



malpractice guide

A Team Approach Whether your region is in crisis or not, make sure you know how to find the best guidance on buying a malpractice insurance policy. You never know when your market could change.

BY RICHARD VENTO



Although I warned of an impending “hard market” when I first wrote for *Unique*

Opportunities® in the May/June 2001 issue, I had no idea just how quickly and dramatically the property/casualty and other insurance markets would change.

Accelerated exponentially by the tragic events of 9/11, the insurance market, especially the medical malpractice market, has “hardened” like never before.

By “hard” market I mean a seller’s market—one in

which prices, availability, limits of liability, and other features of the coverage are dictated by the insurers with little negotiating room.

Can we blame the current medical malpractice crisis solely or primarily on 9/11? No, we cannot, even though there has been a net reduction of \$20 billion available to fund insurance losses resulting from the attacks of 9/11. The hardening market is the result of increases in

the number of claims and the size of those claims, the dollar losses in the financial markets, and above all, the extreme pricing competition of many medical malpractice insurers in the preceding “soft market.” All of these factors contributed to a reduction in the availability of medical malpractice insurance.

You may be fortunate enough to practice in a state or region where the market’s adverse effects are min-

imal. Your premiums have increased only 10 or 15 percent, terms are still favorable, and there are companies still willing to entertain new applicants. On the other hand, you may be unfortunate enough to practice in one of the current “hot spots” in the United States: Pennsylvania, West Virginia, New Jersey, Texas, or Florida, to name a few.

Pennsylvania is a good example of what can happen in this market, and it is literally getting worse by the week. As of the end of May, there were no “standard” medical malpractice carriers entertaining new business applications from physicians. One carrier was ac-

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cepting applications only from new physicians joining the practice of an already insured group, and only then if the new applicant had no claims.

Here in Pennsylvania, renewal premiums are increasing between 50 and 250 percent if renewal is offered at all. St. Paul Insurance Company stopped writing medical malpractice everywhere; Princeton Insurance Company is pulling out of Pennsylvania, as is MIIX, which announced it is voluntarily retiring from business. PHICO is the latest medical malpractice carrier in Pennsylvania to be placed in liquidation. Legion Insurance Company has been placed in rehabilitation by the Pennsylvania Insurance Department. Florida Physicians Insurance Company has ceased writing in Pennsylvania. I'm told that Medical Protective has, for all intents and purposes, stopped writing new business. That leaves the Pennsylvania Joint Underwriting Authority (JUA) as the only admitted market in Pennsylvania. (More about admitted markets later, but basically a carrier that is admitted is one that is regulated and belongs to the state guaranty fund.) The JUA is a residual market, which means it cannot turn any physician applicant away, and it also charges the highest premiums in the state of Pennsylvania, except for non-admitted markets.

What this all means to the average, claims-free, primary care physician who happened to be with one of those carriers that ceased writing in Pennsylvania is that there may be nowhere to go for medical malpractice other than to the JUA!

Get a coach

I'm sure some of you will say, "Yes, but I live in Pleasantville, God's Country,

USA. That won't ever happen to me." You have to ask yourself this: Have there been any increases in the cost of anything else associated with your practice? Of course. So what makes you think that the cost of medical malpractice insurance will not also increase at a rate faster than your income is growing? The best way to protect yourself from rising costs and reduced availability of medical malpractice is to find a trusted professional to assist and advise you. Otherwise, you will not know if you are getting the best coverage available in the medical malpractice insurance market.

How do you find an experienced, professional medical malpractice insurance broker whom you can communicate with and trust? The answer is not unlike the answer I imagine you would give a friend or family member in need of another physician's services: Get input from trusted sources, review the qualifications and background of the candidates, then interview them in a non-pressured setting. By non-pressured setting I mean when you are not in crisis, such as when you have already received notice that your coverage is not being renewed and you have 10 days to replace the coverage or the managed care organization will withhold your reimbursement.

Medical malpractice insurance may be purchased in two ways. One method, commonly called the "direct" system, provides medical malpractice policies from one carrier directly to physicians using an employed sales force. The other system, called the "independent agency" system, sells through independent brokers who represent many malpractice carriers.

Direct carriers claim their premiums are lower than independent

agency carriers because they do not pay commissions to independent brokers. On the other hand, an independent agent broker can serve as an advocate to assist the physician in evaluating the products offered, negotiate the purchase, and help when issues arise. There are some very good direct writers of medical malpractice insurance who would not knowingly give you bad advice. I still strongly recommend that you find an independent broker in whom you have confidence. If the broker is a true professional, she would tell you if there is a direct writer that would be a good choice for you to consider. The broker may even be able to assist you in that process.

To properly evaluate a prospective medical malpractice insurance broker, request the following preliminary information:

- Experience and expertise of the brokerage firm
- Experience and expertise of the individual broker
- A list of the medical malpractice markets represented and the premium volumes with each of the top four carriers they represent
- Other services the broker can provide, such as claims and risk management
- A profile of the marketing technique—what the broker does to put your practice and you in the best light possible with the carrier
- The number of individual physicians the firm represents, by specialty if possible
- References of other physicians represented by the firm and the individual broker, especially those in the same specialty

When you interview the broker, ask

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her to show you a representative underwriting submission for an individual physician, and ask her to discuss her marketing technique and service philosophy. Since you are a health-care provider, you should expect your broker to be sensitive to your 24/7 work requirements and be available to you outside regular 9-to-5 hours. I would be leery of a broker who would not provide you with a home phone number and a cellular number, or who did not have a way for you to contact her after hours.

