



**LAWYER TO LAWYER MENTORING PROGRAM
WORKSHEET Q
INTRODUCTION TO MALPRACTICE INSURANCE**

Worksheet Q is intended to facilitate a discussion about the benefits to carrying malpractice insurance and lawyers' ethical obligations in the event of the failure to do so.

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- Discuss a lawyer's obligation to act competently, work diligently, and communicate effectively with every client. See Prof. Cond. Rules 1.1, 1.3 and 1.4.
- Discuss the reasons for maintaining malpractice insurance and considerations for choosing the right policy. Discuss the attached *Checklist for Purchasers of Professional Liability Insurance* of the ABA Standing Committee on Lawyers' Professional Liability. <http://www.abanet.org/legalservices/lpl/insurancechecklist.html>
- Discuss the best time to involve a malpractice carrier into a claim against you for malpractice liability or ethical misconduct.
- Discuss the natural concerns and fears that occur when allegations of malpractice or ethical misconduct are made and share ways to overcome such fears. Read the attached article, E. Kendall Stock et al., *Not to Panic – Suits Happen*. <http://www.abanet.org/legalservices/lpl/downloads/nottopanic.pdf>
- When an attorney chooses not to carry malpractice insurance, discuss his or her obligation to disclose to clients that he or she does not carry malpractice insurance. See Prof. Cond. Rule 1.4.
- Discuss the impropriety of asking your client to sign a fee agreement which provides for arbitration in the event of a fee dispute, malpractice claim or ethical misconduct allegation. Discuss the propriety of settling claims for malpractice with your client. See Prof. Cond. Rule 1.8.



RESOURCES

OHIO RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

View comments at

http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_1

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

View comments at

http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_3

RULE 1.4: COMMUNICATION

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5 (e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:



- (i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;
- (ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

Client's Signature

Date

View complete rule and comments at

http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_4

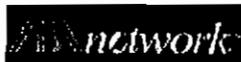
RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(h) A lawyer shall not do any of the following:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice or requiring arbitration of a claim against the lawyer unless the client is independently represented in making the agreement;
- (2) settle a claim or potential claim for such liability unless all of the following apply:
 - (i) the settlement is not unconscionable, inequitable, or unfair;
 - (ii) the client or former client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;
 - (iii) the client or former client gives informed consent.

View complete rule and comments at

http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_8



[CLICK HERE TO RETURN TO PREVIOUS PAGE](#)

CHECKLIST FOR PURCHASERS OF PROFESSIONAL LIABILITY INSURANCE

How to Use this Checklist

This checklist is intended as a guide to be used in reviewing professional liability insurance applications and policies. The questions are divided into eight sections:

- [Application](#)
- [Declaration Sheet](#)
- [Definitions](#)
- [Coverage Agreements](#)
- [Exclusions to Coverage](#)
- [Defense and Settlement Provisions](#)
- [Limits of Liability](#)
- [Conditions of Coverage](#)

A policy may also contain attachments called "Endorsements." Endorsements change coverage on a firm-by-firm basis, either by adding, altering, or limiting coverage. This checklist treats endorsements under either Coverage Agreements or Exclusions to Coverage, depending upon whether the endorsement adds or excludes coverage.

Key issues to consider are listed under each policy section. These issues are followed by specific questions to answer for each policy that you consider.

Before using this checklist, read "Understanding Your Insurance Coverage" for a full discussion of the items included in the checklist.

MALPRACTICE INSURANCE CHECKLIST

Application

Key issues to consider:

Is the application made a warranty or a representation to the contract?
(That is, does the information contained in the application become a legal part of the insurance contract?)

Declaration Sheet

Key Issues to consider:

What are the terms of coverage?

- What is the policy period?
- What are the limits of liability?
- What are the deductibles?
- Who is the "Named Insured"?
- Is there a retroactive date for prior acts coverage?

Does the declaration sheet:

Include a "retroactive date" (an effective date) for prior acts coverage (coverage for acts that occurred prior to the policy period)? (See [endnotes](#).)

Definitions

Key issues to consider:

- Is coverage provided for all person for whom the insured is legally responsible?
- Are individual lawyers or nonlawyers covered for services not preformed on behalf of the firm?

