



# Professional Liability Insurance:

Understanding the Exposure and the Coverage Options

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## Liability Insurance: An Overview

Liability insurance covers the financial risk of unexpected civil lawsuits. If an insured is sued for a covered liability, the insurance company will provide legal defense and pay any judgment up to the policy limits.

The insurance company can also, at its sole discretion, settle any liability claim either before or after a lawsuit is brought. As a practical matter insurance companies settle most liability claims, rather than going to court, in order to avoid the expense and uncertainty of litigation.

### Insurance May be Required

A nonprofit may be required to purchase liability insurance for a number of reasons. If you own automobiles, you are required by statute to have automobile liability. Funding sources, landlords, lessors, mortgagors, municipalities, and other nonprofits may all require you to show evidence of liability insurance, but regardless of your reason for purchasing coverage, the policy itself has only one purpose — to protect your nonprofit from the financial risk of lawsuits.

### Your Interests and the Insurer's May Not be in Sync

This narrowness of purpose can create a conflict between the insurance company and the wishes of the nonprofit. For example, if a volunteer is injured while working on your behalf, you may want your liability policy to pay for the volunteer's medical expenses. The insurance company will defend you if the injured volunteer brings suit, but will make no payment to the volunteer unless a judgment is rendered against you, or unless they believe it is in their interests to settle. On the other hand, you may be served with a suit that you believe is groundless or fraudulent. You want the insurance company to vigorously defend your nonprofit and its reputation. Again, under a liability policy the insurance company's only obligation is to protect you from the financial risk of lawsuits. If the company believes it will be less costly to settle and doing so won't jeopardize their position in future cases, they will do so. You have the right to reject a settlement, but you must pay any expenses above the settlement amount proposed by the insurer.

## What is professional liability insurance?

All nonprofits are exposed to liability claims that result from injury to others resulting from the operation of the nonprofit. This exposure is generally addressed through the purchase of some form of general liability insurance. Employees and volunteers in a nonprofit who render professional services face an additional liability exposure—their **failure to use due care and the degree of skill expected of a person in a particular profession**. The coverage for this type of exposure is known as professional liability insurance. Additional names used to describe this coverage include malpractice insurance and errors and omissions (E&O) liability insurance.

Professional liability insurance protects individuals and organizations against claims alleging errors and omissions in the delivery of professional services within the context of one's profession. Once considered vital coverage for doctors and lawyers but few

others, exposure to professional liability claims and the need for associated coverage has come of age.

Some of the reasons for the exposure include:

- ❑ Many professions, such as social work and teaching, have adopted standards of performance and ethics;
- ❑ New professional regulations and standards have been created which form a complex legal structure within which many professionals must operate;
- ❑ State legislatures and courts have abolished immunity for certain professionals (e.g. social workers);
- ❑ State legislatures and courts have expanded the legal concept of duty to protect and warn;
- ❑ Clients of nonprofit organizations are increasingly aware of the potential to bring claims against professionals and organizations providing services;
- ❑ Many professions, including social work, teaching, counseling, computer programming and more now enjoy increased professional status and visibility.

### Understanding the Coverage: Key Features

Claims covered under professional liability policies aren't limited to those caused by an accident. In fact, many professional liability claims result from the unintentional consequences of intentional acts by the defendant. A good example of this is the faulty diagnosis by a medical professional, or the recommendation by a social worker that a foster child be returned to his natural parents.

Distinct from general liability coverage, which focuses on coverage resulting from "bodily injury" and "property damage," coverage under a professional liability form applies due to "injury" resulting from professional services. The term "injury" may not be defined in a particular policy. Courts have interpreted the term to encompass bodily injury and property damage, as well as "personal injuries" like humiliation, invasion of privacy, and slander, if arising out of professional services. There may be subtle but important differences between an errors and omissions policy and a malpractice policy. For example, most E&O policies exclude "Bodily Injury," while this coverage is essential in a malpractice policy.

