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# What Should Be in a Malpractice Insurance Policy

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THE MALPRACTICE INSURANCE POLICY, also known as Professional Liability Policy, should precisely delineate the coverage, whether partnership or individual, the exact period of the coverage, the exclusions and limitations, the type of practice, the exact premium and the cancellation procedure. Companies generally write this insurance only upon receipt of completed applications furnishing the following information, which becomes a part of the declarations of the policy: the name and address of the applicant, limits of liability, licensure, partnership connections, operation of hospital, sanitarium or clinic with bed and board facilities, performance of major surgery, use of X-ray therapy, professional background and affiliations, specialty, record of past claim experience, and whether similar insurance has ever been cancelled.

Whether or not it is necessary for a physician to have paid a loss before suit can be brought upon the policy depends on whether it is a liability or an indemnity policy, the tendency being to construe such policies as liability contracts. Indemnitees may recover on contract indemnifying against liability as soon as it is fixed, though they have sustained no actual loss.[1]

A case where a policy insuring a surgeon against loss from liability for malpractice, and requiring the insurer to defend, etc., did not use language specifically showing that no action could be maintained thereon until the insured had paid on a judgment. The court held that the indemnity was not limited merely to sums paid by the surgeon so that where the surgeon became a voluntary bankrupt after a rendition of judgment for malpractice, the judgment constituted a loss within the terms of the policy. The trustee in bankruptcy might therefore sue for benefit of the judgment creditor, the sole creditor scheduled.[2]

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1 Pickering v. Hartsock, 221 Mo. App. 868, 287 S.W. 819 (1926).

2 Schambs v. Fidelity Co. of New York (2 cases), 259 F. 55 (C.C.A. Ohio 1919), 170 C.C.A. 55, 6 A.L.R. 1231.

A policy insuring against loss or damages that is not available until an insured pays the loss, should be considered against public policy.

A number of important decisions have set the standards of professional conduct for the practice of physicians. Some leading cases are as follows:

> The physician should have and use a reasonable or ordinary degree of skill and learning commonly possessed by members of his school or system in the same or similar localities, plus exercise of his good judgment.[3]
>
> The standard of conduct is in terms of his community (or similar communities) at the time he practices. So far as medical treatment is concerned, the borders of the community do in effect include those centers readily accessible where appropriate treatment may be had, which the local physician, because of limited facilities or training is unable to give.[4]
>
> The medical practitioner is obliged to keep reasonably abreast of progress in his profession and to use accepted and recognized methods in diagnosis and treatment.[5]
>
> A doctor who holds himself out as a specialist in a specific area of medical practice may be held to a somewhat higher standard of knowledge and skill than is the general practitioner.[6]
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> A doctor may be liable for the conduct of nurses, X-ray technicians and assistants in the performance of operations, other treatment, or diagnostic procedures. The primary factor in imposing liability is the right of the doctor to control the conduct of assistants.[7]

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[3] Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363 (1880). Stallcup v. Coscarart, 79 Ariz. 42, 282 P. 2d. 791 (1955); Horton v. Vickers, 142 Conn. 105, 111 A. 2d. 675 (1955); Moeller v. Hauser, 237 Minn. 368, 54 N.W. 2d 639 (1952); McHugh v. Audet, 72 F. Supp. 394, 399, M.D. Pa. (1947); Ayers v. Parry, 192 F. 2d. 181, 184 (3rd Cir. 1951); Sinz v. Owens, 33 Cal. 2d. 749, 753, 205 P. 2d. 3, 5 (1949).

[4] Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940).

[5] Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760, 762 (1898). Kingston v. McGrath, 232 F. 2d. 495 (9th Cir. 1956); Corn v. Grench, 71 Nev. 280, 289 P. 2d. 173 (1955); Hembree v. Von Keller, 189 Okla. 439, 119 P. 2d. 74 (1941); Reed v. Church, 175 Va. 284, 8 S.E. 2d. 285 (1940); Gottsdanke v. Cutter Laboratories, No. 266, 824 and Phipps v. Cutter Laboratories, No. 272, 691, Superior Court of Cal. for Alameda County (on appeal).

[6] Ayers v. Parry, 192 F. 2d. 181 (3d Cir., 1951); Scarano v. Schnoor, 158 Cal. App. 2d. 612, 1958, 323 P. 2d. 178 (1958); Crovella v. Cochrane, 102 So. 2d. 307 (Fla. App., 1958), Worster v. Caylor, 231 Ind. 625, 110 N.E. 2d. 337 (1953).

[7] 12 Vand. L. R. (3), 598, 604 (1959).

> The medical practitioner who has undertaken to treat a patient cannot cease his visits except with the consent of the patient; upon giving the patient sufficient notice so that he may employ another doctor; or when the condition of the patient is such as no longer to require medical treatment—and of that condition the physician must judge at his peril.[8]

In professional liability policies as in other matters, court interpretations differ widely. In states in which charitable institutions are not legally liable for their torts, most of the courts have still refused to lift the veil of immunity even if the institutions do take out liability insurance.[9]

It may be asked with some reason what benefit or protection is rendered by these policies, since the insured has no legal liability. Most of the better companies now have a provision in their policies preventing the raising of the defense of immunity except with the written consent of the insured, and this is usually reserved as a means of combating fraudulent claims or malingering.

