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IN PRACTICE

The best time to review your legal malpractice policy is during the immediate two months before its renewal.

BEA CONTRIBUTOR

Send ideas for columns or letters to the editor to *Daily Report* Editor in Chief Ed Bean at edbean@ealm.com or (404) 419-2830.

Review your legal malpractice policy

HERE ARE SOME BASIC QUESTIONS every law practice should consider before buying a policy

THE FIRST TIME that many attorneys read their legal malpractice insurance policy is when a claim has been made against them. Unfortunately, that is also the worst time. By then, coverage is fixed in place by the policy with conditions, limitations and exclusions.

The best time to review a legal malpractice policy is during the immediate two months before renewal, especially in today's competitive insurance market. Rarely have there been so many options available but with so much risk.

Reliable, cost-effective legal malpractice insurance is readily available in today's "soft" market. However, attorneys have to be careful in making sure that the coverage they get matches the coverage they need.

There is no substitute for good, sound professional help in evaluating and choosing the best malpractice coverage at the most affordable price. Indeed, there are agencies that specialize in the placement of legal malpractice insurance.

In working with a professional, here are some basic questions that every law practice should consider in making a decision about which malpractice policy to buy.

First, what are the "right" policy limits for the practice?

When law practices carry insurance they never need, it always seems like too much, especially when the premium is due. On the other hand, when a claim comes in, it never seems like the available policy limits are enough.

Striking the balance involves consideration of the type of practice (plaintiffs' personal injury, bankruptcy, etc.); locale of the practice (urban, suburban, rural, etc.); size of the practice (solo, 2-5, 5-10, etc.); and the amount involved in a typical representation.

In addition, not every "policy limit" is the same. For example, some policy limits are "liquidating" limits. This means that costs to defend a malpractice claim reduce the available "policy limits" the same way a settlement or payment of a judgment does. So, if an attorney has a \$1 million policy limit, but \$200,000 is spent defending the claim, the limit is down to \$800,000.

For many practices, like residential real estate or criminal defense, this type of policy may make sense. If a residential real estate

attorney misses a tax lien in a title search, the odds are that there will not necessarily be a lot of litigation expenses defending against that claim. (Of course, there are exceptions.)

On the other hand, for plaintiffs' personal injury lawyers, the costs of defending a legal malpractice claim are routinely high. In these cases, claimants must win 'the case within the case' to prove that any alleged mistake actually caused damage. This translates into higher litigation costs.

There is also the difference between an "aggregate limit" and a "per claim limit." The latter is the most an insurer will pay for any one claim. The "aggregate limit" is the most the insurer will pay for all of the claims (but never more for any one claim of the per claim limit).

So, if the policy has a \$100,000 per claim limit and a \$300,000 aggregate limit, the most the insurer will pay for any one claim is \$100,000. The most the insurer will pay for all of the claims during the policy is \$300,000—but never more than \$100,000 for any one claim.

If the law practice involves higher severity practice areas but lower frequency risks (securities/corporate transactions), then the per claim limit should probably be the same as the aggregate. Practices with higher frequency of malpractice claims, but lower severity (criminal defense/domestic relations) could accept a lower per claim limit.

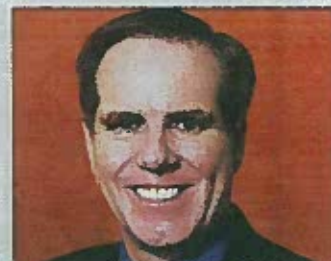
What is the "retroactive date?"

There are three dates that decide the boundaries of legal malpractice coverage. First, there is the date after which an act (the professional negligence) must occur in order to be covered. That is the retroactive date. If the alleged negligent act occurs before the retroactive date, the resulting legal malpractice claim is not covered even if the claim is made during the legal malpractice policy. The best rule of thumb is to have a retroactive date at least six years or longer before the inception date.

Second, there is the date after which a claim must be made in order to be covered. This is the "inception date." This is when the policy begins. If the claim is made before the inception date, it is not covered. So, for coverage, the alleged conduct must occur after the retroactive date, and the claim must be made after the inception date. Typically, these are completely different dates.

Some policies have a "retro date inception" or "retroactive inception date." This means that for coverage the alleged negligent act must occur after the policy begins and the claim must be made before the policy ends.

Since most claims rarely mature within one year of the alleged negligent act, such policies do not provide much coverage. Yet, for some attorneys, a "retro date inception" is the only option because their policies have



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lapsed or they are first-time buyers. If given a choice, "retro date inception" policies should be avoided. (It is yet another reason why attorneys should never "go bare" by allowing their legal malpractice policy to lapse.)

Third, there is the date before which a claim must be made. This is called the "expiration date." It is when the policy ends. For law practices changing insurers, there is the option of an "extended reporting period." This extension allows a law practice more time to report an incident.

Basically, to be covered, four things have to line up:

- The act must be after the retroactive date;
- The claim must be first made after the policy begins;
- The claim must be made before the policy ends; and,
- The claim must be timely reported—in most cases before the policy (or its extended reporting period if applicable) ends.

