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# Insuring Against Medical Professional Liability

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# INSURING AGAINST MEDICAL PROFESSIONAL LIABILITY

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## INTRODUCTION

An estimated 165,000 physicians in the United States carry professional liability insurance. Policies with coverage from $100,000 up to $300,000 for a single claim are not uncommon. Yet, regardless of high limit coverage, there is still the possibility that the physician will find when he reads his policy for the first time—and this may be when he is faced with his first claim—that his policy does not provide the protection he thought he had.

The need for adequate liability insurance coverage is obvious. Modern juries frequently assume the existence of insurance protection and if a defendant should have the ill-fortune of not being adequately insured the jury will not know it.

No professional liability policy now being written covers all of the risks which are inherent in professional practice. There are basic exclusions of coverage which are generally contained in the policies written by all insurers and additional exclusions which individual companies have incorporated in the policies they issue. Coverage for particularly hazardous risks, such as X-ray therapy, customarily requires the payment of an increased premium.

The purpose of this article is to analyze the protection provided in medical professional liability policies. Part I consists of a discussion of some of the factors involved in the purchase of malpractice insurance and an examination of the principal insuring agreements, exclusions, and conditions stated in the standard policy. Part II is a summary of the results of a questionnaire sent by the Law Division of the American Medical Association to insurance companies to determine their opinions regarding insurance coverage in a series of hypothetical cases.

## I. PURCHASING MALPRACTICE INSURANCE

Professional liability, in common with other forms of insurance, may be purchased through agents or brokers. The agent is a representative of the insurance company. Generally, he may countersign and deliver policies and make collections in the name of the company. The broker is a representative of the purchaser. The same person may be an agent for some companies and serve the insurance buyer as a broker with respect to other companies.

In buying any kind of insurance it is wise to select a company, with substantial reserves and unassigned surplus, that has stood the

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tests of time. This is particularly true of medical professional liability insurance. The patient, whom the doctor treats today, may bring a malpractice action many years from now and the doctor will want every reasonable assurance that his present insurance carrier will be in business and able to afford him the protection for which he has paid. The statute of limitations against the claims of minors does not begin to run until they have attained their majority and in many states the statute does not begin to run against adults until the existence of a malpractice injury has been disclosed.

It is also desirable to buy insurance from a company that is licensed to do business in the state where the insured is engaged in practice. The insurance industry is regulated under the laws of the various states through state insurance departments. Although the United States Supreme Court in *United States v. South-Eastern Underwriters Ass'n*,[1] held that insurance is interstate commerce and subject to federal regulation, the federal government has not seen fit to enter this field of government regulation.

In order to be licensed to do business in a particular state, an insurance company must make application and qualify financially. The company becomes subject to the insurance laws of the state and to the rules and regulations of the state insurance department. These rules generally provide for prior approval of the provisions contained in insurance policies and the protection of the public against arbitrary refusal of the company to fulfill its contractual responsibilities under the policies which it issues. The state insurance department will act upon the complaint of a policyholder in cases where it appears that a company is not acting in good faith under the terms of its insurance contract.

*Policy Provisions*

The professional liability policy is usually divided into three sections: Insuring Agreements, Exclusions, and Conditions.

The Insuring Agreements state the coverage provided by the policy. The company agrees to pay on behalf of the insured damages because of injury arising out of malpractice by him in rendering or failing to render professional services. The company also agrees to defend any suit against the insured alleging such injury. Unless an additional premium is paid for such coverage, damages resulting from the contingent liability for the malpractice of a partner is excepted. The company in most instances reserves the right, with the written consent of the insured, to settle any claim or suit as the company deems expedient. One policy provides that settlement may not be made without the consent of the insured but if the physician refuses to ap-

1. 332 U.S. 533 (1944).

prove a settlement offer when acceptance is recommended by the company, the insurance coverage is automatically limited to the amount of the settlement offer.

The exclusions usually state that the policy does *not* apply (a) to such risks as injury arising out of the performance of a criminal act; (b) injury caused by a person while under the influence of intoxicants or narcotics; (c) liability assumed by the insured under an agreement guaranteeing the result of any treatment; (d) X-ray apparatus used for therapeutic treatment (unless specifically included in the policy at an additional premium); and (e) liability of the insured as the proprietor or executive officer of a hospital or sanitarium.

In addition to the foregoing standard exclusions, the AMA Law Division noted in examining sample policies issued by the various insurers, that some of the companies also exclude one or more of the following: shock therapy, cosmetic plastic surgery, contact lenses, non-pathological sterilization, the acts of any non-M.D. anesthesiologist, use of hand fluoroscopes, nuclear energy liability, employment of any surgeon without the knowledge and consent of the patient, and so forth.

The Conditions contain such provisions as a statement referring to the monetary limits of the policy; the duty of the insured to notify the company promptly in event of a claim or suit and to cooperate with the company in defending any claim or suit. Also, the insured may cancel the policy at any time whereas ten days written notice of intent to cancel is required on the part of the company. Some policies require thirty days notice of cancellation on the part of the company and a few group policies may be cancelled only at the end of the policy year.

*Insuring Agreement*

Most of the companies that write professional liability insurance in the United States use the form of the Physicians', Surgeons' and Dentists' Professional Liability Policy adopted by the National Bureau of Casualty Underwriters and referred to in this article as the "standard" policy. The coverage provision in this form states that the company agrees:

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury arising out of malpractice, error or mistake in rendering or failing to render professional services in the practice of the insured's profession described in the declarations, committed during the policy period by the insured or by any person for whose acts or omissions the insured is legally responsible except as a member of a partnership.

The insuring clauses contained in the policies issued by other companies are generally of the same legal effect.

Coverage is not limited to injuries to patients. The insurance would apply to a husband who sues for loss of his wife's services and should also apply to other persons who might be injured by the physician in rendering professional services. For example, if in the course of performing a particular procedure the physician's instrument should slip and he injures the patient's parent who is standing by, the physician should be entitled to insurance protection with regard to the liability thereby incurred.

The insurance protection is not restricted to particular kinds of injury. "Injury" accordingly may include bodily injury, property damage, personal restraint, undue familiarity and other forms of personal injury such as libel, slander, mental anguish, and invasion of privacy. A few forms specifically itemize assault and battery, breach of implied contract, libel and slander, and the like in the insuring clause. The fact that the National Bureau form of insuring clause does not list the specific causes of injury arising out of professional practice for which a physician may be sued would not appear to denote a narrower area of coverage.

However, it should be emphasized that coverage exists only with reference to injuries which arise out of the insured's profession. A physician's liability policy was held not to cover a judgment against the insured as county coroner for an unlawful autopsy performed at his direction as coroner in *Crenshaw v. United States Fid. & Guar. Co.*[2]

The partnership liability which may be created because of malpractice committed by a partner is specifically excepted. For an additional premium it is the usual practice for malpractice insurers to provide such protection. Physicians who are in partnership practice are responsible for the acts of each other and are not protected unless contingent partnership liability coverage is stated in the policy. Such coverage can be particularly essential in the event a malpractice claim is made against a partner who dies or if a malpractice judgment is rendered against a partner who does not have adequate coverage to meet the judgment.

