

Protecting Your Practice: A Guide to Medical Malpractice Coverage

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Medical malpractice coverage is one of the most important lines of coverage purchased by physicians. It provides vital protection against liability from lawsuits brought by patients who believe they have suffered a bodily injury as a direct result of negligence by their healthcare provider. Selecting the appropriate coverage and the right company can be confusing and time consuming. This article provides guidance for physicians and practice managers who are seeking new malpractice coverage and those evaluating the adequacy of their existing coverage. For example, what limits of liability are best to provide adequate protection? Is “entity coverage” necessary in addition to an individual physician’s policy? What are the emerging threats that pose a significant risk to medical practices?

KEY WORDS: Medical malpractice; tort reform; malpractice insurance; Cooperative of American Physicians; liability.

Although the history of medical malpractice and its relationship with the law spans many centuries, legal claims for medical malpractice generally were rare, until a flurry of high-profile cases in the late 20th century thrust the issue into the spotlight. Although some of these suits have been dismissed as frivolous, and federal lawmakers recently have made strides¹ toward medical malpractice tort reform, one thing remains clear: most physicians will be sued for malpractice at least once during their career.² With that in mind, all physicians should be sure that their malpractice coverage is robust and broad enough in scope to meet their needs.

It is essential to secure coverage with a company that will have the financial resources to provide an adequate defense, if needed.

Medical professional liability (MPL) coverage protects healthcare providers when they are sued for allegations of professional negligence by a patient or a patient’s family member(s). MPL coverage is provided under “limits of liability” that companies provide on a “per claim” and “annual aggregate” basis. For example, in California most hospitals and health plans require contracted physicians to

carry liability limits of \$1 million per claim and \$3 million annual aggregate. These limits are used to pay any settlements and judgments incurred by healthcare providers in malpractice cases.

In the wake of national healthcare reform, many more physicians have been opting to consolidate their practices into larger medical groups or seek direct employment due to the shift toward value-based compensation and other regulatory mandates. A major benefit for these employed physicians is that their MPL coverage usually is provided for them by their employer (e.g., hospitals, medical groups, clinics, universities, municipalities). However, if such physicians plan to moonlight or start a part-time, independent practice on the side, it is important for them to know that employer-sponsored MPL coverage typically is “course-and-scope-specific” to medical services provided on behalf of the employer. Therefore, they will need to obtain their own, separate coverage for any independent work.

Physicians who have chosen to remain independent can obtain MPL coverage for the full scope of their medical practice either directly from a professional liability company or through an intermediary, such as an insurance agent or broker.

We offer some basic guidance for physicians and practice managers to take into account when reviewing MPL coverage options for their groups or for their own independent practices.

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SELECTING APPROPRIATE COVERAGE FOR YOUR NEEDS

Certain steps must be taken before you decide on the appropriate coverage:

- Verify that the coverage can be adjusted if you add or delete procedures within your practice, take a leave of absence, or change from full- to part-time status.
- Make sure all locum tenens, physician assistants, nurse practitioners, and other midlevel providers under your supervision are covered for the full scope of services provided on behalf of the practice.
- Consider whether your liability limits are sufficient for your practice, based on the legal environment in your state as well as any minimum requirements imposed by state regulations, local hospitals, and health plans. Although limits of \$1 million to \$3 million are the most commonplace, there are still some states with requirements as low as \$100,000 per claim/\$300,000 aggregate and some with no limit requirements at all. Despite the fact that claim frequency is down nationally since 2006, claim severity continues to rise.³
- When possible, it is important to obtain coverage that will pay for defense expenses in addition to the limits of liability. One of the key drivers of increased claim severity is the escalating legal cost of defending physicians in complex cases. If the limits are depleted by accumulating defense costs, physicians may feel pressure to accept a settlement in order to avoid having to pay damages beyond the limits of their coverage.
- For certain kinds of practices, such as emergency medicine and urgent care, look for pricing that is based on volume and acuity level of patient encounters.
- Inquire as to the availability of entity coverage. Physicians are directly liable for the care they provide, but their medical group also has “vicarious liability” for the acts of all healthcare providers working in the practice. As the shortage of primary care physicians continues unabated, and an increased number of patients have access to medical services under the Affordable Care Act, the volume of care that is being provided by nurse practitioners and physician assistants has continued to grow. This creates additional liability for the medical groups and other healthcare entities that employ mid-level providers.

COMPANY SELECTION AND IMPORTANT COVERAGE PROVISIONS

Certain features always must be considered when choosing the insurance company and coverage provisions:

- **Financial strength:** It is essential to secure coverage with a company that will have the financial resources

to provide an adequate defense, if needed. Look for a company with an A.M. Best rating of “A (Excellent)” or higher, which is indicative of a company’s ability to pay claims. Many hospitals and health plans outline minimum A. M. Best rating requirements within their medical staff guidelines and provider agreements.

