New Lawyers Guide to Professional Liability Insurance

Guide for New Attorneys in Minnesota Practicing in a Solo Setting

Even though malpractice insurance is a good investment, cost matters when you're just starting out. MLM’s New Lawyers Program provides the protection you need at a price “new lawyers” can afford.

DETAILS INSIDE!

Whitepaper from a Malpractice Insurance Company’s Perspective
New Lawyers Guide to Professional Liability Insurance

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Introduction

There are many types of insurance coverage to consider for your new law firm. The most important of which is malpractice insurance. You should have malpractice insurance in place before you begin the practice of law. The best advice we can provide is this...do not practice law without malpractice insurance!

The Phenomenon of the Uninsured Lawyer

There are many reasons why a lawyer might choose to practice uninsured. Some of the more common (and most overlooked) reasons include the following: the belief that they are immune from claims because of their legal expertise; the nature of their practice (i.e., areas prone to claims activities); and the relationship with their client (they wouldn’t sue me, we’re friends). Then too, some lawyers believe that the threat of malpractice claims is overrated and does not justify the cost of coverage. There are those who believe that the risks are real, but feel that their practice cannot bear the cost of insurance and, amazingly, others who feel that the best defense in the event of a claim is lack of insurance, thereby making them less appealing as a "target" for contribution.

Obviously, there are those who for one reason or another, are unacceptable to the insurance market and must perforce remain uninsured. Finally, there are those who probably just forget or don't take time to secure coverage. It may be impossible to change the attitudes of lawyers who practice without insurance, but there should be no illusions about the consequences. No private practice lawyer is immune from a malpractice claim unless they represent only themselves. Superior knowledge and good work habits do not guarantee immunity. Since malpractice begins as an opinion and must later be proven as fact, demonstrating innocence can be just as expensive as indemnifying a legitimate injury. These claims really do happen and are happening more frequently.

The false thrift of going bare becomes painfully clear if a lengthy court action takes the lawyer away from their practice (thereby cutting into earnings), or if defense counsel must be paid out of pocket. A malpractice claim is never expected and virtually impossible to predict. The sharing of significant financial risk through common pooling of resources, that is, an insurance program, is still the most economical way to protect a law practice. If the premium is unaffordable, how much more so the cost of even an average malpractice claim.

In addition to protecting the practice, there is the important question of protecting the client. I’m not aware of any evidence suggesting that aggrieved parties refrain from suing their lawyer if they believe him to be uninsured. On the contrary, many disasters have befallen lawyers in just such a position. In any case, the image of a lawyer practicing in an asset-free firm with a client-be-damned attitude is hardly one to be admired or sought after and sets up negative perceptions in the public mind. Having professional liability coverage demonstrates the proper level of ethical responsibility to the client.

While we cannot completely evaluate the phenomenon of the uninsured lawyer, we sincerely hope that those currently without coverage will seriously rethink the wisdom of their position, for the sake of both lawyers and their clients.
IMAGINE THE WORST AND PREPARE FOR IT

Advice from Author of “Solo by Choice” Carolyn Elefant, Esq.

One absolute rule I have for new solos is that they must purchase malpractice insurance. In the interest of full disclosure, though, I do admit to not following my own advice during my first three years of practice! Back then, I was young and cocky, and I calculated that my potential exposure was low given my regulatory practice, my “long shot” litigation matters and criminal defense work.

One absolute rule I have for new solos is that they must purchase malpractice insurance.

I assumed legal malpractice insurance was as costly as health insurance and probably couldn’t afford it. I had a nothing-to-lose attitude back then, figuring that if anyone sued me, I’d simply pack up my firm and walk away. I have so much invested in my practice that I am unwilling to sacrifice my firm if a client sues me.

Also, after a couple of close calls, I realize that – despite my diligence – I am only human, and capable of mistakes that could morph into a grievance or a malpractice action. Once I understood this, the purchase of malpractice insurance to protect myself from future claims was better than berating myself for my mistakes, or worse, waking in a cold sweat in the middle of the night.

When I finally shopped around for malpractice insurance and spoke with other solo and small firm lawyers, I discovered that it was not as expensive as I had thought.

