

Insurance is asset for both in-house counsel, company

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Many in-house counsel lack insurance coverage for their actions as attorneys. Is this an acceptable risk? If not, what can you do about it?

There has been no shortage of headlines in recent years indicating that in-house counsel face increasing risks of liability and regulatory scrutiny.

For example, the Securities and Exchange Commission views lawyers, including in-house counsel, as corporate gatekeepers on issues regarding the securities laws.

The Rules of Professional Responsibility for Attorneys, promulgated under Section 307 of the Sarbanes-Oxley Act of 2002, which set forth minimum standards of professional conduct for attorneys who provide securities law advice or otherwise submit filings to the commission, are but one example of in-house counsel's exposure.

Moreover, the plaintiffs' bar has routinely included in-house counsel as defendants in class actions, asserting that they have heightened duties to the company and its shareholders because of their professional status.

In-house counsel have been sued or been the subject of disciplinary complaints, brought by employees they were assigned to represent in regulatory and other matters as well as by entities doing business with the company in connection with legal opinions issued for purposes of financing or other corporate transactions.

Thus, in-house counsel have ample reason to worry about their own exposure to suit.

The ELP

Some in-house counsel have discovered too late that in most cases, classic directors and officers liability insurance policies do not cover attorneys for professional services. Even where in-house counsel are designated as officers of the company for purposes of D&O coverage, counsel's actions in providing legal advice and services will usually fall within the professional services exclusion.

Although some D&O policies cover attorneys for securities claims, this can be very limited coverage and, in many cases, will protect in-house counsel only where the company and/or other officers and directors are sued as well.

Where in-house counsel alone is the defendant in a case or the subject of a regulatory action, there may be (and usually is) no coverage. Indemnification provisions in a company's charter or bylaws, which provide for advancement of legal fees and indemnification in case an adverse judgment, often do not protect in-house

counsel who are not officers of the company.

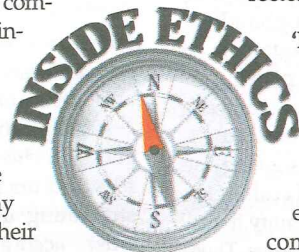
Even in-house counsel who are covered by indemnification could see their protection evaporate in an insolvency situation or may learn that such indemnification can sometimes be discretionary.

Fortunately, professional liability insurance specifically designed for in-house counsel is available to manage the risk of damages caused by professional malpractice and other liability generating actions. These are generally referred to as Employed Lawyers Professional Liability Policies, or ELP. Some insurers offer ELP coverage as a standalone policy; others offer an endorsement to standard D&O policies to extend coverage to in-house counsel for professional acts.

A standalone ELP policy can have a number of advantages. For example, a separate ELP policy is subject to its own distinct limit of liability. The deductible can be far lower than the deductible of a classic D&O policy.

Furthermore, because a professional liability insurance policy is tailored for in-house counsel, it can address many claims that a classic D&O policy does not.

ELP policies will also preserve D&O coverage where losses occur as a result of acts of in-house counsel and other D&Os; including a non-officer attorney on a D&O policy could dilute the amount of coverage available for directors and officers of the company.



'Insured v. insured'

Another advantage of ELP policies is that they provide coverage for risks that are usually excluded from D&O coverage.

For example, most D&O policies exclude coverage for claims by the company against the individuals who are insured. This so-called "insured vs. insured" exclusion may even exclude claims brought by trustees in the name of the company in a bankruptcy.

However, ELP policies generally provide coverage for claims brought by the company, an employee of the company or an affiliate of the company against in-house counsel. Moreover, professional liability insurance coverage generally provides insurance for ethics and licensure proceedings against in-house counsel, including legal expenses. D&O policies, even if expanded to include a rider for in-house counsel, would not provide this type of coverage.

ELP policies also cover malpractice claims asserting failure to oversee the acts of paralegals, clerical staff and other subordinates to in-house counsel.

Without ELP coverage, in-house counsel are bereft of assistance for these types of claims. This is particularly true for in-house legal departments with intellectual property portfolios in the charge of paralegals or clerks, where the failure to meet a patent or trademark deadline can carry significant exposure for the in-house attorney overseeing this work.

An additional advantage to in-house counsel from a specific professional liability policy is the duty to defend. In most ELP policies, the insurer has a duty to affirmatively defend the insured. By contrast, most D&O policies do not include a duty to defend but rather a duty to reimburse the company for reasonable defense costs it pays on behalf of its directors and officers. The duty to defend coverage removes a layer of risk for in-house counsel where the company and its insurers could otherwise disagree about reasonable defense costs.

ELP coverage generally does not include fines, sanctions, taxes, penalties or punitive

damages. Policies usually exclude coverage for moonlighting, in that they cover in-house counsel only for professional services performed for the company in the insured's capacity as an employee. However, coverage can include pro bono work for indigent or public interest clients performed with prior written consent of the company.

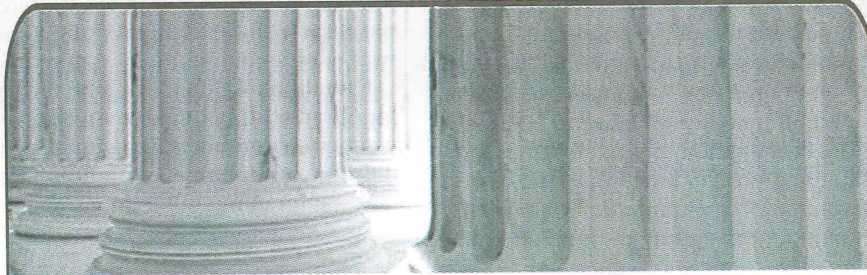
Like D&O coverage fraud, dishonesty, willful violations of law and criminal acts are excluded from coverage.

In-house counsel need adequate protection from liability to do their jobs effectively. This is an asset not just for the in-house counsel but also for the company itself and its creditors in the event of insolvency.



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