Choosing the Right Amount of Coverage

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How much professional liability insurance coverage should a firm purchase is a question we are frequently asked. While only you can evaluate your tolerance for risk and factor in considerations such as the value of the personal assets of members of the firm, we can offer several suggestions that will help in making your decision:

- Consider the monetary value of matters handled by your firm. Average dollar value can be misleading because there is no guarantee that a loss payment won't exceed the average value of your firm's representations. Consider the potential damage to your firm if a claim arose from your firm's biggest case. Many lawyers use this worst-case scenario when choosing limits rather than the firm's average exposure. Risk averse lawyers often use a multiple of two or three times the highest loss they can anticipate in selecting policy limits.
- Determine whether your practice concentrates in areas of law that have a high frequency of claims. Loss experience studies identify plaintiff personal injury cases and real estate matters as the areas with the highest frequency of claims. Practice areas with high but somewhat lower claims probability are business transactions, family law, collection and bankruptcy, workers' compensation, and estate planning. All other areas have relatively low claim exposure. In Kentucky we are seeing an increase in bankruptcy, workers' compensation, estate and probate, and family law claims. Note that over-diversifying your practice into a number of relatively claims-free areas may result in a greater malpractice exposure than concentrating in areas with higher claims frequencies.
- Take into consideration the personal assets of the attorneys in the firm when selecting limits. If personal assets are substantial, higher policy limits may be desirable even though the firm's practice has low exposure to malpractice claims.
- Consider the number of attorneys to be covered under the policy. Frequency of claims increases in direct proportion to increases in the number of lawyers in a firm.
- Evaluate the firm's attitude toward risk:
    - Does your firm have an active risk management program?
    - Are you confident of your docket, work control, conflicts check, filing, and mail handling procedures?
    - Does your firm have a good record of providing legal advice in a careful, responsive manner?
    - Do you provide risk management training for new attorneys and staff?

- Consider the risk tails that may exist for your firm's areas of practice. The risk tail is the time between when an error is made and the claim is asserted. For example, real estate claims have long risk tails because errors are typically not discovered until the properties are resold - usually a number of years later. Similarly, estate and probate claims have long risk tails. A long risk tail means that claims are more costly because of inflation. In these circumstances higher insurance limits are warranted for inflation protection.

- Keep in mind that defense and other claims costs are included in the limits of coverage of many lawyer liability policies, including ours. Defense costs vary with each claim depending upon the complexity of the claim. These costs can erode policy limits substantially before a claim is finally paid. In choosing policy limits consider both indemnity and defense expense.
- Understand the requirements of a Claims-Made and Reported policy, the policy form used by virtually all providers of lawyers liability insurance and the one we use. "Claims Made" means that the policy and limits in effect at the time the malpractice claim is first made against the lawyer covers that claim - not the policy and limits in effect at the time of the conduct giving rise to the claim. Increasing limits as a firm's malpractice exposure grows over the years should be considered to protect against several claims from prior years' representations being asserted in the current policy year.
- Review your firm's malpractice exposure annually, well in advance of your policy's renewal date. Compare the cost of the limits option you think you should have with the next highest option, and evaluate the cost of a lower versus a higher deductible. We can easily provide you with several alternative premium quotes to assist you in your analysis. Just give us a call and we will be glad to give you all the information you need to make an informed decision on your best coverage.

Serving As Corporate Director

Kentucky's Rules of Professional Conduct do not preclude lawyers with corporate clients from sitting on the client's board of directors, but the ethical concerns of doing so are stressed in Comment 13 to Rule 1.7 Conflict of Interest. Many think the rules should forbid it. Similarly, risk managers discourage lawyer-directors. The arguments against being a lawyer-director are loss of independent professional judgment, inherent conflicts of interest, potential loss of the attorney-client privilege, increased risk of becoming a fact witness, risk of disqualification of lawyer and firm, increased risk of a malpractice claim, and vicarious liability exposure of the lawyer-director's firm.

The ABA until now has taken essentially a neutral position on the ethics of board membership by lawyers. In Formal Opinion 98-410 (2/2/98) The ABA Standing Committee on Ethics and Professional Responsibility has come off the fence. Key points in the opinion are:

1. It is not per se unethical for a lawyer to sit on the board of a corporation that the lawyer or the lawyer's firm serves as legal counsel.

2. The primary ethical concerns are conflicts of interest and waiver of the attorney-client privilege.

3. Four conflict situations are identified: the lawyer-director opposes a board action and is later asked to represent the corporation on it; the lawyer is asked for legal advice on a board action in which the lawyer participated; participation in board consideration of hiring or firing legal counsel; when the directors are sued and the lawyer-director's firm is to provide defense counsel.

4. The lawyer-director should make full disclosure of these risks to the corporate client and get the organization client's consent, preferably in writing.

The Committee offered these guidelines for lawyer-directors:

1. Assure that the board and management appreciates the different responsibilities of director and legal advisor, understands that the corporation is the client and not its constituents, and that conflicts of interest could cause the lawyer's recusal in one or both capacities.

2. Explain the attorney-client privilege considerations attendant to counsel serving as director.

3. The lawyer-director should not participate when the board is considering the corporation's relationship with the lawyer or the lawyer's firm.

4. Maintain independent professional judgment, especially in the face of board preferred courses of action that as counsel the lawyer-director finds legally objectionable.

5. Pursue diligently as counsel legally sufficient decisions of the board to which the lawyer-director was opposed.

6. Refuse to act as counsel in any matter that conflicts with the lawyer-director's actions as director.

This opinion is a must read for lawyers serving as directors. The ABA/BNA Lawyer's Manual On Professional Conduct covers it well in Vol. 14, NO. 4, page 105, 3/18/98.

Limited Liability Forms of Practice - The Sound of Silence

The Winter 1998 issue of the KBA Bench & Bar featured the most recent amendments to the rules of the Kentucky Supreme Court. Conspicuous by its absence was the proposed rule authorizing limited liability forms of practice for Kentucky lawyers.

Medicaid Fraud: Putting Grandma's Lawyer In Jail - "U.S. Won't Enforce Law on Fiscal Advice For Seniors, Reno Says" (Wall Street Journal 4/9/98)

The Wall Street Journal reports that the Justice Department will not enforce the law that makes it a crime for lawyers and financial advisors to counsel older adults to transfer assets to qualify for Medicaid entitlements upon entering a nursing home. The AG agrees that the law is "plainly unconstitutional under the First Amendment."