

# Lawyers' Professional Liability Insurance: Why You Need It and Where to Get It

by Christopher B. Little

**D**o you have at least \$20,000 to defend a civil suit or more than \$10,000 to defend an investigation by the Colorado Supreme Court Office of Attorney Regulation Counsel (OARC)? If the answer is no, and you don't have lawyers' professional liability insurance (LPLI), please take a moment to ask yourself why not.

LPLI might not be the most exciting topic, but it's an important one. This article explains the role of LPLI and the reasons for purchasing it. It also addresses the relationship between the Colorado Bar Association and the endorsed relationships it enjoys with ALPS Malpractice Insurance on a direct basis and HUB International as its broker.<sup>1</sup>

## The Role of LPLI

In 2009, the Colorado Supreme Court, pursuant to CRCP 227(c), began requiring all private practice attorneys to disclose whether they carry LPLI. This disclosure is available to the public through the Office of Attorney Registration.<sup>2</sup> Although LPLI may help protect the public, its fundamental goal is to protect the insured. LPLI can protect the lawyer from career-ending claims or illegitimate suits and grievances. The concepts of the "case within the case" and doctrines like strict privity are not designed for enhanced client recovery, but rather to protect lawyers from unsubstantiated claims.<sup>3</sup> Lawyers are not guarantors of client actions, decisions, or outcomes in lawsuits:

A lawyer does not guarantee results. He merely undertakes to use his best skill and judgment. A result unsatisfactory to the litigant scarcely justifies a suit charging the lawyers with fraud and conspiracy. Efforts of a lawyer to obtain an amicable disposition do not subject him to a charge of treason.<sup>4</sup>

Attorneys cannot be guarantors of success. Advising on risk is the nature of the business.<sup>5</sup> The attorney's choice to purchase LPLI is a business decision, and it should be an informed one.

## Who Needs LPLI?

Without question, solo and small firms of two to five lawyers have the greatest percentage of claims brought against them. A recent white paper by the American Bar Association (ABA) stated that 66.24% of all claims brought against attorneys between 2011 and 2015 involved solo and small firms.<sup>6</sup> The ABA reported that the leading area of law for claims during this same four-year period was personal injury–plaintiff, followed by collection/bankruptcy, estate, trust/probate, and family law.<sup>7</sup>

Significantly, OARC determined that in 2016 nearly 2,300 solo firm practitioners did not carry LPLI.<sup>8</sup> This represents approximately one-third of all private attorneys in Colorado who identify themselves as a solo practitioner.<sup>9</sup>

This statistic is concerning because no attorney is immune from risk.<sup>10</sup> To protect themselves from claims, whether catastrophic or nuisance, all attorneys should consider purchasing LPLI. Attorneys are generally forbidden from limiting liability to a client.<sup>11</sup> The rules about corporate structure and efforts to create companies to limit liability do not apply to attorneys. In fact, CRCP 265 addresses the need for an attorney to have insurance if a corporate structure is established. Many in the industry agree that carrying LPLI is a responsible business decision for the lawyer to make.<sup>12</sup>

Acknowledging the need for LPLI is an important yet straightforward first step. The next step—choosing a policy—is more nuanced. Questions to ask when selecting LPLI include: What are the limits? What is a reasonable deductible? Should costs and fees be inside or outside of coverage?<sup>13</sup> What consent to settle authority is granted to the firm? Does a hammer clause exist? Additional considerations include the definition of "professional services," prior acts coverage, gaps in coverage, retroactive dates, disciplinary proceedings defense, loss of earnings coverage, subpoena coverage, privacy breach investigation, coverage for network and privacy breach, retirement or extended reporting periods, extended reporting (tail)



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coverage, and employment practices liability insurance (EPLI) coverage. The range of LPLI continues to grow.

