

When Multiple Healthcare Providers Are Sued Together: The Case For A Coordinated Defense

By Michael McCall,
Senior VP of Insurance Operations

“A house divided against itself cannot stand.” “United we stand; divided we fall.” The foregoing sayings are aptly descriptive of the potential pitfalls inherent in the defense of a medical malpractice claim against multiple healthcare providers.

In Medical Mutual’s experience, the defense of any claim, whether with or without merit, is optimized when the party-defendants coordinate their efforts. For this reason, Medical Mutual requires the attorneys we use to defend legal actions against policyholders to communicate early in the process with their legal counterparts representing other provider-defendants in the same claim. The goal is to coordinate efforts in the investigation, the legal Discovery Process, the analysis of merit, the settlement (if the claim is perceived to have merit) or the ongoing defense of a claim deemed to be without merit. As most of our claims (approximately 75%) are ultimately closed with no payment (non-meritorious), we are most often seeking to coordinate the defense of claims without merit.

The impediments we experience in our efforts to coordinate the defense of a malpractice claim are seen most often when party-defendants are insured by different insurance companies. Divergence in claims-administration philosophies, litigation-management procedures and legal advocacy philosophies of the attorneys selected by companies for defense often-times hinder, if not defeat in total, the

best efforts to coordinate the defense of the providers involved in the claim.



Pitfalls Of A Divided Defense

When party-defendants in a malpractice claim behave in a unilateral manner to optimize their respective individual defense positions, they do so to the detriment of the other party-defendants and that, in turn, not only impacts the other defendants and the defense of the entire claim, it invariably comes back to haunt self-serving defendants as well. An often-seen example is when defendants highlight on the legal record weaknesses in each other’s defense. Ordinarily in a malpractice claim for damages, the burden is on the plaintiff to prove liability. If defendants begin to point fingers at each other in order to defend themselves, they effectively shift the burden of proof to the defense because defendants essentially are making liability claims against each other in arguing their own respective defenses. When such behavior occurs in a non-mer-

itorious claim, the case becomes much more costly to defend, much more difficult to have promptly dismissed and much more risky to take to trial. When such behavior occurs in a meritorious claim, the case is much more difficult to settle globally and the overall settlement dollars are much more likely to exceed what would otherwise be fair and reasonable for the damages alleged in the case.

A very compelling phenomenon highlighting the pitfalls of a divided defense is the reaction of lay jurors during a jury trial in which defendants blame each other for a patient’s outcome. Jurors tend to perceive such finger-pointing as both self-serving and dishonest. They lose trust in the defendant providers, they assume medical error occurred and they become angry with healthcare providers whom ostensibly are not “owning up” to their responsibility for

Continued on next page

In This Issue

Providers and Business Associates Prepare for Changes in HIPAA Regulations — p.3

Policy Features in Plain English: Three Often-Overlooked Medical Mutual Policy Highlights — and Why They Matter — p.4

Clients to Benefit From Extensive Experience of Company’s Two New Senior Risk Managers — p.6

Important Licensing Issue for Maine Physicians — p.6

Medical Mutual Reports 2009 Third Quarter Operating Results — p.7

When Multiple Healthcare Providers Are Sued Together: The Case For A Coordinated Defense

continued from page 1

the patient's adverse outcome of care. The jury's sympathy shifts to the plaintiff and their anger gives rise to inflated awards with judgments against multiple providers.

In claims with merit, settlement discussions are made immensely more difficult to resolve because of a contentious legal record and defendants' emphasis on getting the best individual "deal" with the plaintiff – to the detriment of other parties. In short, parties refuse to agree on apportionment,

If defendants begin to point fingers at each other in order to defend themselves, they effectively shift the burden of proof to the defense because defendants essentially are making liability claims against each other.

refuse to agree on a private, off-the-record method of dispute-resolution concerning apportionment and, negotiate individual settlements in an atmosphere charged by the inflationary risk of a jury trial in which lay jurors are called upon to assess both the plaintiff's damages and the apportionment between parties. Ultimately, divisive defense tactics among providers in the litigation setting can carry over to the clinical setting where rapport, trust and respect among the same providers are profoundly impacted by the litigation experience.

