Law and Order: Lawyers Professional Liability Policies (LPL)

Beth Whitney
Head of Small & Mid-sized Lawyers
Swiss Re Corporate Solutions
What are a Lawyer’s most valuable assets?

✓ License
✓ Reputation

Provide Tennessee lawyers with a product that protects them both!

It takes many good deeds to build a good reputation, and only one bad one to lose it.

~ Benjamin Franklin
Why some lawyers don’t buy insurance – some overheard excuses….  
“I think it is too expensive”  
“I will never commit malpractice”  
“It will suddenly make me a target”  
“I will never get sued”
The truth about lawyers professional liability insurance...

Lawyers need it!
Bar Association Survey

Most lawyers.....

Knew more about their auto policy
Were not aware what triggered coverage
Were not aware of beneficial coverages
Were not aware of exclusions & conditions
Four out of five lawyers will have a claim made against them in his or her career

Claims now question judgment without alleging a discrete error

Lawyers get sued even when they have done nothing wrong as dissatisfaction with results may now drive claims

Non-clients are suing lawyers due to erosion of privity laws in many states
Why lawyers need professional liability insurance

✓ Clients still bring claims even if the lawyer does not have insurance

✓ Claims generate high defense costs even when frivolous

✓ Insurance helps protect reputation by funding the defense and providing sums for potential settlement or judgment

✓ Insurance is now affordable!
Trends in the lawyers’ professional liability market

ABA Standing Committee on Lawyers’ Professional Liability Study
Profile of Legal Malpractice Claims
2012 - 2015
Percent of All Claims by Area of Law in 2015 ABA Study

- Personal Injury - Plaintiff: 13.05%
- Real Estate: 18.24%
- Family Law: 14.89%
- Estate, Trust and Probate: 13.51%
- Collection and Bankruptcy: 12.05%
- Criminal: 5.60%
- Business Trans Comm: 5.30%
- Corporate/Business Org: 10.59%
- Patent, Trademark, Copyright: 4.44%
- All Other: 2.33%

Profile of Legal Malpractice Claims: 1985 - 2015. ABA Standing Committee

70% of claims come from 5 AOPs
All Claims by Type of Activity in 2015 ABA Study

Profile of Legal Malpractice Claims: 1985 - 2015. ABA Standing Committee
Number of Claims by Type of Alleged Error
2015 ABA Study

**Administrative Errors**
- Failure to React to Calendar
- Lost File, Document Evidence
- Procrastination in Performance/Followup
- Failure to File Document - No Deadline
- Clerical Error
- Failure to Calendar Properly

**Substantive Errors**
- Conflict of Interest
- Failure to Know/Ascertain Deadline
- Drafting Error
- Inadequate Discovery/Investigation
- Planning Error - Procedure Choice
- Failure to Know/Properly Apply Law

Profile of Legal Malpractice Claims: 1985 - 2015. ABA Standing Committee
Number of Claims by Disposition of Claim

Disposition of claims

For claims where expenses are incurred, over 50% will be more than $10,000

Profile of Legal Malpractice Claims: 1985 - 2015. ABA Standing Committee
The Westport/BIM/IOT Program
Swiss Re v. Westport

Swiss Re is made up of 3 units

1. Swiss Re – The reinsurance arm
2. Swiss Re Life Capital – Manages open and closed Life and Health books
3. Swiss Re Corporate Solutions – The commercial insurance arm

Westport Insurance Corporation is the legal entity that Swiss Re Corporate Solutions uses for its admitted law firm business

There are 3 main policy forms for law firm business

1. Professionals Advantage for Lawyers – Admitted form- 1-19 attorneys
2. Professionals Premier for Lawyers – Admitted form - 20+ attorneys
3. Specialty Advantage for Lawyers – Non Admitted on First Specialty Insurance Corporation paper. Minimum premium of $10,000

Westport has been writing law firm coverage for over 40 years
The Big I Markets, Insurors of TN and Swiss Re Program ...

Program targets firms with:

- 1-19 attorneys
- general areas of practice
- good claims history

• No onerous appointment process

• Program accepts business from any Big I member agency in Tennessee via BIM’s website

• Provides educational resources and support to enable even agencies without Lawyers' expertise to find success with the product

• Insurors of Tennessee will be offering webinars & informational tools
Non-admitted program
First Specialty Insurance Corporation paper

• Firms with sophisticated, high risk AOPs (e.g. securities, intellectual property, etc.)
• Firms with a lively claims history
• Minimum premium of $10,000
The Application
Application = warranty
Very important part of process

Lawyers/firms should:

- answer all questions
- show risk management controls
- total areas of practice must reach 100%
- complete prior & potential claims history
- poll all lawyers for potential claims

See the FAQ’s on the Big I Markets Website
Key Features

The lawyers professional liability policy
"THIS IS A CLAIMS MADE AND REPORTED POLICY...."

PLEASE READ IT CAREFULLY...
Claims made and reported policy – dual trigger:

Provides coverage for claims:

- First made during the policy period
  AND

- Reported to the carrier during the policy period or within 60 days thereafter

Grace period to report: within sixty (60) days thereafter
Nature of the claims made and reported policy?

Use it or lose it!!
"The Company shall pay...DAMAGES ... as a result of CLAIMS first made against any INSURED during the POLICY PERIOD and reported to the Company in writing during the POLICY PERIOD ,...."
"If, during the POLICY PERIOD, any INSURED first becomes aware of a POTENTIAL CLAIM and gives written notice of such POTENTIAL CLAIM to the Company during the POLICY PERIOD, any CLAIMS subsequently made against any INSURED arising from the POTENTIAL CLAIM shall be considered to have been made during the POLICY PERIOD the INSURED first became aware of the POTENTIAL CLAIM."