FACTORS TO CONSIDER

BUSINESS OPPORTUNITIES A factor to consider is whether you need malpractice coverage for business opportunities. Some referral services will not refer cases to lawyers who do not carry sufficient malpractice coverage. Many times, an RFP (request for proposal) for legal services also require coverage. Even law firms and attorneys who retain lawyers for per diem or contract work often require some amount of malpractice coverage. In short, malpractice insurance is a worthwhile investment economically if it allows you to take advantage of lucrative opportunities that would not otherwise be available in the absence of coverage.

DEGREE OF EXPOSURE Quite frankly, your own assessment of your degree of malpractice exposure should not serve as the deciding factor in your decision regarding coverage. Because even though the chances of a client actually winning a malpractice action against you and collecting a judgment are probably low, it doesn’t take much for a client to initiate such an action in hopes of pressuring a quick settlement – or worse, to file a bar complaint which, if unfavorably resolved, can cause damage to your reputation and lead to a suspension. These days, many legal malpractice plans cover the cost of defense both in malpractice actions in court and, equally importantly, in grievance procedures where lawyers who are represented almost always fare better than those who participate pro se. Thus, malpractice insurance buys you the peace of mind, and gives you one less thing to worry about when that client who initially seemed so reasonable starts threatening a grievance. Moreover, if your risk of exposure is low anyway, you’ll probably be able to find a relatively inexpensive coverage plan.

PRACTICE AREAS & AFFORDABILITY Even though malpractice insurance is a good investment, cost matters when you’re just starting out. There are some practice areas where malpractice insurance can be prohibitively expensive. You might consider dropping that practice area or figuring out other ways to do it – maybe on contract basis for another firm – that will limit your exposure and the concomitant costs of coverage.
In recent years, legal malpractice insurers nationwide have seen increases in the frequency of claims. At MLM, over half of all reported claims are closed without any payment, which usually means the claims lack merit. While this is good news, the threat of a malpractice claim should be of grave concern to every practicing attorney because even claims that lack merit can be expensive to defend, and even one viable claim can have devastating financial effects on an uninsured lawyer.

There are three reasons why a lawyer should not practice without insurance:

1. **To avoid the financial drain of defending claims.** Today some attorneys are “going bare” (i.e., practicing without any professional liability insurance) despite an overall increase in claim frequency. The cost of defending a single claim, whether meritorious or not, can have a devastating financial impact upon a non-insured lawyer. A lawyer who is not insured can lose his non-exempt personal assets as the result of just a single claim. For example, so can an underinsured lawyer.

2. **For the protection of the public.** As a matter of public policy – and personal professionalism – lawyers should not leave their clients unprotected in situations where an attorney’s negligence may have damaged the client.

3. **To protect the lawyer’s personal assets in the event of settlement or judgment.** Malpractice claims can be difficult to foresee, and can be costly whether malpractice can be proven or not. One claim can wipe out years of work in building a successful practice, as well as the personal assets of the attorney. You may never have to use a professional liability policy, but it is extremely risky not to have one.

**CLAIM STATISTICS**

One of the top ten malpractice traps is the unwillingness to believe it could happen to you. According to the ABA's Lawyers Desk Guide to Malpractice, attorneys in private practice have 4-17% chance of being sued for malpractice each year depending on their jurisdiction and area of practice.

Data published by the ABA Standing Committee on Legal Malpractice (2012) indicates new trends in lawyers’ professional liability may be emerging. Some practice areas have become more hazardous for lawyers and the ethical errors that lawyers are most likely to commit are changing. The following presents findings on Types of Errors, Practice Areas, Practice Size and Experience.

**What are the practice areas with the highest risk?**

Practitioners in Real Estate law (both residential and commercial) along with Plaintiff’s Personal Injury tend to report the most malpractice claims. When looking at malpractice claim volume, the fastest rising practice area is Bankruptcy which also includes malpractice claims arising out of debt collection activities. Although some of the areas on the chart are quite small, such as Intellectual Property and Securities work, they tend to make up for their lack of volume in claim severity – meaning the claim matters in those areas are typically very expensive to resolve.
Does size of firm pose any risk hazards?
Malpractice insurers have noticed that firm size can sometimes be an indicator of the likelihood a firm will report a malpractice claim. Lawyers in firms of 2-5 attorneys only make up 14% of lawyers in private practice yet they report 32% of the malpractice claims. We believe that the disparity in malpractice claims for some firms often can be attributed to a firm’s lack of office systems for maintaining adequate oversight.

