CHEST Topics in Practice Management

The Basics of Medical Malpractice*

A Primer on Navigating the System

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Medical malpractice with its associated costs, including insurance premiums, impact on practice, consequences for career and insurability, and emotional toll, is a reality of practicing medicine in the United States. Understanding the types of claims that may be asserted, the issues to consider when securing insurance coverage, how to manage the cost of insurance, the nuances of the claims process, and the implications of the claims process are critical to the successful management of this aspect of medical practice. This article provides a guide for practicing physicians on the legal, financial, and practical considerations involved.

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Abbreviation: RVU = relative value unit

As with many professions, the practical realities of the practice of medicine frequently are not covered in the medical school curriculum. Malpractice, with its associated costs consisting of premiums, impact on practice, the consequences of outcomes on career, the ability to secure insurance, and the emotional toll, is one of those realities. What follows is an overview of some of the issues that a physician will confront in this arena.

Background

Medical malpractice litigation is commonplace in the United States. The law and the juries vary from jurisdiction to jurisdiction, but no one is immune. The exposures tend to be higher in the northeast than in other areas of the country, but there are exceptions to that rule such as Cook County, IL. In some jurisdictions, such as California and more recently Texas, tort reform has been effective. In other areas, such as Pennsylvania, reform efforts either have not been undertaken or have been largely ineffective in decreasing claim severity and premiums. As of March 2007, the American Medical Association had identified 17 states that were in "crisis."[1] Many believe that caps on noneconomic damages are a key element of tort reform. Noneconomic damages include pain and suffering, humiliation, and the loss of the pleasures of life. As of January 2005, the National Conference of State Legislatures reported[2] that there were caps on noneconomic damages in place in 30 states. Among the states with caps are California ($250,000) and Maine ($400,000). Notably, of the 20 states without caps, 11 were among the 17 states identified as being in crisis.

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Types of Malpractice Claims

Malpractice claims typically fall into the following two categories: negligence and informed consent. To

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establish negligence, a complaining party must establish a duty (which is implied in the physician-patient relationship), that the physician deviated from the standard of care, and that the deviation caused harm. Generally, qualified expert testimony rendered with the requisite degree of medical certainty is required to support a negligence claim.

For consent to be informed, the physician must advise the patient of the significant risks and the feasible alternatives to the procedure. Historically, informed consent only was required for invasive procedures. In more recent years, the scope of procedures requiring informed consent has been expanded in certain jurisdictions to include the administration of anesthesia, chemotherapy, radiation therapy, and blood transfusions. The majority of states apply a "professional standard" to determine the adequacy of the disclosure of the risks and alternatives.[3] In other words, it is measured by what a reasonable medical practitioner in the community would disclose under similar circumstances. A substantial minority of states, including Pennsylvania, apply a "lay standard," which requires a physician to disclose the risks and alternatives that a reasonably prudent patient would want to know before undergoing the procedure.[4] If the physician fails to do so, and harm ensues, the physician is liable.

In most states, lack of informed consent gives rise to a negligence cause of action.[5] In a minority of states, such as Pennsylvania, it is considered a battery[6] (an offensive touching). Proof of harm is not required as the procedure itself is considered to be a battery absent informed consent. As a practical matter though, these claims will not be pursued absent patient injury. In the majority of states, including Pennsylvania, if the jury determines that the patient would have undergone the procedure even had they known the significant risks and the feasible alternatives, the physician will not be liable.[7]

Considerations in Securing Insurance Coverage

So, how do physicians protect their practice and assets from these exposures? That is where insurance comes in to play. Some states, such as Pennsylvania, have mandatory coverage requirements that mandate a minimum of $1 million per occurrence and $3 million in the aggregate.[8] Other states, like Florida, have very minimal insurance requirements. In Florida, physicians also have the option to carry no insurance provided they agree to pay the lesser of any judgment or $100,000 ($250,000 if they maintain hospital privileges) and post a sign in their offices advising patients of this fact.[9] Given the exposure involved, the safer course is to secure insurance. Depending on the jurisdiction, the first challenge a physician may confront is securing affordable insurance. In some jurisdictions, commercial coverage is scarce, and where it is available, it is expensive. Between 2000 and 2004, malpractice insurance premiums increased by 120%.[10] A recent *Medical Economics* survey,[11] however, suggested that premiums may be leveling off.

The first decision may be whether to seek coverage with a commercial carrier or via another insurance vehicle such as a risk-retention group (a liability insurance company that is owned by its members). Among the questions to be explored are how well the company is capitalized, its longevity, and whether it is covered by the state guaranty fund in the event of insolvency. Generally, risk-retention groups are not covered by guaranty funds.

The next issue to consider is the type of insurance to obtain. Basically, malpractice insurance takes the following two forms: claims made and occurrence. The most common, and affordable, form of malpractice insurance is claims made. This coverage responds to any covered claim that is reported to the insurer during the policy period where the event occurred within the policy period. For example, if the claims-made coverage commenced on January 1, 2005, and is renewed continuously through calendar year 2008, it will cover any claim reported during 2008 if the event occurred on or after the inception date of the policy (*ie*, on or after January 1, 2005). Inasmuch as the exposures are limited to the cases presented during the policy period, first-year claims-made coverage is more affordable than occurrence coverage, which, as discussed below, covers all exposures arising from events occurring during the policy year regardless of when the claim is filed. As demonstrated in the example discussed above, if a physician is insured with a company on a claims-made basis for multiple years, the covered exposures will extend back to events occurring on or after the inception date of the original coverage. Under these circumstances, an insurer will utilize step-level premium adjustments as an insured physician moves from first-year claims-made coverage to mature claims-made coverage over a period of 4 to 5 years. The increased exposure assumed is reflected in the step premium adjustments that typically would be 35% of the occurrence rate in year 1 and 95% of the occurrence rate in year 4 or 5. With claims-made coverage, it is essential that the physician secure "tail" coverage before transitioning to another carrier. With tail coverage in place, the prior carrier covers any claims subsequently reported with event dates during the policy period. Premiums for tail coverage vary, but generally the cost involved is significant and is