CHECKLIST FOR PURCHASERS OF PROFESSIONAL LIABILITY INSURANCE

How to Use this Checklist

This checklist is intended as a guide to be used in reviewing professional liability insurance applications and policies. The questions are divided into eight sections:

- Application
- Declaration Sheet
- Definitions
- Coverage Agreements
- Exclusions to Coverage
- Defense and Settlement Provisions
- Limits of Liability
- Conditions of Coverage

A policy may also contain attachments called "Endorsements." Endorsements change coverage on a firm-by-firm basis, either by adding, altering, or limiting coverage. This checklist treats endorsements under either Coverage Agreements or Exclusions to Coverage, depending upon whether the endorsement adds or excludes coverage.

Key issues to consider are listed under each policy section. These issues are followed by specific questions to answer for each policy that you consider.

Before using this checklist, read "Understanding Your Insurance Coverage" for a full discussion of the items included in the checklist.

MALPRACTICE INSURANCE CHECKLIST

Question	Carrier A Yes	Carrier A No	Carrier B Yes	Carrier B No
Application				
Key issues to consider:				
• Is the application made a warranty or a representation to the contract? (That is, does the information contained in the application become a legal part of the insurance contract?)	☐	☐	☐	☐

Question	Carrier A Yes	Carrier A No	Carrier B Yes	Carrier B No

Declaration Sheet

Key issues to consider:

What are the terms of coverage?

- What is the policy period?
- What are the limits of liability?
- What are the deductibles?
- Who is the "Named Insured"?
- Is there a retroactive date for prior acts coverage?

Does the declaration sheet:

Include a "retroactive date" (an effective date) for prior acts coverage (coverage for acts that occurred prior to the policy period)? (See endnotes.)	☐	☐	☐	☐

Definitions

Key issuers to consider:

- Is coverage provided for all persons for whom the insured is legally responsible?
- Are individual lawyers or nonlawyers covered for services not preformed on behalf of the firm?

Do the definitions of the insured include:

• Named insured and predecessor firm(s)?	☐	☐	☐	☐
• Former lawyers, partners, officers, directors and shareholders?	☐	☐	☐	☐
• Current lawyers, partners officers, directors and shareholders?	☐	☐	☐	☐
• Automatic coverage for future lawyers, partners, officers, directors and shareholders?	☐	☐	☐	☐

Carrier A **Carrier B**

Question	Yes	No	Yes	No
• Former, current, or future non-attorney employees?	☐	☐	☐	☐
• Independent contractors?	☐	☐	☐	☐
• Attorneys in a "Of Counsel" capacity?	☐	☐	☐	☐
• Others, such as heirs, executors, administrators, legal representatives, or assigns of insured?	☐	☐	☐	☐

Coverage Agreements

Key issuers to consider:

• Is coverage provided for all legal services performed by the firm?	☐	☐	☐	☐
• Does the policy cover all prior acts of the firm and of all the individual members including employees?	☐	☐	☐	☐
• Does coverage exist for acts for other than "acts on behalf of the Named Insured," e.g. pro bono or "cocktail party" advice?	☐	☐	☐	☐
• Are the activities of members of the firm as officers or directors covered?	☐	☐	☐	☐
• Does the policy cover other business pursuits with clients of the firm?	☐	☐	☐	☐
• Are acts in a dual capacity as a lawyer and officer, director or business partner with a client covered?	☐	☐	☐	☐
• Does the policy provide coverage for innocent partners in cases where one member of the firm has not complied with the conditions?	☐	☐	☐	☐
• Is the definition of when a claim is made sufficiently broad?	☐	☐	☐	☐
• Are optional extended reporting periods available?	☐	☐	☐	☐
	Carrier A		**Carrier B**	

Question	Yes	No	Yes	No
Does the policy provide coverage for:				
• Professional services as an lawyer?	☐	☐	☐	☐
• Services as a notary public?	☐	☐	☐	☐
• Services as a title agent?	☐	☐	☐	☐
• An attorney or non-attorney who causes personal injury?	☐	☐	☐	☐

All prior acts of the firm and all members of the firm, including employees, when the insured, prior to the policy period, had not notified any previous insurance company of any act and the insured had no reason to believe a breach of professional duty had occurred? (See endnote.)

