing to bring claims against other lawyers, an increase in third party claims, clients wanting cheaper legal fees, and the current economic malaise.[24] Many insurance carriers blame the poor economy for the increase under the theory that, when there are fewer jobs and people have less money; clients desperate for money are more likely to sue.[25]

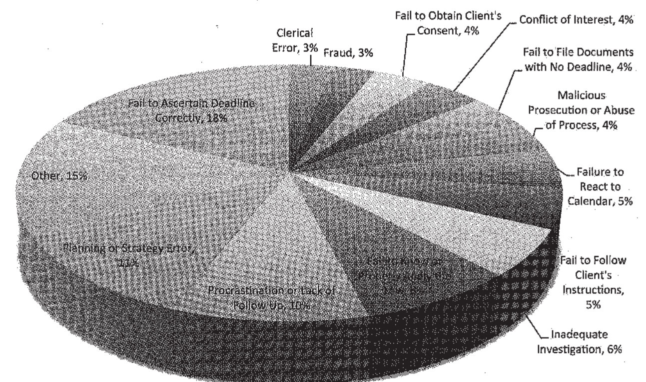
Although the types of claims that are brought in malpractice suits vary, the majority of the claims allege "simple, straightforward mistakes."[26] The most common reasons for malpractice claims include acts such as: missing deadlines, failing to settle, lacking knowledge of law, failing to prepare, failing to manage expectations, and failing to communicate properly.[27]

The Missouri Department of Insurance publishes a Legal Malpractice Insurance Report every ten years that provides statistical data on legal malpractice claims. The 2010 Report showed that 242 legal malpractice claims were closed in 2010, with the average payout being $120,014.[28] The areas of law practiced by the lawyers most often sued for malpractice were bodily injury and property damage, collection and bankruptcy, estates and trusts, family law and real estate.[29] "The most common types of [lawyer] errors included failure to make deadlines, a planning or strategy error, an inadequate investigation, and inadequate knowledge or application of the law."[30] The following two charts show the distribution of claims by area of law and type of lawyer wrongdoing from 2001 to 2010:

**2001–2010 Percentage of Closed Claims by Area of Law[31]**




**2001–2010 Percentage of All Closed Claims by Type of Error[32]**




## III. Malpractice Insurance Basics

To protect themselves from costly claims, solo practitioners and firms buy legal malpractice insurance. Those insurance policies address acts, errors or omissions that a lawyer makes in the scope of the professional services she offers.[33]

Legal malpractice insurance is different from general liability insurance in that it does not cover events such as property damage or physical injuries to clients who are harmed while visiting the lawyer's place of business.[34] Legal malpractice insurance only covers problems that arise from rendering or failing to render professional legal services.[35]

Even if a lawyer works for a large firm and has a large amount of coverage under the firm's malpractice insurance policy, that policy does not provide blanket protection. Generally, policies do not cover a wide variety of acts, such as: fraudulent, malicious, dishonest, or criminal acts; do not insure certain types of remedies, such as: orders of restitution of legal fees, fines, penalties, or orders to pay punitive damages; and do not cover particular categories of disputes, such as: disputes involving the conduct of lawyers who both represent and are part owners of businesses or intra-firm disputes.[36]

18. *See* CNA's Professional Liability Insurance for Lawyers, *Insurance Q & A, available at* www.lawyersinsurance.com (2003).
19. *See id.*
20. *See* Allison O. Van Laningham, *Legal Malpractice and the Civil Defense Lawyer: Past Trends, Present Conditions and Future Avoidance*, FDCC Quarterly/Summer 325, 326 n.2 (2009).
21. *See id.*
22. *See id.*
23. *See* Joel Chineson, Insurance, *Just in Case: Keep Yourself Covered*, Legal Times, Nov. 17, 2003.
24. *See* Van Laningham, *supra* note 20 at 327.
25. Telephone Interview with Jessica Walrath, Insurance Agent, Attorney's Liability Protection Society Inc. (ALPS), Feb. 28, 2012.
26. CNA's Professional Liability Insurance for Lawyers, *supra* note 18.
27. *See* Van Lanyingham, *supra* note 20 at 328-31.
28. Missouri Dep't of Ins., 2010 Missouri Legal Malpractice Insurance Report Executive Summary (2011).
29. *Id.* at 9.
30. *Id.* at 41.
31. *Id.* at 9 (listing the number of claims per area of law).
32. *Id.* at 41 (listing the number of claims per type of error).
33. Harold A. Weston, *Lawyers' Professional Liability Insurance*, 92 A.L.R. 5th 273, § 2[a] (2001).
34. *See id.*
35. *See id.*
36. CNA's Professional Liability Insurance for Lawyers, *supra* note 18; *see also* Matthew L. Jacobs et al., *Errors and Omissions Liability Coverage – The Basics*, 796 PLI/LIT 163, 172-77 (2009).

