

# The Perils Of Being Underinsured In Legal Malpractice Claims

Article excerpt from [www.thebarplan.com](http://www.thebarplan.com), Written By Deanna Brady, Claims Counsel, The Bar Plan  
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When making the decision on the amount of policy limits for legal malpractice insurance, there are many factors to consider, including the:

- potential exposure based upon the types of cases
- cost of defense of a legal malpractice claim
- jurisdiction in which a claim could be brought
- nature and extent of both business and personal assets as they could potentially be subject to collection under a judgment if the attorney is underinsured.

## "HIGH RISK" AREAS OF PRACTICE

When considering lawyers' professional liability insurance, certain areas of practice, such as trusts and estates, plaintiff's personal injury, securities and intellectual property, may carry a higher risk in terms of the likelihood of a legal malpractice claim or the cost to defend or resolve the claim. Many attorneys believe the risk of a claim against them is minimal. However, mistakes happen. Lawyers cannot control every situation. Some may find themselves in a situation where they are liable for not only their own mistakes, but also mistakes by a partner, associate, paralegal or legal assistant within their firm (see more about meritless claims below).

In addition to evaluating potential exposure based upon the types of current cases handled, also consider past cases – this is especially true for those that practice in trusts and estates. It may be that the situation has changed and the attorney no longer represents large estates; and therefore believes lower limits of liability are now appropriate. However, trusts and estates pose more risks for legal malpractice claims as non-client beneficiaries may have standing to sue. Additionally, the statute of limitations may not begin to run until the death

of the client and the alleged negligence is discovered. As most lawyers' professional liability policies are claims-made and reported policies, attorneys could be exposed to potential liability from estate planning conducted many years, or even decades, in the past. If the estate was a large estate, the attorney may not be adequately insured to make the client or the third-party beneficiary whole, or to defend the merits of the claim based upon current limits of liability.

## THE COST TO DEFEND – EVEN IN OTHER JURISDICTIONS

When choosing policy limits, an attorney should not only be concerned about the potential damages that may stem from a potential lawsuit, but also the cost to defend the lawsuit. Most legal malpractice insurance policies, unless a separate defense expense limit is purchased, are eroding policies. These policies are also referred to as wasting or "pac-man" policies because the limits of liability are reduced by the cost for defense as well as any expenses incurred. The defense expenses are paid first, which reduces the amount available to pay any potential damages. If the policy limits are exhausted by the defense costs, the insurance carrier may have no further duty to defend an insured attorney, and there will be no limits remaining to pay on any judgment entered or settlement later reached in the claim. When this occurs, the insured attorney's business and personal assets could potentially be subject to collection under a judgment. If limits of liability are very low, it is possible that the costs of defense would exceed the policy limits; thus, making it very difficult for the attorney to defend his actions.

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