PROGRAM MATERIALS
Program #35205
December 11, 2025

Choosing Legal Malpractice Insurance: Understanding Key Policy Terms, Choosing the Right Coverage, and Protecting Your Coverage When You Have or a Claim

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

Choosing a Legal Malpractice Insurance Policy

Understanding Key Policy Terms, Choosing the Right Coverage, and Protecting Your Coverage When You Have a Claim

Your Speaker

Danny M. Howell (danny@dmhowellfirm.com) is the founding partner of Howell & Rowlett, a litigation boutique in Vienna, Virginia. He has represented attorneys in professional liability matters for over thirty years, and his practice also focuses on insurance coverage. Danny is a frequent lecturer on legal ethics, insurance coverage and implicit bias.

Disclaimer

This presentation and accompanying written materials are intended for informational purposes only and do not constitute legal advice. The contents herein are based on the presenter’s understanding of the relevant laws and regulations as of the date of this presentation. While we strive to provide accurate and up-to-date information, no guarantee is made regarding the completeness or accuracy of the information shared. We recommend consulting with a qualified legal professional before making any decisions based on the content of this presentation.

Disclaimer, cont'd

This presentation and accompanying written materials discuss common policy terms and provisions that will likely differ from the terms and provisions in any specific insurance policy. Again, while we strive to provide accurate and up-to-date information, no guarantee is made regarding the completeness or accuracy of the information shared; and we recommend consulting with a qualified legal professional before making any decisions based on the content of this presentation.

Understanding Key Policy Terms

Common Coverage Provisions, Exclusions and Conditions in a Legal Professional Liability Policy

“Per Claim” and “Aggregate” Limits of Liability

The per claim limit is the maximum amount the insurer will pay for all claims arising from the same or related acts or omission, regardless of the number of claimants or the number of insureds involved.

The aggregate is the total limit of an insurer’s liability for all claims made during a policy year.

Limits Amounts

In deciding what limits of liability you want for your policy, you might consider the following: The total limits of liability available vary by insurer, but typically, limits of $3 million per claim and $3 million aggregate are available. The average verdict in a legal malpractice action has risen over time and is now likely to exceed $300,000. The highest number of claims are against firms with 2-5 lawyers, with an average of over two claims per attorney per year.

Indemnity and Defense

"A liability insurance policy's purpose is to provide the insured with a defense and indemnification for third party claims within the scope of the coverage purchased, and not to insure the entire range of the insured's well-being." *W. Polymer Tech., Inc. v. Reliance Ins. Co.*, 32 Cal. App. 4th 14, 27, 38 Cal. Rptr. 2d 78, 84-85 (1995).

Distinction Between “Claims Made” Verses “Claims Made and Reported”

The major distinction between the **claims made** form and the **claims made and reported** form is that under a **claims made** policy form the insured typically need only report the claim "as soon as practicable" or promptly, but not necessarily during the policy term.

Either way, these are not “form” policies, which means they vary from one insurer to another.

“Claims Made and Reported” -- an Example

“WE will pay, subject to OUR limit of liability, all DAMAGES the INSURED may be legally obligated to pay . . . due to any CLAIM, provided that (1) the CLAIM arises out of any act, error or omission of the INSURED. . .; (2) the act, error, or omission occurred on or after the PRIOR ACTS RETROACTIVE DATE and prior to the expiration date of the POLICY PERIOD; (3) the CLAIM results from the rendering of or failure to render PROFESSIONAL SERVICES;(4) the CLAIM is deemed made during the POLICY PERIOD; and (5) the CLAIM is reported to US during the POLICY PERIOD or within 60 days after the end of the POLICY PERIOD.”

“Defense Within Limits”

Policies may provide that the costs of defense, including fees for defense counsel and expert witnesses and other cists, are “within limits”, meaning that every dollar spent for expenses will reduce the amount of available liability coverage by the amount spent. Other policies may provide that some or all expensed with “outside limits”. The amount of defense costs that are “outside limits” will not reduce the limits of liability.

Defense Within Limits, cont'd

"The policy [] is what is commonly know as a 'wasting asse' or '**defense within limits'** policy because the available indemnity limits may be consumed or 'wasted' by the costs of defense . . the insureds' costs of defense, including attorneys' fees [and] expert witness fees [are] deducted from the policy limits[,] thereby reducing the amount of insurance coverage available to pay settlements or satisfy judgments."