As with a good doctor-patient relationship, the physician-broker relationship must be based on trust, honesty, good communication, and prompt and accurate service. Feel free to discuss the broker's philosophy and best practices for service and ask to meet all the people who would be involved in your account. This is very important, as the broker may be out of the office at a time you need her, and having a good relationship with her assistant could be invaluable.

You must be willing to trust the broker and he you. The information you disclose to him must be kept strictly confidential, and you must be completely forthright and open with him about issues that affect your insurability. The types of information you will need to share with the broker include the following:

- Medical malpractice application(s) and requested attachments
- Curriculum vitae
- Continuing education history
- Claims experience (10-year loss runs), carrier generated
- Letterhead
- License, DEA certificate
- Anything unique about your practice not

normally associated with your specialty, such as the fact that you are a family practice physician who also does obstetrics

The information you provide is the basis for the insurance company accepting your risk and pricing your insurance (underwriting). If the information provided in the underwriting process is found to be a material misrepresentation of the facts, and that misrepresentation affected the decision of the underwriter as to your insurability, your coverage would be voided.

Understand the details

In addition to choosing a broker, you need to understand what you are buying. While this is always true, it is never more true than in a "hard" market. The reason is this: The shrunken availability of insurance and the resulting higher premiums attract unscrupulous predators to the market. "Fly-by-night" insurers with inadequate or invisible capital and without collectible reinsurance may appear on the scene as "white knights" to write applicants at very cheap rates. As the saying goes, if the rates are too good to be true, they probably are. That's where your broker should be invaluable. He will be aware of all the viable markets and can advise you of any that are less than stable.

Remember to keep a good perspective on what you are buying when you pay for a policy. Simply put, you are buying a promise from the carrier to defend you and pay claims on your behalf at some point in the future. As such, the most important question to ask is this: What are the chances that the carrier will still be in business when it is time to pay the claim(s) you present? The most important thing is

NOT how much you have to pay NOW! There is not much point in saving even 50 percent today if the carrier is not around three, five, or ten years from now when that big lawsuit is tried and the judgment goes against you.

Policy discussions

When the broker presents you with the alternatives for your medical malpractice coverage, he will need to discuss the relative merits of each carrier and policy with you. Make sure your broker discusses the following with you for every policy you are being asked to consider:

- Financial security. How have the various insurance industry rating agencies rated the carrier?
- Claims paying reputation of the carrier
- Policy form—whether it is claims-made or occurrence—and you should know the differences. An occurrence form requires even more financial wherewithal on the part of the carrier than a claims-made form
- Is the carrier admitted (licensed and supervised by the State) in your state or is it non-admitted (approved but not supervised or regulated to any great degree)?

This difference between admitted and non-admitted carriers is one of the most important concepts to grasp. All insurance companies fall into one or the other category. Insurance is regulated by individual states, and these two terms refer to the medical malpractice carrier's status and relationship with each state insurance regulatory authority.

Admitted carriers' rates, policy forms, and financial conditions are closely regulated by the state insurance department. Admitted carriers

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are protected by state guaranty funds that respond to claims made against policyholders of bankrupt insurance companies. Non-admitted carriers (sometimes called 'surplus lines') are carriers that write in a state free of regulation by the state's insurance department. Non-admitted carriers have the flexibility to alter coverage or pricing to meet their needs and those of the market. Typically, their medical malpractice products are more expensive and restrictive, and their clients do not enjoy the protection of the state guaranty fund. Self-insurance programs, captive insurance companies, and risk retention groups almost always are outside of the state purview. In the case of risk retention groups, only the state where they are formed has any true oversight responsibility.

In addition to the carrier, you should evaluate individual parts of each policy with your broker. Whatever policy you buy, there are certain universal parts to that policy, including the Declarations, Insuring Agreement, Definitions, Exclusions, and Conditions. Your broker will explain the nuances of each part of the policy to you. If you do not read any other part of the policy, please read the exclusions section.

Other issues that you should discuss with your broker:

- Is the claims reporting "trigger" an incident or a written demand? What this means is: Do you report a claim if something untoward happens that's likely to result in a claim, or do you wait until you are sued?
- Deductible—does a deductible apply and does it include legal expenses?
- Is your consent required for the carrier to settle a claim, and is there a penalty if you withhold consent?

- If the coverage is claims-made, what are the provisions for the "tail?" Carefully note the retroactive date

Choosing a broker is the beginning of the process—a process to which there is no end. That is because the broker should keep you apprised of the changes in the marketplace and events that affect your coverage and costs. Then, before you know it, it's time to start process of renewing your coverage or looking at alternatives.

One last comment. Once you find that professional medical malpractice specialist broker whom you are comfortable with, and who has lived up to the service promises he has made, stick with him. Shotgunning your application to multiple brokers to "get the best deal" works to your disadvantage. You lose negotiating leverage, a strong personal relationship with your broker/advocate, and you develop no tenure with a carrier. You would not want to lose a patient to a new doctor in town because he charges a few dollars less for an office visit. As I screamed earlier, this is primarily not about saving money on your medical malpractice insurance today, it's about having a carrier that will be there when it's time to pay a claim.

Don't take my word for it—talk to a doctor in Pennsylvania who was insured with Physicians Insurance Company, then Physicians Insurance Exchange, then PH-ICO, all of whom were put in liquidation.

Good luck with your purchase. ■

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