*Cases Involving Disputed Coverage*

*Equipment:* In *American Policyholders Ins. Co. v. Michota*,[3] a patient had gone to the chiropodist for treatment of a foot ailment. He instructed her to sit in a metal hydraulic chair designed for the occupancy of patients. Due to the failure of the chiropodist to "lock"

2. 193 S.W.2d 343 (Mo. App. 1946).
3. 156 Ohio St. 578, 103 N.E.2d 817 (1952).

the chair, it suddenly rotated as she was attempting to get into it, throwing her to the floor and injuring her.

In an action to determine if the insurer was liable to the chiropodist for the amount of a judgment obtained against him by the patient, the insurer contended that the policy was strictly limited to those injuries which might arise out of the actual rendition of professional services, and that injury due to the condition of the chair was not covered. The court held that the injury was one "arising out of the practice of the insured's profession" and also constituted "an injury resulting from professional service rendered or which should have been rendered" which brought it within the coverage of the insured's professional liability policy. The court said that maintaining the treatment chair in a proper and safe condition for the accommodation of patients was a service or duty directly connected with the practice by the insured of his profession as a chiropodist.

The terms "malpractice, error, negligence or mistake" were held in *Harris v. Fireman's Fund Indem. Co.*,[4] to cover injury to the patient of an insured osteopathic physician when the safety catch on his treatment table failed, causing collapse of the table.

*Libel:* In *Maier v. United States Fid. & Guar. Co.*,[5] the plaintiff was a member of the Colorado State Medical Society which carried group insurance with the defendant insurer. He sued the insurance company to recover attorney's fees and costs expended in defense of a libel suit.

About June, 1946, the insured had signed a death certificate and after supplying all of the necessary medical information he added in the margin the following statement: "This patient died from criminal neglect at the Spears Sanitarium." In June, 1950, suit against Dr. Maier was instituted by Spears Sanitarium, based upon two claims, one of which referred to the above marginal statement written by the insured; and the second to a publication in a newspaper, about three years after the death certificate was signed, of a photostatic copy of the death certificate together with the statement that the patient had died after being at the Spears Sanitarium for several days without care. This litigation terminated favorably to the insured.

Dr. Maier then brought suit against the insurer to recover his expenses. The policy insured the physician against any claim or suit based upon malpractice, error, negligence, mistake, slander, or libel, arising from his professional services. The insurer had offered to provide defense only for the first cause of action in the "Spears" case but this was refused by the insured and his attorney. The court

4. 42 Wash. 2d 655, 257 P.2d 221 (1953).
5. 133 Colo. 571, 298 P.2d 391 (1956).

held that when the insured rejected this offer and hired counsel in violation of a policy provision that he would not contract any expense without the insurer's written authorization, he was not entitled to recover from the insurer for attorney fees and costs.

As to the second cause of action in the "Spears" case concerning the publication of the alleged libel in the newspaper, this was not covered by the insured's policy, since it was not related to professional services rendered or which should have been rendered. The court said:

> When the insurer offered to defend the first cause of action and was refused, and the insured insisted that the defense should be conducted by an attorney of his choosing, such choice on the part of the insured was one that he had no right to make under the terms of the policy. There is little doubt, if any, that there was liability on the part of the insurer to defend that part of the "Spears" suit based upon the marginal notation on the death certificate, but no liability as to the other. . . . While it is true that the marginal notation on the death certificate was not a pure compliance with any requirement of the law or the death certificate itself, it may be considered as an allowable elaboration of the insured's full diagnosis of the causes of death.[6]

*Period of Coverage*

Where the treatment of a patient began before a professional liability policy became effective, but the treatment is continued thereafter for some period of time, the insurer will be liable to defend a suit if it is claimed that acts of malpractice occurred after the effective date of the policy.

In *Aetna Life Ins. Co. v Maxwell*,[7] a physician treated a patient from March 26 to August 7, 1932. The policy of insurance against malpractice was issued July 23, 1932. It was held that the defendant insurance company was liable only for such malpractice or neglect as took place between July 23 and August 7. Since it was necessary for the jury to distinguish between the effects of the medical and surgical treatment before and after July 23, the court of appeals ruled that it was error for the trial court to exclude offered medical expert testimony on this issue.

In *Shaw v. United States Fid. & Guar. Co.*,[8] the patient received forty-one treatments prior to the issuance of the policies of insurance. Only fourteen treatments were given after the policies were in force. The insurance company took the position that the patient's injuries were caused by the treatments received prior to the inception of the insurance coverage and not by the treatments received thereafter. The court stated that the company would be liable if it was shown

6. 298 P.2d at 393.
7. 89 F.2d 988 (4th Cir. 1937).
8. 101 F.2d 92 (3rd Cir. 1938).

that the injuries received by the patient were sustained by her as a result of the fourteen treatments last given to her, and also that the company would be deemed liable if the fourteen treatments last given caused the patient's injuries because their effect was added to that of the forty-one treatments first given.

The original policy issued to the insured covered the period from November 20, 1925, to November 20, 1926, and the second policy covered the period from November 20, 1926, to November 20, 1927. The patient noticed ill effects from her treatment for the first time in August, 1926, and there was confiicting testimony on the question of whether or not the injuries were sustained within the period of the policy. The court held that the question of the weight and sufficiency of this testimony was properly left to the jury.

In *Waterman v. Fidelity & Cas. Co.*,[9] an insured physician began treatment of a patient on February 20, and the liability policy was issued on March 18. The physician continued to treat the patient for five or six weeks thereafter, and in a subsequent case brought by the patient against the physician for malpractice it was alleged in the complaint that the physician had continued to treat the patient after the policy was issued, during all of which time he was guilty of malpractice.

The court held that the insurer should have defended the case for the insured, and that not having done so it was liable to reimburse the insured for the amount he had been required to expend as the result of the suit. The contention of the insurer had been that since the patient was first treated on February 20, which was prior to the issuance of the policy, the malpractice was not within the scope of the coverage. The court, however, dismissed this contention, stating that it had been expressly charged in the malpractice case that the plaintiff had been guilty of malpractice while the policy was in force.

*Guaranteed Result*

Suits in which the patient claims that a guaranteed result was not obtained present a particular hazard to the doctor because they are specifically excluded from coverage in professional liability policies. Evidence of a poor result is sufficient to justify a verdict if the jury chooses to believe that an oral agreement of guarantee had been entered into. Where malpractice is charged, expert medical testimony is generally necessary to support the claim that the doctor failed to exercise the proper degree of skill but in a contract action the doctor's skill is not in issue.