Legal malpractice policies, instead, "provide coverage for claims that arise from 'wrongful acts' committed in the rendering of legal services ... in your capacity as a lawyer and generally provide both indemnification coverage and claims expense coverage, subject to specified deductibles and endorsements."[37] Because most policies are drafted by insurers and attorneys have little ability to negotiate terms, malpractice insurance policies are considered adhesion contracts; consequently, in coverage disputes, courts tend to resolve ambiguities in favor of the non-drafting party, the lawyer.[38]

## IV. Terms, Conditions, and Exclusions

A malpractice insurance policy usually consists of the following sections: Definitions, Coverage Agreements, Defense Provisions, Conditions, Exclusions, and Limits of Liability.[39] The Definitions explain the terms in the policy, the Coverage Agreements explain what services and actions are insured by the policy, Exclusions withdraw coverage for particular types of otherwise covered conduct, Defense Provisions determine the lawyer's rights in regards to defending and settling claims, Conditions state requirements that must occur for coverage, and Limits of Liability set the outer bounds on what the insurer will pay.[40] Below, we explain each of these sections in turn.

The Definitions section is significant; most coverage disputes involve questions of policy language interpretation.[41] For example, to understand the Coverage Agreements section, courts look to the Definitions section. To determine whether a policy covers a particular act of misconduct, courts first analyze three basic questions: 1) Was the party insured? 2) Was there an actual claim? and 3) Was the alleged misconduct committed at a time when the lawyer was acting within the scope of providing legal professional services?[42] The key to answering these questions lies in the Definitions section, which is usually found at the very beginning of the policy.

Usually, the Coverage section communicates that the policy provides coverage to all the lawyers and employees who act on behalf of the firm, and to the firm itself.[43] To determine whom the policy actually protects, the policy's "Named Insured" and "Additional Insureds" definitions are critical.[44] The "Named Insured" term usually lists the firm, partnership, corporation, and individuals covered under the policy.[45] The "Additional Insureds" lists other lawyers whom the policy covers.[46] That list might include former lawyers or employees during the time when they were employed by the firm.[47]

Similarly, the Coverage section promises coverage for "claim(s)." To determine whether a claim has been made, courts examine the definition of "claim" in the policy.[48] Under any policy, a client's demand for relief in a lawsuit meets the definition of a claim. However, issues in this area arise if a client requests certain information from her lawyer or asks a regulatory or prosecutorial agency to conduct an investigation.[49] Courts usually find that a request for information is not a claim under most policies, but that a requested investigation is.[50]

The third type of coverage definition dispute involves questions of whether the lawyer was providing a professional service within the scope of a legal representation when she made the error. Claims regarding court deadlines, conclusions of law, and client advice are obviously in the realm of legal professional services. Courts differ, however, regarding claims concerning legal fees; such disputes do not obviously relate to the quality of the professional services, and the clients' claims do not obviously give rise to the type of client injury contemplated by malpractice insurers.[51] An additional example is when lawyers are owners of other businesses and engage in transactions with their clients. Courts must then decide whether the negligent act was in the scope of the lawyer's legal duties or within the separate business. If the court concludes that the act was in the legal sphere, the client could then hold the firm responsible for the lawyer's negligent act.[52]

Another important term in the Definitions section is the insurer's definition of "damage" or "loss."[53] In general, a malpractice insurer provides coverage or payment for the damage that a lawyer has caused and is legally obligated to pay.[54] Thus, knowing the definition of "damage" or "loss" lets the lawyer know exactly what the insurance will pay for if he or she loses.[55] Courts have concluded that the term "damage" is broader or covers more conduct than the term "loss."[56] Regardless of which term the policy uses, insurance companies often argue that claims for restitution, disgorgement, penalties, or the return of fees do not qualify as either "damage" or