Does this coverage include:				
• Prior acts of attorneys for professional services before joining the firm?	☐	☐	☐	☐
• Prior acts of attorneys and the firm for professional services with the firm before inception of the policy?	☐	☐	☐	☐
• An attorney acting as a trustee, executor, administrator, guardian or conservator?	☐	☐	☐	☐
• Investment advice?				
• Pre- or post-judgement interest, appeal bonds, and related costs?	☐	☐	☐	☐
• Claims first made and reported during the policy period?	☐	☐	☐	☐
If so, does the policy provide coverage:				
• Regardless of when the error occurred? Or	☐	☐	☐	☐
• Only if the error, as well as the claim was made during the policy period?	☐	☐	☐	☐

Question	Carrier A Yes	Carrier A No	Carrier B Yes	Carrier B No
• Claims first made after the expiration of the policy, assuming that the insured:	☐	☐	☐	☐
(1) had reasonable knowledge that a wrongful act occurred and a claim might be made, and	☐	☐	☐	☐
(2) reported the suspected wrongful act to the insurance company during the policy period?	☐	☐	☐	☐
• An optional extended reporting period?	☐	☐	☐	☐
• If so, for what period(s) of time is the extended reporting period available?	☐	☐	☐	☐
• Is there a separate, additional limit of liability?	☐	☐	☐	☐
• Are there limitations on the types of persons eligible?	☐	☐	☐	☐
• Are there stipulations that the extended reporting period option is exercisable only by the named Insured and not by "Other Insureds")?	☐	☐	☐	☐
• Within what time period after expiration of the policy must this option be exercised?	☐	☐	☐	☐
• Is the premium and availability of the extended reporting period guaranteed?	☐	☐	☐	☐
• Is the extended reporting period available if an insured's license to practice is revoked?	☐	☐	☐	☐
• An optional retired or non-practicing attorney's extended reporting period?	☐	☐	☐	☐
• If so, for what period(s) of time is the extended reporting period available?	☐	☐	☐	☐
• Is there a separate, additional limit of liability?	☐	☐	☐	☐
• Are there limitations on the types of persons eligible?	☐	☐	☐	☐

Question	Carrier A Yes	Carrier A No	Carrier B Yes	Carrier B No
• Are there stipulations that the extended reporting period option is exercisable only by the Named Insured (and not by "other Insureds")?	☐	☐	☐	☐
• Within what time period after expiration of the policy must this option be exercised?				

Exclusions to Coverage

Key issues to consider:

• Is the coverage excluded for any services crucial to the firm (e.g. securities, real estate)?	☐	☐	☐	☐
• Are the activities of members of the firm as officers or directors excluded?	☐	☐	☐	☐
• Does the policy exclude other business pursuits with clients of the firm?	☐	☐	☐	☐
• Are acts in a dual capacity as a lawyer and officer, director or business partner with a client excluded.	☐	☐	☐	☐
• Does the policy exclude coverage for claims brought by regulatory agencies?	☐	☐	☐	☐

Is the coverage excluded for:

• Dishonest acts?	☐	☐	☐	☐
• If so, is coverage afforded to innocent parties?	☐	☐	☐	☐
• Fraudulent acts?	☐	☐	☐	☐
• If so, is coverage afforded to innocent parties?	☐	☐	☐	☐
• Malicious acts?	☐	☐	☐	☐
• If so, is coverage afforded to innocent parties?	☐	☐	☐	☐
• Vicarious liability (liability acquired by law or by contract for the acts, errors or omissions of others)?	☐	☐	☐	☐

Question	Carrier A Yes	Carrier A No	Carrier B Yes	Carrier B No
• Claims made by or against a business enterprise owned or controlled by an insured? (Refers to claims by or against the business itself)	☐	☐	☐	☐
• Claims arising out of or in connection with a business enterprise owned or controlled by an insured? (Refers to third-party claims)	☐	☐	☐	☐
• Activities as an officer, director, partner, trustee or employee of a business not named in the policy? (Refers to an insured's activities as an officer, director, etc. of a business not owned or controlled by the insured)	☐	☐	☐	☐
• Acts in a dual capacity as both a lawyer and as an officer or director?	☐	☐	☐	☐
• Acts involving business pursuits with clients?	☐	☐	☐	☐
• Services as a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA)?	☐	☐	☐	☐
• RICO (Racketeer Influenced and corrupt Organization Act) claims?	☐	☐	☐	☐
• Activities as an elected public official?	☐	☐	☐	☐
• Worker's compensation claims?	☐	☐	☐	☐
• Advertisers' liability?	☐	☐	☐	☐
• Loss sustained as a beneficiary or distributee of a trust or estate?	☐	☐	☐	☐
• Bodily injury or property damage?	☐	☐	☐	☐
• Real estate claims?	☐	☐	☐	☐
• Claims by regulatory agencies?	☐	☐	☐	☐
• Notarization of a signature without the physical appearance of the signatory?	☐	☐	☐	☐

Question	Carrier A Yes	Carrier A No	Carrier B Yes	Carrier B No
• Claims involving an insured versus another insured?	☐	☐	☐	☐
• Discrimination?	☐	☐	☐	☐
• Sexual harassment?	☐	☐	☐	☐
• Prior acts (acts committed before the policy period) where the insured had knowledge of or should have foreseen the claim?	☐	☐	☐	☐
• Investment advice?	☐	☐	☐	☐
• Securities work or SEC claims?	☐	☐	☐	☐
• Punitive damages?	☐	☐	☐	☐
• Fines, statutory penalties and sanctions?	☐	☐	☐	☐
• Business enterprises liable for contamination or pollution of the environment?	☐	☐	☐	☐
• Loss to nuclear reaction, radiation or contamination?	☐	☐	☐	☐