### What about Cyber Liability Protection?

Although antiquated, Colorado statutory provisions regulate some of the issues attendant to a data breach. CRS § 6-1-715 regulates the confidentiality of social security numbers, and CRS § 6-1-716 specifies what lawyers must do if they encounter a security breach. Specifically, CRS § 6-1-716(2) states that attorneys who become aware of a security breach are obligated to:

conduct in good faith a prompt investigation to determine the likelihood that personal information has been or will be misused. The individual or the commercial entity shall give notice as soon as possible to the affected Colorado resident unless the investigation determines that the misuse of information about a Colorado resident has not occurred and is not reasonably likely to occur. Notice shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement and consistent with any measures necessary to determine the scope of the breach and to restore the reasonable integrity of the computerized data system.

The Colorado Rules of Professional Responsibility also address a lawyer's duty to safeguard client information in cyberspace. For example, Colo. RPC 1.6(c) requires attorneys to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."<sup>14</sup>

As an attorney, are you ready to respond to a cyber-attack? Ransomware? Cyber-extortion? According to a recent publication from the ABA's Standing Committee on Lawyer's Professional Liability, "the majority of law firms today have some kind of information technology exposure to their firm's operations."<sup>15</sup> CNA reports that 59% of cyber claims stem from human error and hacking, with 12% attributed to lost or stolen laptops.<sup>16</sup>

Cyber exposure alone should cause a reasonable attorney to evaluate or reevaluate insurance coverage. In fact, purchasing a stand-alone cyber policy may be prudent. Cyber liability insurance can greatly minimize the negative effects of a breach, which can result in lawsuits, regulatory investigations, fines and penalties, and diminished reputation.<sup>17</sup> Most standard LPLI policies offer only minimal protection.

An attorney cannot necessarily prevent a data beach, but with the appropriate cyber-liability protection and prevention tips from a carrier, an attorney can minimize the risks.

### Risk Management and the CBA

The CBA has gone to great lengths to assist lawyers in evaluating the prospects for LPLI. The CBA Lawyers Professional Liability Committee was created in the 1980s in response to the failure of the LPLI market generally, and specifically, the collapse of programs offered by the specialty lines of the Home Insurance Company. At that time, Home was the primary insurer of attorneys and was reeling from the high inflation in the late 1970s and the poor pricing decisions of carriers writing LPLI policies.

As a result of the precarious financial world at that time, the LPLI market entered into a hard market and most attorneys were unable to find affordable LPLI. With assistance from the ABA, insurance industry carriers began offering "claims made" policies to attorneys.<sup>18</sup> In states where insurance could not be obtained, the ABA worked with state bar associations to explore the feasibility of establishing state-based captive LPLI companies (generally referred to by the profession as NABRICO companies<sup>19</sup>). ALPS was one of the original NABRICO companies, established as the nation's first multi-state bar endorsed insurance carrier, and today enjoys more state bar endorsements than any other carrier regardless of size (including states like Virginia, Washington, and now Colorado), with a specialty emphasis on small firms (fewer than 50 employees) and solo practitioners.

Since the inception of the LPL Committee, the CBA has created a mutual relationship with an insurance company, or more accurately, an insurance broker. This is confusing to many. At one time, the carrier was the Westport Insurance Company and the broker was Sedgwick. In the early 2000s, Sedgwick was acquired by Marsh. Marsh then brokered a deal with CNA to provide the paper (i.e., the insurance contract) that many CBA members purchased.<sup>20</sup> CNA acted through an exclusive relationship with Marsh and wrote insurance policies in this capacity for approximately 10 years. Then Mercer, acting as a substituted broker to Marsh, assumed responsibility for the management of the bar program in 2013.

The relationship between Mercer and the CBA changed in 2015 when Mercer was replaced by HUB Insurance. HUB was selected because it offers a variety of optional insurance companies. HUB believes that having options enables attorneys to better evaluate coverage and pricing. At this same time, the LPL Committee also created a separate relationship with ALPS as a direct writer

of LPLI insurance (ALPS exclusively writes only LPLI insurance). With ALPS, there is no broker, similar to the models Geico and Progressive use in the auto insurance market. All underwriting, sales and marketing, claim handling, and loss prevention work through ALPS originates directly through their employees.