It would appear that this is a circumvention of the protection statute by the defendant and/or the company. Suggestions have been made that the courts could easily regard the carrying of the insurance as a waiver of judicial immunity up to the policy limits, in states where the veil of sanctity surrounding such institutions still remains. The suggestions may serve a useful purpose, but they can not be considered as having a logical legal basis.

A policy should not include coverage prior to the date of the endorsement period (on the theory that the insured did not know that suit could be reasonably expected).

When a chiropractor's policy expressly limited its liability to *claims* arising within two months after the termination of its coverage, a claim arising thereafter was not covered, even

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[8] Becker v. Janiniski, 27 Abb. N. Cas. 45, 49, 15 N.Y. Supp. 675, 676 (1891); Gray v. Davidson, 15 Wash. 2d. 257, 130 P. 2d. 341 (1942); Lawson v. Conaway, 37 W. Va. 159, 16 S.E. 564 (1892).

[9] Levy v. Superior Court of California, 74 Cal. App. 171, 239 P. 1100 (1925). Williams Adm'x v. Church Home for Females and Infirmary for Sick, 223 Ky. 355, 3 S.W. 2d. 753, 62 A.L.R. 721 (1928); McKay v. Morgan Memorial Cooperative Industries and Stores, 272 Mass. 121, 172 N.E. 68 (1930); Greatrex v. Evangelical Deaconess Hospital, 261 Mich. 327, 246 N.W. 137, 86 A.L.R. 487 (1933); Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465, 67 A.L.R. 1106 (1930); McLeod v. St. Thomas Hospital, 198 Mo. 562, 95 S.W. 2d. 917 (1936); Susman v. Y.M.C.A., 101 Wash. 487, 172 P. 554 (1918).

though the malpractice occurred during the policy period.[10] This kind of limitation should be deemed against public policy.

Where a policy issued to an osteopath excluded injuries caused while engaged in performing an unlawful act, an injury to a patient resulting from treatment by such osteopath's unlicensed assistant knowingly permitted by the insured, which made both the insured and his assistant guilty of violating the law, was not covered.[11]

The word "malpractice" may embrace the performance of a criminal act, such as a criminal assault, and words "error" and "mistake" could also embrace an assault.[12]

Failure to obtain a patient's consent before performing an operation did not constitute an assault and battery within an exclusionary clause when that liability was covered under a malpractice clause.[13]

Where the contract of the physician with the patient was to effect a cure, or guarantee a successful skin grafting operation, a failure to perform such an operation successfully was not within the terms of the policy.[14]

An indemnity policy insuring an optometrist against "malpractice," error, or mistake in the practice of optometry only did not cover his malpractice in doing things not covered by the statutory definition of optometry. Removal of dirt from a patient's eyes was held not covered by such a policy.[15]

Policies require that insured must cooperate with the company and, upon the company's request, attend hearings and trials and assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits.

In one case an indemnity policy required the insurer to defend suits at its own expense. It also required the insured to attend and cooperate in the preparation and defense of suits "without charge." The failure of a physician to make a trip from

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[10] Lehr v. Professional Underwriters, 296 Mich. 693, 296 N.W. 843 (1941).

[11] Glesby v. Hartford Acc. and Indemnity Co., 6 Cal. App. 2d. 89, 44 P. 2d. 365 (1935).

[12] Sommer v. New Amsterdam Casualty Co., 171 F. Supp. 84 (D.C. Mo., 1959).

[13] Shehee v. Aetna Casualty and Surety Co., 122 F. Supp. 1 (D.C. La., 1954).

[14] McGee v. U. S. Fidelity and Guaranty Co., 53 F. 2d. 953 (C.C. 1st, 1932).

[15] Gen. Code 1295-21. Kime v. Aetna Casualty and Surety Co., 66 Ohio App. 277, 33 N.E. 2d. 1008 (1941).

Texas to Ohio at his own expense to attend the trial of a suit against him was held not to be a breach of a condition subsequent where he gave notice that it was financially impossible to do so.[16]

## Summary

It should be considered against public policy for a malpractice insurance policy to:

1. require actual payment, that is monetary loss, by the insured, before his insurer, that is the insurance company, becomes liable for the resulting obligation against the insured.

2. insure in disregard of a protection statute against the legal liability of a charitable institution, by means of a waiver by the company of this legal protection, whether or not conditioned upon later written release of the company from such waiver by the insured to combat fraud and malingering.

3. limit the duration of liability for malpractice that occurred during the policy period, nor should the policy include coverage for malpractice that occurred before the beginning of the endorsement period.

4. release an insurer from claims resulting from unlawful acts, such as assault and battery in operating without permission.

5. require unreasonable assistance from insured in the matter of cooperation and attendance at a trial where actual hardship and financial impossibility are involved and the insured gave notice thereof to the company.

There should be thorough investigation of the feasibility of non-cancellable and group malpractice insurance, and of compulsory malpractice insurance.

The preceding discussion generally applies to all professional liability policies, including those of physicians, dentists, hospitals, nursing homes, lawyers, accountants, chiropractors, chiropodists, podiatrists, other medical practitioners, and druggists.

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[16] Medical Protective Co. v. Light, 48 Ohio App. 508, 194 N.E. 446 (1934); 7A Appleman, Insurance Law and Practice, Secs. 4502-4507 (1942).