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Newsletter of the Physicians Reimbursement Fund, Inc.

PRF NEWS

Volume 6, Number 1

Covering Practice and Risk Management Issues for Physicians

Act Now to Preserve the $250,000 Medical Liability Cap

BY STEPHEN J. SCHEIFELE, M.D.

Throughout the country physicians are facing staggering increases in medical malpractice premiums. From 1996 to 2000 malpractice claims rose five percent nationwide, with some states experiencing a doubling in the number of claims filed. The economic impact just to defend each claim averages $25,000 – despite the fact that only seven percent of all claims ever come to trial and more than 60 percent of those claims are dismissed or dropped without any award. When judgments have occurred, the average medical liability award increased 76 percent between 1996 and 1999, with the median compensatory award now reaching $1 million. To cover these costs malpractice insurance premiums have risen as much as 81 percent in Pennsylvania. Because of MICRA legislation passed in 1975, California has remained relatively unaffected. Since 1975, malpractice premiums increased nationwide by 505 percent. In California the increase was only 167 percent; thus, MICRA saves Californians $6 billion every year in healthcare costs. Continued assaults on MICRA from within the California legislature, as well as possible federal malpractice insurance reform legislation, could change the picture drastically.

MICRA, the Medical Injury Compensation Reform Act, was enacted by a special session of the California Legislature called by Governor Jerry Brown. California at the time was experiencing a medical liability crisis much like the one facing many other states in the country today. The current inability of physicians and hospitals to obtain insurance at reasonable rates threatens access to health care. In December 2002 St. Paul Companies left 10 percent of all doctors nationwide without malpractice insurance when the company stopped providing coverage. As a result of tightening markets and rising premiums, physicians are curtailing services, leaving litigious states, or abandoning the practice of medicine altogether. Approximately one out of 11 obstetricians have stopped performing deliveries and 38 percent of hospitals are having difficulty obtaining physician coverage. MICRA protects patients and health care providers in California by:

- Providing full compensation for all economic damages, including medical bills, lost wages, future earnings, custodial care and rehabilitation.
- Limiting non-economic damages to $250,000.
- Establishing a statute of limitations on claims.
- Ensuring that the bulk of any award goes to the plaintiffs by restricting attorney's fees.

Florida is among the states with the highest medical malpractice premiums. The range of rates for an OB/GYN is $143,000-$203,000; for a surgeon it is $63,000-$159,000; and for an internist it is $27,000-$51,000. In 2002 a Governor's Select Task Force was commissioned in Florida to analyze the availability and affordability of medical malpractice insurance. The number of carriers writing insurance in Florida had decreased from 66 to 12, and the remaining companies were unable to provide coverage to physicians whose policies had been cancelled. The Task Force proposed changes in five key areas, which were felt to affect access to high-quality and affordable healthcare. Some of the recommendations made by the Task Force to the Florida State Legislature are:

HEALTHCARE QUALITY

1. Develop or adopt statewide electronic medical records and protocols for a medication ordering system.
2. Authorize a "no fault" medical malpractice demonstration project as recom-

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mended by the Institute of Medicine (IOM).
3. Eliminate contingency fees for attorneys.
4. Establish a high-technology simulation center for use by healthcare providers.

PHYSICIAN DISCIPLINE

1. Legislate that standard of care decisions be left to the regulatory medical boards.
2. Strengthen peer review requirements to allow earlier dismissal of meritless claims.

TORT REFORM

1. Cap non-economic damages at $250,000 per incident.
2. Allow ex parte communication between the defendant's counsel and the plaintiff's treating physicians.
3. Examine ways to improve expert witness qualifications and require experts who review and render pre-suit opinions to be discoverable and admissible in future proceedings.

ALTERNATIVE DISPUTE RESOLUTION

1. Require confidential mediation within 120 days of filing a suit and provide for sanctions if a good faith settlement offer is refused.
2. Require courts to consider whether the issues and facts presented at mediation were significantly the same issues presented at trial.

INSURANCE REFORM

1. Allow for the creation of medical malpractice risk management trust funds and encourage the creation of self-insured options [PRF-RRG is one example] for healthcare providers.