What are the most common alleged errors?
Most malpractice claims (about 45%) involve Substantive errors made by lawyers. Those are matters where the lawyer thought they knew the law but it turns they didn’t. Other categories of errors alleged against lawyers are Client Communication errors, Administrative errors, and Intentional wrongs. Administrative errors and Client Communication errors are the most preventable mistakes that lawyers make, yet together they are the basis for over 40% of the malpractice claims asserted against lawyers. The most frequent error made by lawyers is “failure to know the law.” Recently, administrative errors such as “Procrastination” and “Lost File, Document, or Evidence” went to the top of the chart, placing them in the top five most reported errors alleged against lawyers in a malpractice claim.

How does experience effect claim frequency?
Data suggests it is not all the new lawyers reporting the malpractice claims. In fact, when looking at reported claims by lawyer experience, the group reporting the most has been in practice 11 to 20 years. What explains this result? It primarily has to do with the fact that the more experienced lawyers have more of a “Tail” which means more matters from their past can come back and haunt them as a malpractice claim. Other factors contributing to this is the fact that the more experienced lawyers tend to take on more matters, the matters they take on tend to be more complex, they also tend to oversee other lawyers work which puts them at risk if the other lawyer is the one who makes the mistake.
TIPS TO AVOID MALPRACTICE CLAIMS

According to the American Bar Association, one of the top ten legal malpractice traps is the unwillingness to believe it could happen to you. The truth is, a lot of bad lawyers get sued for legal malpractice. But so do really good lawyers, new lawyers, old lawyers, big firm lawyers, and solo practitioners. So be careful, buy insurance, and take steps to avoid claims.

1. **Don’t be afraid to turn down a client.** The pressure to land new clients is a fact of life. However, the most important client to your practice may be the one you turn away. Frequently, lawyers sued for legal malpractice will say they knew at the outset they should not have taken on the client who sued them. Beware of clients who fired their previous counsel or who have been turned down by other lawyers. Think twice about a client who has more litigation experience than you do or the one who has nothing good to say about lawyers or the legal system. But most importantly, run from the clients who just don’t feel right. Chances are you have good instincts. Learn to trust them.

2. **Don’t forget the small cases.** There is a case that has been sitting on the corner of your desk, the end of your credenza, or the bottom of your pile, and you just cannot bring yourself to pick it up. You tell yourself you will work on it tomorrow, or the next day, or next week, because today you must devote attention to your big cases and your big clients. This is the attitude that will get you sued. Only rarely are lawyers sued by their most important clients or on the cases where they spend a great deal of time. Almost always it is the small case or the difficult client lawyers will neglect. The truth is, there are no small, insignificant cases or transactions on your docket.

3. **Use effective retention agreements.** A central but often overlooked issue in legal malpractice cases is the existence and scope of the attorney-client relationship. Lawyers frequently get sued by people they never thought they represented, or by clients they know they represent but on matters they did not think they were engaged to handle. Preparing specific engagement letters can help prevent these suits, or at least they can provide strong defenses if you are sued. The engagement letter need say nothing more than this: “Thank you for retaining me to represent you in the lawsuit entitled Smith v. Jones, now pending in the Third Judicial District Court, case no. 01-00345. Although I would be happy to represent you in other matters should the need arise, this current representation will be limited to the Smith v. Jones case.” Moreover, many lawyers represent clients on multiple matters. Although it may seem like a hassle at the time, preparing separate engagement letters for each new matter, and avoiding general representations such as “corporate advice” or “general business matters,” could be your salvation in a legal malpractice case.

(Continued on page 6)
4. **Manage your clients’ expectations.** Many clients’ exposure to the legal system is limited to what they see on television, which usually gives them unrealistic expectations about what you and the legal system can do for them, how long it will take to do it, and how much it will cost. Clients almost always believe their position is the correct one, and they expect to be vindicated in the courtroom or across the transaction table. Rarely do they view their legal predicament with objectivity, so they need their lawyer to explain concepts like the adversarial system, the neutral fact finder, varying interpretations of the law, competing policy concerns, inherent delays of litigation, controllable and uncontrollable expenses, and unpredictable outcomes.