The Benefits of a Coordinated Defense

Communication between defense lawyers in a multi-defendant case is vital to optimizing the defense of that case for a variety of reasons. Coordination of efforts and assignment of tasks eliminate redundant activities and redundant costs associated

with the defense of the case. For instance, which firm will be responsible for obtaining all relevant medical records; or, which firm should handle the procurement of a medical expert witness who will testify on the question of causation?

Communication between attorneys can prevent one defendant from being "blindsided" by the testimony of another. The purpose for the communication is not to influence how another party should testify;

but, instead, the purpose is to eliminate unexpected surprises. When a defendant is blindsided by the testimony of a co-defendant, human nature tends to

prompt both anger and retaliation. Not only does finger-pointing and retaliatory behavior taint the legal record in the claim, as mentioned above, clinical relationships suffer as well.

As noted earlier in this discussion, approximately 75% of Medical Mutual's claims are closed without settlement payments which means these claims were without merit; but when defendants "joust" in the legal record, these claims become much more difficult and expensive to close. Whereas, with a coordinated defense both the time and expense associated with obtaining a dismissal are conserved.

With respect to meritorious claims in which more than one defendant is believed to be culpable, coordination and cooperation among defendants are essential to assure settlement values are reflective of actual damages, with negotiations much more likely to be influenced by valid miti-

gating arguments put forth by a united group of defendants. Whether or not the defendants agree among themselves on respective participations and proportions of contributions toward the settlement, they remain united in their negotiations with the plaintiff in order to obtain a fair and reasonable global settlement of the entire claim. In short, if disagreements on apportionment exist, the defendants effectively "agree to disagree" among themselves off-the-record, sparing the legal record their disagreements surrounding apportionment and focusing the negotiations with the plaintiffs on fair compensation for actual damages. In the coordinated defense, the defendants who cannot agree on apportionment at least come together to agree upon a method of "internal" dispute resolution (oftentimes a private, confidential arbitration) to enable productive collaboration in arriving at the global settlement. Coordination eliminates the likelihood disagreements concerning apportionment will undermine negotiations with plaintiffs. Case settlements are more reasonable and timely. Highly public jury trials in which juries must assess total damages and apportion those damages among defendants are avoided.

Medical Mutual strongly believes all parties benefit, including plaintiffs, when the defense of a case is coordinated. Accordingly, we always urge our defense attorneys to strive to coordinate the defense of a claim, even if the case involves defendants not insured by Medical Mutual. While we are much more successful in achieving a coordinated defense of a case when we insure all of the defendant parties, whenever we succeed, our experience illustrates vividly that "a house united, indeed, does stand."

Providers and Business Associates Prepare for Changes in HIPAA Regulations

by Cinde Warmington

The Health Information Technology for Economic and Clinical Health Act, commonly referred to as HITECH, was adopted as part of the economic stimulus bill last February. Among other things, HITECH includes changes to HIPAA that have a significant impact on both providers and their business associates. Key among the changes are the new breach notification requirements which obligate providers and business associates to track and report breaches. The Interim Final Rule governing breach notifications was issued on August 24, 2009 with an effective date of September 23, 2009.

Although the law is already in effect, the Secretary of the U.S. Department of Health and Human Services has indicated that no sanctions will be imposed on providers who fail to comply with the breach notification requirements for breaches which occur before February 22, 2010.

The breach notification requirements are very detailed but, in general terms, every breach requires the provider to conduct an evaluation to determine if an actual breach has occurred. If so, the provider must perform a risk assessment to determine if the security or privacy of the patient's protected health information ("PHI") was compromised. If the risk assessment reveals a significant risk of financial, reputational or other harm to the patient, the provider must follow the breach notification requirements. Notice of the breach must be given to the patients by first class mail unless the patient has agreed to receive electronic notice. There are additional requirements for giving notice when the patient is deceased, when the provider does not have the patient's current contact information and when the breach involves 500 or more patients. Business Associates are required to give the provider notice of any breaches and are also required to comply with certain security standards to protect any electronically stored data. The new changes to the law impose significant sanctions on both the providers and business associates for breaches and for the failure to comply with the breach notification requirements.