- **Consent to settle:** Make sure the coverage documents prohibit the company from settling any claims without the physician’s consent and that there is no reduction in limits if the physician withholds consent for a settlement (i.e., “hammer clause”). In tough cases, physicians need a company that will fight to defend the standard of care, not just the bottom line.
- **Outside limits for defense costs:** Defense costs should not deplete the limits of liability, which must be preserved for settlements and judgments.
- **Retirement tail:** The coverage should stipulate that an Extended Reporting Period (aka tail) is provided at retirement or upon death or permanent disability, at no additional charge.
- **Supplemental lines of coverage:** Some professional liability programs (including those available through the Cooperative of American Physicians) are now offering supplemental lines of coverage for other medical practice exposures:
 - Cyber liability for ransomware attacks and electronic breaches of patient data, protected health information, and personally identifiable information;
 - Regulatory issues such as HIPAA, Emergency Medical Treatment and Labor Act, or Medicare/Medicaid billing fraud and abuse;
 - Wrongful termination, sexual harassment, hostile work environment, and other employment-related lawsuits;
 - Administrative defense coverage for disciplinary proceedings related to professional conduct and competency issues, including actions by a professional review body (hospital or managed care organization) or state licensing board; and
 - General liability for office premises exposures (e.g., slip and fall).

ADDITIONAL BENEFITS AND SERVICES

Additional benefits and services also may be available.

- Ask about risk management resources that may be available by phone, online, or in person, for the physician and the office staff.
- Find out whether the company offers a litigation education program for physicians (and their spouses) when dealing with their first malpractice claim. For many, this can be extremely helpful when navigating this stressful time.

- Ask whether the company operates a 24-hour risk management hotline to provide expert advice to physicians following an adverse outcome, to ensure that adequate documentation is filed and procedural best practices are followed?
- When possible, try to find a physician-owned company. The company should prioritize the physicians it covers, rather than shareholders seeking a return on their investment. Some of these companies, including the Cooperative of American Physicians, provide additional services for their members, (e.g., human resources support, group purchasing discounts for medical and office supplies, risk management training for office staff and physicians, retirement savings programs, and additional lines of coverage specifically tailored to medical practice).

NASCENT THREATS

Cyber Liability

Given the healthcare industry's relatively low investment in information security compared with the financial and retail sectors, medical practices have become an easy and lucrative target for cyber criminals. In fact, in 2016, 88%⁴ of all ransomware attacks on U.S. businesses were leveled against the healthcare industry. Cyber criminals appear to have become all too aware that the information contained in medical records can be even more valuable than stolen credit card information, because of the sensitive nature of the data collected (e.g., Social Security numbers, dates of birth, home addresses, and other personally identifiable information). In fact, one IBM study⁵ underscored the extent of the issue, and the profit to be made from unscrupulous attacks, by noting that 70% of businesses that had fallen victim to cyber attack eventually relented and paid the requested ransom.

Given the increasing frequency and sophistication of email phishing attacks, physicians should make sure they are taking adequate precautions to protect the security of patient data and privacy. Ransomware has become a significant threat to medical practices of all sizes, causing significant disruption to operations and often incurring high costs.

Fortunately, some malpractice companies are now including cyber liability coverage as part of their standard coverage, but it is often very basic coverage with relatively low limits of liability. Physicians should ask about expanded coverage and higher limits for this increasingly important line of coverage.

Overprescribing of Opioids

The growing crisis of opioid addiction in the United States is hard to ignore—a study released in 2017⁶ indicated that, from 2010 to 2016, the number of people diagnosed with an addiction to opioids skyrocketed by a staggering 493%.

As a result, physicians are falling under increased scrutiny, with both federal and state regulatory bodies intensifying their enforcement efforts. Under the Controlled Substances Act, the Drug Enforcement Administration (DEA) is able to take action against physicians who “knowingly and intentionally prescribe drugs outside of the usual course of medical practice or for non-legitimate medical purposes.”⁷ In fact, one investigation⁷ revealed that, from 2011 to 2015, the DEA accepted surrender of 3679 prescribing licenses, and revoked another 99.

Failure to comply with the CDC's *Guideline for Prescribing Opioids for Chronic Pain*⁸ not only can put patients at greater risk for opioid addiction and overdose, but also may lead to both civil and criminal liability for the prescribing physician. Physicians should, therefore, have robust Administrative Defense coverage to protect their medical licenses from unwarranted disciplinary actions by State Licensing Boards and Federal Law Enforcement officials. This type of coverage often is included alongside MPL coverage, with a relatively low sublimit (\$25,000 to \$50,000 per claim). But separate, stand-alone coverage is widely available for those who may need higher limits.