37. CNA's Professional Liability Insurance for Lawyers, *supra* note 18.
38. *See* Standing Committee on Lawyers' Professional Liability, American Bar Association, *Understanding Your Insurance Coverage*, http://apps.americanbar.org/legalservices/lpl/insurancecoverage.html (2006).
39. *Id.*
40. *Id.*
41. *See* Weston, *supra* note 33.
42. *See id.*
43. *See* CNA's Professional Liability Insurance for Lawyers, *supra* note 18; *see also Senate Ins. Co. v. Tamarack American*, 788 N.Y.S.2d 481 (App. Div. 3d Dep't 2005) (holding that a lawyer was not provided malpractice coverage because the misconduct occurred before the lawyer joined the firm, thus he was not acting on behalf of the firm).
44. *See* Jacobs, *supra* note 36 at 168; *see also* Understanding Your Insurance Coverage, *supra* note 38.
45. *See* Understanding Your Insurance Coverage, *supra* note 38.
46. *See id.*
47. *See* CNA's Professional Liability Insurance for Lawyers, *supra* note 18.
48. *See* Jacobs, *supra* note 36 at 168.
49. *See id.*
50. *See id.*; *Compare Hoyt v. St. Paul Fire & Marine Ins. Co.*, 607 F.2d 864, 866 (9th Cir. 1979), *with Ace Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789, 793 (D. Md. 2008).
51. *See* Jacobs, *supra* note 36 at 176-77; *see also* Weston, *supra* note 33 at § 10[d] (citing *Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v. Shane & Shane Co., L.P.A.*, 605 N.E.2d 1325 (8th Dist. Cuyahoga County 1992) (holding that a lawyer was not covered under malpractice policy when he retained attorneys fees fraudulently from a settlement)).
52. *See Phillips v. Carson*, 731 P.2d 820 (Kan. 1987) (Court found attorney negligent for taking out a personal loan from client for a separate business. The Court remanded the case to determine if the attorney's law firm was also liable).
53. *See* Jacobs, *supra* note 36 at 172.
54. *See id.*
55. *See id.* at 175 (citing *Nutmeg Ins. Co. v. East Lake Mgmt. & Dev. Corp.*, 2006 WL 3409156 (N.D. Ill. 2006)).
56. *See id.*

"loss."[57] Some courts have rejected those arguments, holding that "damage" or "loss" includes at least some forms of restitution, and even disgorgement, depending on the specific language in the policy.[58]

The Coverage section also establishes the nature of the coverage provided. Legal malpractice insurance policies also are called errors and omissions policies, because they provide coverage for mistakes lawyers make in the scope of their professional services.[59] Currently, the majority of legal malpractice insurance policies are, as indicated above, claims-based policies, meaning if a claim is made and reported during the policy period, it is covered.[60] Earlier claims-based policies only required reporting during the policy period so long as it was reasonably practicable to provide such notice.[61] Now, most policies require reporting during the policy period.[62]

The failure to make a timely report of a claim affects other insured individuals besides the lawyer who committed the act; a failure to report a claim could also affect the firm or partnership's coverage for the claim.[63] In fact, disputes between firms and their insurers regarding claims made but not reported during the policy period are common.[64] This issue often arises when a claim is made at the end of a policy period, and the insured did not have time to report the claim before the policy period ended.[65] Courts tend to favor the insurer's argument in such cases, concluding that, if a policy has a provision requiring the insured to report claims during the policy period, there is no coverage if the lawyer fails to do so.[66]

Malpractice insurance policies used to be written more similarly to general liability policies, granting coverage on an occurrence basis.[67] Under an occurrence-based policy, insurers provided coverage if the action happened during the policy period, regardless of when the claim was made.[68] Such policies have disappeared. Occasionally malpractice policies create a hybrid between a claims-based and occurrence-based policy.[69] For example, the policy might provide occurrence-based coverage for conduct occurring during the policy period and claims-based coverage as to conduct that occurred prior to the policy period.[70]

The Exclusions section can seem to contain a series of traps for the uninformed. The most common exclusions include: intentional dishonesty, uninsurable claims by law, and prior acts or knowledge.[71] If the claim falls under an exclusion, the lawyer must provide her own defense costs and pay the claim.[72] The above three exclusions are described below.

The intentional dishonesty exclusion denies coverage for acts that are dishonest, fraudulent or criminal.[73] Insurers typically use one of three common forms of this exclusion. The rarest excludes the most conduct, denying coverage if there is *any allegation* of fraudulent, dishonest, or criminal conduct.[74] The second form denies coverage if fraudulent, dishonest, or criminal conduct *actually took place*.[75] The third form, which is the most commonly used and denies the least amount of coverage, excuses the insurer only if there is a final judgment or settlement of a claim for fraudulent, dishonest, or criminal conduct.[76] Because the third form provides the most coverage, lawyers should aim for a policy that uses that particular language and not overlook this exclusion.