An over-optimistic prognosis may lead some patients to believe

9. 209 Ill. App. 284 (1917).

that the physician guarantees a satisfactory result, and if taken literally, his careless remarks may give rise to the semblance of a contract of guarantee which he does not intend. Assume, for example, that the patient is suffering from a painful condition which can be cured by an operation which statistically involves a minimum operative risk. Because even the most prudent, informed persons might be expected to undergo such surgery as a matter of course, the surgeon may unwittingly go too far in attempting to convince the patient. "I assure you that you will be good as new" or "I guarantee you that this operation will make you well again" are remarks that may have the legal purport of a contract of guaranteed cure. Yet they may be taken out of the text of a fuller conversation that is intended solely to convince the patient to undergo an operation that any reasonable, intelligent, and informed person would not hesitate to risk. But what if despite skillful surgery the patient turns out to be the one unfavorable statistic out of a thousand?

In agreeing to perform an operation, the physician does not, in the absence of a special contract, guarantee particular results or to cure.[10] In the cases that have come to the attention of the writer in which a guaranteed result was alleged, in only a few was there any legitimate basis to claim the existence of a contract guaranteeing a cure. However, since such claims are excluded from coverage by the standard policy, a physician-defendant in such an action is entitled to neither indemnification nor defense.

The studies of the AMA Law Division show that by and large physicians of reputable standing in the medical community are the ones generally involved in malpractice actions. The exclusion against guaranteed results may be intended to safeguard the insurance company that inadvertently issues a policy to a quack. Nevertheless, it operates to deprive the reputable and qualified physician of insurance coverage if he unwittingly makes remarks which the plaintiff and the jury or court choose to construe as a contract of guarantee, or if he is the target of an unscrupulous plaintiff.

Howard Hassard, a California attorney who is prominent in defending physicians' malpractice cases recently reported that "suing for breach of contract has become popular of late among plaintiffs' lawyers."[11] Here, then, is an area of potential liability in which the doctor is faced with a serious unprotected gap in his insurance coverage. From the standpoint of the medical practitioner, the standard

10. Piper v. Halford, 247 Ala. 530, 25 So. 2d 264 (1946); Hawkins v. McCain, 239 N.C. 160, 79 S.E.2d 493 (1954); Waynick v. Reardon, 236 N.C. 116, 72 S.E.2d 4 (1952); Vann v. Harden, 187 Va. 555, 47 S.E.2d 314 (1948); Fritz v. Horsfall, 24 Wash. 2d 14, 163 P.2d 148 (1945).

11. Hassard, *Your Malpractice Insurance Contract*, 168 J.A.M.A. 2117, 2118 (1958).

policy should be revised to provide him with defense against a claim or suit charging a guaranteed result, and also indemnification for payment of the judgment unless the findings of the court show that he was guilty of conduct amounting to a violation of the Principles of Medical Ethics.

In *Safian v. Aetna Life Ins. Co.*,[12] the court held that a policy indemnifying a physician against loss for claims for damages "on account of any malpractice, error or mistake committed" by the physician did not cover liability in an action for breach of an oral contract to remove facial blemishes. One of the statements, in connection with the issuance of the policy, was the representation made by the physician that he did not have in force and would not "enter into any special contract or agreement . . . guaranteeing the result of any operation or treatment." The court said:

> It should be obvious that insurance coverage for claims arising out of "malpractice, error or mistake," is clearly legally distinguishable from coverage for breach of contract. The legal duty, the breach of which is covered, is wholly different. If a doctor makes a contract to effect a cure and fails to do so, he is liable for breach of contract even though he used the highest possible professional skill. Insurance of such a contract could protect only medical charlatans. The honorable member of the medical profession is more keenly conscious than the rest of us that medicine is not an exact science, and he undertakes only to give his best judgment and skill. He knows he cannot warrant a cure.[13]

In *McGee v. United States Fid. & Guar. Co.*,[14] a physician was found to have entered into an oral special contract with the patient whereby he guaranteed to perform a skin graft operation which would give the patient "a perfect hand 100 per cent good." The court held that a policy protecting the physician against losses due to malpractice, did not cover a loss suffered when the physician was sued because of an alleged disfigurement in an attempted skin graft, since the liability arose out of the special contract to perfect a cure with a guaranteed result, and not because of "malpractice, error or mistake" in treatment. The physician's liability did not result from the implied contract applicable to every physician in the treatment of his patient, which is covered by malpractice insurance, but because of the special contract to give his patient "a perfect hand 100 per cent good."

A different result was obtained in *Sutherland v. Fidelity & Cas. Co.*[15] The physician's policy insured him against liability for mal-

12. 260 App. Div. 765, 24 N.Y.S.2d 92 (Sup. Ct. 1940), *aff'd*, 286 N.Y. 649, 36 N.E.2d 692 (1941).

13. 24 N.Y.S.2d at 94-95.

14. 53 F.2d 953 (1st Cir. 1931).

15. 103 Wash. 583, 175 Pac. 187 (1918).

practice, error, or mistake in the practice of his profession, and "against loss from the liability imposed by law upon the assured, for damages on account of bodily injuries or death, suffered by any person or persons in consequence of any malpractice, error or mistake." The court held that this covered an act of liability based on a contract entered into between the assured and his patient whereby the former agreed to remove all the gallstones and causes of disease from the latter, which was not successfully accomplished. The insurer argued that the phrase "the liability imposed by law," referred only to common law liability and not to that which had its basis in contract. The court rejected this contention, stating that such reasoning would be sound only if the policy had covered malpractice alone, but clearly did not apply where the coverage was extended to mistake or error. The court concluded that the fact that the insured had entered into a special contract did not affect the insurance policy, because it was a contract made in the practice of his profession, and one which he clearly had a right to make.

*Criminal Acts*

Where the patient's injuries were attributable to the use by the insured physician of an unqualified and non-licensed assistant in violation of the provisions of law, the court in *Glesby v. Hartford Acc. & Indem. Co.*,[16] held that the liability of the insured for malpractice in the treatment of the patient was not within the coverage of the policy. The policy provided that it would not cover bodily injuries caused by the assured or any assistant of the assured while engaging in a violation of any law or ordinance.

Many of the actions brought by patients against physicians allege assault and battery[17] and not necessarily a charge that the physician negligently failed to render services with the requisite degree of skill. These cases usually involve a claim that a surgeon operated without proper consent or that he extended the operation beyond the consent given. Even though the surgeon may have acted in complete good faith, doing what he believed to be in the best interest of the patient, lack of legal consent amounts to a technical assault and battery and, subject to local law, may be construed as an unlawful or criminal act.

In *Shehee v. Aetna Cas. & Sur. Co.*,[18] a federal district court in Louisiana held that the failure to obtain a patient's consent before performing an operation did not constitute assault and battery as that term was intended in the exclusionary clause in the policy in

16. 6 Cal. App. 2d 89, 44 P.2d 365 (1935).
17. Moos v. United States, 118 F. Supp. 275 (D. Minn. 1954); Church v. Adler, 350 Ill. App. 471, 113 N.E.2d 327 (1953); Dicenzo v. Berg, 340 Pa. 305, 16 A.2d 15 (1940); Nolan v. Kechijian, 75 R.I. 165, 64 A.2d 866 (1949); Physicians' & Dentists' Business Bureau v. Dray, 8 Wash. 2d 38, 111 P.2d 568 (1941).
18. 122 F. Supp. 1 (W.D. La. 1954).

question, which excluded acts involving "assault and battery" from coverage by the policy. The court reasoned that liability was covered under the insuring clause covering acts of malpractice.

