

LIABILITY INSURANCE OF LAWYERS

Rstić J. Milan

Faculty of Management and Economics, Kragujevac, Serbia

Rstić M. Jovan

Jugoimport, Belgrade, Serbia

Petrevska B. Miroslava

Higher Technological School of Business Studies, Šabac, Serbia

Petrevska B. Ljupka

College of Professional Studies of Traffic Management, Niš, Serbia

Abstract: *Lawyers professional liability coverage provides attorneys with liability coverage for financial loss suffered by third parties arising from acts, errors, and omissions in providing professional legal services. In Serbia, as well as in many other countries, a lawyer is obliged to conclude the contract of obligatory liability insurance with a registered organisation that deals with such type of insurance. Also, the lawyer can do this through the Bar deal with an insurance company in a form of a collective obligatory liability insurance for all the attorneys enlisted in its directory. Without it, a lawyer cannot perform his duties and continue with his professional career. For the lawyers, these questions are of crucial and existential significance, and for the judges they are landmarks for solving specific cases, and for the insurance companies they are landmarks to form a new product of insurance in our country. This paper investigates the liability insurance in the world, compares it with Serbia and it follows the introduction of new law regulating this area.*

Keywords: *lawyers, insurance, professional liability, law, legal practice*

1. INTRODUCTION

The tradition of lawyers' profession¹ in Serbia is rather long, having in mind that the northernmost part of Serbia, today's Autonomous Province of Vojvodina, belonged to the well organised Austrian Empire, which had a strong Western tradition of civil society and civilisation norms that coincided with it. The civilisation norms mentioned included strong judicial system, the developed network of courts and the extensive network of lawyers' offices. The tradition of lawyers' practice in Vojvodina dates back to the middle of the 17th century, while the first lawyer's chamber appeared on the 1st of January 1875. In Central Serbia, in the region that was previously known as The Principality of Serbia (later Kingdom of Serbia), the lawyer's practice appeared in the first part of the 19th century, with the Principality's liberation from the Ottoman Empire and consequently with the process

¹ We will continue with the use of the word "lawyer", in accord with the definition "a person learned in the law; as an attorney, counsel or solicitor; a person who is practicing law" (Henry Campbell Black, Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Co., 1979), 799.)

distancing from the Ottoman courts and the kadi² system. The first law on legal representation was passed on 28th of February 1862, and the first society of legal representatives was formed in August of 1886.

Therefore a strong tradition of legal representation in Serbia causes a need to regulate the sensitive field of responsibility of lawyers to their clients and the insurance against the malpractice and the consequences of such malpractice. It is covered by professional liability insurance. Professional liability insurance is required by law in some areas for certain kinds of professional practice (especially medical and legal), and is also sometimes required under contract by other businesses that are the beneficiaries of the advice or service.³ For example, in reference to medical professions it is called malpractice insurance, while errors and omissions⁴ (E&O) insurance is used by insurance agents, consultants, brokers and lawyers.⁵

Lawyers' professional liability coverage provides attorneys with liability coverage for financial loss suffered by third parties arising from acts, errors, and omissions in providing professional legal services. Fraud, intentional and criminal acts, bodily injury (BI), and property damage (PD) are excluded from coverage.

However, most of the policies provide coverage for personal injury (PI) perils (i.e., defamation, invasion of privacy) since allegations of such acts occur frequently in the legal arena. As is the case with most professional liability forms, lawyer's professional liability policies are written with a claims-made coverage trigger. Lawyers' professional liability coverage is also available in many states in the world through bar-sponsored captive insurers in addition to commercial insurers.⁶

2. LIABILITY INSURANCE OF LAWYERS AS A NECESSARY MEANS OF PROTECTION

Generally, each lawyer gives the utmost efforts in their legal practice, invests a lot of energy, expertise, knowledge and work in their clients and the job that has to be done. A client's satisfaction is of supreme importance, but lawyers are human beings and, despite being professionals, they can make mistakes. The oversights and miscalculations, undesired errors and wrong decisions in the process tend to appear due to the piled up obligations, fast pace of work or due to some other factors (lack of concentration, personal or psychological issues, illness, exhaustion etc). Therefore the legal representatives must insure themselves against the liabilities.

Such insurance provides coverage against the indemnity claims of clients (persons who ordered the legal representation services), that appeared due to the errors or malpractice during the legal practice.

² Or sometimes spelled qadi. A kadi was an official in the Ottoman empire. Based on the Islamic concept of a judge (Arabic: قاضي *qāḍī*), the Ottoman official also had extra duties; they performed local administrative tasks, and they were involved in taxation and conscription. Kadi was a judge appointed by the Sultan, ruling in accordance with the Islamic law, Shariah (definition from www.wikipedia.org)

³ www.wikipedia.org

⁴ Common designation in the United States of America

⁵ „Negotiating Your Law Firm's Malpractice Insurance: How to Avoid Purchasing the 'Never Pay Policy'". *The National Law Review*. Arnall Golden Gregory LLP. 2012-01-21.

