

How to select professional liability insurance

by

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It is important that physicians carefully evaluate an insurance carrier and the types of coverage available before purchasing or renewing their insurance coverage.

The changes that have occurred in health care within the past 10 years have increased physician exposure to professional liability in areas not previously covered by traditional professional liability insurance. One must be sure that current policies are adequate, not only for the traditional professional liability exposures, but also for the expanded liability that physicians face today. This article discusses factors to consider in selecting a professional liability carrier, and the amount and types of protection that should be considered.

Criteria

Important criteria to consider in selecting a professional liability insurer are size, financial strength, reputation, length of time the company has been writing this type of insurance, and rating of the company by independent insurance rating organizations. The larger the company and the stronger its financial resources, the better able it is to carry out its mission. The financial strength of the company can be determined by reviewing the annual financial statements of the company. Things to evaluate are the total assets of the company, amount of surplus, the premium-to-surplus ratio, and profitability. In general, the larger the surplus and the smaller the premium-to-surplus ratio, the stronger the company. The physician's accountant, financial advisor, and insurance agents can be helpful in this financial assessment.

Another criterion to consider in selecting a professional liability insurer is the assessment of independent insurance rating organizations. A.M. Best is an example of such a rating organization and a review of their analysis of a professional liability insurance carrier can be most revealing. An A- rating or better by A.M. Best is advisable. The reputation of an insurance carrier is also a valuable tool. Discuss with your colleagues whether they have been satisfied with their coverage. Speak to those who have been sued and find out how they were treated. Did the company respond quickly and were the company representatives available when needed? Did the company provide adequate legal representation? Was the information and support supplied by the company adequate? These are just some of the questions that help determine the quality of an insurer.

One should consider how long the company has been in business and whether professional liability is the main product of the company or simply a sideline endeavor. It is preferable to be insured by a company that specializes in professional liability insurance and has sufficient experience (a

minimum of 10 years is suggested) in the field of physician professional liability insurance, especially in the local area in which the physician practices. Knowledge and experience with the local court systems, judiciary, and defense attorneys can be most valuable in defending a physician.

Another consideration is whether the company provides a “consent to settle” feature, which allows a policyholder veto power over any proposed settlement. This provision is an expensive feature and usually adds to the cost of insurance. Many experts believe this clause is unnecessary, as most insurance companies will not settle a case against a defendant’s wishes. However, in the unusual case in which the defendant is unreasonable, and independent experts determine the case to be indefensible, the insurance company can save a good deal of money and prevent additional litigation by retaining the right to promptly settle such cases.

Types of coverage

Once the company has been selected attention should be focused on the types of coverage required and the cost. The first consideration, and probably the most difficult, is the amount of professional liability insurance one should carry. There is no clear consensus on this question. The majority of physicians insured by the Physicians Association of America companies carry \$1-million/\$3-million coverage (\$1 million maximum per claim and \$3 million maximum per year of coverage). It is important that this amount of dollar coverage is in addition to the cost of defending the claim. In this climate of increasing awards, more physicians, especially those in high-risk specialties (obstetrics/gynecology, orthopaedics, and neurosurgery), are opting for higher limits. Most are purchasing \$2-million/\$6-million, some even higher. This trend does raise the concern of professional liability insurers that greater insurance coverage by physicians will lead to still higher awards and result in an upward spiral in the cost of professional liability insurance.

The next decision is whether to purchase a *claims made* or an *occurrence* policy. Claims made policies cover only those incidents that occur and are reported during the policy period. With this type of coverage, when a physician changes insurance carriers or retires, he or she may have to pick up a reporting endorsement coverage, frequently re-

ferred to as *tail coverage*, at a cost that can equal two years premium or more. Tail coverage is insurance that covers a physician for incidents that occurred while the policy was in force but were not filed until after the coverage was cancelled. Some carriers allow the tail coverage to be earned if a policyholder has held a claims made policy for a number of years (three to five years is usual). Most insurance companies will automatically provide free reporting endorsement coverage for policyholders who die or become permanently disabled.