Edwards v. Daugherty, 883 So. 2d 932, 941-42 (La. 2004)

Definition of “Claim” – an Example

Five types of events typically fall within the ambit of a "claim":

1. A "demand" for money or services.
2. A lawsuit seeking money or services.
3. An "incident" that could reasonably support a demand.
4. A "communication" of a potential claim.
5. A "notice" of a potential claim.

Chapman v. Minn. Lawyers Mut. Ins. Co., 2009 Minn. App. Unpub. LEXIS 698, at *8 (June 30, 2009)

Definition of “Claim” – Another Example

"**Claim**" [i]s "a demand for money or services, including but not limited to the service of suit or institution of arbitration proceedings against the Insured").

ALPS Prop. & Cas. Ins. Co. v. Merdes & Merdes, P.C., 2014 U.S. Dist. LEXIS 177679, at *19 (D. Alaska Dec. 29, 2014)

“Professional Services”

The policy broadly defines the term "PROFESSIONAL SERVICES" as "legal or notary services provided to others, while engaged in the practice of law." It then itemizes a list of specific services that are included within the broader definition by using the language "including, but not limited to" and then listing "escrow agent" as a specific service included within the definition.

Willey v. Minn. Lawyers Mut. Ins. Co., 2017 IL App (5th) 160452-U, ¶ 31

Definition of “Potential Claim”

A "potential claim" is one that the insured knew or *reasonably should have known* was likely to become an actual claim. This definition contains two alternative tests: a subjective element (whether the insured knew) and objective element (whether the insured reasonably should have known).

Nat'l Fire & Marine Ins. Co. v. Infini PLC, 2017 U.S. Dist. LEXIS 175908, at *11 (D. Ariz. Oct. 24, 2017)

Notice Provisions

"The Insured, as a condition precedent to this policy, shall immediately provide Notice to the Company if any Insured has any basis to believe that any Insured has breached a professional duty or to foresee that any such act or omission might reasonable be the basis of a Claim."

Leavitt, Kerson & Duane v. Am. Guarantee & Liab. Ins. Co., 856 N.Y.S.2d 498, 498 (Sup. Ct.)

Cooperation and Voluntary Payments Clauses

A sample cooperation and voluntary payment clause:

Each Insured shall cooperate with the Company . . . . The Insured shall not make any payment, admit any liability, settle any Claims, assume any obligation or incur any expense without the consent of the Company. If our Insured does elect to admit liability, settle a Claim, assume any obligation or incur any expense without the consent of the Company it does so at its own cost and waives coverage for that Claim and any related act or omission.

Supplemental Payments

Supplemental Payments usually refers to certain additional costs that are covered by an insurer over and above the basic policy limits. In a legal professional liability policy, these payments may include payment of legal fees to defend disciplinary proceedings or investigations.

Disciplinary Proceedings – One Definition

A disciplinary proceeding is defined as "any *formal scheduled hearing* by any bar association . . . to investigate any charges alleging professional misconduct in performing legal services." *Id.* (emphasis added). St. Paul maintains that it did not have a duty to defend Bennett against any of the Bar complaints because none of them have risen to the level of a formal scheduled hearing . .

Bennett v. St. Paul Fire & Marine Ins. Co., 2006 U.S. Dist. LEXIS 29017 (D. Me. May 12, 2006)

Disciplinary Proceedings – Another Definition

The E&O Policy defines "Disciplinary Proceeding" as "any proceeding commenced by a regulatory or disciplinary official, board or agency to investigate charges of professional misconduct in the performance of Professional Services." . . . an investigatory proceeding regarding misconduct . . . constitutes a Disciplinary Proceeding.

Diamond Residential Mortg. Corp. v. Liberty Surplus Ins. Corp., 2020 U.S. Dist. LEXIS 223093 (N.D. Ill. Nov. 30, 2020)

Exclusions

After the insuring agreement "giveth," the exclusions "taketh away."