The Task Force made a total of 60 recommendations. However, there were two key conclusions: 1) non-economic jury awards are a key factor behind the medical malpractice insurance crisis in Florida and 2) without a MICRA-like $250,000 cap on non-economic damages, no legislative reform will be successful in achieving the goals of controlling increases in healthcare costs and improving access to care. Furthermore, a cap will also lead to significantly lower malpractice premiums and have the greatest long-term impact on stabilizing liability insurance rates.

Although a few states have passed MICRA-like legislation, the American Hospital Association and others feel that a federal solution is necessary. The United States House of Representatives, with the support of President Bush, has just passed legislation mandating a MICRA-like $250,000 cap on non-economic damages. The previous six attempts by the House in the past eight years for malpractice insurance reform have all failed in the Senate. Senator Dianne Feinstein initially championed the bill in the Senate, but she has withdrawn her support because of opposition from the CMA and other California physician groups. The CMA is opposing the current Senate version of the bill because it increases the cap on non-economic damages to $500,000. It is critical for PRF that any national medical malpractice legislation include a cap on non-economic damages that mirrors California's. A higher cap would serve to drive up settlement costs and malpractice premiums in California, undermining the savings achieved by MICRA. A strong grass roots campaign on the part of physicians is needed to encourage Senators Feinstein and Barbara Boxer to seek Senate approval for a $250,000 cap. As the outcome directly impacts the ongoing success of our organization, PRF members should play an active role in this effort by contacting Senators Feinstein and Boxer.

I urge you to write letters to both senators explaining in your own words why you support a $250,000 cap. For your convenience, their addresses are included in the Briefcase item at left. ■

Dr. Scheifele is a board member and chair of the Risk Management & Education Committee of PRF.

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BRIEFCASE

WRITE YOUR SENATORS

Write letters to Senators Feinstein and Boxer explaining in your own words why you support a $250,000 cap on non-economic damages. Their addresses are:

Senator Dianne Feinstein
SH-331
Hart Senate Office Building
Washington, DC 20510-0504

Senator Barbara Boxer
SH-112
Hart Senate Office Building
Washington, DC 20510-0505
■

Medical Board Coverage: What Is It and How Does It Benefit the PRF Insured?

Currently more than 75 percent of PRF physician insureds elect to purchase Medical Board Coverage for the nominal annual fee of $288. However, the following information is for the benefit of all PRF insureds.

Exactly what is Medical Board Coverage?

The Medical Board of California ("Medical Board") has been increasingly active in investigating and prosecuting patient complaints and cases arising from malpractice settlements over $30,000. The level of Medical Board action ranges from preliminary record collection to formal investigation, administrative hearing and, in some cases, trial. Your medical malpractice policy alone does not provide coverage for these proceedings or for the attorneys' fees and costs that may be incurred. Beginning in 1999, in order to fill the need for this type of coverage, PRF began offering an "endorsement" to the existing policies of its insureds.

How does it differ from my medical malpractice coverage?

Medical Board Coverage applies strictly to patient complaints made to the Medical Board and subsequent inquiries and hearings before the Medical Board (i.e., investigative, administrative or disciplinary proceedings instituted against the named insured by the Medical Board). A complaint to the Medical Board may be a precursor to litigation; it may be made after the settlement of a suit; or a complaint to the Medical Board may not relate to either of these two scenarios.

For the insured to be covered, the event giving rise to the complaint must have taken place during a time that the Medical Board Coverage endorsement and the underlying policy were in effect. For example, if an insured purchased Medical Board Coverage for the policy period of January 1, 2000 through January 1, 2001, but the event giving rise to the complaint occurred before January 1, 2000, the insured would not be covered.

How does it benefit the insured?

In the event that you are called to appear before the Medical Board, PRF will pay legal fees and the costs of defense up to a maximum of $35,000 total per case initiated by the Medical Board. If you do not have Medical Board Coverage you will be forced to "go it alone" before the Medical Board or pay attorney's fees out of your own pocket.

Often complaints do not go further than the investigative status. Even in this instance, attorney fees can be costly. Without legal representation, physicians are more likely to say or do something that could inadvertently harm their case.

When should you contact PRF regarding Medical Board Coverage?