Failure to obtain a proper consent to an operation has nevertheless repeatedly been held to constitute assault and battery in actions brought by patients against physicians for civil damages.

If the philosophy of the *Shehee* decision is applied in interpreting the policy exclusion of "injury arising out of the performance of a criminal act" the exclusion would operate only where it would offend public policy or good conscience to require the insurer to indemnify the policyholder. For example, if a physician were to deliberately assault and injure a patient who refused to pay a bill for services, the criminal act exclusion would avoid coverage. However, it is unlikely that an injury of this nature could be considered as arising out of the rendition of professional services, as required by the insuring clause.

It may be contrary to public policy for an insurer to be required to indemnify a physician convicted of illegal abortion for any civil damages that he might be required to pay. But the policy exclusion of criminal acts is far broader than necessary to satisfy public policy. A convicted abortionist should not be able to satisfy his civil liability through insurance, but the term "criminal act" embraces misdemeanors as well as felonies, and intent to do wrong is not necessarily an ingredient of the criminal act. Furthermore, the insurance company may determine for itself whether the plaintiff's claim involves a criminal act committed by the doctor. The prior judgment of a court is not necessary.

To provide the reputable physician with unambiguous and adequate insurance protection, the exclusion of criminal acts should be qualified. Defense should be required except where the act involved is one for which the physician has been convicted by a criminal court. Obviously there should be no indemnity where the court has found that an illegal abortion occurred, nor where the laws of the state may prohibit indemnity for reasons of statutory law or public policy. A further exception excusing indemnification might be with reference to an act found by the court to have been committed by the physician-defendant which is in violation of the Principles of Medical Ethics.

*Misrepresentation*

The company may deny liability in a loss situation, where a material fact, one that would have affected the issuance of the policy, was deliberately misrepresented.

In *United States Fid. & Guar. Co. v. Fridrich*,[19] a dentist represented that he was a member in good standing in his state dental society at the time of securing the policy. His acceptance of a renewal of his policy was held to be a new representation to the same effect, and if, at that time, he had failed to pay dues and was not in good standing, the insurer has been held entitled to cancel the policy. The court said: "A part of the consideration for the policy was membership, and when this condition of membership did not exist the consideration failed."[20] The insurance company issued different policies for members in the state dental society and for non-members.

*Reservation of Rights*

An insurance company may do one of the following when it is notified of a claim or suit against a policyholder. (1) It may assume its responsibilities under the policy without raising any question as to coverage. (2) The decision may be made that the claim is not covered by the policy and the company may send the policyholder a notice of disclaimer of liability. (3) The insurer may preserve the status quo as to its defenses by sending the policyholder a letter of reservation of rights, or by requiring a nonwaiver agreement to defend.[21]

A notice of reservation of rights is a notice from the insurer that it will investigate the claim, defend any suit, discuss settlements with the claimant or take any other action, with reference to the claim, without waiving its rights under the policy. The company will probably say that it reserves the right at any time to discontinue the investigation, defense, discussion of settlement or other action, and disclaim liability.

In the event of a dispute between the insured and the insurance carrier regarding coverage, the company may ask the insured to sign a nonwaiver agreement. This agreement permits the company to proceed to handle the claim and defend any suit without surrendering the company's right to later disclaim liability under the policy.

*Cooperation*

The policy requires the assured to assist and cooperate with the insurance carrier. The standard provision states:

> The insured shall cooperate with the company, and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost,

19. 123 N.J. Eq. 437, 198 Atl. 378 (1938).
20. 198 Atl. at 382.
21. Ancateau v. Commercial Cas. Ins. Co., 318 Ill. App. 553, 48 N.E.2d 440 (1943); Hinchcliff v. Insurance Co. of North America, 277 Ill. App. 109 (1934).

> voluntarily make any payment, assume any obligation or incur any expense.

The insurance company is entitled to a full, frank, and truthful disclosure of all of the facts. The insured's liability to cooperate with his insurer was ably stated by Judge Cardozo in *Coleman v. New Amsterdam Cas. Co.*[22]

> Cooperation does not mean that the assured is to combine with the insurer to present a sham defense. Cooperation does mean that there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense. . . . Cooperation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. . . .

It is the duty of an insured to cooperate with the company by appearing at the time of trial and assisting therein. In *Medical Protective Co. v. Light,*[23] it was held that the insurer was obliged to pay the traveling expenses of the insured physician in attending the trial, but he would have no right to make a professional charge for attendance as a witness. The policy stated that the insured "will attend, assist, and co-operate . . . without charge." The insured lived in Texas and the case was tried in Ohio where the alleged malpractice had occurred and where the physician had formerly practiced.

*Settlement*

When a claim is made, the insurance company will conduct an investigation and then estimate the reasonable disposal value of the claim. A reserve in this amount for the payment of the claim is established inasmuch as claims reserves are generally required by state insurance laws to assure the availability of funds to pay claims. Whether the claim will be settled within or in excess of the original reserve or allowed to mature into a lawsuit is determined by subsequent developments and negotiations.

The standard settlement provision states that:

> the company may make such investigation and negotiation and, with the written consent of the insured, such settlement of any claim or suit as the company deems expedient. . . .

This provision gives the physician protection against the settlement by the insurer of unmeritorious claims. Unfortunately, there are some attorneys who will press for settlement of claims which they know could not be successfully substantiated in court. Solely from the standpoint of cost it may be cheaper for an insurer to dispose

22. 247 N.Y. 271, 160 N.E. 367, 369 (1928).
23. 48 Ohio App. 508, 194 N.E. 446 (1934).

of these nuisance claims by way of a nominal settlement rather than to incur the expense of defending a law suit. As a matter of principle, the average physician will resent any payment to dispose of an invalid claim. Furthermore, many physicians feel that any malpractice claim that is settled reflects adversely against his professional reputation.

However, no physician should as a practical matter refuse an insurance company's decision to settle a claim unless he has first secured the advice of his personal attorney. A refusal to settle within the limits of the policy may result in a judgment in excess of the policy limits in which case the physician, would, of course, be obligated to pay the excess. The question is probably academic, but if a doctor were to arbitrarily and unreasonably prohibit an insurer from settling an obviously valid claim at a low figure, he might have to contribute the difference between this amount and the judgment rendered by the court, even though the judgment was within the policy limits.

Another form of policy provides that:

> The Underwriters shall not settle any claim without the consent of the Insured Person. If, however, the Insured Person shall refuse to consent to any settlement recommended by the Underwriters and shall elect to contest or continue any legal proceedings in connection with such claim, then the liability of the Underwriters for the claim shall not exceed the amount for which the claim could have been so settled plus the costs and expenses incurred with their consent up to the date of such refusal.

This settlement provision does not permit the insurer to settle without the insured's consent but refusal to consent could be costly. For example, if a claim could have been settled for $500, but the insured refuses to permit settlement, then this amount fixes the maximum responsibility of the insurer with reference to the claim and subsequent costs. Assume that the claim is defeated but $1,500 is subsequently spent in defense and litigation costs. A literal interpretation of the language of the policy might make the insured responsible for the $1,000 difference in the cost of disposing the claim.

