Best Practices for Buying Insurance for Your Law Firm

By Michael Hale

In the world of best practices, overlooking insurance coverage for your law firm is like the cobbler's kids wearing shoes with no soles. The dentist with crooked teeth. The car mechanic who doesn't change the oil in his car. I find that many law firms delegate the purchase of insurance to an administrator or, worse, rely on an insurance agent, and often the policies are not read or understood—until the time of a claim, that is.

What policies does your law firm purchase? What are the terms and conditions of coverage on those policies? What insurers are being used and what is their reputation for paying claims? Perhaps even more important, who is the agent packing your firm's parachute?

I recently reviewed the insurance program of a 30-member law firm in the metro Detroit area. This program, written largely through a direct writer better known for selling homeowner and personal auto policies, was more like a group of policies and was replete with errors, gaps, and misunderstood terms and conditions. For example, the firm had no liability coverage for attorneys or other employees driving on company time (yes, the firm was bare for auto accident claims). Office furnishings and equipment were insured on an actual cash value basis as opposed to replacement cost. The endorsement adding employee benefit mistake liability coverage, which probably would have cost less than $250 per year, was missing.

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Why do law firms, whose business is managing risk, pay little heed to managing their own insurance? I have found a few reasons for this, including:

- The firm delegates purchasing insurance to an administrator who is focused on price and may not have the qualifications to understand the policy contracts or know the questions to ask.
- There have been no claims to test the integrity of the program.
- An insurance agent has been writing the insurance for years without incident and the coverages are renewed annually without much attention to an in-depth yearly review.

In my day-to-day practice, which involves overseeing commercial insurance programs for numerous businesses, including many agents and brokers, I often find glaring problems that can lead to disaster when it's time to make a claim.

Problems with commercial insurance programs

In Michigan, it's well established that an insured is obligated to read his or her insurance policy and raise any questions within a reasonable time after the policy is issued.[1] I see many problems. Here are some to keep in mind.

Missing names—This is a cardinal sin I find in most programs I review. A named insured chart comparing which names are covered under what polices should be created to find any gaps. Michigan courts interpret insurance policies as they do other contracts.[2] A court must first determine if an insurance policy provides coverage and then decide if an exclusion applies.[3] Sometimes, the claim does not get to the exclusions analysis in that the entity claiming coverage was either not listed or was listed improperly.

Coinsurance penalties—Property insurance policies often contain penalty provisions if the insured did not insure enough of the replacement cost (80, 90, or 100 percent). Many insurers will waive these dangerous provisions if asked.

Business interruption issues—Most firms know that, in the event of a fire or similar disaster, their attorneys can bill time from home or another location and may think they don't need business interruption insurance. However, a more central law firm exposure following such a claim is staying up and running in temporary space, notifying clients, etc. This will likely involve employee overtime and major other extra expenses.

Failure to blanket property insurance limits among locations—If you have multiple locations where you have property or operations, you should have a single blanket limit of insurance instead of separate per-location limits. This allows for a safety net in the event of inadequate limits at a single location.

Missing coverage under E&O (errors and omissions) policies for acting as trustees—Most malpractice policies exclude trustee services by attorneys within the firm. If your firm engages in these services, seek alternative coverage.

Missing employment practices liability or only basic coverage without wage and hour, immigration, or breach of employee privacy coverage—Some business-owner policies will automatically throw in coverage for employment practices liability. Do not rely on this. Instead, look at comprehensive standalone policies that will better protect the firm.

The absence of coverage for employee benefit mistake errors and omissions liability—The premium for this vital coverage is probably less than $250 per year. Better yet, get a full fiduciary liability

policy that will also protect fiduciaries and the firm for ERISA-type claims.

No coverage for employees driving on company time—Often called non-owned auto coverage, this insurance is crucial given the severity of the automobile residual liability exposure. Even if you have this, don't confuse this with thinking you have coverage for damage to rental cars; that's a separate insurance.

Personal vehicles insured on the firm's "fleet" policy without coverage added to properly protect the partner and his or her family—In this situation, you will typically need to have a lease-back arrangement and a special endorsement on your commercial auto policy.