### *Vicarious Liability*

Nonprofit insurance buyers are often concerned about providing coverage for their staff, volunteer and contracted professionals—coverage that will protect the individual as well as the entity. Some policies will only cover vicarious liability; some will cover the professionals as insureds. This is mostly an issue with medical malpractice policies. Keep in mind the fact that independent contractors aren't covered as insureds under General Liability.

(The following section was written by David Szerlip and is excerpted from **Coverage, Claims and Consequences: An Insurance Handbook for Nonprofits**.)

At least one social commentator has estimated that if current trends continue every American adult will be a lawyer within four generations. While this observation may be

statistically correct, it does not take into consideration the fact that not every American is capable of passing a bar exam. Nonetheless there seems to be an unmistakable trend towards professionalism, demonstrated by an ever-increasing number of professional associations, the proliferation of designations and certifications, and societal aspirations to be professional. This aspiration for professionalism is arguably a great strength of our society, but it also can lead to an increased exposure to civil liability.

Liability is typically based on a failure to act in accordance with a *reasonable person* standard of care, but certain service providers by virtue of their training and credentials can be held to a higher standard of care.

Professional liability is liability for the higher standard of care required of professionals when providing services in their area of expertise.

Going back almost 200 years, professional liability was limited almost exclusively to the legal and medical professions, but starting in the 1960s courts began to hold a wider range of service providers to a professional standard of care. Social workers and mental health counselors in particular became accountable for liabilities such as negligent counseling, failure to diagnose, breach of confidentiality, failure to warn, improper child placement, and negligent referral, all of which are considered professional liabilities. Other service providers, including travel agents, employment agencies, financial planners, clergy, and many others, were also held to a professional standard of care for the first time.

Insurance companies responded to these new exposures by adding professional exclusions to commercial general liability and directors' and officers' liability policies, and by developing separate professional liability policies in a variety of formats.

### **Challenges in Purchasing Professional Liability Insurance**

Purchasing professional liability insurance for a nonprofit may seem simple enough. A counseling center needs professional liability insurance, so it purchases a professional liability policy for counseling centers, at the lowest price it can find. Sometimes it is that simple, but a few problems can arise:

- ❑ *For some nonprofits it is unclear whether there is a need for professional liability coverage.* For example, does a foster care placement program need professional liability? A paratransit program? A nonprofit school? A community-based visual arts theater?
- ❑ *New exposures may be created when nonprofits expand their services.* If a women's shelter retains a volunteer attorney, does the shelter need lawyers' professional liability coverage? Does an addiction treatment center need additional coverage if it hires an acupuncturist?
- ❑ *Sufficiency is a hard row to hoe.* Since there is no standard for comparison and quite a bit of variation between professional liability policies, how can a nonprofit know if it has purchased sufficient coverage?

## The Need for Professional Liability Insurance

A nonprofit will need professional liability insurance if:

1. there are one or more employed, volunteer or contracted professionals working on behalf of the nonprofit. Referral, or the failure to refer, to outside professionals may also establish liability.
2. the professional is providing *professional services*.
3. incidental professional liability coverage under general liability and D&O policies is not adequate to cover the nonprofit's professional exposure.

## Who Is a Professional?

The courts ultimately define who can be held to a professional standard of care. An excerpt from a ruling by the Nebraska Supreme Court has been frequently cited by other courts:

The term 'professional' ...means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A 'professional' act or service is one ...involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. In determining whether a particular act is of a professional nature or a 'professional service' we must look not to the title or character of the party performing the act, but to the act itself. – *Marx v. Hartford Accident and Indemnity Co.* 157 NW 2d 870 (Neb. 1968)

This and similar definitions may leave room for interpretation, and therefore uncertainty, but at a minimum it should be assumed to apply to:

- anyone licensed, accredited or certified to provide services to patients, clients or students.
- anyone providing traditional or nontraditional health care services.
- mental health counselors including marriage, addiction, youth, adolescent, family, or pregnancy counselors.
- social workers, especially if involved with child placement, crisis intervention, or the criminal or juvenile justice systems.
- members of professional associations.