Why should lawyers investigate the carrier and broker that the LPL Committee currently endorses? During the 1990s and through the Marsh relationship, the carrier—Westport or CNA—agreed to provide financial support to the CBA. They also provided analysis about risks to practice areas and operated a “Hotline” for attorneys who had questions about claims and coverage. The analysis was shared with the LPL Committee and the specific carrier. During this time, the Hotline fielded thousands of calls, which proved to minimize malpractice risk. The Hotline was unique in the field of risk management in that the lawyers answering the Hotline calls created an attorney–client relationship with the caller. Limited and strategic advice was provided and, anecdotally, claims were avoided because the calling lawyer was able to get legal advice, evaluate the situation, and provide timely advice to a client—or in some cases repair a client relationship altogether.

With assistance from Westport and CNA, the LPL Committee began sponsoring CLE programs on preventing legal malpractice and created the CBA-CLE hornbook *Lawyers’ Professional Liability in Colorado*, now in its 18th year of publication.<sup>21</sup> The relationship with these carriers also enabled the LPL Committee to sponsor this “Whoops” column addressing risk management concerns.

HUB, through its agent Tim Elliott, a consultant and liaison to the LPL Committee, is presently evaluating how to manage the Hotline and make “Whoops” more meaningful to Colorado practitioners. ALPS is also an industry leader in providing its policyholders with resources, counsel, and advice in the areas of ethics, law practice management, technology, and practice form aids, primarily through its website at [www.alpsnet.com](http://www.alpsnet.com).

## Conclusion

Despite television commercials suggesting insurance exists to pay victims, LPLI is principally underwritten on the premise that the attorney needs protection from claims, whether unwarranted or legitimate. It is purchased to shield the attorney’s assets from exposure.

Everyone who practices law should have appropriate levels of insurance to protect themselves and their assets from a judgment creditor. Simply hoping to prevent claims because you do not have insurance is not a sound risk management plan.

## Notes

1. CBA members are encouraged to contact HUB or ALPS with questions about LPLI. At HUB, a broker of insurance products, contact Tim Elliott at (303) 382-5171. At ALPS, a direct marketing insurance company, contact Chris Newbold at (800) 367-2577.

2. CRCP 227(c) (“The information provided by the lawyer regarding professional liability insurance shall be available to the public through the Supreme Court Office of Attorney Registration and on the Supreme Court Office of Attorney Registration website.”).

3. See *Baker v. Wood, Ris & Hames*, 364 P.3d 872 (Colo. 2016) (“We decline to abandon the strict privity rule, and we reaffirm that where non-clients are concerned, an attorney’s liability is generally limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation.”); *Allen v. Steele*, 252 P.3d 476, 484 (Colo. 2011); *Boulders at Escalante LLC v. Otten Johnson Robison Neff and Ragonetti, PC*, 2015 COA 85 (“[W]e agree with Law Firm that, to the extent that the damages award was based on Developer’s claimed business losses, the evidence was insufficient as a matter of law to prove that Law Firm’s negligence was the legal cause of those losses. We therefore reverse the judgment in part.”).

4. *Eadon v. Reuler*, 361 P.2d 445, 450 (Colo. 1961).

5. See *Buel v. Holland & Hart*, 851 P.2d 192 (1992) (“[T]he question remains whether defendants, as reasonably prudent attorneys, should have foreseen that the option, as drafted, was likely to result in litigation and whether other attorneys, in similar circumstances, would have taken steps to prevent such a result.”).

6. See ABA Standing Committee on Lawyers’ Professional Liability et al., “Profile of Legal Malpractice Claims: 2012–2015” (ABA Publishing 2016).