The liability of an insurer is generally limited to the amount stated in the policy. Under exceptional circumstances insurance companies have been held liable for amounts in excess of policy limits. Such cases involve negligence, fraud, or bad faith on the part of the company in refusing an offer to settle within policy limits with a subsequent court verdict in excess of policy limits. However, there are no reported cases involving professional liability insurance in which an insurer has been held liable in excess of policy limits.

## II. THE AMA QUESTIONNAIRE

Approximately thirty-five to forty companies write medical professional liability insurance in the United States. To evaluate the

strictness or liberality with which insurers interpret the basic policy provisions relating to coverage and exclusions, the AMA Law Division sent a questionnaire to thirty-five insurers. Some responded that they had discontinued writing such insurance or that the number of policies which they had in force was so small that they did not feel that they should speak on the subject; several politely but firmly declined to complete the questionnaire. However, twenty-two companies responded to the questionnaire and in terms of number of policies they probably account for more than eighty per cent of the policies in force.

The responses indicate that the malpractice insurance protection which the physician purchases is determined not only by the policy provisions but to a large extent by the underwriting philosophy of the company. In commenting on the questionnaire, one respondent stated:

> Consider, if you will, the consternation that would result if you prepared 14 different sets of symptoms representing 14 fine-line medical cases and asked a representative group of doctors what they would do in each instance. I am sure that any replies which you received would be full of "ifs" "ands" and "buts." Policy drafting is no more an exact science than medicine. I don't know how many insurance companies received your questionnaire but if a large number reply, including perhaps some that have only recently undertaken to write physicians' and surgeons' liability, I don't envy you your job in trying to reconcile the answers. You might get a different answer from the same company depending on whether the reply was made by a claims attorney or an underwriter. As to my company, if it is the underwriting intent to give coverage in a particular instance, then that intent prevails even though a strict construction of the policy wording might offer an "out."

While the above respondent is primarily concerned with "underwriting intent," the respondent whose comments follow considers its policy obligations in a more literal sense:

> Whether a claim is covered for the purpose of defense is determined by the allegations of the injured party's complaint. If these allegations are of something which would be covered by the policy, the Company owes a defense however false and fraudulent the allegations are. If, however, the complaint alleges something not covered by the policy and does not allege anything else, no defense is owed. This is founded in reason and is the universal decision of the courts of this country, with the exception of one or two poorly reasoned cases. There is no difference between the defense provision in malpractice policies and the defense provision in other general liability policies.
>
> To illustrate the matter a little further, if the injured party alleges nothing covered by the policy, there is no defense; if the injured party alleges two grounds of action, for example in different counts of the declaration, one of which would be covered by the policy if true and the other of which would not, the Company is bound to enter a defense. In such event the

Company would defend under a reservation of rights. This is because it may turn out at the trial that the injured party had an actual claim only on the ground which was not covered by the policy, so that the insurer will not have to pay the judgment.
In answering the questions we have assumed that the injured party is not alleging any other ground than that stated in the question. We therefore have answered the question simply on whether or not there is coverage on the allegations of the plaintiff stated in the particular question, except in one or two cases, since, if there is not coverage, there is no obligation to defend.

Although based upon actual claims and cases which have come to the attention of the AMA Law Division, the questions are hypothetical. With reference to each of the numbered fact situations set forth below, the company was asked for its opinion regarding coverage, or the insurer's obligations to defend and pay the judgment, if any, within policy limits. The responses are summarized and some of the significant remarks made by the respondents are included, as well as the comments of this writer.

1. Dr. Benson, a general practitioner, was called to treat Peter Smith. When he arrived he found what appeared to be an acute psychiatric emergency. Subsequently, Peter Smith brought an action against Dr. Benson charging personal restraint and false imprisonment.

6 Companies said "yes," without qualification, regarding coverage.
16 Companies qualified their answers in varying degrees, as indicated by the following excerpts from their replies:

"Coverage is given as long as the action of the doctor is within the normal activities of a doctor."

"Yes. Except where insured has stepped outside the bounds of his profession, as he would if his action is prompted by personal bias, and except where the insured's action amounts to performance of a criminal act, such as conspiracy. In actual practice, we have defended the vast majority of cases of this type to a conclusion, since the exceptions eliminating coverage are rarely, in fact, established."

"Yes. We would defend under a Reservation of Rights if a criminal act is alleged but our insured, the doctor, denies the criminal act."

"If the insured's report, our investigation or the allegations of the complaint disclosed a criminal act no insurance therefor would be provided by the policy."

"Frequently, when claims are presented, among the allegations will be found one involving a criminal act. Rarely if ever is a criminal act the sole basis of a claim. Even then said criminal act is simply an allegation and not a fact until the point has been adjudicated. In such cases it would be our policy to defend our insured but to reserve our rights under the policy should our insured be found guilty by a duly authorized court of having performed a criminal act."

"We would normally expect to defend an insured accused of a criminal act, if he denies it. Until the contrary is proven or admitted we would not expect to pay a judgment which was founded upon the performance of a criminal act by the insured."

"The case supposed in the question, if it is unlawful detention, appears to be so only in a civil sense, and it also happens to be malpractice in our viewpoint. However, there can be any number of cases of false arrest or unlawful detention connected with a physician's practice, which would not constitute malpractice within a proper construction of the insuring agreement, or which would be excluded as a criminal act. For example, a physician might have a patient arrested for allegedly giving him a bad check in payment of his bill. This could not possibly be construed as malpractice."

"The determining factor would be whether in fact a criminal act is involved. In drafting this particular policy form, the criminal act exclusion was included as a protective measure to exclude those acts which clearly go beyond the border of good professional conduct. It was not the intention that the exclusion would be literally and technically applied but that it would be used in those cases where it seemed necessary and proper to do so."

*Comment:* It is not unusual for a physician to be called to help cope with the situation when some member of the family has apparently and suddenly gone berserk. Legal actions have evolved out of these cases in which the physician has been charged with the use of excessive force, false imprisonment, and so forth.

It is clear that Dr. Benson came upon the scene to render professional services of a nature frequently performed by physicians. However, the professional liability policy specifically excludes coverage of "criminal acts" even though they may arise out of the practice of medicine.

If Dr. Benson did in fact apply excessive force and restraint, technically this would amount to a "criminal act" in most jurisdictions even though the possibility of prosecution or conviction might be remote.

2. Dr. Collins operated upon Mrs. King, with her consent, for an ovarian cyst. In the course of the operation he found that a radical hysterectomy was advisable and thereupon performed this procedure. Mrs. King brought suit against Dr. Collins charging assault and battery in that he went beyond the consent given.

12 Companies responded that they would defend the physician and pay the judgment.

The other insurers generally did not refuse coverage but qualified their position with statements such as these:

"The answer to this question would depend upon whether the performance of the radical hysterectomy without the consent of Mrs. King was a

criminal act in that jurisdiction. Assuming that it only gave rise to a civil suit for damages, we would think that it was malpractice not excluded by the policy."

