

MEDICAL MALPRACTICE

HOW WELL DOES THE INSURANCE COMPANY'S LAWYER PROTECT YOUR RIGHTS?

**by Steven I. Kern and Michael J. Schoppmann
Kern Augustine Conroy & Schoppmann, P.C.**

Not too many years ago a medical malpractice suit may have bruised a physician's ego, but little else. The malpractice insurance company appointed counsel and, if liability was found, paid the bill. That pretty much ended the story.

Today, it is far more complicated. A medical malpractice verdict is reported to the National Practitioner Data Bank, the New Jersey Board of Medical Examiners and usually must be disclosed to every managed care organization with which he has privileges. A large verdict or a series of verdicts can jeopardize a doctor's ability to carry on his career.

We are regularly asked whether a physician needs personal counsel in addition to the attorney appointed by the malpractice insurance company. The question is not easy answer. Obviously, a physician does not want to spend money on a personal lawyer when he already has a lawyer appointed to protect him, by his carrier.

To help answer the question, certain issues must be considered: They include:

Is there a punitive damage claim to the lawsuit?

If the complaint against the physician seeks punitive damages, these damages are not covered by a malpractice insurance policy. While the insurance company may offer a courtesy defense to these claims, if you lose, you will ordinarily be required to pay these damages out of your own funds. Often, the interest of the insurance company and those of the physician are not identical when punitive damages are at issue. Appointed counsel, though obligated to represent the physician's interests, often find themselves in conflicting roles when the interests of the physician diverge from those of the insurance company which may be responsible for a large portion of his yearly income. Private counsel can assist in limiting the likelihood of a punitive damages claim by interposing certain defenses and, where appropriate, by demanding that the carrier settle the case within policy limits. Insurance company appointed counsel, in our experience, rarely suggests these alternatives to the physician. For these reasons, personal counsel is usually a good investment.

Are there claims not covered by the policy?

Alarming, the number of complaints against physicians which include a charge of sexual impropriety are sharply on the rise. Acts of sexual impropriety are not covered by your insurance policy. If you are found guilty—you pay. Worse, a guilty verdict will almost certainly receive the attention of the Board of Medical Examiners, the hospitals in which you have privileges and the managed care companies in which you practice. In our experience, most medical malpractice lawyers have limited experience in dealing with these very difficult cases. Personal counsel is almost always warranted in these circumstances.

Does the plaintiff see damages in excess of policy limits?

More and more malpractice actions now seek damages in excess of policy limits. If a settlement or jury award exceed insurance coverage, the physician will be personally liable for the difference between the award and the coverage limits. The law provides mechanisms to protect the physician from excess damage awards. However,

these mechanisms invariably place the physician's counsel in a position of conflict with the malpractice insurer. When the complaint seeks damages in excess of the physician's policy limits, personal counsel should always be considered.

Is there a concurrent complaint before the Board of Medical Examiners?

A recent trend among plaintiff's lawyers is to initiate a complaint with the Board of Medical Examiners either before or at the same time a malpractice case is filed. When this occurs, it is imperative that you seek personal counsel. Any adverse action by the Board of Medical Examiners will almost certainly make it impossible to fully defend the malpractice action. Worse, if the Board of Medical Examiners finds the physician's actions to be willful, this may provide the malpractice insurance company with a reason to avoid providing coverage during the civil case. While malpractice defense lawyers are likely to tell the physician that they are capable of handling Board of Medical Examiners matters, experience demonstrates that this is rarely the case. There is a vast difference between representing a physician before the Board of Medical Examiners, and representing a physician in civil litigation. The rules are different, the proof requirements are different, the experts required to succeed in defending an action can be different, and the question of damages is unimportant.

Only recently, an insurance company appointed lawyer representing a physician in a concurrent Board action recommended settlement of the Board action. By settling the Board action, it would have been nearly impossible to defend against the punitive damages claims in the pending civil action. Moreover, the physician would surely have lost his lucrative managed care contracts. The physician contacted our office, the case was carefully evaluated (for the first time) world class experts were consulted, and it is now likely that both the Board action and the civil action will be successfully defended.

Is the insurance company's lawyer responsive to the physician's needs?

Often, insurance company appointed counsel are involved in many malpractice cases at the same time. Most spend substantial portions of their time in court and have little time to fully prepare the strongest possible defense. As such, the time they have to devote to one case may be severely curtailed by their own schedules and by the insurance company's desire to limit defense costs. Many rely upon paralegals and young associates to handle matters which can be of great importance to the ultimate outcome of a case. If your appointed attorney does not return your calls in a timely fashion, if he or she does not answer your questions satisfactorily, if he or she does not promptly identify experts, if his or her strategy decisions do not make sense to the physician, or if your contact is usually with a paralegal or a young associate, rather than with an experience attorney, appointed to your case, it's time for a second opinion.

Conclusion:

Personal counsel can provide enormous benefit to a physician facing a malpractice action. The small investment may substantially reduce significant risk.

Kern Augustine Conroy & Schoppmann, P.C. is a law firm with offices in Bridgewater, NJ, Lake Success, NY and Chicago, IL. Its attorneys devote nearly all of their time representing individual physicians in licensing matters, hospital privileges issues, as personal counsel in malpractice actions, and in business transactions.