The intentional dishonesty exclusion is distinct from the uninsurable claims by law exclusion; the latter bars coverage when providing such coverage would violate state law.[77] The exclusion is not based on the lawyer's act being unlawful; rather, it applies if having an insurer pay for the legal fees would itself be unlawful. The particular circumstances where this exception applies vary depending on the particular state where the insurance policy is provided and the type of claim alleged.[78]

The clause excluding prior acts and knowledge bars coverage for acts, errors or omissions that occur before the "prior acts date" set in the policy, even if the claim is made and reported during the policy period.[79] The exclusion prevents more than one insurer from providing coverage for a single claim, and allows the insurer to avoid providing coverage to a lawyer who did not have insurance when the misconduct occurred. Insurance carriers also rely on this exclusion to deny coverage for claims against newly-added lawyers, such as claims against lawyers added in a law firm merger.[80] The policy will either state a retroactive date, exclude prior acts altogether or both.[81] "A policy with no prior [acts exclusion] or retroactive date affords "full prior acts" coverage, meaning the time of the act is not relevant if the claim is made during the policy period."[82]

The next policy section, the Defense Provisions, is vital because it states how much say the insured will have in defense decisions. Some policies allow the insurer to choose the defense counsel.[83] Other policies allow the insured to choose the defense counsel, but only on the approval of the insurer.[84] Additionally, the Defense Provisions might include a statement addressing the question of whether the insurer needs approval or consent by the insured to settle a particular claim.[85] "If the insured's

57. *See id.* at 172-77.
58. *Id.* at 174, n.31.
59. *See id.* at 167.
60. *See* Weston, *supra* note 33.
61. *See id.*
62. *See id.*
63. *See id.*
64. *See id.*
65. Jacobs, *supra* note 36 at 171.
66. *See id.*
67. *See* Weston, *supra* note 33.
68. *See id.*
69. *See id.* at § 4.
70. *See Employers Reinsurance Corp. v. Phoenix Ins. Co.*, 186 Cal. App. 3d 545 (1st Dist. 1986).
71. *See* Jacobs, *supra* note 36 at 179-82.
72. *See* Understanding Your Insurance Coverage, *supra* note 38.
73. *See* Jacobs, *supra* note 36 at 179.
74. *See id.* (emphasis added).
75. *See id.* (emphasis added).
76. *See id.*
77. *See id.* at 180-81.
78. *See id.* at 181.
79. *See* CNA's Professional Liability Insurance for Lawyers, *supra* note 18.
80. *See id.*
81. *See* Jacobs, *supra* note 36 at 181.
82. Weston, *supra* note 33.
83. *See* Understanding Your Insurance Coverage, *supra* note 38.
84. *See id.*
85. *See id.*

consent is required, policies often place a limit on what the insurer will pay if the insured refuses to settle."[86] Unless there is a significant amount of trust between the insurance company and the lawyer or firm, it is in a lawyer's best interest to have a provision requiring insured consent to settlements.

Policies often place a cap on the amount of money the insurer must provide during a policy period; thus, if the insurer settles a large claim early in the policy period, the insured will have limited protection for the remainder of the policy period. This issue makes examining the Limits of Liability section of the policy also important, because the Limits provision will provide the amount the insurer will pay for each claim, the aggregate liability for all claims, and whether the deductible is per claim or in the aggregate.[87] Sometimes, policies will state that deductibles are "loss only deductibles," which means that the insured will only pay when there is a settlement or judgment.[88] The Limits of Liability section will also address a critical issue, whether defense costs are included in the policy limit. In most policies, defenses costs don't count towards the policy limit;[89] if defense costs do count against the policy limit, the coverage provided by the policy is much more limited than it appears at first glance.[90] However, some of the policies that count defense costs against policy limits also include a "claims expense allowance," which provides a fund for defense costs that, until exhausted, won't reduce the coverage amount.[91] Claims expense provisions, however, are rare.[92]

## V. The Coverage Gap Problem

Gaps in coverage are an insidious problem because they are usually unexpected. The best way to understand the issue is to imagine the following, specific example. A lawyer, who is insured by one malpractice insurer, purchases insurance for the following year from another insurer. The lawyer commits malpractice during the policy period covered by the first insurer, but the lawyer doesn't realize the error until he is sued in the second year. The lawyer reports the claim to both insurers on the day he learns of it. The first insurer denies coverage because the insured did not report the claim during the policy period. The second insurer denies the claim because of the prior acts exclusion. As indicated earlier, the prior acts exclusion excludes claims that occur during the policy period but which stem from malpractice committed before the period started.[93] The insured has a coverage gap.