"In such cases it would be our policy to defend our insured but to reserve our rights under the policy should our insured be found guilty by a duly authorized court of having performed a criminal act."

"If the insured's report, our investigation or the allegations of the complaint disclosed a criminal act no insurance therefor would be provided by the policy."

*Comment:* Despite the good faith of the surgeon who may be acting in the interest of the patient, if, in the absence of an emergency, he performs an operation substantially different from the one to which the patient consented, he may be guilty of a technical assault and battery.[24] Situations of this kind have arisen in the course of surgery under circumstances where the patient is anesthetized and the surgeon assumes that the patient would rather have him proceed than to undergo another operation. If the operative result is poor the patient's attorney may prefer to allege unauthorized surgery than to attempt to prove negligence.

3. Dr. Allen examined Mrs. Jones for a possible female disorder. Later she brought suit for damages against Dr. Allen claiming undue familiarity.

7 Companies responded that they would defend and pay the judgment, if any.
11 Companies indicated that they would defend if they were convinced that the allegations were untrue, but that they would not pay any judgment that might result.
The other 4 insurers interpreted their policy obligations as follows:

"If our investigation indicated that the doctor was actually not guilty of undue familiarity, we would defend unless the doctor was convicted in a criminal prosecution; however, under such circumstances, we would not pay the judgment."

"If the doctor denied the patient's allegations we would defend the suit. Whether or not we would respond in payment of an adverse verdict would largely depend upon the facts developed during the trial of the lawsuit."

"Assuming that acts of undue familiarity constitute a crime in the jurisdiction involved, this suit would not be covered."

24. In Rolater v. Strain, 39 Okla. 572, 137 Pac. 96 (1913), the patient consented to the defendant's operating on her foot for the purpose of draining an infected wound but instructed the defendant not to remove any bones. The defendant removed the sesamoid bone because the drainage could not be accomplished unless he did so. This was held to be actionable even though there was expert testimony that the sesamoid bone serves no useful purpose. In Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905), it was held that the patient's consent to an operation on her right ear did not authorize the performance of a similar operation on her left ear. See also Wall v. Brim, 138 F.2d (5th Cir. 1943); Perry v. Hodgson, 168 Ga. 678, 148 S.E. 659 (1929).

"Such a claim would not be covered if a criminal act such as rape or attempt thereat was committed. However, if the 'undue familiarity' consisted of certain acts considered normal in performing such an examination, there would be coverage under our policy."

*Comment:* Physicians are continually cautioned by their medical societies and insurers to avoid examining female patients unless a third person, such as a nurse, is present. Claims alleging undue familiarity are frequently no more than extortion threats. A physician who is convicted of a rape charge may not be entitled to defense or indemnification if the complaining witness brings a civil suit against him. But to what extent should the physician who is involved only civilly in a suit charging undue familiarity be able to rely upon his insurer for defense and indemnity? Apparently this is an area in which there is no specific answer at this time.

4. Dr. Elliott performed an abortion upon Mrs. Arthur which resulted in her death. Mr. Arthur brought a death action charging an illegal abortion. In asking the company to defend him, Dr. Elliott claimed that there was a therapeutic need for the abortion.

12 respondents stated that they would defend but would not pay any judgment that might be rendered.
7 Companies would defend only if they believed that the physician had not committed a criminal act, but indicated that they would not be liable to provide coverage against any judgment that might be rendered.
2 Companies would neither defend the physician nor pay any judgment inasmuch as a criminal act was alleged and such actions are not covered by the policy.
1 Company interpreted its liability to cover both defense and payment if a judgment is awarded.
Typical of the comments of the respondents were these:

"Any charge against the doctor in a suit for damages must be based on his having done something illegal."

"We assume that an illegal abortion would be a crime in any jurisdiction. This being so, there would be no obligation to defend a suit alleging an illegal abortion, and, of course, no obligation to pay a judgment. Dr. Elliott's claim that there was a therapeutic need for the abortion is merely a plea by him that he did not commit the crime. Since nothing but the crime is alleged in the declaration, there is no coverage whether or not Dr. Elliott wins the suit."

"As long as the doctor says it was necessary for therapeutic reasons we would defend the case, but if the jury found that the operation was not for therapeutic reasons we would not pay any judgment on the assumption that the operation was illegal."

*Comment:* Even though an illegal abortion is clearly a criminal act and is therefore excluded by the policy, only two companies would refuse to defend a physician who denied the charge. Considering the

obligations which an insurer has to its other policyholders or stockholders, is it justified in gratuitously assuming the defense of a claim excluded by the policy?

5. Dr. Forgan performed a non-therapeutic sterilization operation upon Mrs. Sutter who wanted to avoid further additions to her family of eight children. An accidental injury occurred in the course of the operation and Mrs. Sutter brought suit for injuries because of alleged malpractice.

8 respondents interpreted their liability as covering both defense and payment even though the sterilization operation was for non-therapeautic reasons.
The other Companies generally stated that they would provide coverage only "if sterilization is not a criminal act."
A few of the representative comments of the respondents are:

"In the states where we operate, so far as we know, such actions by the doctor have not been adjudged criminal."

"We would defend and pay whether or not the doctor claimed a therapeutic need for the operation."

"This answer is based on the assumption that a 'non-therapeutic sterilization operation' is not criminal. If it constitutes a crime, we would defend the doctor unless he had been convicted in a criminal prosecution."

"Yes. Unless act was found to constitute crime of mayhem."

*Comment:* At least in some states, non-therapeutic sterilization operations are not infrequent. The legality of the non-therapeutic sterilization operation still is an academic question in medicolegal circles. The replies indicate generally that insurance protection will be given at least until such time as the courts or legislatures specifically declare such procedures to be illegal.

6. Dr. Monroe was of the opinion that another pregnancy would endanger Mrs. Phillips' life and therefore recommended and performed a vasectomy on Mr. Phillips. Later Mr. Phillips brought suit charging malpractice and that the operation upon himself was unnecessary.

8 Companies acknowledged that the policy covered both defense and payment.
The remaining respondents generally stated, as in the previous hypothetical case, that there would be coverage "if sterilization is not a criminal act."

*Comment:* Even though a vasectomy is a comparatively minor procedure compared to the sterilization of a woman, some physicians and others have taken the position that if pregnancy will endanger the wife, she is the one that should be sterilized. It has been argued, for example, that if the wife should die and the husband should remarry, the new spouse would be deprived of the opportunity to have a family.

Apparently the insurance industry will regard such operations

as legal until such time as the courts or legislatures may decide to express a contrary opinion.[25]

7. Dr. Dickinson was sued by Mrs. Gordon for alleged injuries resulting from an attempt to artificially insemmate her.

7 respondents said "yes," without qualification to policy coverage.
The 15 other respondents stated that coverage would depend upon such qualifications as "whether artificial insemination is a crimmal act or against public policy" or whether "artificial insemination was deemed the rendering of professional service."