Defense and Settlement Provisions

Key issues to consider:

• Who selects defense counsel?				
• Is the insured's consent required to settle claim?	☐	☐	☐	☐
• Is the agreement to defend claims sufficiently broad to offer full protection?	☐	☐	☐	☐

Does the policy provide for:

• Selection of defense counsel by the insurance company or by the insured? (See endnote.)				
• If the insured has the right to select defense counsel, does the insurance company restrict this right in any way (e.g. by retaining the right to approve the choice of defense counsel in advance or the right to require the insured to revoke the selection)?	☐	☐	☐	☐

Question	Carrier A Yes	Carrier A No	Carrier B Yes	Carrier B No
• The insured's consent required to settle a claim?	☐	☐	☐	☐
• If so, does the policy provide for a limit of payment by the insurance company if the insured refuses to settle?	☐	☐	☐	☐
• Arbitration of a coverage dispute between the insurer and the insured?	☐	☐	☐	☐
Limits of Liability				
Key issues to consider:				
• Are claim expenses included in the limits of liability?	☐	☐	☐	☐
• Are limits of liability per claim or annual aggregate?	☐	☐	☐	☐
• How are two or more related claims treated?	☐	☐	☐	☐
• How are claims against multiple INSUREDS treated?	☐	☐	☐	☐
• Are deductibles per claim or annual aggregate?	☐	☐	☐	☐
• Is a "loss only" deductible option available?	☐	☐	☐	☐
Does the policy provide:				
That claim expenses are included in the limits of liability?	☐	☐	☐	☐
• If so, does the policy provide a claim expense allowance?	☐	☐	☐	☐
• Limits or liability for each claim?	☐	☐	☐	☐
• Annual aggregate liability on a firm basis?	☐	☐	☐	☐
• That two or more claims arising out of a single act or series of acts are considered a single claim with a single set of limits?	☐	☐	☐	☐

Question	Carrier A Yes	Carrier A No	Carrier B Yes	Carrier B No
• If so, does the policy provide that the policy year the first act is reported is considered the claim reporting date?	☐	☐	☐	☐
• That if a claim is made against multiple INSUREDS, all sets of limits form all applicable policies apply (rather than just one set of limits)?	☐	☐	☐	☐
• A per claim deductible?	☐	☐	☐	☐
• An aggregate deductible?	☐	☐	☐	☐
• That the deductible applies to:				
• Loss payments only? Or	☐	☐	☐	☐
• Claim expenses and losses?	☐	☐	☐	☐

Conditions of Coverage

Key issues to consider:

• Is there a requirement to give notice to the insurance company of claims or potential claims?	☐	☐	☐	☐
• At what point does your claim get reported and to whom?	☐	☐	☐	☐
• Are there requirements concerning changes in the firm?	☐	☐	☐	☐
• Is the carrier experienced in professional liability claims administration?	☐	☐	☐	☐

Does the policy:

• Require timely notice to the insurance company of all claims and potential claims?	☐	☐	☐	☐
• Require the assistance and cooperation of the insured?	☐	☐	☐	☐

Question	Carrier A Yes	Carrier A No	Carrier B Yes	Carrier B No
• In the event of any payment by the insurer, transfer the insured's rights of recovery to the insurance company (subrogation)?	☐	☐	☐	☐
• Provide coverage in excess of other available insurance?	☐	☐	☐	☐
• Provide coverage for innocent attorneys in cases where one member of the firm fails to meet the conditions of the coverage?	☐	☐	☐	☐
• Cover changes in the firm automatically until renewal?	☐	☐	☐	☐
• Provide for arbitration of the underlying malpractice claim?	☐	☐	☐	☐
• Is arbitration required?	☐	☐	☐	☐
• Is arbitration permitted?				
• Is arbitration prohibited without the insurance company's consent?	☐	☐	☐	☐
• Provide at least a 30-day notice of cancellation by the insurance company?	☐	☐	☐	☐
• Provide, if the policy is canceled by the insurance company, that the premium returned will be figured on a "short rate" or "pro rata" basis?	☐	☐	☐	☐
• Provide, if the policy is canceled by the insured, that the premium returned will be figured on a "short rate" or "pro rata" basis?	☐	☐	☐	☐

Endnotes

Prior Acts Coverage: In order to have a retroactive date on the Declaration sheet, you must have prior acts coverage. Prior acts coverage is an extremely important item. Make sure that, if at all possible, your policy covers all prior acts of the firm and of all of the individual members, including non-attorney employees.

Right to Select Defense Counsel: The policy language may explicitly state the right of the insurance company to select defense counsel (e.g. "Selection of defense counsel will be a the prerogative of the Company"), or the right may be implied in the right to defend (e.g., "The Company shall have the right and duty to defend any claim").