

Shoring Up Malpractice Insurance

The importance of prior acts coverage and extended reporting endorsements

BY E. KENDALL STOCK and
DUKE NORDLINGER STERN

There is an unfortunate irony in the area of lawyers' professional liability insurance. While a prudent attorney would consider coverage issues where a client's matter involved insurance, too many lawyers—because of real or imagined time demands—ignore policy and carrier considerations and only concentrate on premium cost differences when deciding on legal malpractice insurance protection. The result can be false savings when a claim is uninsured or underinsured.

But, before you can even consider the multitude of coverage issues, you must become aware of the basic structure of the contract to avoid gaps in protection.

Since most policies are only written on a claims-made basis, a basic policy only provides coverage when the act, error or omission occurs and the claim is made during the same policy period. However, since claims can be made 1) during the current policy year for incidents that occurred before this period, and 2) after the current policy has been terminated for prior acts, errors or omissions, an understanding of prior acts coverage and the extended reporting endorsement (tail coverage) is a critical first step in understanding legal malpractice insurance.

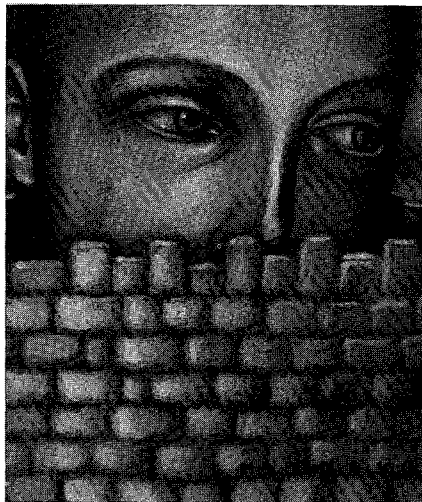
There is no sure way to predict which representation in an attorney's years of practice will result in a malpractice claim, but the statistical probability of a claim increases with each additional year of practice. As a result, a lawyer or law firm must have coverage today for any negligence which took place before the current policy period year.

The typical way to protect against such a risk is through prior acts coverage. If this coverage extension is written without time limitation, a claim would be covered no matter when the incident occurred. There is usually a premium surcharge for this additional protection, based on the number of previous years of coverage required.

This typical method of transfer-

ring the risk of prior malpractice exposures is not without complications. It may be that a carrier will not write "full prior acts" coverage as a matter of underwriting philosophy or because of information developed from the application.

Or it may be that full prior acts coverage is available, but that the policy is more restrictive than the lawyer's or law firm's prior coverage form. (This is becoming more com-



mon, with insurers adding additional coverage limitations at renewal.) Or it may be that the usual prior acts conditions would negate needed coverages for particular exposures. (Prior acts coverage is normally excluded for acts, errors or omissions that the insured knew of or reasonably should have known of prior to the inception of the policy.)

Therefore, while every attempt should be made to purchase full prior acts coverage, the lawyer must review the policy for any limitations on this vital protection.

Covering Your Tail

Just as the spectrum of the legal malpractice risk includes the possibility of current claims for incidents prior to the present policy period, it also includes possible claims after the present policy period for prior acts, errors or omissions. With statute-of-limitations discovery rules adding uncertainty to the duration of prior acts exposures, there is no way to predict accurately if or when such a claim might be made.

This continuing possibility of future claims is often called the "risk tail"; the policy feature which ad-

dresses this exposure is sometimes called "tail coverage," but is properly the "extended reporting endorsement."

The most common situation in which an extended reporting endorsement should be considered is when an attorney no longer has an active practice. For example, upon retiring, or becoming a judge or an in-house lawyer, the exposure from prior private practice would be addressed by purchasing an extended reporting endorsement, unless it can be assured that the prior law firm will continue to maintain coverage.

Additionally, if a renewal policy will be too restrictive, tail coverage might protect retrospectively against the broader exposures while prospectively deleting or modifying the areas of practice that will not be protected in the future.

The extended reporting endorsement also can be critical if the insured is changing carriers and prior acts coverage will no longer be available or will be too restrictive. And, the lawyer or law firm may be in the very unfortunate situation of being nonrenewed without any alternative insurer being available.

The time to evaluate this option is before purchasing the policy. This is important because there are not standardized policy provisions as to: 1) the lengths of coverage time available (it is almost always advisable to purchase an "unlimited" extended reporting endorsement); 2) under what conditions the endorsement can be purchased (these limitations can severely restrict the benefits of this policy extension); and 3) endorsement costs (with some policies the price is a set multiple of the underlying premium, while with others the cost will be the rate in effect at the time the endorsement is purchased).

It would be ideal to have a lawyers' professional liability insurance market with enough providers and few coverage or premium cost changes over time. The reality is that continuous monitoring of policy terms, including prior acts and extended reporting endorsement provisions, is imperative.

And, if a jurisdiction has an insurance company with experienced professional management, and provisions for bar review of policy changes and underwriting decisions, the probability of gaps in coverage can be reduced even more. ■

E. Kendall Stock is a solo practitioner in Leesburg, Va., and Duke Nordlinger Stern is a lawyer in St. Petersburg, Fla.