

Shopping for Malpractice Insurance

There is more than cost to consider

BY H. ROBERT FIEBACH

When it comes time to buy legal malpractice insurance, many lawyers simply select the coverage and the deductible they want and then buy the policy with the lowest premium for that coverage. There are, however, many differences in coverage that a lawyer should take into account before making that decision.

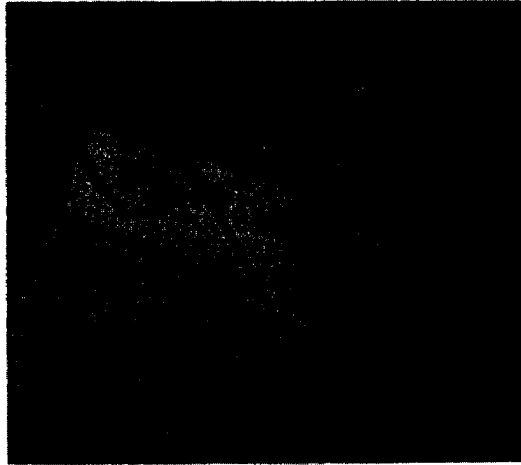
Eroding coverage. In some malpractice liability insurance forms, the amount of the policy coverage includes defense costs. In the jargon of the industry, defense costs are "inside" the policy. This means that when a claim is asserted, the amount of actual coverage for the claim decreases as defense costs are incurred. For example, if the defense costs are "inside" a \$1 million policy, and the defense costs are \$250,000, the insured lawyer has only \$750,000 remaining to cover a settlement or judgment. In some policies, however, the defense costs are "outside" the policy limits and the limits do not erode as the case progresses.

So, if the defense costs are included in the available coverage, a lawyer needs greater coverage to afford the same protection. There are some insurance companies which provide that the defense costs are "outside" the policy but with a cap, so that after that cap is met the excess defense costs are "inside" the policy.

Does the deductible include defense costs? This is another dollar-sensitive issue which should affect the premium. If the deductible only applies to liability, the insured lawyer does not have to pay the deductible until there is a settlement or judgment. On the other hand, if the deductible includes defense costs, the insured lawyer is paying from the first dollar of expense until the deductible is exhausted.

Can the insurer settle without consent? This is a hot issue in state bar-endorsed programs. Most insurers want the ability to settle a case without the insured attorney's

consent, while most lawyers want the ability to consent before the case can be settled. Some policies have a "hammer" clause that provides that the insurance company cannot settle the case without the insured's con-



sent, but if the insured does not consent, the insurance carrier's liability is limited to the amount for which it could have settled.

Right to choose defense counsel. Unless you are a lawyer in a large firm, the likelihood is that your policy will provide that the insurance company assigns defense counsel. This does not mean, however, that in every case the insured attorney has no say about the selection of defense counsel. Most insurance companies have a panel of defense lawyers and in most instances the insurance carrier will permit an insured to select from among the panel. It is a good idea to ask the carrier who the choices are before consenting to the carrier's selection of defense counsel. Some forms of insurance policies, usually for large firm coverage, do permit the insured to select defense counsel subject to the approval of the insurance carrier.

Prior acts coverage. All legal malpractice insurance policies currently issued are "claims-made" policies, which means that coverage is measured by the policy year in which the claim is made and reported to the insurer and not by the year of the occurrence. The existence of "prior acts coverage" can prevent gaps in coverage when a lawyer is changing employment or changing insurance companies. Some policies will exclude coverages for claims which

occurred prior to a certain date or event, such as prior to the first day of coverage. Because the prior insurance coverage may not cover the claim on a claims-made basis, the lawyer will be without coverage for that claim unless the policy covers prior acts.

Are sanctions covered? With the recent amendments to Federal Rule of Civil Procedure 11 and similar changes in state court sanctions rules, imposition of sanctions has become more commonplace. Quite often the cost to defend against the imposition of sanctions and the sanctions themselves are substantial. There is a great disparity in insurance policy language on this issue and the policy should be read with care to determine whether there is coverage for sanctions.

Limits on deductibles. Differences in policy language control whether a new deductible is incurred when there are multiple claims in the same policy year. A policy may provide that the deductible only applies to the first claim in a given policy year, so that if a second claim should arise there is no deductible and insurance coverage begins from the first dollar of expense.

The deductible may also be treated on an aggregate basis. If a policy contains a \$10,000 per claim deductible, it might provide that there shall not be more than \$30,000 of deductible incurred in the aggregate during a policy year. Thus, if there are a large number of claims asserted in a given policy year, there will be a cap on the amount of deductible in the aggregate that the insured would have to incur before the insurance coverage kicks in. If this is not the case, then the deductible will kick in for every claim asserted during that policy year. ■

(A more detailed analysis of the many policy coverage issues can be found in "The Lawyers Desk Guide to Legal Malpractice," which is published by and available from the Standing Committee on Lawyers' Professional Liability. A new study published by the standing committee compares policy coverages on a company-by-company basis. This study can be obtained from the standing committee.)

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