Hudson Hardware Plumbing & Heating, Inc. v. AMCO Ins. Co., 888 N.W.2d 682 (Iowa Ct. App. 2016)

Intentional or Fraudulent Acts

Typical wording:

> Any CLAIM made against any INSURED based upon or arising in whole or in part out of the dishonest, criminal, malicious or deliberately fraudulent act of the INSURED.

Usually contains an “innocent insured” provision.

Fee Reimbursement or Disgorgement

Excludes coverage for damages arising out of a dispute over fees or costs, or a claim that seeks the return, reimbursement, or disgorgement of fees

Business Enterprises Exclusion

Typically excludes claims arising out of professional services the attorney provides in connection with any business enterprise in which the insured has an ownership interest, or a business the insured owns or controls.

Activities as a Member of a Board of Directors

Excludes claims arising out of a insured’s activities as an officer or director of a charity, corporation, company or business other than that of the insured.

Investment Advice

Excludes claims arising out of the rendering of investment advice, including advice given by any Insured to make any investment or to refrain from doing so.

Client Assets and Funds

Excludes claims based on, arising out of, or in any way involving the actual or alleged loss or value of any asset in any Insured's care, custody or control, misappropriation, conversion, embezzlement, failure to provide an accounting, or commingling of client funds.

Insured Versus Insured

Excludes any act or omission by any Insured in an action brought by or on behalf of any other Insured.

Some policies allow for insured verses insured coverage under limited circumstances, such as when there is an attorney client relationship created. Some policies do not contain this exclusion at all.

Choosing the Right Coverage

Indemnity, Defense, Conditions and Supplemental Payments

Defense of Bar Complaints and Investigations or Defense of Only Formal Proceedings

Legal professional liability insurance “supplementary payments” provisions usually pay for legal expenses up to a limit of usually $10,000 to $25,000, to defend either (a) the lawyer’s response to the complaint, any investigation, and any formal disciplinary proceedings, or (b) just the defense of the formal proceedings.

For every thousand bar complaints, as few as 50 will result in formal disciplinary proceedings. Legal fees through the investigative phase can often exceed $10,000.

Coverage or Reimbursement

Under most legal malpractice insurance policies, the insurer pays the cost of defense of bar complaints or proceedings, assigning “panel counsel” who work at reduced rates to represent the insured lawyer.

Some policies, however, provide only reimbursement coverage, meaning the insured must hire the lawyer, possibly for a fee much higher than what the insurer pays to “panel counsel, pay the fees first, and then seek reimbursement from the carrier.

Protecting Your Coverage When You Have a Claim

Your Notice and Cooperation Duties Under Your Policy

I. What is a "Potential Claim": Interpreting Your Policy's Reporting Requirements.

We all understand that the terms of our policy require us to report a lawsuit to our professional liability insurer.

But that is not all we must report. Depending on the language of your policy, you are likely required to report a "potential" or "possible" claim.

When Must a Potential Claim Be Reported

You are probably going to have to report or disclose this potential claim at least two or three times: first, when you apply for insurance; second, when you discover a potential claim after the policy is issued; and third, when you apply to renew your policy.

What Is A Potential Claim

So it would be good to know what a “potential claim” is. But it’s probably not defined in the policy. And the courts don’t often agree on what its meaning is commonly understood to be.

Location of "Potential Claim" Reporting Requirements in the Policy

The Policy is intended to cover fortuitous risks, not risks we have reason to believe may already exist. *Bryan Bros., Inc. v. Cont'l Cas. Co.*, 660 F.3d 827, 831(4th Cir. 2011) ("[Fortuity is] a fundamental premise of insurance law. Insurers do not usually contract to cover preexisting risks and liabilities known by the insured. Thus, it is generally the insured's duty to provide truthful and complete information so the insurer can fairly evaluate the risk it is contracting to cover.")

Prior Knowledge Clause
Based on Potential Claim Language

So a typical legal professional liability policy contains a "prior knowledge" clause, which might read like this:

- **"This Policy does not apply to any claim arising out of any act, error, or omission occurring prior to the effective date of this policy if any Insured at the effective date knew or could have reasonably known that such act, error, or omission might be expected to be the basis of a claim or suit."**

Prior Knowledge Clause - Condition Precedent to Coverage

"A condition precedent to coverage under the policy is that prior to the policy period, no insured had become aware of an actual or alleged act, error or omission by any insured which could reasonably support or lead to a claim."