## What Are Professional Services?

The line separating professional services and nonprofessional operations is not always clear, as illustrated by the following two scenarios:

### **Scenario #1 – Patient Dies During Counseling Session**

A patient at a substance abuse treatment program became agitated during a counseling session, got into a brief scuffle with his counselor, tripped, hit his head on a corner of a table, and sustained serious head injuries, which resulted in his death. The patient's family brought a wrongful death suit against the counselor and the nonprofit.

The nonprofit had general and professional liability coverage with two different insurance companies. Both companies declined the claim. The general liability

carrier argued that the injury arose out of the counselor's professional acts, including his inability to control the counseling session, and therefore was a professional liability claim. The professional liability carrier argued that the injury arose from a *trip and fall* accident, a premises exposure, and was therefore a general liability claim. The two insurance companies brought their dispute to court. After two years of litigation, the court ruled that the injury did not arise from the delivery of professional services, and the general liability carrier was ordered to cover the claim.

❑ **Scenario #2 – Elderly Patient Injured in Fall from Bed**

A nurse at an assisted living facility neglected to raise the bed railings of an elderly patient's bed, resulting in the patient falling from the bed and sustaining serious injuries. A lawsuit was brought against the nurse and the assisted living facility. Again, different carriers covered general and professional liability, and both argued that the other was responsible for the claim. In this case the court ruled that the injury did arise out of professional liability, and the professional liability carrier was ordered to cover the claim.

These two scenarios are particularly interesting because injuries arising out of counseling are almost always considered professional, and simple omissions like failing to raise bed rails are usually considered nonprofessional. Based on the facts, the court in the first scenario may have felt that the counseling injury arose at least in part from the layout of the room, and only minimally from professional judgment; while the court in the second scenario may have felt that the nurse's oversight was an error in professional judgment, rather than simple neglect in dealing with nonmedical equipment.

Note that in determining professional services *we must look not to the title or character of the party performing the act, but to the act itself*. This concept has been an important factor in the expansion of professional liability exposure to a wide range of service providers. In the assisted living claim it would not have mattered if the person neglecting to raise the bed railings were a medical doctor, a nurse, or a medical assistant. *Anyone* with *any* professional credentials has a potential professional liability exposure if providing services to patients, clients or students.

Some nonprofits mistakenly believe that if paid and volunteer staff have their own individual professional liability policies, the nonprofit does not need its own corporate policy. Individual professional liability policies rarely cover anyone but the individual professional. As was the case in the two scenarios, the nonprofit corporation employer will almost always be named in a professional suit. Managers, supervisors, administrative personnel, and board members can also be named in these suits.

Finally the above scenarios show the importance of having general and professional liability with the same insurance company.

## Professional Liability Coverage Under the General Liability Policy

Absent any special endorsement, a standard CGL policy would cover a nonprofit for the acts of an employed physician performing brain surgery. This is why underwriters attach professional liability exclusions to CGL policies.

General liability has three built-in limitations as respects professional liability:

- ❑ Coverage is limited to liability for bodily injury and property damage. Professional liabilities that arise from pure economic damages, such as professional liability for lawyers, paralegals, accountants, insurance agents and financial planners, will never be covered.
- ❑ Under the *Who Is Insured* section of the policy, employees are excluded as insureds if providing professional health care services. The nonprofit, however, is covered for the acts of the employees.
- ❑ Under the *Contractual Liability Exclusion*, architects, engineers and surveyors are not covered for the contractual assumption of liability. In addition, a professional liability exclusion will be attached when underwriters perceive an exposure. If you want to know what your CGL underwriter thinks your professional liability exposure is, read the exclusions he or she attaches to your policy. There are at least 25 professional liability exclusions that can be attached to the CGL, some of which can be customized to exclude specific professions. These exclusions rarely attempt to exclude all professional liability, and therefore coverage may be left for incidental exposures.