⁶ www.irmi.com/online/insurance-glossary/terms/l/lawyers-professional-liability-coverage.aspx

These types of insurance, called the *insurance from civil responsibility* or *civil liability insurance*, appeared relatively recently. The first policies appeared towards the end of the 19th century, but the development was rapid and already in the beginning of the 20th century civil liability insurance became one of the leading branches of insurance.

Civil liability refers to the responsibility an individual or entity has to another individual or entity. There are many relationships where civil liability is apparent: employer to employee, professional to client, even homeowner to guest.⁷ A person likely has a legal responsibility to someone in their life, just as someone else has a legal responsibility to this person. Insurance helps to cover monetary responsibilities that arise from these relationships in the event that a liability issue ever comes up.

Insurance that protects professionals such as accountants, lawyers and physicians against negligence and other claims initiated by their clients. It is required by professionals who have expertise in a specific area because general liability insurance policies do not offer protection against claims arising out of business or professional practices such as negligence, malpractice or misrepresentation.

Depending on the profession, professional liability insurance may have different names, such as medical malpractice insurance for the medical profession, and errors & omissions insurance for real estate agents. Professional liability insurance is a specialty coverage that is not provided under homeowners' endorsements, in-home business policies or business-owners' policies. It only covers claims made during the policy period.⁸ In addition, professional liability policies contain what are known as „shrinking limits,” meaning that unlike CGL policies (commercial general liability, where defense costs are paid in addition to policy limits); the insurer's payment of defense costs reduces available policy limits.⁹

Civil liability insurance covers all the sources of endangerment that threaten the persons that perform certain public professions:

- Persons who perform services in crafts
- Private persons
- Persons who perform professions such as doctors, lawyers, revisers, auditors, controllers, inspectors, brokers, actuaries, architects etc.

Among them, lawyers might be vulnerable to indemnity claims if the client lost the legal battle or feels dissatisfied with the effort that lawyer gave during a legal process. In theory, without a legal framework, a client that lost the legal battle might always sue a lawyer for malpractice, since they can claim that “a lawyer did not do his/her best during the process” or that “a lawyer committed certain errors”. That would lead to endless legal battles and it would multiply the number of cases, which is highly undesirable.

Different legal systems have different types of this type of insurance. For instance, in British Columbia, a Canadian westernmost province (Canada has a British legal system), the provincial government created The Lawyers Insurance Fund. The Lawyers Insurance Fund is the programme established by the Law Society to provide insurance for British Columbia lawyers and protects the profession and the public from the risks associated with the practice of law by providing high quality professional liability and defalcation insurance.

⁷ http://www.ehow.com/about_6550443_definition-civil-liability-insurance.html

⁸ www.investopedia.com

⁹ www.irmi.com/online/insurance-glossary/terms/p/professional-liability.aspx

Professional liability insurance protects lawyers who are liable for negligence and ensures that clients receive compensation to which they are entitled. Lawyers are also protected if they fall victim to the „bad cheque” scam, helping ensure that clients do not suffer a financial loss.¹⁰

Other countries and provinces around the world have similar laws or similar funds, organisations or trusts.

3. MORAL AND LEGAL BASIS OF LIABILITY INSURANCE OF LAWYERS

Liability insurance of lawyers has deep roots in tradition of fair business practice and it has certain moral and legal grounds.

One of the bases is the idea that the principles of United Nations Charter should be embedded in laws that regulate the legal practice and legal representation. Also, the idea is to embed the ideas of the Universal Declaration of Human Rights, the International Pact of Civil and Political Freedoms, the European Convention of Protection of Human Rights and Basic Freedoms, as well as the ideas from other international acts. These include principles of development, promoting and encouraging of human rights and basic freedoms, the equality before law, the presumption of innocence, the right of legal help and advice of a lawyer, the guarantees of defence, the fair and impartial legal process and trial without unnecessary delays, protractions or stall.

Also, one of the basic ideas is that advocacy and the practice of law represents one of the free professions in the framework of public order and society, and that lawyer is a special factor in the judicial system, and therefore a lawyer becomes a qualified representative and adviser in all legal matters. Lawyer is therefore obliged to protect the interests of clients, and to do everything in his power to realise the interests of his client, but is also obliged to act in such a manner that the law and legal order keeps preserved, and the justice is done. A special moral responsibility of lawyers comes from the fact that lawyer acts in the domain in which the client does not know rules, regulations, practice and the system of institutions. In this light, lawyer has to act in such a manner to enable independent, expert, diligent and responsible enforcement of law and justice through performance of the profession. It is one of the main guarantees of the enforcement of law and justice and the realisation and respect of human rights and freedoms.

One of the important consequences of lawyer's behaviour is that the importance and respect of legal practice and legal representation is highly dependent upon the behaviour and mode of work of every individual lawyer. The Lawyers Bars and Chambers thus have responsibility to establish and maintain standards of professional conduct and deontological ethics of lawyers.

