

Policy Description

An important post-contract expiration or termination obligation in all public defense professional services contracts (including contract public defender, investigator and transcriptionist) is to obtain and provide proof of continuing professional liability insurance either in the form of a continuously renewed full policy, or an “extended reporting period” or “tail coverage” provision or rider for a period of three years after the expiration or termination. This requirement exists in recognition of the fact that professional liability insurance policies are, without exception, “claims made” policies, meaning that regardless of when the incident of malpractice is alleged to have taken place, the claim against the policy must be made at a time when the policy is in force (or within the extended reporting period) in order for the claim to be honored. This is as opposed to other types of insurance that provides coverage on an “occurrence basis” meaning that as long as coverage was in place *during the time when the incident occurred*, the claim would be honored regardless of whether the policy was still in effect at the time of the claim.

Policy Application

This policy applies to all professional services agreements administered by the Benton County Office of Public Defense and expressly includes, but is not limited to, public defender contracts, investigator contracts, transcriptionist contracts and any future contracts for expert professional services (such as for competency evaluators).

Enforcement Protocol

The enforcement protocol shall consist of three stages: a) Pre-Exit Reminder; b) Non-Compliance Notice; and c) Referral to Risk Management.

PRE-EXIT REMINDER

This stage is designed to maximize the chances of voluntary and timely compliance with Post-Contract Insurance Obligations by reminding exiting contractors of this obligation,

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explaining exactly what is required, and providing basic information on what is typically required to comply.

This stage consists of two reminders for terminations and expirations other than involuntary terminations by the County for cause. In the case of involuntary terminations by the County for cause, only the Final Reminder shall be sent and shall be sent on or before the final termination date.

1. First Reminder No later than 30 calendar days before the final effective date of contract expiration or termination, a notice shall be sent to the contractor utilizing the appropriate notice delivery method as specified in the contract. This notice shall contain the following (and shall be in substantially the same form [as shown in Exhibit A](#)):
 - a. A reminder of the Post-Contract Insurance Obligation including a reference to the appropriate contract section;
 - b. A description of exactly what is necessary including the option to either have proof of continuing coverage *or* proof of activation of an extended reporting period provision of the policy and how the proof is to be supplied to County;
 - c. A reminder that this is an important surviving provision of the professional services agreement that will be enforced by the County;
 - d. A suggestion for the contractor to contact their insurance broker as soon as possible to arrange for the required coverage and proof;
 - e. A request to have proof of compliance provided *before* the final termination date so as to facilitate compliance reporting;
2. Final Reminder If no proof of compliance has been received, then a *Final Reminder* ([as shown in Exhibit B](#)) shall be sent to contractor in the same manner as with the First Reminder and with the same contents. The Final Reminder shall further state that if compliance is not made within a 10 day grace period (mirroring the period allowed by the insurance compliance provisions of the contract compliance enforcement resolutions adopted by Benton County) then the contractor will be deemed to be in formal breach of contract and further action will be taken consistent with such.

NON-COMPLIANCE NOTICE

If proof of compliance is not received within 10 calendar days of the final termination date (mirroring the 10 day grace period for insurance related non-compliance as adopted via resolution by Benton County) then the Non-Compliance Notice Stage will be followed. This consists of:

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1. Non-Compliance Notice Immediately upon the expiration of 10 calendar days after final termination date, the First Non-Compliance Notice will be sent. This shall be in substantially the form [as shown in Exhibit C](#) and shall include the following:
 - a. A statement advising the contractor that he/she is in breach of contract and citing the contract breach provision of the contract;
 - b. A statement specifying the breach; ie that contractor has failed to provide proof of Post-Contract Insurance Obligation;
 - c. A statement advising and reiterating what exact steps must be taken to cure the breach;
 - d. A warning that failure to cure the breach within 10 business days will result in the matter being referred to County Risk Management for further enforcement action;