In addition to providing patient notification, providers will also be required to give notice of the breach to the U.S. Department of Health and Human Services ("DHHS"). This is a significant shift from previous rules which required providers to keep an



accounting of improper disclosures, but did not require patient notification except to the extent necessary to mitigate any harm caused by the breach. What this means to providers is that every breach will require evaluation including unauthorized use by the provider's own employees. For example, previously, if an employee improperly accessed a patient's record out of curiosity, the employee would likely have been subject to discipline, most likely termination. Under the new requirements, the provider will most likely be required to give notice

of the breach to the patient and to DHHS. Faxing the document to an incorrect phone number inadvertently is also likely to require notification as will any loss of unencrypted electronic patient data, for example the loss of a lap top containing protected health information.

In general terms, every breach requires the provider to conduct an evaluation to determine if an actual breach has occurred. If so, the provider must perform a risk assessment to determine if the security or privacy of the patient's protected health information ("PHI") was compromised.

To be in compliance with new rules, providers are required to revise their policies and business associates agreements, train their employees on the new requirements and implement sanctions for employees who fail to comply with the privacy policies. Providers who are not already in compliance are urged to begin implementation immediately so as to be in full compliance with the law before February 22, 2010.

The breach notifications are only part of the changes to HIPAA included in HITECH. Additional changes include, but are not limited to, new requirements to account for disclosures for users of electronic health records, new requirements limiting the

Continued on page 6

Three Often-Overlooked Medical Mutual Policy Highlights — and



Policy Features in Plain English

Medical professional liability insurance is serious business. And like any legal contract, when you're talking about the actual lan-

guage of a policy, it can get complicated in a hurry. The fact is, whether you're a physician, a practice manager, or a hospital administrator, there are likely to be aspects of your medical professional liability insurance policy that you don't grasp entirely. You may even be completely unaware of certain coverage benefits and nuances.

That's why, starting with this issue of the *Advocate*, Medical Mutual will attempt to peel the onion, so to speak, and dissect the contract legalese to provide you with plain English explanations of specific policy features. The goal is to help you understand exactly what you get with a Medical Mutual policy and to make sure you have the necessary insight to take full advantage of your Medical Mutual benefits.

We'll begin by shining a light on three often-overlooked features of a typical Medical Mutual policy: 1) "Coverage B," which typically pertains to physician versus physician or physician versus administrator lawsuits 2) Physician Administrative Defense, a provision related to defending physicians when, for instance, their licensing or practice privileges are put in jeopardy by a government body or institutional board and 3) coverage for allegations of "undue familiarity," more commonly referred to as sexual misconduct.

Coverage B: What is Non-Patient or Staff Privileging Incident Liability?

Under what circumstances might a physician or administrator be subject to a professional liability claim from a non-patient? Typically the answer lies in one's professional duties serving as a member of, say, a peer review or quality committee. In such roles, a physician is often asked to render an opinion on the conduct or service of a physician relative to a specific incident or set of circumstances. In such cases, your opinion could very well impact that physician's employment status or ability to practice. When that impact is negative, it is becoming more common for the physician to bring a suit against you for your role on the review committee and for allegedly damaging his or her reputation and livelihood.

A separate limit distinguishes Medical Mutual's coverage.

Most insurance carriers cover such claims in some way. But there is a significant difference between the way Medical Mutual covers such claims compared to other carriers. Specifically, Medical Mutual provides for a separate coverage limit from your standard medical professional liability limit. Other carriers treat such claims "within limits." That is, they are part of your standard medical incident liability limit. So consider a scenario where you are sued by a fellow physician for an opinion you rendered as part of a peer review committee; then in the same policy year, a patient files a claim against you due to an adverse medical outcome. With most companies, you have just one set of liability limits to cover both claims. With Medical Mutual on the other hand, the patient injury claim would be protected under one set of liability limits, while the physician-privileging claim would have a separate set of limits. In other words, the physician-privileging claim would not reduce the coverage available to you for patient-injury claims, the predominant risk for which you purchase coverage, providing you with far greater protection of your assets.