*Comment:* Despite the opposition of a large segment of the clergy in the United States to artificial insemination, it appears that insurers will generally render insurance protection until such time, if ever, that artificial insemination performed by a physician may be declared by the courts or the legislatures as an illegal act.

8. Dr. Gaines performed cosmetic surgery upon Miss Barton. The operation failed to improve her appearance and she brought suit claiming that Dr. Gaines had guaranteed that the operation would improve her appearance. Dr. Gaines denied the alleged guarantee.

11 respondents would deny coverage where the suit is based upon an alleged guarantee and therefore would neither defend the doctor nor pay any judgment that might be rendered against him.
9 of the Companies responding indicated that they would defend the doctor if he denied the guarantee or if their investigation did not support the allegation but they would not pay a judgment based upon an alleged guarantee of result.
2 Companies would both defend and pay on behalf of a doctor who unsuccessfully denied an alleged guarantee of result.
The following are a few of the comments made by the respondents:

"If investigation did not support the allegation, the company would defend under reservation."

"The company would defend such a claim but would reserve its rights in connection with the physician's guarantee that he would obtain a good result. Any judgment based solely upon the guarantee would not be satisfied."

"Generally this would not be covered and both answers should be 'No.' However, if malpractice is alleged additionally to the guaranty, we would answer 'Yes' as to the malpractice allegations."

*Comment:* The fact that the professional liability policy expressly excludes claims based upon a guarantee of result presents a serious

25. Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934). The therapeutic justification for the sterilizing operation in this case was that further pregnancies would be dangerous to the health of the plantiff's wife. The operation was performed on the plaintiff husband because the operation for the sterilization of a male is simpler and less dangerous than that for the sterilization of a female. This was held to be not contrary to public policy. The operation did not produce sterility in the husband. See also Wiley v. Wiley, 59 Cal. App. 2d 840, 139 P.2d 950 (1943), in which the court assumes, without discussion, that a nontherapeutic sterilization is a wrongful act.

problem. Only a charlatan would guarantee a result for the purpose of obtaining a medical fee. However, there are numerous instances in which a physician will offer words of encouragement to a despondent patient. Such words of encouragement may sometimes be misinterpreted by the patient, particularly in cases of cosmetic surgery where the injured patients will compare the results of the surgery to his appearance as it was before the injury and not as he looked after the injury. There have been an increasing number of suits charging reputable doctors with alleged guarantees of result, but it appears that more than half the insurance companies responding would not defend in an action based exclusively upon an alleged guaranteed result.

9. Dr. Lawrence had a difficult day and to induce sleep he took a barbiturate before retiring. In the middle of the night, while somewhat under the influence of the drug, he was called upon to render emergency medical service to the victims of an automobile accident under circumstances where another doctor was not immediately available. He is sued for malpractice growing out of the services he rendered.

4 Companies considered the case as being excluded by the policy exclusion relating to services rendered by a physician while under the influence of intoxicants or narcotics.
2 respondents would defend but were uncertain as to whether they would pay any judgment that might be rendered.
3 respondents said that the degree to which the doctor was under the influence of the barbiturate would determine their decision regarding coverage.
13 acknowledged coverage as to both defense and payment.
The significant comments of the respondents are as follows:

"This case involves the exclusion which rules out injury caused by a person while under the influence of intoxicants or narcotics. On the face of the exclusion, the case would not be covered. However, a court might feel that the remnants of the effect of a barbiturate, when considered in connection with the emergency were not sufficient to bring the case within the real intent of the exclusion."

"The facts in your case in Question 9 involve an emergency without other professional help available. Under such circumstances it is difficult, if not impossible, to conceive of our invoking the 'narcotics' exclusion."

"Answers would be yes if insured not sufficiently under influence of drug as to affect his skill or judgment."

"We do not believe barbiturate is a narcotic such as is intended in the exclusion."

"Question 9 has to do with the exclusion of an injury 'caused by a person while under the influence of . . . narcotics.' Is a barbiturate a narcotic? We do not think so."

"The company would defend and pay. It is the intent of the policy exclusions relating to 'Narcotics' to deny coverage where flagrant misconduct in the use of narcotics is evident."

*Comment:* Barbiturates may come within the board definition of intoxicants and narcotics even though laymen generally think of intoxicants in terms of alcoholic beverages and narcotics in terms of such drugs as morphine, opium, or heroin.

The policy excludes claims arising out of service rendered under the influence of intoxicants or narcotics. Most, but not all, of the respondents indicated that they would not interpret the exclusion literally but would apply it against a physician who is a drug addict and committed malpractice while under the influence of his addiction.

10. Dr. Johnson is a general practitioner and is insured as such. One of the declarations in his policy states that the insured does not perform major surgery. Prior to the issuance of the policy Dr. Johnson performed only minor surgery and did not perform any appendectomies for about three years. Being unable to obtain a surgeon to perform an emergency appendectomy on one of his patients, Dr. Johnson undertook to perform the operation himself. A bad result occurred and Dr. Johnson was sued for malpractice.

None of the 22 respondents would deny coverage under the facts stated.

Some of the remarks made by the respondents are:

"The policy declarations contain a statement that the insured does not perform major surgery. This is included for rate-making purposes only and is not intended as a restriction upon policy coverage. As to question 10, therefore, would both defend such a claim and pay any judgment in connection therewith subject, of course, to the limits of liability set forth in the policy."

"There is no exclusion in the policy to void a claim of this kind assuming no fraud or deceit was involved when doctor completed questionnaire for Professional Liability Insurance."

"Yes—in view of the fact that the operation was performed on an emergency basis and not as a regular practice."

"His statement in the declaration was made in good faith and when made was true."

*Comment:* It does not appear that the situation presented in the question raises any issue in regard to which the respondents disagree significantly.

11. Dr. Howard was away for a Christmas vacation, and left his employee Dr. Snyder in charge. While attending a Christmas party, Dr. Snyder, who had had four or five drinks, was called to perform an emergency appendectomy. He realized that he was to a minor degree affected by the alcohol he had consumed but because there was no other physician immediately available to take care of the emergency he felt that he had no other alternative but to go ahead with the operation. The operative result was bad and Dr. Howard was sued for the alleged malpractice of his employee.

6 respondents said "yes" to both defense and payment.
6 respondents said "no" to both defense and payment.
The remaining companies would be willing to defend the employing physician but expressed either doubt or refusal to pay any judgment.
Some of the companies expressed these reasons for their position:

"We would defend if there was a question as to whether the doctor was under the influence of liquor. We would not pay if the court determined that he was."

"It should be mentioned that the fact that the operation was performed by an employee of the insured instead of by the insured makes no difference. The exclusion is not limited to injury caused by the insured himself while under the influence of intoxicants, but extends also to injury caused by any person while under the influence of intoxicants, for whose acts the insured is responsible."

"We would defend a claim of the type described in question 11 under a reservation of rights to determine whether Dr. Howard knew of a tendency of Dr. Snyder toward the indiscriminate use of alcoholic beverages. If such a propensity is substantiated there would be a denial of coverage under the policy."

