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**Errors and Omissions (E&O) Insurance and Professional Liability  
Insurance for Licensed Site Professionals (LSPs)**

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(This article was co-authored with Carl Shapiro, LSP, Wheatstone Engineering & Consulting, Inc. and James Young, LSP, Environ Corp., and portions of the article appeared in the LSPA Newsletter.)

This is intended to be the first in a series of articles about insurance covering errors and omissions (E&O), also known as professional liability insurance, and how LSPs can be protected by such policies. The articles are intended to be general in nature and LSPs should consult with experienced professionals on specific insurance and policy issues.

**Overview**

Like any business providing “professional services,” Licensed Site Professionals (LSPs) and their firms are exposed to financial risks and liabilities arising out of their performance of services. Such risks can be managed using a variety of strategies, including good contracts, corporate structure, good technical practices, loss prevention measures, asset protection strategies, and insurance. Insurance is just one protective measure and will not manage all risks by itself. Firms and LSPs may obtain various insurance policies to cover different risks, including general liability, vehicle, and errors and omissions (E&O), or professional liability.

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Importantly, a general liability (“GL”) policy typically excludes claims involving the rendering of “professional services” and therefore would not cover a lawsuit concerning an LSP’s alleged acts, errors and omissions. The LSP should not expect its GL carrier to provide a legal defense or liability coverage if a claim pertained to professional services, and should instead look to its E&O policy (if one existed) to cover the claim. (However, as a general practice, the LSP should consider providing prompt notice of any claim to its carriers under all policies, even if it believed coverage may not exist, to avoid a carrier later attempting to deny coverage due to lack of notice or reporting.)

E&O insurance recognizes that any professional, including an LSP, may make (or, are alleged to have made) mistakes and are subject to financial risks. LSPs also have specific additional liabilities that are unique to their practice arising from the complexities of the Massachusetts Contingency Plan and the Rules of Professional Conduct which govern the practice.

In many instances, the firm may be in charge of obtaining E&O insurance and the LSP is anticipated to be covered as an employee of the firm. In those instances, the specific E&O coverage obtained by the firm could be outside the control of the individual LSP. However, because an LSP could be individually named in a claim based upon actions taken as a licensed professional, the LSP should be aware of how E&O insurance works. In addition, the LSP may wish to consider clarifying its protection under the firm’s policy or trying to obtain its own individual coverage to avoid potential gaps in coverage for the LSP. All questions of coverage should be confirmed with the broker or carrier because policies differ regarding details of coverage.

### General Description of Coverage

If a client sued a company or an LSP for damages allegedly caused by negligent acts, errors or omissions, the company or LSP could look to its professional liability insurance for protection, assuming, of course, that such insurance is in place. Such a claim is possible if errors or omissions occurred, or even if a client *alleged* they occurred. Coverage is for negligent acts, but not for intentional or knowing acts or deliberate noncompliance with requirements. As mentioned, each insurance company’s policy is different and the specific policy language has to be analyzed on an individual basis.

Most often the insurance pays attorney’s fees to defend against the lawsuit as well as a settlement achieved through mediation or a court-ordered judgment, subject to exclusions and other terms. Having the legal defense coverage, even for a baseless lawsuit, may be a primary reason to obtain E&O insurance. Coverage for attorneys’ fees, to avoid having to self-fund a legal defense (especially if the lawsuit is frivolous), can be vital for a small business.

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The original contract with the client, with its agreed upon scope of work, task orders and LSP representations, will help decide the allegations of negligent rendering of professional services. Work performed without a contract may be harder to defend. Having clear, well crafted contracts for all work undertaken is critical for an LSP's risk management

The policy can cover the company, whether it is a sole proprietorship or a larger firm, as well as the LSP and other employees. An LSP should not anticipate coverage for errors or omissions of independent contractors engaged by the LSP. The LSP should confirm whether subcontractors are covered and consider requiring its contractors to maintain and provide confirmation of a certain level of E&O insurance as well as other forms of insurance. The firm's use of various professionals and subcontractors, as well as the specific types of services that are performed, should be disclosed in its insurance application and analyzed during underwriting. The key point here is which entity(s) and individual(s) should qualify as "insured" (and "additional insured" or "additional named insured" as may be appropriate) under the respective policy.

### *Selection of Insurance Broker and Carrier*

An experienced insurance professional can help advise on selecting an insurer, the coverage limits and deductible, and many other important terms for an LSP. This involves consideration of many factors, such as the LSP's typical contract values, project complexity, professional experience, internal risk management, client requirements, and the likelihood of being sued (and losing). These require internal business analysis as well as discussions with a broker and carrier experienced with E&O insurance. Questions an LSP should ask a prospective broker might include the broker's specific experience with placing E&O; experience with LSP and environmental consulting practices; examples of their advice on coverages, exclusions, and other terms; carriers they have access to and their history handling claims; the broker's experience with claims handling; assistance with loss prevention and risk management; and, costs and fees.

### *Coverage Period and Exclusions*

LSPs should understand and negotiate the dates when coverage begins and ends, and what is excluded from coverage. The timeframes for policy coverage are critical. E&O policies are usually "claims made" policies (or "claims made and reported"), instead of "occurrence" policies that are common in the auto and general liability areas and that are based on when the event actually occurred. To obtain coverage under a claims made E&O policy, the claim must be made (and, in some cases, reported to the carrier) within the policy period in effect at the time of the claim.

To limit the carrier's obligations for actions taken before the policy, the policy may include a "retroactive date" (or "prior acts date"), prior to which the policy would not apply even if a claim is made during the policy period. Generally, an LSP would want to negotiate the retroactive date to be as early as possible so the policy would cover

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earlier prior acts. The LSP may also want to try to list selected prior projects for coverage.

A policy's list of "exclusions" from coverage are typically long and commonly include civil, criminal and administrative fines, penalties or disciplinary actions. This exclusion would tend to bar coverage for a DEP or LSP Board action directly against the LSP, although policies may differ regarding this 'gray' area involving possible nonmonetary sanctions. Other exclusions may include wastes shipped off-site; prior acts or prior knowledge of a claim; costs to repair faulty workmanship or remediation; and, the ubiquitous fraud and misrepresentation exclusion.

*This communication is intended to provide general information about an area of concern to LSPs. It is not legal advice. You should consult with legal counsel for advice specific to your circumstances.*

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