This problem can be solved by purchasing an extended reporting option.[94] An extended reporting option "extends coverage for a delineated period of time after the claims-made policy's expiration date."[95] The extension can be anywhere from 30 to 60 days.[96] Insurers base the cost of this option on the previous year's premium and the number of years the lawyer or firm has had coverage.[97] If the firm or company does not purchase the extended reporting option, a lawyer can purchase it individually.[98] It is important to remember that claims can be brought against a lawyer for past conduct even if he or she no longer practices law and has switched careers.[99] Thus, lawyers who anticipate leaving their current employers in the upcoming year should strongly consider purchasing an extended reporting option.[100]

## VI. How Insurers Set Their Premium Rates

The factors that determine lawyers' premium payments include: the size of the firm or employer, the number of employees, the number of years the lawyer has been practicing, the area of practice, and the jurisdiction in which the firm or employer practices.[101] The most important factor that insurers take into consideration is the area of practice.[102] It is normal for an insurer to charge firms in high-risk practice areas twice the normal rate.[103] Geographic location is also important. Normally, insurers start with a general rate that is state influenced depending on state malpractice law and the risk pool.[104] The risk pool is defined by other lawyers in surrounding areas and how many claims or acts of misconduct have occurred.[105] Sometimes, an insurer will require a lawyer to pay a higher rate if, for example, the lawyer practices in or even near a large city if the city risk pool is very high. Thus, a lawyer practicing in the suburbs may be lumped under the same rate as her city colleagues.

Furthermore, the amount of time that the lawyer has been covered affects a lawyer's rate. When lawyers first begin practicing, they have a higher risk of claims and thus are subject to higher rates.[106] After a lawyer practices for several years, the risk flattens out and the rates are lowered.[107] Additional factors that affect insurance rates are: personal claims history, amount of years of coverage, internal firm procedures, limits of liability selected, the amount of the deductible, and risk management.[108]

86. *Id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.*
93. *See* Standing Committee on Lawyers' Professional Liability, American Bar Association, *How to Prevent Gaps in Your Insurance Coverage*, http://www.americanbar.org/groups/lawyers_professional_liability/resources/materials_for_purchasers_of_professional_liability_insurance.html (updated on 9/9/2011).
94. *See id.*
95. Understanding Your Insurance Coverage, *supra* note 38 (also referred to as "Tail Coverage").
96. *See* Jacobs, *supra* note 36 at 171.
97. *See id.*
98. *See* How to Prevent Gaps in Your Insurance Coverage, *supra* note 93.
99. *See id.*
100. *See id.*
101. See Chineson, *supra* note 23.
102. *See id.*
103. *See id.*
104. *See* CNA's Professional Liability Insurance for Lawyers, *supra* note 18.
105. Standing Committee on Lawyers' Professional Liability, American Bar Association, *Notes on Insurance Cost: How Much Will It Cost?* http://www.americanbar.org/groups/lawyers_professional_liability/resources/materials_for_purchasers_of_professional_liability_insurance.html (updated on 9/9/2011).
106. *See* CNA's Professional Liability Insurance for Lawyers, *supra* note 18.
107. *See id.*
108. *See* Notes on Insurance Cost: How Much Will It Cost?, *supra* note 105.

## VII. Strategies for Lowering Insurance Rates, Avoiding Claims and Successfully Defending Malpractice Allegations

### A. Strategies for lowering insurance rates

Of course, having the lowest possible malpractice rates, at all costs, should not be any lawyer's goal. Choosing malpractice insurance is a lot like choosing other forms of insurance in that it is important to consider factors such as the lawyer's risk tolerance, the breadth of coverage provided, the dollar amount of the policy limits, and the size of the deductible. Factors such as the limits of liability and the amount of the deductible require lawyers to make trade-offs between long-term risk and current cost. Because, as we have explained above, policies can include provisions that greatly restrict the scope and amount of coverage, the specific language of any proposed policy requires careful scrutiny.