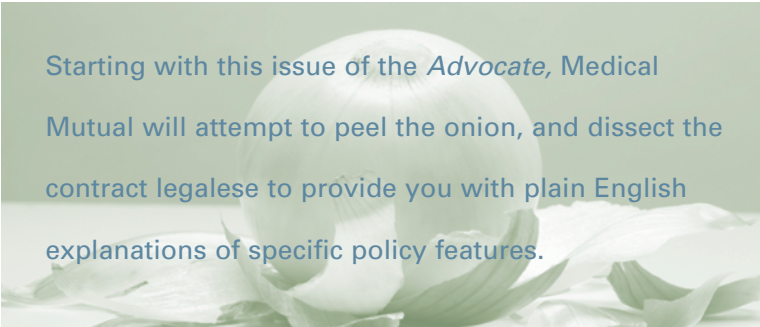
Why They Matter

Physician Administrative Defense: When it's time to answer to The Man.

Physician Administrative Defense (PAD) is a feature of your medical professional liability insurance policy you can take advantage of should you be the subject of a disciplinary proceeding in front of a government licensing board, a hospital board, or any other organization that can curtail, suspend or revoke your ability to practice. Like most carriers, Medical Mutual provides coverage, subject to limits, for legal consultation and defense costs related to administrative disciplinary proceedings. Again, differences arise, however, in how Medical Mutual and other carriers treat such situations.

Reimbursement and coverage are not the same.

While some will reimburse you for expenses incurred to defend yourself in such situations, Medical Mutual pays the expenses directly (up to the specified limits). So you incur no out-of-pocket expenses. With Medical Mutual, you also receive this



Starting with this issue of the *Advocate*, Medical Mutual will attempt to peel the onion, and dissect the contract legalese to provide you with plain English explanations of specific policy features.

coverage as part of the standard medical professional liability policy. And, there are no caveats with Medical Mutual's protection. For example if you receive notice from your state's Medical Board that an investigation of your license has commenced, coverage under your Medical Mutual PAD endorsement applies regardless of whether the investigation is of a matter never likely to become a professional liability claim.

Undue Familiarity Allegations: When sexual misconduct claims threaten you or your organization.

Sexual misconduct allegations against individual physicians and organizations may not be covered under some policies; or more typically are subject to limitations. And the details of the coverage vary greatly from carrier to carrier.

Differences in limits and corporate coverage can be significant

Some policies exclude completely coverage and defense for such claims, even if there are also allegations of professional negligence in the claim, or if the sexual misconduct allegations are baseless. Others cap their coverage; for instance, providing a "sub-limit" of \$100,000 to apply not only to the first claim of alleged sexual misconduct, but that same \$100,000 is all you have to protect you for any other claim against you for sexual misconduct asserted in that same policy year. Furthermore, the cost of your defense reduces that "sub-limit" under this type of policy. Medical Mutual does not sub-limit the amount of defense coverage provided and defense costs are outside the limit of liability. And while most policies, including Medical Mutual's, do not indemnify on behalf of "the perpetrator" if that individual is found liable for sexual misconduct, Medical Mutual will indemnify on behalf of the corporation or hospital if the organization is found vicariously liable for the sexual misconduct of the perpetrator — a significant difference relative to corporate coverage under competitor policies.

Policy Features in Plain English: More to Come.

Look for more easy-to-understand explanations and insights on one or more medical professional liability insurance policy features like the ones above every quarter as "Policy Features in Plain English" becomes a regular feature of the *Advocate*.

Clients to Benefit From Extensive Experience of Company's Two New Senior Risk Managers

Susan Boisvert, BSN, MHSA and Lou Anne McLeod, MHA recently joined Medical Mutual as Senior Risk Managers.