Do the definitions of the insured include:

- Named insured and predecessor firm(s)?
 - Former lawyers, partners, officers, directors and shareholders?
 - Current lawyers, partners officers, directors and shareholders?
 - Automatic coverage for future lawyers, partners, officers, directors and shareholders?
 - Former, current, or future non-attorney employees?
 - Independent contractors?
 - Attorneys in a "Of Counsel" capacity?
 - Others, such as heirs, executors, administrators, legal representatives, or assigns of insured?
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Coverage Agreements

Key issues to consider:

- Is coverage provided for all legal services performed by the firm?
- Does the policy cover all prior acts of the firm and of all the individual members, including employees?
- Does coverage exist for acts for other than "acts on behalf of the Named Insured," e.g. pro bono or "cocktail party" advice?
- Are the activities of members of the firm as officers or directors covered?
- Does the policy cover other business pursuits with clients of the firm?
- Are acts in a dual capacity as a lawyer and officer, director or business partner with a client covered?
- Does the policy provided coverage for innocent partners in cases where one member of the firm has not complied with the conditions?
- Is the definition of when a claim is made sufficiently broad?
- Are optional extended reporting periods available?

Does the policy provide coverage for:

- Professional services as a lawyer?
- Services as a notary public?
- Services as a title agent?
- An attorney or non-attorney who causes personal injury?

All prior acts of the firm and all members of the firm, including employees, when the insured, prior to the policy period, had not notified any previous insurance company of any act and the insured had no reason to believe a breach of professional duty had occurred? (See [endnotes](#).)

Does this coverage include:

- Prior acts of attorneys for professional services before joining the firm?
- Prior acts of attorneys and the firm for professional services with the firm before inception of the policy?
- An attorney acting as a trustee, executor, administrator, guardian or conservator?
- Investment advice?
- Pre- or post-judgment interest, appeal bonds, and related costs?
- Claims first made and reported during the policy period?

If so, does the policy provide coverage:

- Regardless of when the error occurred? Or
- Only if the error, as well as the claim was made during the policy period?
- Claims first made after the expiration of the policy, assuming that the insured:
(1) had reasonable knowledge that a wrongful act occurred and a claim might be made, and
(2) reported the suspected wrongful act to the insurance company during the policy period?
- An optional extended reporting period?
- If so, for what period(s) of time is the extended reporting period available?
- Is there a separate, additional limit of liability?
- Are there limitations on the types of persons eligible?
- Are there stipulations that the extended reporting period option is exercisable only by the named insured and not by "Other Insureds"?
- Within what time period after expiration of the policy must this option be exercised?
- Is the premium and availability of the extended reporting period guaranteed?
- Is the extended reporting period available if an insured's license to practice is revoked?
- An optional retired or non-practicing attorney's extended reporting period?
- If so, for what period(s) of time is the extended reporting period available?
- Is there a separate, additional limit of liability?
- Are there limitations on the types of persons eligible?
- Are there stipulations that the extended reporting period option is exercisable only by the Named Insured (and not by "other Insureds")?
- Within what time period after expiration of the policy must this option be exercised?

Exclusions to Coverage

Key issues to consider:

- Is the coverage excluded for any services crucial to the firm (e.g. securities, real estate)?
- Are the activities of members of the firm as officers or directors excluded?
- Does the policy exclude other business pursuits with clients of the firm?
- Are acts in a dual capacity as a lawyer and officer, director or business partner with a client excluded.
- Does the policy exclude coverage for claims brought by regulatory agencies?

Is the coverage excluded for:

- Dishonest acts?
- If so, is coverage afforded to innocent parties?
- Fraudulent acts?
- If so, is coverage afforded to innocent parties?
- Malicious acts?
- If so, is coverage afforded to innocent parties?
- Vicarious liability (liability acquired by law or by contract for the acts, errors or omissions of others)?
- Claims made by or against a business enterprise owned or controlled by an insured?
(Refers to claims by or against the business itself)