Knowledge of "Any Insured" Preludes Coverage for All Insureds

Depending on the Policy's choice of words, any one insured attorney's knowledge of a potential claim could bar coverage for that claim for the entire firm.

See Coregis Ins. Co. v. Lyford, 21 F. Supp. 2d 695 (S.D. Tex. 1998) (The case law overwhelmingly supports the conclusion that the use of the words "any insured" meant that "all insureds" were bound by any insured's knowledge of a potential claim.)

“Potential Claim” Language in the Policy Application

The policy application or renewal application typically asks about knowledge of a potential claim.

Depending on the question, the application may require that *any* proposed insured attorney’s knowledge of a potential claim be disclosed.

Example: “Is *any firm member* aware of “any incident which could reasonably result in a claim being made against *any member* of the firm.”

"Potential Claim" Language In the Policy's Notice Provision

Typically, the policy requires notice of a potential claim. Later, the insured is still required to provide notice of an actual claim or suit.

See Sirignano v. Chi. Ins. Co., 192 F. Supp. 2d 199, 202 (S.D.N.Y. 2002) ("[T]he policy imposes two separate notice conditions. The first [requires] timely notice of a potential claim, while the second sentence refers to notice of an actual claim or suit. [S]uch policy conditions are unambiguous and comport with most attorney's professional liability policies.")

“Reasonable Person’s” Prior Knowledge Determined Under a Subjective/Objective Standard

When the clause uses the word “reasonable”, reasonableness is determined under a subjective/objective standard. *Westport Ins. Corp. v. Cotten Schmidt, LLP*, 605 F. Supp. 2d 796, 804 (N.D. Tex. 2009) (“[T]he language of the exclusion requires an analysis of what an objectively reasonable attorney would expect given the subjective knowledge of the particular attorney involved.”).

“Likely” or “Might”

“[The] prior-knowledge exclusion is subject to a lower standard in that all that is required is that, based on the subjective knowledge of the actual attorney at issue, a reasonable attorney would understand that his actions "might" be the basis of a claim.

> *Westport Ins. Corp. v. Cotten Schmidt, LLP*, 605 F. Supp. 2d 796, 805 (N.D. Tex. 2009)

In the Policy's definition of "Claim"

Sometimes the policy will include "potential claim" language in the policy's definition of the word "claim". *See Minn. Lawyers Mut. Ins. Co. v. Schulman*, 2016 U.S. Dist. LEXIS 127261, at *38 (N.D. Ill. Sep. 19, 2016) ("Here, the MLM Policies clearly defined "claim" to include not only a 'demand communicated to the [insured] for [damages,]' but also 'any act, error or omission by any [insured] which could reasonably support or lead to a demand for [damages].'").

So What Is a "Potential Claim"?

Let's begin by asking the question, what would the potential claim be for?

The answer is usually damages.

Often the policy will define the claim as a demand or potential demand for damages.

There is a reason that legal professional liability policies define a claim against a lawyer as a demand for damages.

A Professional Error Causes Damages, or that the Client Believes May Have Done So.

A legal malpractice claim typically requires proof not merely that an attorney committed a professional error, but that such error proximately caused damage. Attorneys frequently make mistakes that do not cause the client damage. But a client's "claim" that their attorney made a mistake that cost them money, even without basis in fact, likely to constitute knowledge of a potential claim.

Examples of Potential Claims

An attorney's "knowledge of a client's dissatisfaction with legal services provided, combined with knowledge such services resulted in an adverse outcome for the client, puts a reasonable attorney on notice of a potential claim which must be reported to the insurer." *Wittner, Poger, Rosenblum & Spewak, P.C. v. Bar Plan Mut. Ins. Co.*, 969 S.W.2d 749, 753 (Mo. 1998) (concluding a default divorce decree and two complaint letters from the client requesting that a law firm remedy the situation provided a basis to believe she might make a claim).

“The Seeds of a Malpractice Claim”

Thomson v. Hartford Cas. Ins. Co., 656 F. App'x 109 (6th Cir. 2016) (Where client accused lawyer of failing to provide client with sufficient information to determine the status of the life-insurance policy and what options may be available to prevent any lapse, and any lapse of the policy “would result in a ‘tremendous loss of value to the Trust and its beneficiaries’”, “any reasonable lawyer would have known that this course of events bore the seeds of a malpractice claim.”).

