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Document Retention and Destruction

While every professional has repeatedly heard “document, document, document” as one of the best protections against an allegation of professional liability, often left unanswered is the question of what to do with all that documentation once it’s been created. Here are six guidelines suggested by the National Society of Professional Engineers (NSPE):

1. Any document retention policy that is created should be followed consistently for every project. If deviation from the formal policy is made for a particular project, the firm should document why the deviation was made. If retention policies differ for different projects, that should also be included in the written policy.

2. If a policy is created that allows for

destruction of documents, ensure that the document destruction is absolute, and record the date of destruction.

3. Make sure that document retention

policies are in writing, especially if the policy includes document destruction that otherwise might seem suspicious.

4. Ensure that individuals in charge of document retention or destruction are trustworthy, especially for confidential items, such as items related to lawsuits, payroll or competitive information.

5. Ensure that stored documents are organized, labeled, secure and easy to retrieve.

6. Do not destroy documentation after notice of a lawsuit has been served, regardless of the written policy related to those documents.



Prompt Reporting Matters

At the time of a loss, prompt reporting to your insurer is a critical first step in the loss settlement process. But, remember, it isn’t the last step.

Although the peace of mind and security that comes from trusting your insurance partners to help carry the load at time of loss is a key benefit of your insurance program, your ongoing cooperation and assistance are needed in the claims process.

What is it you need to do after that first report of loss? Each of your policies has a section titled “Duties Following a Loss” or

something similar. A quick review of that section will help you to keep your claim process on track. The duties vary by type of loss. For example, they may include promptly sending your insurer copies of any legal papers delivered to you about the claim; agreeing to attend mediation, depositions, hearings or courts at the insurer’s request; and agreeing not to make any settlement offers or other agreements with the claimants without your insurer’s prior approval.

If you have any questions about your role, feel free to contact us for answers.

First-Dollar Defense



There is an endorsement that may be of interest to professionals who are worried about the onslaught of frivolous lawsuits. That endorsement is called “first-dollar defense,” and it provides coverage for legal defense expenses related to a claim without the insured having to first pay a deductible. That allows the insured to pay a deductible only in the case that actual damages are assessed as a result of a professional error or omission.

If you have a high deductible on your professional liability policy, you might want to consider adding this endorsement. If your company had to pay defense costs up front and then wait to be reimbursed, or if it had to pay a deductible for a legal defense that wouldn't be reimbursed at all, would it be prepared to do that?

Many lawsuits run into the tens of thousands of dollars for legal costs. Keep in mind that lawsuits can be brought even against the innocent, and lawyers must be hired in those cases. Only sometimes do courts award attorneys fees, and they never award them up front.

Taking Advantage of Soft Prices

Insurance pricing has been in a trough for at least five years, resulting in lower prices for most clients. As a result, many public companies have been raising their limits of insurance for directors and officers (D&O) coverage.

A combination of increased regulatory changes at the federal level and enhanced whistleblower protection is producing a rich risk environment for directors and officers. Boards of financial services companies and fiduciaries at all companies are being hit particularly hard by new regulations stemming from the Dodd-Frank Act. Rules established under the Patient Protection and Affordable Care Act

(healthcare reform) can also be expected to increase D&O liability exposures as companies far and wide grapple with compliance.

While increasing limits may be an advisable step, following best board practices is key. Boards need to be engaged and thorough in all their dealings, and accurate minutes of meetings should be kept. While the minutiae of day-to-day operations may be outside the scope of the board's duties, the overall governance of the company is not. Make sure your board is diligently executing its role, and talk to one of our professionals about taking advantage of good insurance pricing.

Burnout and Substandard Care

According to a study published in the *Annals of Internal Medicine*, 76% of new physicians in the University of Washington internal medicine residency program suffered from symptoms of burnout.

So what else is new? The trials faced by medical residents due to too little sleep and too much stress have been well documented in studies, television and movies. But the real kicker to this study is that more than half of the residents reported that their burnout levels had led to “sub-optimal” patient-care practices.

That is the danger alarm that should awaken all professionals. It's one thing to expect new and less experienced staff members to “earn their stripes” with long hours and heavy workloads. It's another to expect your clients to pay the price by experiencing substandard service. Substandard service leads to mistakes and professional liability claims.

Take preventive steps now to assure that your clients will receive the full professional care and attention they expect and deserve. Be aware of staff who may be putting in too many hours or shouldering a heavy workload that might tempt them to cut corners on adequate client care. Consistently review documentation to be certain proper procedures are being followed. Provide training opportunities to keep yourself and your staff up-to-date on the latest best practices for your profession.



Mark Your Words!

As a professional, your knowledge is critical to your success. One excellent method to demonstrate your expertise and build recognition among current and potential clients is to contribute to newsletters, blogs or trade publications.

Often, however, professional services firms worry that publishing in such a way opens the company up to accusations of intellectual property rights abuse, such as copyright infringement.

If your employee misuses a work copyrighted by another, and if a proper notice of copyright appears on the published materials that your employee used, then your employee, and possibly your firm, would lose the ability to claim they didn't realize the materials were copyrighted.

To avoid this problem, name the source of any outside information used or secure permission to use large tracts. Alternatively, prohibit the use of such material on firm-related media. In all cases, your business needs to have a written and agreed-to policy that covers such external com-

munications. You can also purchase an endorsement to your professional liability policy to cover claims arising from actual or alleged patent, copyright, trademark, trade name, trade dress, trade secret or other intellectual property infringement. Some policies cover all defense costs and/or damages; others have more restrictive allowances.

The U.S. Patent and Trademark Office has ruled that all content on the Web falls under the category of periodicals, so be careful where you get your information and how widely

known and used it is. Check with your attorney before beginning any publications or blogs that are related to your business, and check with us about your insurance coverage for such media.



Consent-to-Settle Clause

Many professional liability policies contain “consent-to-settle” clauses. These typically state that your insurance carrier cannot settle a liability claim against you without your consent.

Why wouldn't you consent? You might not want the associated loss of prestige and reputation, or you might firmly believe that you are innocent. Your insurance company, however, might be adamant that your case isn't winnable, based on its experience with similar cases.

Before making any decision about giving or withholding your consent, talk with us about what provisions

in your policy apply in such a situation. For example, what if you withhold your consent to settle a claim for a small amount, then later the

Your insurance company might be adamant that your case isn't winnable.

court awards a significantly higher amount to the claimant? Since the insurer could have settled the claim for far less if you had consented, you might bear responsibility for a

portion of the damages assessed.

The same provisions apply in reverse. You may strongly want to settle the claim, but the insurer might think such an offer would be premature. What are your options in this scenario, and what effect could they have upon the insurer's future ability to defend the claim or offer future settlements?

Following our discussions with you about your specific coverage provisions, you and your legal counsel can make your best choices with a clear understanding of your options and the implications of each.

**Thank you for
your referral.**

If you're pleased with us, spread the word! We'll be happy to give the same great service to all of your friends and business associates

The Inflation Game

"We are seeing multi-million-dollar cases. The day of carrying a million dollars of coverage is gone."

With these words, a state association of insurance professionals begins an article about increasing exposure to errors and omissions claims. The comment reflects the reality of claims inflation in our litigious society. Even when actual damages are not that valuable, plaintiff lawyers often seek punitive damages that would put many professionals out of business, and juries frequently comply.

How do your current professional coverage limits compare to present-day trends and actual "worst-case scenario" court awards? Talk with your associations. Talk with your peers. Then talk to us.