The following are two examples of professional liability exclusions that might be attached to the CGL:

### Services Furnished by Health Care Providers Exclusion

This insurance does not apply to *bodily injury, property damage, personal injury or advertising injury* arising out of rendering or failure to render:

1. Medical, surgical, dental, X-ray or nursing service, treatment, advice or instruction, or the related furnishing of food or beverages;
2. Any health or therapeutic service, treatment, advice or instruction;
3. Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming;
4. The furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances; or
5. The handling or treatment of dead bodies, including autopsies, organ donation or other procedures.

### Counseling Services Exclusion

This insurance does not apply to *bodily injury, property damage, personal injury or advertising injury* arising out of advisory services or counseling with respect to such things as mental health, crisis prevention, social services or drug and alcohol rehabilitation or similar subjects.

## Professional Liability Coverage Under the Nonprofit D&O Policy

There is a fairly clear distinction between professional liability and directors' & officers' liability. Professional liability coverage is liability for providing professional services to clients. D&O liability is liability for corporate governance. For nonprofits, confusion about the difference arises principally from the significant expansion of coverage under nonprofit D&O beyond the traditional coverage provided under for-profit D&O policies. In an attempt to acknowledge this expansion of coverage into essentially a different type of policy, some underwriters began to reclassify nonprofit D&O under new names such as *Association Professional Liability* or *Nonprofit Professional Liability*. This understandably led some nonprofits to mistakenly believe that their D&O policy was a professional liability policy.

The scope of a particular nonprofit D&O policy may so broad that it sometimes can, in fact, provide incidental professional liability coverage, although this is never its primary intent. Nonprofit D&O coverage is for *wrongful acts* subject to policy exclusions, so the policy will provide professional liability coverage to the extent it is not excluded.

Because D&O policies exclude bodily injury and property damage, incidental professional liability provided under the policy will be limited to pure financial loss arising from the acts of professionals such as attorneys, accountants, accountants, real estate managers, investment managers, or financial planners. Claims for emotional distress or mental anguish, which commonly arise from counseling or social work, will usually not be covered because most nonprofit D&O policies exclude emotional distress and mental anguish as part of their bodily injury and property damage exclusion.

A typical exclusion reads as follows:

Any actual or alleged: bodily injury, mental anguish, emotional distress, loss of consortium, sickness, disease or death of any person, or damage to or destruction of any tangible property including loss of use thereof.

Employment practices liability will usually be exempt from this exclusion.

Many nonprofit D&O policies also have specific exclusions for professional liability. These exclusions are either built into the policy itself or added by endorsement. For example:

### Example #1

The rendering or failure to render medical, psychological or counseling services or referrals.

### Example #2

Claim or claims based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving the performance of any professional services for others for a fee, and caused by any act, error or omission.

### Example #3

Any claim made against any insured based upon, arising out of, directly or indirectly resulting from, in consequence of, or in anyway involving any liability arising out of any



error or omission, malpractice or mistake of a professional nature committed or alleged to have been committed by or on behalf of the insured in the conduct of any of the activities of the organization.

#### Example #4

Claim or claims based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving the rendering or failure to render professional services in connection with the member's business as a provider of professional services, including but not limited to:

- providing medical, surgical, chiropractic, dental, phlebotomy, acupuncture, psychiatric or nursing treatment, diagnosis or services, including the furnishing of food or beverage in connection therewith;
- furnishing or dispensing drugs or medical, dental or surgical supplies or appliances;
- providing veterinary services;
- offering any advice in connection with any of the above.

The first two of the four listed exclusions are narrow enough to potentially leave coverage for incidental professional liabilities. The last two exclusions attempt to exclude professional liability entirely.