In addition, attorneys also have an obligation to timely notify the insurer—typically, when the attorney gains "first knowledge" of a problem. Waiting until there is an actual lawsuit or demand letter could be too late.

The duty to notify begins from the application process and extends until the policy ends. For example, a typical question in an application for legal malpractice insurance is:

"Are you after reasonable inquiry aware

See Policy, page 6

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Lee Parks is a trial lawyer with a national practice specializing in employment, personal injury, constitutional law, education, voting rights and civil rights matters. He was the plaintiff's lead counsel in *Miller v. Johnson* and *Atkins v. Johnson*, the first successful constitutional challenges to racially gerrymandered Congressional and State legislative districting plans. Mr. Parks successfully argued both of these cases before the United States Supreme Court.

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'Scam bloggers' are changing legal education

Scam bloggers, from page 1
disgruntled and questioning the value of their law degree."

Scam bloggers are law school graduates who take to the Internet to trash law schools for what they see as a scam of exacting high tuition for the privilege of competing for too few available legal jobs. Jewel surveyed the phenomenon in "You're Doing It Wrong: How the Anti-Law School Scam Blogging Movement Can Shape the Legal Profession," published by the Minnesota Journal of Law, Science & Technology.

Jewel said she decided to research the scam blog movement because it represents a new way to view the law school system—one that has resonated well beyond the relatively

small world of legal education. Newspapers including *USA Today* and *The New York Times* covered scam blogs during 2010.

"With the scam blogging movement, a small set of underemployed or unemployed attorneys—not the type of lawyers who would normally be listened to with respect



Despite its nontraditional approach, the scam blogging movement has had a palpable effect on the debate of an important issue facing the legal profession.

—Lucille Jewel,
associate professor,
John Marshall Law School

to ideas for reforming an aspect of the profession—harness the power of the Internet

Policy, from page 4

of any circumstance that might give rise to a claim?"

An accurate response is important. Law firms should survey their attorneys and inquire if any attorney is aware of any circumstance that might result in a claim. If so, the safer course is to do two things: (i) Answer "yes" and identify the circumstance; and, (ii) report the circumstance under the expiring policy.

Lawyers who answer "no" and fail to notify their existing insurer run the risk of no coverage under either the expiring policy or the new policy.

Is it a financially sound insurance company?

The good news is that there are dozens of

choices for insurance companies. This extra capacity means lower rates with more coverage. Unfortunately, it is not as simple as just selecting the cheapest rate or the broadest coverage. If an insurance company is not around to deliver on its promises, it does not help much that it charged less.

Georgia lawyers are very familiar with this risk. Several years ago, the State Bar of Georgia endorsed a risk retention group as the preferred legal malpractice insurer for Georgia lawyers. When it failed, many Georgia lawyers were left scrambling to find replacement coverage for what they thought they had already bought.

As a start, check the financial rating of the insurance company using established services like A.M. Best Co. or Moody's.

to argue for changes in the way that law schools market themselves," she wrote.

Scam blogging first emerged in 2009 and gained momentum in 2010. These days, more than 20 blogs often interlink with one another.

Their denunciations of the law school system can be jarring to legal professionals, who are accustomed to culture of restraint and deference, Jewel wrote. Their blogs, with names such as Third Tier Toilet and Subprime JD, rarely mince words. They feature graphics showing overflowing toilets and stories of humiliating job experiences, but their blunt tactics are no reason to dismiss their arguments, Jewel concluded.

"This article ultimately concludes that the legal profession will be strengthened by the new arguments and ideas entering online from the profession's sidelines," Jewel wrote. "Thus, we should, to a certain

extent, relax our professional norms and allow these arguments to take shape."

It's difficult to gauge the effect the scam blogger movement has had on the larger debate over the transparency of law school employment data. The American Bar Association recently moved to require law schools to report more detailed job information in its annual questionnaire. However, that push involved a number of more traditional advocates, including law professors and Law School Transparency, a nonprofit group formed by two former Vanderbilt University Law School students.

Still, no one can argue the scam bloggers haven't been noticed, Jewel wrote: "Despite its nontraditional approach, the scam blogging movement has had a palpable effect on the debate of an important issue facing the legal profession." ●

Karen Sloan writes for *The National Law Journal*, a *Daily Report* affiliate.

among legal malpractice policies.

For example, some policies exclude from coverage for all claims of fraud (including constructive fraud) while others narrowly exclude intentional fraud only after final adjudication. There is nothing worse than to have a claim, only to find that it is excluded under the legal malpractice policy because of a carefully worded exclusion.

Legal malpractice insurance is very important. Treat it that way now. Tomorrow could be too late. ●

Randolph Evons and Shari L. Klevens are co-authors of "Georgia Legal Malpractice Law," which will be published this fall by *Daily Report Books*. Their column on legal malpractice appears monthly in the *Daily Report*.

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