Occurrence policies cover the insured for any incidents that occur during the coverage period, regardless of when the claim is filed. This type of insurance is recommended, but is more expensive initially. If a surgeon is employed by either a group or a hospital, it is important for that surgeon to be sure that he or she is fully covered for the time of employment. Many an unsuspecting surgeon has left employment only to find that they are personally responsible for tail coverage, which can be very costly.

Enhancements

There are a number of enhancements to basic professional liability coverage:

- *Prior acts coverage* provides protection for those who have had prior professional liability exposure without adequate insurance coverage. This can occur when your professional liability insurance company goes into bankruptcy or when you have had a claims made policy and cannot purchase the tail coverage.

- *Corporate coverage* protects the assets of the corporation. This coverage is in addition to the individual coverage of the physician members of the corporation. There is usually an additional charge for this added coverage, but it does protect the assets of the corporation, which can be considerable.

Professional liability coverage for employees of the physician’s professional corporation should be considered. Most often this will entail additional cost, but it is necessary for those employees involved in patient care.

- *Medical waste coverage* provides protection to the physician from the liability of those responsible for disposing of medical, hazardous, and other waste generated by medical practice, which can be substantial and includes bodily injury, clean up, preventive action, and defense costs. Additional

charges are usually incurred for this type of coverage.

- *Defense coverage* for professional conduct review is another important form of protection. State boards of registration in medicine, state commissions against discrimination, and the like regularly hold hearings on alleged physician misconduct. Although these hearings are not part of the judicial system they can have severe implications for physicians and their practices, including fines and suspension or revocation of licenses. Many professional liability insurers provide this coverage for defense costs at no additional premium to their insureds.

- *Defense coverage for allegations of sexual misconduct* is another policy endorsement that may be provided by some professional liability insurers. Defending a civil suit alleging sexual misconduct, abuse, molestation, harassment, and so forth, can be a very time-consuming and expensive process, even when the defendant is later absolved. This type of coverage should not only cover the insured, but anyone for whom the insured is legally responsible. It is often provided at no additional cost by the professional liability insurance company.

- *Coverage for billing errors and omissions* is a new type of coverage that professional liability insurers are beginning to offer. With the government's aggressive enforcement of the fraud and abuse provisions of the Health Insurance Portability and Accountability Act of 1996, more physicians will be finding themselves having to defend charges of billing errors, coding errors, upcoding, and so on. Defending against such allegations can be very costly and even if a compromise is found, the monetary penalties can be severe. For an additional premium some professional liability insurers will provide coverage for defense costs for the physician and reimbursement for monies paid for civil judgments, settlements, and investigations.

- *Directors and officers liability coverage* is important for those physicians who are assuming responsibility as managers and leaders of various health care systems including hospitals, managed care organizations, and physician practice management companies. Liability can arise when physician officers and directors of a business act on its behalf. Physicians who perform such a role should be sure that the business entity provides directors

and officers liability coverage. This coverage is not ordinarily provided by the physician's professional liability insurance policy, although it can be purchased for an additional charge.

Conclusion

Selecting professional insurance protection can be a difficult and time-consuming exercise. It is important that the physician understands the coverage being provided as well as the cost. Professional help can and should be utilized. While cost is always a factor, one should not base decisions on price alone, or economize on the exposures to be covered or the total amount of coverage. Statistics show that most surgeons will be sued at least once during their career. Having the proper amount and type of coverage, and being represented by a financially strong and reputable company with a responsive, supporting staff can make this odious experience tolerable. It will certainly justify the time involved and cost of purchasing adequate protection. □

This article was generated through the efforts of the Committee on Professional Liability of the ACS Board of Regents. Members of the committee believe that this and other articles published in the *Bulletin* will stimulate thought and possible action on a wider spectrum of issues related to professional liability.

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