“But my client never complained.”

In establishing prior knowledge, there is no requirement that the client complain ahead of time or indicate that they will file a claim against the insured.

See Mt. Airy Ins. Co. v. Thomas, 954 F. Supp. 1073, 1080 (W.D. Pa. 1997) ("Any dispute over whether the defendant believed [that the client would make the claim], on the basis of his relationship with his client or [what] his impression [was] of that client's reaction to the situation, . . . is not relevant to our analysis.”).

My Client Told Me He Would Not Sue Me.

See Abood v. Gulf Grp. Lloyds, 2008 U.S. Dist. LEXIS 51406 (W.D. Pa. July 1, 2008) ("[M]embers of the law firm knew of their failure to toll the statute of limitations, [] explained the error to Sefcik, and [] her response indicated [] that she would not take legal action regarding the error . . . the indication [] that she did not intend to pursue legal action cannot be considered a release that waived claims against them. The plaintiffs' subjective belief that they would not be sued has no bearing on the analysis of whether or not they should have reasonably expected to be sued.").

I never thought I might be sued.

Neither the merits of the potential malpractice claim, nor the insured attorney's subjective beliefs and intentions are pertinent in determining the coverage issue. *See Koransky, Bouwer & Poracky, P.C v. Bar Plan Mut. Ins. Co.*, 712 F.3d 336, 343 (7th Cir. 2013) (explaining any eventual ruling in the client's underlying case was irrelevant to whether the insured law firm "had reason to believe that their acts or omissions *may* result in a claim for malpractice").

The Client Was Dissatisfied and Believed They Were Damaged

Roberts v. Alps Prop., 2020 U.S. Dist. LEXIS 267250 (D. Neb. Nov. 23, 2020) ("The proper question is whether Roberts 'knew or reasonably should have known or foreseen that' Rohde's dissatisfaction with Roberts's representation might have been the basis for an insurance claim . . . a reasonable attorney with the information Roberts had—especially after receiving Rohde's email telling him he needed to contact his insurer about a $63,308.31 mistake he allegedly made—would have known that Rohde at least *might* file a malpractice claim.").

The Subjective/Objective Test for Determining When a Potential Claim Exists

Courts apply a two-part test to determine if a prior knowledge condition precludes coverage, "asking first, whether the insured had actual knowledge of a suit, act, error or omission, a subjective inquiry; and second, whether a reasonable professional in the insured's position might expect a claim or suit to result, an objective inquiry." *Metro. Dist. Comm'n v. QBE Americas, Inc.*, 416 F. Supp. 3d 66, 72 (D. Conn. 2019).

A Quiz.

Could these situations be considered potential claims?

- Your client demands that you waive or refund their fees
- Your client alleges malpractice or threatens to sue verbally or in writing
- Your client's new lawyer requests the client's file
- Your client threatens or files a bar complaint against you
- You believe you made an error that could damage your client but your client tells you not to worry about it

Protecting Your Interests When Your Insurer Issues a Reservation of Rights or Brings a Declaratory Judgment Action Against You.

When an insurer receives a claim against you, the insurer will either defend the claim without a reservation of rights, defend the claim with a reservation of rights, or deny the claim. If it decides to defend under a reservation of rights or if it denies coverage, it may file a declaratory judgment action asking a court to resolve a disputed issue as to its duty to defend or to indemnify.

What is a Reservation of Rights?

Usually when the insurer believes that part or all of the claim might not be covered, or if the claim seeks damages tat could exceed the limits of coverage, it will defend the claim under a reservation of rights.

You will receive a reservation of rights letter setting forth the particular reasons the insurer believes there might not be coverage and the particular policy provisions the insurer is relying on.

Defending Under a Reservation of Rights

Defense counsel must report information to the insurer necessary for it to fulfil its settlement and defense duties.

If that information could affect whether you have coverage, however, defense counsel will need to alert you of that possibility (even though defense counsel is not representing you as to coverage) and obtain your informed consent to forward the information to the insurer.

You may want independent legal advice regarding whether to give that consent.