5. **Return your phone calls.** Lawyers who get sued for legal malpractice almost invariably violate this rule. There is nothing clients resent more than being ignored by the lawyer they are paying to look out for their interests. Combined with unfulfilled expectations, unreturned phone calls make clients angry with their lawyer. A lawsuit is a predictable result.

6. **Don’t sit on your mistakes.** Most lawyers pride themselves on fixing the mistakes of their clients, not making mistakes themselves. So when they do make mistakes – and all of us do – they naturally are embarrassed and instinctively want to prevent anyone else from knowing. But the biggest mistake of all usually is trying to hide your mistakes. Lawyer mistakes do not go away, they fester and grow. There is no need to make a public announcement, but talk to a partner or a trusted colleague for some objective advice. And most importantly, tell your client. Frequently, there is a solution to the problem, and if there is not, the last thing you want is a failure to disclose to add to a negligence claim.

7. **Think twice before suing to collect unpaid fees.** Being a lawyer carries an implied threat of suing anyone who crosses you. So you might get some mileage out of mentioning your occupation to an insurance representative trying to deny your coverage request, or to an auto mechanic trying to overcharge you. But throwing your legal weight around by suing clients when they fail to pay will land you in a legal malpractice suit ten out of ten times. There are times when suing your clients might be justified, just be aware of the certainty of a counterclaim and be confident you can prevail.

8. **Be diligent in billing and collecting fees.** The corollary to the rule against suing clients for fees is to keep your billings and collections under control so you are not tempted to sue. If you do not bill for three or four months at a time, your receivables may grow to the point where you cannot afford to walk away. The same may be true if you bill regularly, but do not collect. You do not have to work for free, and even your deadbeat clients will not expect you to. But they will take advantage of you for not billing and collecting regularly, leaving you in the awkward position of having to continue working pro bono or seeking to withdraw for non-payment, which almost assures you will not get paid without suing.

9. **Write it in your calendar, and then write it in another calendar.** The number one cause of legal malpractice, by an overwhelming margin, is missed deadlines. Most lawyers have a false sense that something so easy as meeting a deadline is not so hard. But the reality is that deadlines change, compete with other deadlines, and are just plain forgotten. So make a habit of writing all of your deadlines in your calendar, and then have a secretary or docket clerk make a backup calendar. And most importantly, remember to review your calendars daily.

10. **Look for conflicts, not away from them.** Few things look worse in a legal malpractice case than conflicts of interest. Conflicts frequently arise in non-litigation contexts, such as when the estate planning lawyer represents a trustor, trustee, and beneficiaries at the same time; when the real estate lawyer represents multiple members of a development joint venture; or when the corporate lawyer represents the buyer and the seller in a small transaction. For litigators, common conflicts traps include taking different positions on the same legal issue or representing the adversary of a former client in a factually related matter. Most potential or actual conflicts can be foreseen and resolved at the outset of a matter with an inquiry or a conflict waiver letter, which in the long run is a lot less trouble than taking a chance and getting sued.
In this tough economic climate, more and more new lawyers are starting their own practice. MLM’s New Lawyers Program provides a policy with a relatively low limit to give new attorneys an affordable option while avoiding the risk associated with “going bare.” Visit www.mlmins.com to complete an online application.

**POLICY**

**COVERAGE**
- Limits of $200,000/$600,000
- $1,000 Per Claim Deductible
- No Prior Acts Coverage
- Securities Exclusion and Patent Law Exclusion Endorsements

**ANNUAL PREMIUM SCHEDULE**
- Low set premiums of $250 the first year and $500 the second year– after the second year, you move into the regular premium rating program

**ELIGIBILITY**
- You must have become licensed in Minnesota within the last three years (and not previously admitted in another state)
- You are currently a solo practitioner
- You are discipline free
- You have or intend to have acceptable Docket Control and Conflicts of Interest checking systems
- No malpractice claims have been made against you
- You are not aware of any facts which could reasonably result in a claim being made against you
- Meet nominal underwriting requirements

**NEW LAWYERS PROGRAM GUARANTEES**
- After the first year in the New Lawyers Program, your policy is guaranteed to be renewed for one additional year, if you still qualify. This renewal guarantee is subject to your annual compliance with the original Eligibility Requirements set forth above and any applicable underwriting guidelines. Failure to meet any one of these qualifications and guidelines may void the guarantee.