### **The Professional Liability Policy—Formats and Scope of Coverage**

All professional liability policies cover *wrongful acts*, *professional incidents*, or *medical incidents*, depending upon the policy, and then provide a further coverage definition in either the insuring agreement itself, the policy definitions section, the declarations page, or by endorsement.

The scope of the coverage definition will depend at least in part on which of the four professional liability policy formats coverage is written. These four formats are:

- Profession-Specific Professional Liability,
  - Miscellaneous Professional Liability,
  - Allied Health Care Professional Liability, and
  - Social Services Professional Liability.
- Profession-Specific Professional Liability** — The traditional format for professional liability. Policies are customized for organizations within a particular industry, such as for educational institutions, law or accounting firms, hospitals, blood banks, or counseling centers.

Here is an example of a coverage definition in a Profession-Specific Professional Liability Policy:

any act or omission arising out of: a. The providing of or failure to provide professional health care services in connection with the making of a blood donation; b. The handling or distribution of any blood products; or c. Any representation or warranty made at any time with respect to any blood product.

- Miscellaneous Professional Liability** — Introduced in the mid-1970s to cover professions for which Profession-Specific policies were not available. Written on

a generic professional liability template, and limited to a specific profession by endorsement or entry on the declarations page.

Here is an example of a coverage definition in a miscellaneous professional liability policy:

Professional Services means services rendered to others solely in the conduct of the Insured's profession as stated in Item 8 of the Declarations.

- Allied Health Care Professional Liability** — Generic professional liability templates similar to Miscellaneous Professional Liability, but designed for health care professionals. May have either a broad or limited coverage definition.

Here is an example of a coverage definition in an allied health care professional liability policy:

any act or omission: a. In the providing of or failure to provide professional health care services to your patients, including: (1) The providing or dispensing of food, beverages, medications or medical supplies or appliances in connection with such services; and (2) The handling or treatment of dead bodies, including autopsies, organ donation or other procedures.

- Social Services Professional Liability** — First developed in the 1980s. Typically only nonprofits will be eligible.

Here is an example of a coverage definition for a social services professional liability policy:

any act, error or omission arising out of the actual rendering of or failure to render professional services to others, including counseling services, in your capacity as a social service organization. Professional services include the furnishing of food, beverages, medications or appliances in connection therewith.

## Professional Liability Exclusions

Typical exclusions that might be found within a professional liability policy include exposures that are considered uninsurable, exposures for which coverage is available under other policies, and exposures for which coverage is not available except under a professional liability policy.

The following exposures that are considered uninsurable:

- Intentional Injury
- Dishonest or Criminal Acts
- Illegal Personal Profit
- Claims Reported to Prior Insurers
- Prior Litigation
- Nonmonetary Relief
- Breach of Contract

The following exposures can be insured under other policies:

- Employment Practices
- Discrimination
- Auto, Aircraft and Watercraft Liability
- Patent and Copyright Infringement
- ERISA and Fiduciary Liability
- Employee Benefits Liability
- Pollution
- Personal Injury
- Failure to Maintain Insurance
- Workers' Compensation
- Abuse and Molestation
- Acts, Errors or Omissions of a Managerial or Administrative Nature
- Membership in a Formal Accreditation or Professional Board or Society

The following are exposures for which coverage is not available except under a professional liability policy:

- Insured Versus Insured
- Contractual Liability
- Communicable Diseases
- Punitive Damages
- Arising From Operation of a Hospital, Sanatorium, Medical Clinic, Facility or Laboratory
- Prescription or Dispensing of Drugs or Medical Supplies Except at the Direction of a Physician
- Professional Services by an Attorney, Architect, Engineer, Accountant, Real Estate or Investment Manager
- Professional Services by a Physician, Dentist, Psychiatrist, Anesthesiologist, Nurse Anesthetist, Nurse Practitioner, Nurse Midwife, X-Ray Therapist, Radiologist, Chiropractist, Chiropractor, Optometrist, or Veterinarian

