

## PROFESSIONAL LIABILITY REVIEW BY THE MEDICAL DIRECTOR

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Professional liability or medical malpractice review is an interesting area of insurance medicine. The medical director may be called upon for advice on the underwriting of physicians in various specialties or subspecialties. The medical director also may be asked to provide input for malpractice prevention education of insured physicians. Additionally, an important and very challenging area involves review of the professional liability claim.

In medical malpractice claims the medical director's role is to advise the claims department of the medical issues at hand. These include whether or not the standard of care required by the physician was met with regards to the claimant's treatment, any adverse outcome as a result of the treatment, mitigating factors, and from which particular specialist expert testimony is recommended.

Also, the medical director may put the medical diagnosis and treatment issues of the claim into laymen's terms, making the issues more readily understandable by the claims department personnel. The medical director also provides literature from medical sources to buttress the conclusions reached regarding all of the above issues.

A systematic approach to a claim is most effective. The premise of a medical malpractice case is that the physician was negligent, and this negligence resulted in injury. Thus the first question to be answered is: "Did the physician follow the standard of care?" It used to be that physicians were held to the community standards, and these would vary from community to community making testimony from a physician in New York City inapplicable to a case occurring in Smalltown, USA. Generally this type of standards test no longer holds.

There are many factors to consider regarding the appropriate standard of care. Since many specialties provide guidelines, the question is raised: Did the physician follow the guidelines outlined by his/her specialty? The standard of care also applies not only to treatment actually rendered or prescribed by a physician, but also whether or not appropriate and timely referrals were made for a patient whose problems were beyond the scope of the primary physician to diagnose and treat. Surgical standard of care issues often revolve around indications for surgery, complications of surgery,

whether or not the complication was one that was "known," and whether or not the complication was recognized and dealt with promptly and appropriately. Accurate legible notes maintained by a physician go a long way towards resolving standard of care issues.

If it is determined that the physician did not uphold the standard of care, then the injury must be defined by the claimant. Examples include decreased life expectancy, loss of function, creation of chronic complications. The medical director may comment on these. It is important for the medical director to indicate that, in certain cases, while the standard of care may have been breached, the outcome would not have been any different. For example, a delay in investigational work-up for rectal bleeding in the presence of an underlying carcinoma would constitute a breach of the standard of care, but the length of that delay may not have been sufficient to significantly affect the outcome.

Another example would be the following situation. A patient with many medical problems may have had a minor problem improperly treated, but succumbed shortly thereafter to one of his major medical problems which had been properly treated, and the death was totally unrelated to the treatment for the minor problem. Thus a claim alleging malpractice may utilize the defense that the claimant's injury was causally unrelated to the purported negligence.

A claim cannot be properly assessed without the complete medical records. What may appear at first glance to be a simple, clearcut case will sometimes become, with receipt of the complete record, quite complex with shades of gray.

It is easier to assess a case if the physician's records are legible and if the documentation is complete. Juries often take the view that if something isn't documented, it didn't happen – and this boils down to the physician's word versus the patient's word. Types of documentation problems include:

1. Failure to document that informed consent for a procedure or operation was obtained.
2. Failure to document the content of patient/doctor telephone dialogue, discussing diagnosis, prognosis and treatment, either in the office or on call.

3. Failure to document the chief complaint, related symptoms, pertinent physical findings (positive and negative), diagnostic plan and treatment in the office visit notes.
4. Alteration, modification, deletion or amendment of the records.

A medical director may become involved in professional liability cases at various stages. Most medical malpractice carriers require that the physician notify them when events of a potentially litigious nature have occurred. Such events that may trigger a physician's reporting requirement may include a request for medical records by an attorney. Or, if a patient has an adverse result which the physician believes might be cause for the patient bringing suit in the near future, he may notify the carrier. Or, a patient may inform the physician in writing or verbally of his intent to sue. The claim representative may then request home office medical input.

If the medical director finds evidence of physician negligence causally related to an injury suffered by a patient, then the claims department may be informed that consideration should be given to settling the case. Not infrequently such a claim will then return to the medical director for another review, this time asking for an estimated life expectancy as part of a structured settlement. This situation is commonly seen in obstetric cases where fetal distress was not acted upon in a timely manner and the baby ended up with severe neurological deficits and may well incur large future medical expenses. The plaintiff's attorney may indicate that the settlement should be based on a life expectancy of 60 more years. However, the medical director can cite studies showing that with the defects the claimant has, the life expectancy would be on the order of 4 more years or some other reasonably based and researched alternative. This represents a significant difference in cost to the company and may be useful in reaching a mutually agreeable settlement amount.

In addition to physician malpractice cases, medical directors sometimes review claims involving dentists, nurses, pharmacists, and lawyers. In dental cases, we cannot provide an opinion on technical issues, but oftentimes the claim involves medical concerns. For example, did the dentist inquire about any medical condition the patient might have? If the dentist knew the claimant had aortic stenosis, did he prophylax the patient with appropriate antibiotics in the course of performing a root canal? If the answer is no, and the claimant then develops endocarditis soon after, the dentist will likely be found liable.

Nursing claims often involve medication errors, failure to monitor the patient properly or failure to inform the attending physician of a change in the patient's condition.

Pharmacy cases frequently involve the dispensation of an incorrect medication. These cases often raise two issues: What, if any, was the effect of the incorrect medication on the claimant, and what was the consequence on the claimant of not taking the prescribed drug?

Occasionally a medical director may be asked to review a legal malpractice claim – that is, if the legal malpractice claim involved an underlying medical malpractice lawsuit. The medical malpractice aspect of the claim is analyzed the same way as any other medical malpractice claim. Using the conclusions of the medical director, the claims and legal departments will further analyze the claim with regard to the legal malpractice issues (e.g. statute of limitations, etc.).

Worker's compensation cases are increasingly being submitted for professional liability review to investigate the possibility of subrogation. For example, a worker may have suffered a back injury during the course of employment. He then may have undergone back surgery in the prone position. When he awoke, he could not see out of his left eye. Should the worker's compensation carrier have to pay for the lost vision as well as the back injury? Was this malpractice? Was the claimant's face improperly protected by the anesthesiologist? The medical director can help the claims adjuster develop these and other theories.

It can be seen that a medical director performing medical malpractice review must have the ability to handle a wide variety of cases and be knowledgeable about a myriad of medical issues. If a case is in a specialty area in which the home office medical director is trained, the analysis will be easier. However, some cases are beyond the ability of the medical director to address. For example, an expert in pathology will be needed to review slides if a tissue diagnosis is in question. For many cases, research into textbooks and journals is required. We have found the subspecialty textbooks and the various Clinics of North America publications to be the most useful. A good library in the medical department is an invaluable resource. Sometimes a visit to the local medical school library is necessary to obtain journal articles. Additional insight can be gained if one knows a physician in the specialty area being reviewed who is willing to help.

While home office medical malpractice review can be complex and time consuming, this review serves to

define the issues involved, educate the claims representative and defense attorney about the medical issues, and help the company control costs. New knowledge gained by the medical director as a result of research on the case often helps in decisions regarding future medical underwriting. The medical director may have reviewed several claims from a particular clinic and may

be able to identify problem areas which will assist in professional liability underwriting as well as risk management.

In summary, professional liability claims review is interesting and challenging and contributes to the overall effectiveness of the medical and the claims department.