"The fact that there is an emergency and no other qualified physician was available would have great bearing on our attitude. We would not invoke the 'intoxication' exclusion. From a practical point of view this exclusion is aimed at the habitual drunk or alcoholic whose habits were not known to the Company when the policy was accepted."

"Question 11 involves the 'intoxication' exclusion and seems to ask if that exclusion applies against an innocent insured whose employee is the culprit. The exclusion is one that must be interpreted with a sense of proportion. The actual wording refers to *any* person under the influence of intoxicants who is the cause of the injury. This would seem to exclude coverage for the innocent doctor who left his employee to take over while he was away. Such an application might not be unreasonable if the doctor-employer knew of the propensities of his employee, and leaving him in charge of operations was a reckless disregard of the obvious. Without this factor, I think the policy should cover. Certainly the exclusion cannot be interpreted literally."

*Comment:* The policy excludes coverage with regard to claims which arise from the performance of services while under the influence of intoxicants. Some of the companies would interpret the exclusion literally while others to varying degrees would yield to the equitable considerations presented in the case.

12. Dr. Innes, while performing an operative procedure, accidentally permitted an instrument to slip, thereby causing a severe injury to his physician assistant.

17 Companies said that this type of claim is covered.
1 Company thought that coverage was questionable.

1 respondent would provide defense only.
3 Companies would deny coverage.

"We doubt if this injury would be held to be caused by malpractice. The reasonable meaning and intent of the insuring agreement is to cover an injury to a patient of the insured."

Yes. The case involves "injury arising out of malpractice, error or mistake in rendering or failing to render *professional services* in the *practice* of the insured's profession."

"For defense only."

"Yes. We assume that the physician assistant is not an employee of Dr. Innes."

"Yes—there is no exclusion applicable under these circumstances and it makes no difference that the injured was a fellow doctor."
"Our policy is not limited to claims by patients. The insuring clause refers to injuries arising out of malpractice, error or mistake in rendering or failing to render the professional services."

*Comment:* It is significant that the specific language of the professional liability policy is not limited to injuries sustained by patients. Yet a few insurers would apparently read such a limitation into the policy.

13. Dr. Lawrence gave Mr. Smith a pre-employment physical examination. The doctor reported to the prospective employer that Mr. Smith was afflicted with syphilis and Mr. Smith was rejected for employment. Because of a mistake which occurred in the laboratory Dr. Lawrence's report that Mr. Smith had syphilis was in error. Mr. Smith brought suit against Dr. Lawrence charging among other things libel.

All of the respondents acknowledged coverage with the exception of one company which would defend the doctor but would not pay any judgment that might result.
Two of the respondents explained their position as follows:

"The malpractice policy is not a policy covering libel or slander. In a very restricted class of cases a libel might also constitute malpractice and therefore, if not criminal libel, be covered by the policy. Such a case would appear to be stated in Question 13. The doctor appears to be rendering professional services when he makes the physical examination and immediately renders a report. However, there can be any number of cases in which slander or libel has some connection with the physician's practice where the libel or slander would not merely be malpractice. For example, in the very case given Dr. Lawrence might publish his finding of the disease in some manner other than the report to the employer for the purpose of which the examination was made. Such publication would be pure libel and not malpractice, and therefore not covered."

"Inasmuch as the policy refers to the unqualified word 'injury,' there would be coverage with respect to personal injury which would include libel. Thus the company would be required to defend and to pay."

*Comment:* Although the standard policy refers to coverage for "injury" arising out of the performance of professional services, there does not seem to be any question that injury includes libel as well as physical injury.

14. Members of the medical staff at the Central Hospital determine the admission or expulsion of physicians from the medical staff. Only members of the medical staff are entitled to hospital privileges. Dr. Mason, a member of the medical staff was asked to investigate the surgery performed by Dr. Nixon. Dr. Mason's report stated that Dr. Nixon was incompetent and had performed unnecessary surgery. On the basis of this report Dr. Nixon was expelled from the medical staff. He then brought suit against Dr. Mason charging libel, etc.

8 Companies would defend and pay if a judgment were rendered.
2 would defend but would not pay any judgment.
2 merely stated that a difference of opinion existed regarding coverage and did not indicate their own position.
10 respondents stated that there was neither an obligation to defend nor to pay on the part of the company and 3 of these respondents also noted that they knew of no standard policy which would cover the risk involved.
The following are extracts from the comments received:

"Our policy would provide protection for Dr. Mason's individual liability."

"On the assumption that the doctor's report was not intentionally and maliciously false, we probably would defend and pay the judgment."

"If the opinion is based upon professional knowledge there would be coverage under the policy, but if it should be based upon personal prejudice, maliciousness and intent to harm then it would be an unprofessional act and no coverage should be afforded."

"No standard type of insurance is available."

"We cannot consider the action of Dr. Mason in this case to be malpractice in rendering professional services. It is merely libel committed by him in the course of his administrative duties which does not result in injury to any patient or to any patient medically examined by him."

"Does it not appear conclusive that it would be unwise to provide such coverage under a professional liability policy because it would protect a doctor who provoked litigation by an act that is not a professional service rendered in the practice of his profession? There will always be honest differences of opinion on medical procedures. Remember Pasteur's experience?"

*Comment:* In the typical community hospital, administrative and housekeeping functions are within the domain of the board of trustees and the hospital administrator. The medical staff is usually self-governing and determines standards of medical care within the institution, evaluates the surgical and medical care rendered by members of the medical staff, and controls the admittance or ex-

pulsion of physicians from the medical staff. The medical staff carries on its responsibilities through one or more committees, depending upon the size of the hospital. Most physicans who treat hospitalized patients participate in the activities of the medical staff from time to time.

When the tissue or medical audit committee has found that a particular physician has repeatedly engaged in unjustified surgery, for example, the result is likely to be that the medical staff will either limit or suspend his hospital privileges. The importance of the activities of the medical staff and its committees in assuring good medical care of the hospitalized patient is self-evident. Physicians serve the public not only by treating their own patients but also by applying their professional learning talents and experience to the medical affairs of the hospitals which they attend.

All will agree, of course, that the physician who knowingly or unknowingly undertakes surgery beyond his experience and capabilities should be curbed. But the physician involved may not agree with the decision of his fellow physicians which limits him professionally and thereby economically.

The instant case is hypothetical, but it is based upon a few situations which have recently occurred and which are likely to occur in the future in great numbers as the needs and complexities of modern medicine and surgery require stricter discipline within the self-government of modern hospitals. From the replies received from the insurance carriers the average physician has no assurance whatsoever as to whether his professional liability insurance will cover him in an activity which most practicing physicians may be called upon to perform from time to time. This is an area in which specific insurance coverage should be available.

## Conclusions

It is inevitable that there always will be shades of difference among insurance carriers in the interpretations they place upon standard policy provisions. In the case of medical professional liability insurance it appears that some of the provisions relating to coverage and to policy exclusions is susceptible of too wide a difference in interpretation.

The results of the questionnaire sent by the AMA Law Division to the companies writing medical professional liability insurance indicate that there are important areas in which the professional liability policy should be clarified and amplified regarding coverage, indemnity, and defense.