- Claims arising out of or in connection with a business enterprise owned or controlled by an Insured? (Refers to third-party claims)
 - Activities as an officer, director, partner, trustee or employee of a business not named in the policy? (Refers to an insured's activities as an officer, director, etc. of a business not owned or controlled by the insured)
 - Acts in a dual capacity as both a lawyer and as an officer or director?
 - Acts involving business pursuits with clients?
 - Services as a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA)?
 - RICO (Racketeer Influenced and corrupt Organization Act) claims?
 - Activities as an elected public official?
 - Worker's compensation claims?
 - Advertisers' liability?
 - Loss sustained as a beneficiary or distributee of a trust or estate?
 - Bodily injury or property damage?
 - Real estate claims?
 - Claims by regulatory agencies?
 - Notarization of a signature without the physical appearance of the signatory?
 - Claims involving an insured versus another insured?
 - Discrimination?
 - Sexual harassment?
 - Prior acts (acts committed before the policy period) where the Insured had knowledge of or should have foreseen the claim?
 - Investment advice?
 - Securities work or SEC claims?
 - Punitive damages?
 - Fines, statutory penalties and sanctions?
 - Business enterprises liable for contamination or pollution of the environment?
 - Loss to nuclear reaction, radiation or contamination?
-

Defense and Settlement Provisions

Key issues to consider:

- Who selects defense counsel?
- Is the insured's consent required to settle claim?
- Is the agreement to defend claims sufficiently broad to offer full protection?

Does the policy provide for:

- Selection of defense counsel by the insurance company or by the insured? (See [endnotes](#).)
 - If the insured has the right to select defense counsel, does the insurance company restrict this right in any way (e.g. by retaining the right to approve the choice of defense counsel in advance or the right to require the insured to revoke the selection)?
 - The insured's consent required to settle a claim?
 - If so, does the policy provide for a limit of payment by the insurance company if the insured refuses to settle?
 - Arbitration of a coverage dispute between the insurer and the insured?
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Limits of Liability

Key issues to consider:

- Are claim expenses included in the limits of liability?

- Are limits of liability per claim or annual aggregate?
- How are two or more related claims treated?
- How are claims against multiple Insureds treated?
- Are deductibles per claim or annual aggregate?
- Is a "loss only" deductible option available?

Does the policy provide:

- That claim expenses are included in the limits of liability?
- If so, does the policy provide a claim expense allowance?
- Limits or liability for each claim?
- Annual aggregate liability on a firm basis?
- That two or more claims arising out of a single act or series of acts are considered a single claim with a single set of limits?
- If so, does the policy provide that the policy year the first act is reported is considered the claim reporting date?
- That if a claim is made against multiple Insureds, all sets of limits from all applicable policies apply (rather than just one set of limits)?
- A per claim deductible?
- An aggregate deductible?
- That the deductible applies to:
 - Loss payments only? Or
 - Claim expenses and losses?

Conditions of Coverage

Key issues to consider:

- Is there a requirement to give notice to the insurance company of claims or potential claims?
- At what point does your claim get reported and to whom?
- Are there requirements concerning changes in the firm?
- Is the carrier experienced in professional liability claims administration?

Does the policy:

- Require timely notice to the insurance company of all claims and potential claims?
- Require the assistance and cooperation of the insured?
- In the event of any payment by the insurer, transfer the insured's rights of recovery to the insurance company (subrogation)?
- Provide coverage in excess of other available insurance?
- Provide coverage for innocent attorneys in cases where one member of the firm fails to meet the conditions of the coverage?
- Cover changes in the firm automatically until renewal?
- Provide for arbitration of the underlying malpractice claim?
- Is arbitration required?
- Is arbitration permitted?
- Is arbitration prohibited without the insurance company's consent?
- Provide at least a 30-day notice of cancellation by the insurance company?
- Provide at least 60 days notice of intent not to renew?
- Provide, if the policy is canceled by the insurance company, that the premium returned will be figured on a "short rate" or "pro rata" basis?
- Provide, if the policy is canceled by the insured, that the premium returned will be figured on a "short rate" or "pro rata" basis?

Endnotes

Prior Acts Coverage: In order to have a retroactive date on the Declaration sheet, you must have prior acts coverage. Prior acts coverage is an extremely important item. Make sure that, if at all possible, your policy covers all prior acts of the firm and of all of the individual members, including non-attorney employees. Your prior acts coverage may also be limited to acts on behalf of the Named Insurer only.