WHEN AND HOW OFTEN COVERAGE SHOULD BE REVIEWED

Malpractice coverage should be reviewed periodically (every three to five years), and following any significant changes in the practice or dramatic shifts in pricing or coverage terms. However, this line of coverage should not be moved from one company to another with great frequency or without good reason. Switching companies every few years to save a few dollars can negatively impact a physician's future ability to secure coverage and potentially open gaps caused by the disruption in continuity of coverage.

Coverage should be reviewed whenever there are changes to the practice (e.g., addition or removal of medical staff, expansion or reduction in the scope of services provided, relocation to another state or county). Furthermore, if there are any significant changes in healthcare legislation that may impact the practice, the existing coverage should be reviewed to ensure that it provides coverage to protect against any new exposures.

RETROACTIVE COVERAGE AND EXTENDED REPORTING PERIODS

Should you make the decision to replace existing claims-made coverage, you will need to arrange for “nose” coverage with your new company or “tail” coverage with your old company. This makes for a smoother transition period, and ensures that there is no gap in coverage:

- *Retroactive coverage* (aka nose) means your new company will pick up the liability for any previously unknown claims that may arise in the future as a result of

an incident that occurred while your prior claims-made coverage was in effect.

- *An Extended Reporting Period* (aka tail) enables the healthcare provider to report claims that, following termination or expiration of their claims-made policy, have subsequently arisen as a result of an incident that took place while said policy was in effect. *Note: Physicians and practice managers should also be aware that when faced with a steep bill for tail coverage from your incumbent company, they can often find stand-alone tail coverage from another company at a much lower price. This coverage is typically available through insurance brokers who specialize in Medical Professional Liability coverage.*

Most physicians have many options for coverage.

In spite of emerging new risks such as the growing number of cyber attacks against medical practices, and a mushrooming opioid addiction epidemic, it's not *all* bad news. MPL claim frequency has been trending lower⁴ for more than a decade, while coverage costs have been falling or stable over the same period. Most physicians have many options for coverage, and companies are aggressively competing for their business. However, a number of industry experts believe that pricing has reached the bottom of the range needed for the industry to remain profitable as a

whole. Therefore, physicians and practice managers should be prepared for a reversal of the "soft market" for MPL coverage in the coming years. ■■

REFERENCES

1. Pickett K. House passes medical malpractice tort reform bill. DailyCaller.com. <http://dailycaller.com/2017/06/29/house-passes-medical-malpractice-tort-reform-bill/>. Accessed August 16, 2017.
2. Jena AB, Seabury S, Lakdawalla D, Chandra A. Malpractice risk according to physician specialty. *N Engl J Med*. 2012;365:629-636. www.ncbi.nlm.nih.gov/pmc/articles/PMC3204310/. Accessed August 16, 2017.
3. Greve P. HealthTrek: medical malpractice claim trends in 2017. Willis-TowersWatson. www.willistowerswatson.com/en/insights/2017/06/insights-healthtrek-medical-malpractice-claim-trends-in-2017. Accessed August 16, 2017.
4. Caspi H. Healthcare its own enemy in attracting 88% of U.S. ransomware attacks. Healthcarediver.com. www.healthcarediver.com/news/healthcare-its-own-enemy-in-attracting-88-of-us-ransomware-attacks/425990/. Accessed August 16, 2017.
5. Kessem L. Ransomware: how consumers and businesses value their data. IBM.com. www-01.ibm.com/common/ssi/cgi-bin/ssialias?htmlfid=WGL03135USEN&. Accessed August 16, 2017.
6. America's opioid epidemic and its effect on the nation's commercially-insured population. Blue Cross Blue Shield. www.bcbs.com/the-health-of-america/reports/americas-opioid-epidemic-and-its-effect-on-the-nations-commercially-insured. Accessed July 27, 2017.
7. Lord R, Silber M. DEA is cracking down on physicians who over-prescribe pills. *Pittsburgh Post-Gazette*. August 12, 2016. www.post-gazette.com/news/overdosed/2016/08/12/Feds-have-taken-thousands-of-prescribing-licenses/stories/201608120095. Accessed July 28, 2017.
8. Dowell D, Haegerich TM, Chou R. CDC guideline for prescribing opioids for chronic pain. *MMWR*. 2016;65(1):1-49. www.cdc.gov/mmwr/volumes/65/rr/rr6501e1.htm. Accessed July 28, 2017.