The Basic Principles of the Role of a Lawyer were adopted at the Eighth United Nations Congress on Prevention of Crime and Treatment of Offenders in Havana, Cuba, in the period 27th of August – 7th of September 1990. Also, The Code of Professional Ethics of Lawyers of the European Union was adopted on the plenary session of The Council of Lawyers' Bars of the European Union (CCBE) on the 28th of October 1988, and it was renewed and new paragraphs were added in consecutive plenary sessions held on the 28th of November 1998, 6th of December 2002 and 19th of May 2006.

¹⁰www.lawsociety.bc.ca

The Suggestion 21 of the Council of Ministers of the European Union from 25th of October 2000, named “The freedom of legal practice (advocacy)” was one of the biggest influences in recent days for Yugoslav lawmakers. Also, one of the most important legally binding decisions was the International Convention of the Protection of the Right of Defence, which was adopted and stored in the Lawyers’ Bar of Paris on the 26th of June 1987. The Association of Republic and Provincial Lawyers’ Bars of Yugoslavia, as a legal predecessor of Lawyers’ Bar of Serbia, signed the Convention in Novi Sad, on the 25th of March 1995. There is another document, which is named The Principles of Conduct in Legal Practice, adopted on 28th of May 2011 by the International Bar of Advocates (IBA). All these documents and conventions were a legal basis for the laws in Serbia today.

There are some more legal documents that gave the incentive for the passing of law that cover liability insurance of lawyers. These are international legal standards of similar professions, such as, *inter alia*, Basic Standards of the Independence of Judicial System, which was adopted on the United Nations Congress on Prevention of Crime and Treatment of Offenders held in Milan in the period from the 26th of August to the 6th of September 1985, the Code of Minimal Standards of Judicial Independence, adopted by the International Union of Lawyers in New Delhi in 1982, the Universal Declaration of Judicial Independence, adopted in Montreal in 1983, the Bangalore principles of Judicial Independence supported by the General Assembly of the United Nations in 2003 and the Instructions for the Role of Attorneys, adopted at the Eighth United Nations Congress on Prevention of Crime and Treatment of Offenders in Havana, Cuba, in the period 27th of August – 7th of September 1990.

4. NEW LAWS ON LEGAL PRACTICE AND THE ROLE OF LIABILITY INSURANCE OF LAWYERS IN IT

The suggestions of new Law on Legal Practice emphasises the responsibility of lawyers to their clients and specifies legal obligation of a lawyer to his or her client to insure himself or herself from the damage caused to the client.

It is also important that there is an option to diminish the responsibility by a contract made with the client. For instance, in California, Rule 3-400 (Limiting Liability to Client) defines such cases the following way:

“A member shall not:

(A) Contract with a client prospectively limiting the member’s liability to the client for the member’s professional malpractice; or

(B) Settle a claim or potential claim for the member’s liability to the client for the member’s professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client’s choice regarding the settlement and is given a reasonable opportunity to seek that advice.”¹¹

Similar legal solutions are prescribed in the new Law on Legal Practice (Advocacy) in Serbia, from 2011¹² and 2012.¹³ Article 37 in this law specifies:

- “An attorney is obliged to conclude the contract of obligatory liability insurance with a registered organisation that deals with such type of insurance.

¹¹<http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3400.aspx>

¹² „Sl. glasnik RS”, br. 31/2011

¹³The ruling of the Constitutional Court of Serbia from 2012.

- The Lawyers Bar can conclude a contract of collective obligatory liability insurance for all the attorneys enlisted in its directory.
- The Lawyers Bar of Serbia will establish the minimum amount of professional liability insurance for the potential damages.
- The Lawyers Bar of Serbia will deny the issue or renewal of attorney's licence to an attorney who has not concluded contract of obligatory liability insurance with a registered organisation, except if such a contact was already concluded in a way specified in Paragraph 2 of this Article."¹⁴

We therefore conclude that professional liability insurance is an obligatory condition for performing legal practice, retain the lawyer's licence, and continue with work in the area of legal practice.

5. CONCLUSION

As said previously, lawyers professional liability coverage, commonly known in the United States of America as Errors and omissions (E&O) insurance, is a type of insurance that provides lawyers with liability coverage for financial loss suffered by third parties arising from acts, errors, and omissions in providing professional legal services.

Lawyers professional liability coverage, which may exclude negligent acts other than errors and omissions („mistakes”), is most often used by consultants and brokers and agents of various sorts, including notaries public, real estate brokers, insurance agents themselves, appraisers, management consultants and information technology service providers (there are specific E&O policies for software developers, website developers, etc.), architects, landscape architects, engineers, attorneys, third-party business administrators, quality control specialists, nondestructive testing analysts, and many others. A mistake which causes financial harm to another can occur in almost any transaction in many professions. In Serbia, as well as in many other countries, a lawyer is obliged to conclude the contract of obligatory liability insurance with a registered organisation that deals with such type of insurance. Also, the lawyer can do this through the Bar deal with an insurance company in a form of a collective obligatory liability insurance for all the attorneys enlisted in its directory. Without it, a lawyer cannot perform his duties and continue with his professional career.

For the lawyers, these questions are of crucial and existential significance, and for the judges they are landmarks for solving specific cases, and for the insurance companies they are landmarks to form a new product of insurance in our country.

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