REFERRAL TO RISK MANAGEMENT

If proof of compliance is not received by the expiration of the 10-business-day cure period, then the entire matter will be **closed out** by BCOPD and will be referred to Risk Management for further action. Risk Management will be provided with a file containing:

1. Copies of all notices sent pursuant to this protocol together with the responses received (if any);
2. A copy of the professional services agreement in question together with all documentation that effectuated the termination (if agreement ended because of termination) – no documentation is needed if agreement simply expired without renewal;
3. Information about the circumstances of the departing contractor (eg illness, departure from the area, discontinuance of practice, acceptance of public sector employment, unable to be located) that may be useful to Risk Management in making a determination about appropriate course of enforcement action;

Once Risk Management has been referred a case for further enforcement, it is anticipated that based on their internal policies and the information provided by BCOPD the file would be placed into one of three categories:

1. Not Likely to Be Enforceable If it is determined that it is not likely that legal action will be able to successfully initiated or that it would otherwise be futile (ie for reasons including, but not limited to, where the contractor is extremely ill, cannot

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be found or has left the area and is difficult to serve with legal process) Risk Management may close the case on this basis.

2. Enforceable but not Advisable If it is determined that legal action, while possible and likely to be successful, is not advisable (whether based on a cost-benefit analysis, political reasons – for example if the former contractor is now an elected official, or other reason) Risk Management may close the case on this basis.
3. Enforceable If it is determined that legal action is possible and likely to be successful and there is nothing to advise against it, then Risk Management may elect to proceed with initiating legal action to enforce compliance and will then work with the Civil Division of the Prosecutor’s Office to initial such legal action.

Special Provisions for Lapse of Continuing Coverage Only

This section only applies to instances where a departing contractor has advised that he/she will be continuing their professional liability policy coverage (ie since they are continuing to practice as an attorney in private practice) and the coverage has lapsed.

The enforcement protocol shall consist of three stages: a) Compliance Reminder; b) Non-Compliance Notice; and c) Referral to Risk Management.

Notices in this section shall be sent to the contractor at the address they have listed with the State Bar Association (if the contractor is an attorney) or at their last known address (for other contractors).

Compliance Reminder

Upon non-compliance, a Compliance Reminder notice shall be sent. This Compliance Reminder is intended to notify the contractor of the impending breach and advise them that they have a ten day grace period for compliance before a formal breach notification is sent. This notice shall substantially be in the form [provided in Exhibit D](#).

Non-compliance Notice

1. If proof of compliance is not provided within the ten day grace period as requested in the Compliance Reminder, then Non-compliance Notice shall be sent to the contractor. This notice shall substantially be in the form [provided in Exhibit E](#) and shall include the following:
 - a. A statement advising the contractor that he/she is in breach of contract and citing the contract breach provision of the contract;

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- b. A statement specifying the breach; ie that contractor has failed to provide proof of Post-Contract Insurance Obligation;
- c. A statement advising and reiterating what exact steps must be taken to cure the breach;
- d. A warning that failure to cure the breach within 10 business days will result in the matter being referred to County Risk Management for further enforcement action;

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EXHIBIT A
Sample *First Reminder*

****IMPORTANT CONTRACT COMPLIANCE NOTICE – REMINDER ONLY****

Dear [Contractor]

As you know, your professional services agreement with Benton County is scheduled to [be terminated/expire] with a final termination/expiration date of _____. **This notice services as a reminder about an important post-termination/post-expiration obligation in your agreement pertaining to continued professional liability insurance coverage. Specifically [section number] requires you to provide proof of continuing professional liability insurance coverage for a period of 36 months after the final termination/expiration date.**

This post-termination/post-expiration obligation is one that Benton County takes very seriously and your cooperation in providing prompt proof of compliance is greatly appreciated.