### **Professional Liability Endorsements**

Because professional liability is usually written on nonstandard forms, insurance companies can customize the coverage they want to provide within the policy itself, and there is no need for a large number of endorsements. The following are some examples of endorsements that typically might appear on a professional liability policy:

- State Amendatory Endorsements
- Waiver of Charitable Immunity
- Addition — Designated Professionals
- Addition — Scheduled Physicians
- Addition — Abuse and Molestation
- Additional Insureds — Volunteers
- Additional Insureds — Funding Sources
- Additional Insureds — Scheduled Contract Holders
- Exclusion — Designated Professionals
- Exclusion — Abuse and Molestation

## Sublimits — Abuse and Molestation

Sometimes social services professional liability is issued as an endorsement and combined with a CGL policy. If this is the case, all endorsements to the CGL will also apply to the professional coverage.

### **Evaluating Your Professional Liability Policy**

Evaluating your professional liability policy involves identifying your potential professional liability exposures, and comparing those exposures with the incidental professional coverage which may be provided by your CGL and D&O policies, and the definition of coverage and exclusions on your professional liability policy.

Some points to consider:

- Professional liability is written on both *claims-made* and *occurrence* liability forms. When available, *occurrence* is almost always the better coverage option.
- Most nonprofits are best served by either the profession-specific or social services policy formats. If there is too much medical exposure to be eligible for the social services format, the allied health format will be an acceptable alternative. Note however that allied health coverage will be limited to *medical incidents*.
- Nonprofits employing social workers or mental health counselors need professional policies that do not exclude bodily injury.
- If possible, a nonprofit should purchase commercial general liability and professional liability coverage from the same insurance company.

Finally, professional liability is not for amateurs. Seek the advice of your insurance agent, and make sure that he or she is familiar with the full extent of your professional operations.

### **Additional Claim Examples: Which Policy Applies?**

In *American Casualty Company v. Hartford Insurance Company*, 479 So. 2d 577 (1985), the court decided that both the general liability insurance policy and the professional liability insurance policy applied to the claim. A patient fell and was injured while climbing onto an EKG table. The patient's doctor had ordered the EKG exam but was not present when the patient tried to get on the table.

The question before the court was whether the injuries were due to medical or nonmedical services. The court ruled that the general liability insurance applied since the fall of and subsequent injury to the patient was nonmedical in nature. The court further ruled that the professional liability insurance also applied since the doctor failed to furnish medical services to the patient properly, thereby causing injury. In determining whether the particular act that caused an injury here was of a professional nature or a nonprofessional nature, the court looked to the act itself and saw both.

*Albert J. Schiff Associates Inc., v. Flack*, 435 N.Y.S.2d 972 (1980) concerned an insurance agent's professional liability policy. The insured had been sued by another insurance agent for allegedly using a marketing plan developed by that agent without permission. The professional liability carrier declined coverage based on the idea that the dispute did not involve a professional service, and this even though the insured did render services to potential customers by utilizing the marketing plan. The New York court of appeals agreed and said that "the renting of an office, the engagement of employees, arrangements to expand the size of one's activities may all have some connection with a covered business or profession. But, while they may set the stage for the performance of business or professional services, they are not the professional activities contemplated by the special coverage. An errors and omissions policy is intended to insure a member of a designated calling against liability arising out of the mistakes inherent in the practice of that particular profession or business." This case distinguishes between acts undertaken by a professional as a professional from other acts.

*Blumberg v. Guarantee Insurance Co.*, 238 Cal. Rptr. 36 (1987) was a California case involving a dispute between former law partners that was tendered to legal malpractice insurers. The court of appeals found that there was no professional liability coverage in this instance based on the conclusion that Blumberg was not rendering professional services for others, but was acting in his capacity as a law partner. The court stated that "it can not be said that a law partner acting in his capacity as a *partner* is performing a professional service for others in his capacity as a lawyer".