No coverage for theft of IOLTA funds by employees—Have employee dishonesty coverage? It does not usually extend to third-party client funds. Ask for third-party employee dishonesty coverage and be sure you have adequate limits.

Inadequate or nonexistent crime coverage for employee dishonesty investigation costs—I recently had a case in which a company had $25,000 in coverage for forensic costs to prove the employee dishonesty claim, but those costs exceeded $200,000. Many carriers offer higher limits in this area.

No coverage for fraud or email scams—Often known as social engineering coverage, this is not usually included on most business-owner policies. While most think their employees would never fall for fraud or email scams, it is surprising how often this happens. In this area, I have seen claims exceeding $400,000 in losses for a single company. At least one Michigan court has determined that computer fraud coverage is not triggered by an email phishing scam.[4]

Missing international coverage—If you have international clients or travel abroad, be sure to consider a separate international policy, which will cost approximately $2,500 a year. Also, ask your malpractice carrier if its coverage applies internationally.

No workers' compensation for employees living in states other than Michigan—If you have employees in states other than Michigan, coverage is not automatic under workers' compensation policies and needs to be added specifically for that state.

Insurance coverage that doesn't track with indemnification obligations in leases—As lawyers know, indemnification obligations in leases and other contracts can be quite broad. Many times, such assumptions of liability are broader than the coverage granted under the commercial general liability policy. Check with your insurance agent or consultant to advise you further.

No coverage for third-party harassment claims—An example of this is a vendor claiming she or he was harassed by a firm associate or administrator. Third-party harassment and discrimination claims are not automatically included under some employment practices liability policies. Be sure your carrier has this coverage.

Lack of coordination among policies to make them more of a program and less of a group of distinct policies—It is striking how many times I find different agents and policy expiration dates for law firms. Try to have a coordinated program, if possible, to minimize gaps and force you to look at the insurance program as a whole at a particular time every year.

No first-dollar defense on firm malpractice policies to waive the deductible for defense costs—This endorsement is often available among certain insurers.

No defense outside the limits on malpractices policies—Defense costs can be staggering and can otherwise erode indemnification limits on a policy that has a $1,000,000 limit.

No choice of counsel election on malpractice or employment practices liability policies—When lawyers are sued, they often want to select who defends them. This is usually not permissible, but some insurers offer this option if negotiated in advance.

Many firms believe that partner/member disputes will trigger coverage under D&O policies when these policies will typically exclude such claims under "insured versus insured" exclusions—Although employment practices coverages might apply depending on the claim being made, shareholder derivative or member lawsuits are not likely covered under D&O (directors and officers) liability insurance policies.

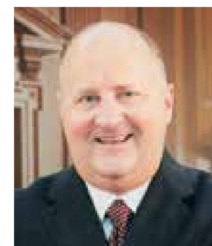
The overriding issue

Getting a license to sell insurance in Michigan requires only 40 hours of class time and passing a basic examination.[5] Often, agents are paid on commission with higher percentages on new business, so most employ a "catch and release" strategy. While well intentioned, many agents do not even read the policies themselves.

One approach is to find a well-trained agent who specializes in writing for law firms and spends quality time reviewing your coverages and advising you each year. Michigan law assumes most agents are order takers, but you may not know what to order! If necessary, hire a consultant who can objectively advise you about coverages, prices, and agents.

Conclusion

If there is an exception to the rule that a lawyer who represents himself or herself has a fool for a client, it should be for paying attention to the firm's insurance coverages. I often find that this is not the case, and that coverage gaps are discovered only at the time of a claim—when it is too late. ■



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ENDNOTES

1. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 394 (2006).
2. *Farmers Ins Exch v Kurzman*, 257 Mich App 412, 417 (2003).
3. *Auto-Owners v Harrington*, 455 Mich 377, 382 (1997).
4. *American Tooling Ctr v Travelers Cas and Surety Co of America*, opinion of the United States District Court for the Eastern District of Michigan, issued August 1, 2017 (Case No. 16-12108), p 3.
5. MCL 500.1204a(iv) and MCL 500.1204a(v).