7. *Id.*

8. See [www.coloradosupremecourt.com/PDF/PMBR/Attorney%20Malpractice%20Statistics.pdf](http://www.coloradosupremecourt.com/PDF/PMBR/Attorney%20Malpractice%20Statistics.pdf).

9. *Id.*

10. Mihm, ed., *Lawyers’ Professional Liability in Colorado* ch. 13 (CBA-CLE 2015):

Every lawyer is subject to risk. A risk can reveal itself in the form of a claim for legal malpractice or as a complaint to the Office of Attorney Regulation. A risk can mean exposure to mental and physical health problems. Risk management is the lawyer’s dedication to procedures and practices that reduce the risk of error detrimental to the client’s representation. It is a dedication that permeates all aspects of the professional practice and client service. Sometimes, the lawyer fails to focus on the tools that should be in place to minimize risks for the client. At other times, the lawyer pursues tasks for the client with such singularity of purpose that the lawyer fails to effectively manage risks to himself or herself.

11. Colo. RPC 1.8(h).

12. See Cohen, “Professional Liability Insurance—What to Consider When Purchasing Insurance,” 41 *The Colorado Lawyer* 107 (July 2012);

Fleishman, “Potential Perils of the Professional Liability Insurance Policy,” 24 *The Colorado Lawyer* 299 (Feb. 1995); Weiser and Friedman, “What to Look for When Purchasing Professional Liability Insurance,” 25 *The Colorado Lawyer* 89 (Aug. 1996); Little, “2009 Changes to Rule 265 and C.R.C.P. 5.4,” [www.cobar.org/For-Members/Committees/Lawyers-Professional-Liability-Committee](http://www.cobar.org/For-Members/Committees/Lawyers-Professional-Liability-Committee).

13. Some policies carry a “pac-man” condition that reduces the amount of coverage. An insurance contract that states that defense costs are within the limits is a pac-man policy. This means the cost of defending a claim, even if the claim is eventually dropped, reduces the limits of liability.

14. Colo. RPC 1.6(c).

15. Garczunski and ABA Standing Committee on Lawyers’ Professional Liability, *Protecting Against Cyber Threats: A Lawyer’s Guide to Choosing a Cyber-Liability Insurance Policy* (ABA Publishing 2016).

16. CNA reports to ALADN; contact the author for more information.

17. Hudson, Jr., “Cyber liability insurance is an increasingly popular, almost necessary choice for law firms,” *ABA Journal* (Apr. 2015), [www.abajournal.com/magazine/article/cyber\\_liability\\_insurance\\_is\\_increasingly\\_popular\\_almost\\_necessary\\_choice](http://www.abajournal.com/magazine/article/cyber_liability_insurance_is_increasingly_popular_almost_necessary_choice).

18. In *St. Paul Fire and Marine Ins. Co. v. Hunt*, 811 P.2d 432, 434 (Colo.App. 1991), the Court noted that the “fundamental distinction” between occurrence and claims made policies is the peril insured against by each type of policy. An occurrence policy insures against the “occurrence” itself. Once the occurrence takes place, coverage attaches even if the claim is not made until sometime thereafter. Under a claims made policy, the making of the claim is the event and peril being insured, regardless of when the occurrence took place (subject to policy language). (Citations omitted.)

A claims made policy may also be described with respect to its notice provision as a “claims made and reported” contract. Coverage is conditioned on the disclosure of facts that might result in a claim. (Citation omitted.)

19. NABRICO stands for National Association of Bar Related Insurance Companies. See [www.nabrico.com](http://www.nabrico.com).

20. Many attorneys do not know what “paper” their insurance is written on because attorneys are taught little if anything about liability insurance. Occasionally, CBA-CLE offers courses on coverage, but attorneys generally ask their office administrator or their broker what insurance they have.

21. Mihm, ed., *Lawyers’ Professional Liability in Colorado: Preventing Legal Malpractice and Disciplinary Actions* (CBA-CLE 2016). ■