Right to Select Defense Counsel: The policy language may explicitly state the right of the insurance company to select defense counsel (e.g. "Selection of defense counsel will be a the prerogative of the Company"), or the right may be implied in the right to defend (e.g., "The Company shall have the right and duty to defend any claim").

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Not to Panic—Suits Happen

Bring your malpractice insurance carrier into the case upfront

BY E. KENDALL STOCK
AND DONNA D. LANGE

Face it: In today's law practice environment, the chances are good that a disgruntled client is going to sue you for legal malpractice.

Once lawyers accept the possibility, if not probability, of being sued, they can become better prepared to respond appropriately when the possibility becomes reality.

As any client could tell you, it is almost impossible to plan for the onslaught of a suit. But at the very least, you should be familiar with your professional liability insurance policy. When the lawsuit is already in hand is not the time to pull out the policy to see what it says.

At least be familiar with these policy elements: the limits of liability, the deductible amount, whether the deductible applies to claims expenses and costs, whether the cost of defense is included in the limits of liability, whether fines or sanctions are covered, and whether pre-judgment interest is covered.

If a lawsuit is filed against you, your initial response will be crucial. Your first step should be to locate your file on the underlying case, organize it and protect it. Second, prepare a statement of the facts as completely and as objectively as you can. Finally, notify your insurance carrier as soon as possible.

During this emotional and traumatizing time, it is essential to remain calm and objective. Do not try to deal with the claim yourself. Under no circumstance should you discuss this matter with the plaintiff—even though that party is (or was) a client—or the plaintiff's attorney. Your insurance company's counsel should deal with them.

E. Kendall Stock chairs the board of directors for American National Lawyers Insurance Reciprocal (Risk Retention Group), the endorsed professional liability carrier for the Arizona, Hawaii, Tennessee and Virginia state bars. Lawyer Donna D. Lange is the group's assistant vice president of marketing. Stock, a solo practitioner in Leesburg, Va., is on the ABA Standing Committee on Lawyers' Professional Liability.

Above all, do not ignore the suit because it will not go away.

Reporting the claim immediately provides opportunities for repair or mitigation. Reporting should be done with a telephone call to the carrier followed by a confirming letter.

Report as much detail as possible, even if some of the information

the impact of a settlement on your rights and responsibilities under your malpractice insurance policy.

For instance, does the insurer need your approval to reach a settlement, or do you have a right to reject it? What is the impact of a "hammer clause" in a policy (which provides that, if you do not agree to the settlement, the proposed amount of the settlement becomes the new policy limit)? Can a carrier's decision to settle be appealed? How will a settlement affect your future premium costs or insurability?

If the claim against you alleges vicarious liability arising out of dishonest acts of a partner, most policies cover you as an innocent partner.

You need to take steps immediately, however, to prevent further actions by this partner, and review all of his or her files for further ex-

posure. If there has been publicity on the case, other former clients of the partner may file additional claims alleging dishonest acts, and there even may be some frivolous claims of negligence.

Obviously, such an occurrence affects your insurance record, and you may consider purchasing an extended reporting endorsement.

An extended reporting endorsement designates some specified period of time after the termination of the policy during which a claim can be reported. In all cases, the professional services that give rise to the claim must have occurred prior to the termination of the underlying policy for the insurer to defend it.

The extended reporting endorsement, or "tail" coverage, is, however, one of the aspects of your malpractice insurance policy that should be evaluated before a claim makes it an imperative.

By addressing questions about your policy coverage before any claims are filed, you may not be able to avoid a claim, but at least you will be prepared for it. ■

Stay Involved In Your Case

Lawyers have a tendency to either completely avoid involvement in their cases or to become overly involved. Neither response is productive.

Instead, discuss with your insurance company who your defense counsel will be and whether you have any say in the selection. You are entitled to copies of pleadings and correspondence. The insurance company should not object to your input if you think your representation has been sloppy or inadequate.

On the other hand, do not assume that your defense counsel cannot handle your case because he or she has not practiced in the area of the underlying matter. An experienced malpractice defense lawyer will rely on you and experts to explain the underlying intricacies.

You should be closely informed of any serious settlement discussions. You should also be aware of