**COMPREHENSIVE RISK MANAGEMENT SERVICES**
In addition, MLM offers an array of the comprehensive risk management services:

- **Webcast & On-Demand Education**
  Offering up to 5 hours of CLE each year (3 Webcasts & 2 On-Demand). A value of $345!

- **Electronic Access to Practice Resources**
  Forms, checklists, articles, booklets and more!

- **Risk Management HotLine**
  Personalized claim avoidance, practice management and ethics advice.
WHY MINNESOTA LAWYERS MUTUAL?

MLM started during troubled times. In the 1970s, professional liability insurance prices skyrocketed as a result of the increasing numbers of claims and a troubled economy. At the recommendation of the Minnesota State Bar Association, a task force was established to consider a solution to the problem. The task force recommended the formation of a mutual insurance company with the dual responsibility of providing legal professional liability insurance and risk management services to the state's legal community. MLM was part of a trend in a handful of states where bar groups founded mutually-owned, bar-related insurance carriers.

MLM opened for business on April 19, 1982. Many of the lawyers who led the drive still serve on MLM's board, and the task force chair, Bert Greener, was named board chair for the new company – a position he still holds to this day.

The company continues to stress high-quality service and loyalty to the lawyers who are the reason for the company’s existence.

We’re looking ahead...

Today, we continue the storied tradition of those who founded this company – ensuring the legal community that MLM understands the issues lawyers face, and are going to face.

We’re here to help...

MLM has accomplished much in support of lawyers, but there is plenty more to be done. The strength of our company positions us as a leader in our industry, due in a large part to our response to the unique needs of our constituents and competitive pricing.

We welcome you...

Unlike other legal malpractice insurance companies who see you as a policyholder, MLM views you as an owner with a stake in the company. Having been founded by attorneys and still run by attorneys, MLM is closely aligned with your interests.

Learn more about Minnesota Lawyers Mutual and its New Lawyers Program by visiting www.mlmins.com or calling Chad Mitchell-Peterson at (800) 422-1370 ext. 9681 or chad@mlmins.com

Minnesota Lawyers Mutual Insurance Company
333 South 7th Street, Suite 2200, Minneapolis, MN 55402
## FREQUENTLY ASKED QUESTIONS

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<th>Why did MLM create the New Lawyers Plan?</th>
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<td>A</td>
<td>It is MLM’s belief that lawyers wish to carry malpractice insurance if they can find a reasonably priced policy. The New Lawyers Program is designed to assist new-to-practice attorneys in establishing their private practice by providing professional liability insurance at an affordable price.</td>
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<th>What additional benefits come with being a Minnesota Lawyers Mutual insured?</th>
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<td>As a lawyer-founded, lawyer-owned, and lawyer-led organization, we consider you to be a member of Minnesota Lawyers Mutual, not merely a policyholder. As a member, you enjoy tangible benefits, including the potential for dividend distributions and a wide array of tools and support, designed to strengthen your practice and manage risk.</td>
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<td>The following are the eligibility requirements:</td>
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<td>• Licensed in Minnesota within the last three years (and not previously admitted in another state)</td>
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<td>• You are currently a solo practitioner</td>
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<td>• You are actively licensed with the Minnesota State Bar</td>
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<td>• You are discipline free</td>
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<td>• No malpractice claims have been made against you</td>
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<td>• You are not aware of any facts which could reasonably result in a claim being made against you</td>
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<th>How do I know when I have enough business at my new law firm to justify purchasing a lawyers’ professional liability policy?</th>
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<td>A</td>
<td>The analysis is not really how many clients you have, but rather what is your potential exposure given your practice area, as well as your assets. You should be thinking about what a malpractice lawsuit will potentially cost you in terms of damages and, equally importantly, defense costs, and whether you want to buy protection against that risk.</td>
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<th>Does this policy cover part-time work?</th>
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<td>A</td>
<td>This policy makes no distinction between part-time and full-time work. The premium most likely compares favorably with part-time rates offered by other carriers. It’s worth mentioning, the policy makes no distinction between paid work or pro bono work.</td>
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<th>What if I accept a position at a firm or leave private practice?</th>
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<td>A</td>
<td>There’s no penalty for canceling the policy midterm. We will return any unused premium to you. If there is any change in status midterm, please call us to discuss your options.</td>
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