REMINDER ABOUT STEPS NECESSARY TO COMPLY

What needs to be provided

Proof of compliance can be provided in two forms:

1. Proof of continuing professional liability insurance coverage. If your policy does not expire for some time, a letter from you on your letterhead, advising us that you intend to continue to practice in your profession, will be maintaining professional liability insurance coverage in the requisite amount, and intend to renew for the next three years, would be sufficient. Please make sure that you ask your insurance company to provide proof of renewal to BCOPD as you renew your policy annually.
2. Proof of activation of extended reporting period provisions of your policy. Most, if not all, professional liability insurance policies provide some sort of “extended reporting period” provision, many of which need to be explicitly requested or activated, and some of which may cost nothing at all to do so.

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How proof of compliance is to be provided

Proof of compliance must be in the same form as required in your expiring/terminating professional services agreement and supplied to the same contract compliance contact you have at BCOPD.

When proof of compliance is to be provided

Proof of compliance is due on or before the final expiration/termination date of your professional services agreement. In your case, this date is [date]. Your cooperation in providing proof by (or even ideally before) this date is greatly appreciated.

To facilitate the production of proof of compliance in a timely manner, ***you are highly encouraged to contact your insurance agent or broker to determine what steps are needed on your part to procure the necessary coverage and proof.*** Furthermore, if you or your agent/broker have any questions, please contact BCOPD's Office Manager as soon as possible to minimize any delay.

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EXHIBIT B
Sample *Final Reminder*

****IMPORTANT CONTRACT COMPLIANCE NOTICE – FINAL REMINDER****

Dear [Contractor]

As you know, your professional services agreement with Benton County expires today. **This notice services as a reminder about an important post-termination/post-expiration obligation in your agreement pertaining to continued professional liability insurance coverage. Specifically [section number] requires you to provide proof of continuing professional liability insurance coverage for a period of 36 months after the final termination/expiration date. You were previously reminded of this requirement and it is due immediately.**

Resolutions _____ mandate a short, ten calendar day grace period for insurance related contract compliance matters so please provide the required proof of continuing coverage as soon as possible and, in any case, no later than _____ [10 days from letter]. If this proof of coverage is not received by then, you will be regarded as being in breach of your agreement and further steps will be taken to protect Benton County's interests.

REMINDER ABOUT STEPS NECESSARY TO COMPLY

What needs to be provided

Proof of compliance can be provided in two forms:

1. Proof of continuing professional liability insurance coverage. If your policy does not expire for some time, a letter from you on your letterhead, advising us that you intend to continue to practice in your profession, will be maintaining professional liability insurance coverage in the requisite amount, and intend to renew for the next three years, would be sufficient. Please make sure that you ask your insurance company to provide proof of renewal to BCOPD as you renew your policy annually.
2. Proof of activation of extended reporting period provisions of your policy. Most, if not all, professional liability insurance policies provide some sort of "extended reporting period" provision, many of which need to be explicitly requested or activated, and some of which may cost nothing at all to do so.

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How proof of compliance is to be provided

Proof of compliance must be in the same form as required in your expiring/terminating professional services agreement and supplied to the same contract compliance contact you have at BCOPD.

When proof of compliance is to be provided

Proof of compliance is due on or before the final expiration/termination date of your professional services agreement. In your case, this date is [date]. This proof should have been provided by now. If it has already been done so, then we thank you for doing so. If not, please do so as soon as possible.

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EXHIBIT C

Sample *Non-Compliance Notice*

****IMPORTANT – Contract Breach Notification – Immediate Cure Action Required****

Dear [Contractor]

The purpose of this letter is to advise you that as of the date of this letter, Benton County regards you to be in breach of your professional services agreement [identify agreement]. You were reminded on two previous occasions about the need to provide proof of continuing professional liability coverage even after the termination or expiration of your professional services agreement (see _____ in your agreement) and no such proof has been supplied to us as of the date of this letter.

Pursuant to _____ [breach of contract provision in agreement], Benton County hereby demands that you cure this contract breach by providing proof of compliance with the aforementioned post-termination/expiration contract provision.