Insureds with Medical Board Coverage should contact the PRF office when:

1) The insured receives notice from the Medical Board that a patient has filed a complaint.
2) The insured receives notice from the Medical Board that there will be a hearing regarding a matter in which there was a settlement or judgment awarded to the patient

What can I do to minimize the chances of a patient filing a complaint against me with the Medical Board?

1) Always respond promptly to patient complaints. Regardless of the validity of the complaint, a patient complaint to the Medical Board can cause the physician considerable grief.
2) Keep excellent records of all treatments, including telephone advice and prescriptions.
3) Be courteous when speaking with a Medical Board representative. Any display of anger (however justified) or defensiveness can only work against you.
4) Belonging to your local medical and specialty societies can also be helpful. These societies will go to bat for you, especially if they believe that an adverse outcome would affect other society members.

If you have further questions regarding PRF's Medical Board Coverage, please call the PRF office at (415) 921-0498. ■

BRIEFCASE

ARBITRATION AGREEMENTS

As a PRF Insured you understand the importance of using arbitration agreements. Arbitration agreements are available to all PRF insureds ***free of charge***. To order arbitration agreements call **Lasting Impressions Printing** at **(925) 686-1509**. Just give the staff at Lasting Impressions the name of the PRF Insured and order the quantities that you need in English, Spanish or Chinese. We suggest that you clip this item from the newsletter and post it in a prominent place for your office staff. ■

For arbitration agreements call Lasting Impressions Printing at (925) 686-1509

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How Long to Retain Medical Records?

BY JEFFREY E. FAUCETTE, JD

When physicians call PRF asking how long they need to keep a patient's medical records after treatment is concluded, our recommendation is "indefinitely." Although there are some legal record retention requirements that must be met, risk management should be the controlling consideration. Because you put yourself at a significant disadvantage in a lawsuit where you have destroyed or discarded a patient's records, PRF recommends that you store rather than discard old patient medical records and view the expense involved as a prudent self-protective step in dealing with unforeseen future litigation.

Under new HIPAA regulations patients have a right to receive an accounting of disclosures of protected health information made for purposes other than treatment, payment and healthcare operations. Physicians are required to track disclosures and keep a record of them for six years.

Various California statutory authorities impose specific minimum retention periods:

- The records of Medi-Cal patients must be maintained for three years after the date of the last service rendered.
- Records for patients for whom reimbursement was received from the Emergency Medical Services Fund must be maintained for three years after the last reimbursed service.
- All records of prescription of controlled substances on Schedule II must be kept for at least three years after the prescription.
- Physicians with ownership interests in licensed clinical laboratories face *personal* liability if the lab does not maintain medical records, cytology slides and cell blocks for at least five years and cytology reports for at least ten years.

From a statutory or contractual point of view, there is no single controlling time limit. For example, contracts you have signed with practice groups, HMOs, hospitals, or reimbursement sources frequently specify a retention period longer than the minimums described above. Although the general statute of limitations for professional negligence claims is the shorter of three years from the incident or one year after discovery of (or reasonable opportunity to discover) the injury, there are many important *exceptions*, including an extended period for minors under the age of six and an effectively unlimited period where there is an allegation of fraud, intentional concealment, or sexual abuse.

A study by the Truck Insurance Exchange for the California Association of Hospitals and Health Systems found that 99 percent of professional liability claims against *hospitals* are filed within ten years of the incident. If this is also true for claims against physicians, there may not be much risk in destroying records ten years after the last service rendered to the patient, yet if a claim against you falls into that one percent that come after ten years, and the records have been discarded, your ability to defend against a claim — even one having little or no merit — is likely to be seriously compromised. For example, if the issue were one of informed consent, it is unlikely you would have a recollection of what occurred, and without a record to verify that the appropriate information was actually provided to the patient, the case could hinge solely on whether you or the patient were more credible.

For all of these reasons, PRF recommends that you take the prudent, conservative course, and maintain your patients' medical records indefinitely. ■

Jeffrey E. Faucette, JD, is an associate in the law firm Howard, Rice, Nemerovski, Canady, Falk & Rabkin, which represents Physicians Reimbursement Fund and its member physicians.