Once a lawyer has weighed these considerations and shopped for the right insurance carrier and policy, a few key strategies can help reduce rates. The insurer's application represents one such opportunity. The lawyer must truthfully fill out the application and inform the insurer of any prior acts that might lead to a claim.[109] This duty of candor does not mean the lawyer must write down every possible mistake he or she might have made, but it is important to identify the act(s) that he or she thinks might lead to a claim. Additionally, the lawyer should identify any past claims and "explain any extenuating circumstances, mitigating factors, and remedies taken."[110] If the lawyer gives the insurer complete information, the lawyer has a chance to explain situations to the insurer and steps he or she has taken to fix them.[111]

After the application is complete, the insurer will evaluate the amount of risk the lawyer presents, also known as "underwriting."[112] The insurer will look for items on the application that are red flags or indicate high-risk activities so the insurer can tailor a rate to the lawyer's particular practice behaviors.[113] Some of the high-risk activities that insurers notice and that lawyers can take steps to avoid or minimize include: missed deductible payments, gaps in malpractice insurance, bar disciplinary problems, prior malpractice claims, additional professional licenses, and business relationships with clients.[114]

Because, as explained above, insurers set rates based on risk pools, questioning the risk pool into which the insurer placed the lawyer can yield reductions in rates. For example, the American Bar Association's Standing Committee on Lawyers' Professional Liability recommends that lawyers "[t]ry to find out into which risk pool [they] fall [in] and, if [they] fall within a higher risk group than [they] should, do what [they] can to be placed in a lower risk group."[115] Other rate reduction strategies address some of the factors insurers use in setting rates. Having and adhering to a careful set of internal firm procedures for managing client matters and for risk management are rating factors that are completely within a lawyer's or a firm's control.

### B. Strategies for avoiding malpractice claims

Even a lawyer who has purchased the best imaginable malpractice insurance at the lowest possible rate must consciously work to avoid malpractice claims. Some strategies are worth adopting right now. First, lawyers should select clients and cases carefully and thoughtfully. A client who is a problem before the lawyer has taken the case will be a problem later. A client who wants to sue over every minor insult may someday turn on his lawyer. New matters often require learning some new law and learning something new about the world, such as the client's business. However, some areas of law, such as securities law, ERISA, and tax law, are so complex that a lawyer who is new to the field is taking a malpractice gamble.

Because so many malpractice claims stem from missing deadlines, it is critical to create and use efficient case management techniques. Missing a deadline because one's secretary made an error is no excuse; some calendaring redundancy is a good idea. Insurers agree: they recommend that sole practitioners, employers and firms use a computerized filing and docketing system to help them keep track of clients and deadlines.[116]

As you might expect, using care in managing case facts, in researching the law, and in crafting arguments isn't merely good lawyering; it's also a risk management strategy. For similar reasons, participating in more than the minimal CLE trainings and working under or associating with experienced attorneys can minimize malpractice claims.

Good client relations may be the key to avoiding malpractice claims. Clients who feel good about their lawyers as people are much less likely to sue them. Lawyers who treat each client with respect and therefore attend to relational aspects of the attorney-client interaction have happier clients, and happier clients are less likely to sue. Keeping the client informed, managing the client's expectations, and clearly identifying the scope of the attorney-client relationship also all help avoid or at least minimize claims.[117]

### C. Dealing with malpractice claims

If you are sued for malpractice, there are things you can do to minimize the claim and your expenses. Immediately inform your insurer. Maintain all relevant files, email messages, etc. Do not represent yourself; get someone else involved. Regularly communicate with your insurer and counsel and be candid with both. Do not contact the claimant about the claim. In short, be a good client.

## VIII. Conclusion

No lawyer is immune to the risk of malpractice claims. Malpractice insurance can be a safety net so that an irrational client or a single mistake does not jeopardize the future. The

109. *See* Understanding Your Insurance Coverage, *supra* note 38.

110. *See* Notes on Insurance Cost: How Much Will It Cost?, *supra* note 105.

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *Id.*

116. Telephone Interview with Jessica Walrath, Insurance Agent, Attorney's Liability Protection Society Inc. (ALPS), Feb. 28, 2012.

117. *See* Van Lanyingham, *supra* note 20 at 332-35.

malpractice safety net, however, can have holes. Malpractice policies have important variations, and it is therefore critical for lawyers to know how terms, conditions, exclusions and other policy provisions affect their coverage, as well as how to avoid gaps in coverage. By avoiding high risk activities and engaging in a few practice management behaviors, lawyers can lower their policy rates and the likelihood of a claim without sacrificing coverage. Lawyers who are knowledgeable about malpractice policies and risks therefore are more likely to end up with the most impenetrable safety nets. ■

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