No grace period to report potential claims
Exclusions This insurance does not apply to claims:

if at the effective date of the policy any insured knew or could have reasonably foreseen that such WRONGFUL ACT might be the basis of a CLAIM;
Report all of the following!

- lawyer is in process of correcting mistake
- frivolous suit has been filed against lawyer
- bar complaint has been filed against lawyer
- client advised lawyer “don’t worry about it”

If in doubt, REPORT, REPORT, REPORT
Relief that is usually not covered:

- Civil or criminal fines, penalties or sanctions
- Punitive or exemplary damages
- The multiplied portion of any award
- Return of paid legal fees
- Any form of non-monetary relief
- Matters deemed uninsurable by public policy or law

You owe me restitution!
Common exclusions

Intentional, fraudulent malicious, criminal conduct
Innocent insured carve back

This exclusion applies to any insured who is adjudged or admits to have committed such acts. This exclusion does not apply to any insured who did not commit, know or acquiesce in such wrongful act which is the basis of the claim.
Further common exclusions

- Notary services if notary failed to witness signature
- Commingling of funds, personal profit or advantage
- Capacity as a beneficiary of a trust or estate
- Professional services rendered to an entity owned by lawyer
- Manage, control or have an equity interest of 10% or more.
- Insured v. insured claims
- Bodily injury claims (GL coverage)
If an INSURED is entitled to independent counsel...in those instances where ...Company reserves its rights ...which create a conflict of interests... then the INSURED may select independent counsel. Such counsel shall have at least five (5) years of experience ...maintain error and omissions insurance coverage...provide full information, documentation and cooperation...

The Company shall be liable only for reasonable and necessary defense costs at rates customarily paid....
Choice of counsel endorsement

The Company may employ counsel to defend any CLAIM. The counsel will be mutually agreed upon between the Company and the NAMED INSURED. The Company will not unreasonably withhold consent to counsel as long as counsel agrees to operate within the Company’s litigation guidelines and counsel agrees to reasonable rates which are commensurate with the experience of counsel, complexity of the case and the jurisdiction in which the case is venued.
Benefits to carrier choosing defense counsel

- Defense firms have appropriate coverage in place
- Specialist in "case within the case" lawyers defense
- Very similar issues time and time again in lawyer claims
- Same attorneys bring these suits time and time again
- Defense firms understand how to try these cases
Common condition:

No INSURED shall, without the prior written consent of the Company, incur any CLAIMS EXPENSES, make any admission or payment, admit liability, settle any CLAIMS, assume any obligation, agree to arbitration or any similar means of resolution, or waive any rights.
Consent to settle

• The Company shall not admit or assume any liability, or settle any CLAIM without the written consent of the NAMED INSURED, which consent shall not be unreasonably withheld...

• If, however, the NAMED INSURED refuses to consent to a settlement, ...the Company's liability for the CLAIM shall not exceed the amount which would have been paid if the CLAIM could have been settled, including CLAIMS EXPENSES incurred up to the date of such refusal, or the applicable limit of liability, whichever is less;...
Supplemental policy provisions

- Disciplinary complaints - $20,000
- Cyber events - $10,000/$20,000
- Crisis events coverage - $10,000
- Subpoenas - $10,000
- Pre-claim mitigation – no sub-limit
Disciplinary Proceeding coverage

The Company shall reimburse the INSURED up to $20,000 per POLICY PERIOD, for reasonable fees, costs and expenses incurred in defending a DISCIPLINARY PROCEEDING first made against any INSURED during the POLICY PERIOD, and reported to the Company in writing during the POLICY PERIOD...
Crisis event coverage

Crisis event means any:

1. Death, departure or debilitating illness of the managing partner, owner of a sole proprietorship, or practice group head
2. Dissolution of the Named Insured
3. Workplace violence
4. Bankruptcy petition
Swiss Re Corporate Solutions
Value adds

Risk Management
Dedicated risk manager
Emergency hotline
Publications
Access to CLE programs
Risk management programs
Onsite live risk management
Deductible reduction for early resolution
Swiss Re Corporate Solutions: 
other benefits for Tennessee lawyers:

• Risk Management
• Claims Commitment
• Free CLE
• 60 day grace period for claim reporting
• Coverage for independent contractors
• Disciplinary Coverage - $20,000
• Breach of Data coverage
• Crisis Event coverage
• Pre-claims mitigation
• Deductible reduction with broad time frame
How to evaluate a carrier
How to evaluate a carrier?

- **Financial Strength Rating**: subjective rating by a reputable rating company (e.g. A.M. Best Company)

- **Financial Size Rating/Surplus**: Available money to pay claims

- **History**: How long the carrier has been writing the line of business (some may enter & exit market quickly)

- **Trends**: Research reputation of carrier; especially their claims department
The sample policy verbiage contained herein is abbreviated and for Illustrative purposes only. While most lawyer professional liability policies have similar language, **the exact policy wording will vary**, not only from carrier to carrier, but also from state to state.
Thank you
Legal notice

©2017 Swiss Re. All rights reserved. You are not permitted to create any modifications or derivative works of this presentation or to use it for commercial or other public purposes without the prior written permission of Swiss Re.

The information and opinions contained in the presentation are provided as at the date of the presentation and are subject to change without notice. Although the information used was taken from reliable sources, Swiss Re does not accept any responsibility for the accuracy or comprehensiveness of the details given. All liability for the accuracy and completeness thereof or for any damage or loss resulting from the use of the information contained in this presentation is expressly excluded. Under no circumstances shall Swiss Re or its Group companies be liable for any financial or consequential loss relating to this presentation.