Steps Necessary to Cure

What needs to be provided

Proof of compliance can be provided in two forms:

1. Proof of continuing professional liability insurance coverage. If your policy does not expire for some time, a letter from you on your letterhead, advising us that you intend to continue to practice in your profession, will be maintaining professional liability insurance coverage in the requisite amount, and intend to renew for the next three years, would be sufficient. Please make sure that you ask your insurance company to provide proof of renewal to BCOPD as you renew your policy annually.
2. Proof of activation of extended reporting period provisions of your policy. Most, if not all, professional liability insurance policies provide some sort of “extended reporting period” provision, many of which need to be explicitly requested or activated, and some of which may cost nothing at all to do so.

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How proof of compliance is to be provided

Proof of compliance must be in the same form as required in your expiring/terminating professional services agreement and supplied to the same contract compliance contact you have at BCOPD.

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EXHIBIT D

Sample – *Compliance Reminder* (for failure to provide proof of continuing coverage cases only)

Dear [contractor]

As you know, you've previously been party to a professional services agreement with Benton County for [services]. One important post-termination/expiration provision of your agreement was the requirement to provide continuing professional liability insurance coverage. When your agreement [terminated/expired], you represented, by letter dated [date], that you intended to continue to provide such coverage in the form of the continued purchase and renewal of a full professional liability insurance policy with policy limits and other features meeting the requirements of your professional services agreement.

According to our records, your professional liability insurance policy has expired as of [date] and as of the date of this letter, we have not received proof of renewal from your insurance company.

Please note that renewal of your professional liability insurance policy, and the providing of our office with proof of same, are critically important contract compliance obligations that survive the termination or expiration of your professional services agreement. Your attention to this matter is appreciated and Benton County requests that you ensure that your policy is renewed *and* that proof of the policy's existence (in the form of an Acord form certificate) be provided to us as required by your agreement.

As was the case when your contract was active, **you are being provided a ten calendar day courtesy grace period [expiring on ____] during which proof of compliance with your continuing professional liability insurance obligation must be provided to this office.** Pursuant to [relevant section] of your professional services agreement, if such proof is not provided by the end of this grace period, then you will be considered in breach of your agreement and further steps will be taken to protect Benton County's interests.

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EXHIBIT E

Sample – *Noncompliance Notice*

****IMPORTANT – Contract Breach Notification – Immediate Cure Action Required****

Dear [Contractor]

The purpose of this letter is to advise you that as of the date of this letter, Benton County regards you to be in breach of your professional services agreement [identify agreement]. You were previously advised that, contrary to your written representation to the County, you have not supplied proof of renewal of your professional liability insurance policy as required by the post-termination/expiration provisions of your professional services agreement. As of the date of this letter such proof still has not been received. Therefore, Benton County now regards you to be in breach of your agreement.

Pursuant to _____ [breach of contract provision in agreement], Benton County hereby demands that you cure this contract breach by providing proof of compliance with the aforementioned post-termination/expiration contract provision.

Steps Necessary to Cure

What needs to be provided

Proof of compliance can be provided in two forms:

1. Proof of continuing professional liability insurance coverage. If you have a current professional liability insurance coverage in force, then proof of the policy must be provided to this office in the form of an Acord Form certificate.
2. Proof of activation of extended reporting period provisions of your policy. If you have decided to terminate your professional liability insurance coverage, then you must either activate the “extended reporting period” provision of your previous policy or purchase an equivalent policy.

How proof of compliance is to be provided

Proof of compliance must be in the same form as required in your expiring/terminating professional services agreement and supplied to the same contract compliance contact you have at BCOPD.

Consequences of failure to address breach

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If you fail to address this contract breach as demanded, then this matter will be referred to Benton County Risk Management for further action. In addition to taking possible legal action against you, Benton County may also regard you as disqualified for future professional services agreements.

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