Susan Boisvert

Boisvert, who joined the Company in July, is no stranger to the Medical Mutual Risk Management Department, having worked closely with the Company during her nine-year tenure at St. Andrew's Hospital and Healthcare Center in Boothbay Harbor, Maine, where she held positions as Chief

Nursing Officer, Vice President of Quality and Vice President of Performance Improvement. Boisvert's experience also includes 12 years as a nurse at Mount Desert Island Hospital and, most recently, two years at Parkview Adventist Hospital in Brunswick, where she served as Vice President of Clinical Services and Chief Nursing Officer. Boisvert also brings with her a wealth of experience in hospital and healthcare regulation, having served as a member of the Division of Health and Human Services Hospital

Licensure Reform Steering Committee. As a Senior Risk manager at Medical Mutual, she will serve Medical Mutual's Maine-based clients from the Company Headquarters in Portland.



Lou Anne McLeod

McLeod comes to Medical Mutual from Rutland Regional Medical Center in Rutland, Vermont, where she was Director of Risk Management. Well versed in hospital regulatory requirements, her experience also includes quality and risk management positions at Dartmouth Hitchcock Medical

Center in Lebanon, NH, New London Hospital in New London NH and Strong Memorial Hospital in Rochester, NY. She takes over for Ann Turbyne, who is retiring after leading Medical Mutual's New Hampshire-Vermont field office for the past five years. She joined Medical Mutual in December and will serve the Company's New Hampshire and Vermont clients from her home office in Rutland.

Important Licensing Issue for Maine Physicians

This notice is especially targeted to those physicians who have staff members complete their license renewal applications. In Maine, medical licensing renewal applications must include a certification from the physician that the information included on the renewal is accurate. Unfortunately, many of our physicians are not closely reviewing their renewal forms and errors have occurred. If there is an error on your renewal application – for instance, if the renewal failed to disclose an open Board complaint – the Board of Licensure has been issuing its own complaint against the physician for “fraud” on the renewal application form. Thus far the Board of Licensure in Maine has been dismissing these complaints with a letter of guidance. However, physicians should take this situation very seriously and ensure that they carefully review all licensing applications and renewal applications before the forms are submitted.

Providers and Business Associates Prepare for Changes in HIPAA Regulations

Continued from page 3

content of disclosures and new restrictions on the use of PHI for marketing and fundraising purposes. Providers seeking additional information about the breach notification requirements and other HIPAA changes may access a Power Point Presentation on the subject at <http://www.shaheengordon.com/news-events/cinde-warmington-provides-presentation-on-hipaa-changes-including-hipaa-breach-notification-requirements.html>.

Cinde Warmington is a partner and chair of the Health Law Practice Group at the law firm of Shaheen & Gordon, P.A. in Concord, NH. Questions may be directed to her at (603)225-7262 or through the firm's web-site at www.shaheengordon.com.

¹ Depending on the nature of the breach, providers may already have an obligation to give notification to patient and the State's Attorney General's office.

Medical Mutual Reports 2009 Third Quarter Operating Results

For the Nine Months Ended September 30, 2009, Medical Mutual realized net income of \$4,849,000. Surplus increased to \$88.0 million at September 30, 2009, from \$79.5 million at year-end 2008. The increase in surplus is primarily due to favorable net operating results and a significant increase in the value of the Company's equity portfolio as the stock market continued its recovery.

In the first nine months of 2009 versus 2008, the number of hospital claims reported to the Company increased by 9 to 66 (57 in 2008) while Physician and Surgeon reported claims decreased by 7 to 116 (123 in 2008). The decrease in Physician and Surgeon claims represents the lowest reported number in the past eight years – 57 % of the level reported in 2002 and 2003. Hospital claims, on the other hand, while lower than the high watermark of 2003, are the fourth highest in the past eight years.

Tempering the impact of continued favorable results in the reported number of claims (frequency) was an increase in the overall expected loss per claim (severity), resulting in an increase in net losses projected on a per-claim basis. Net losses of

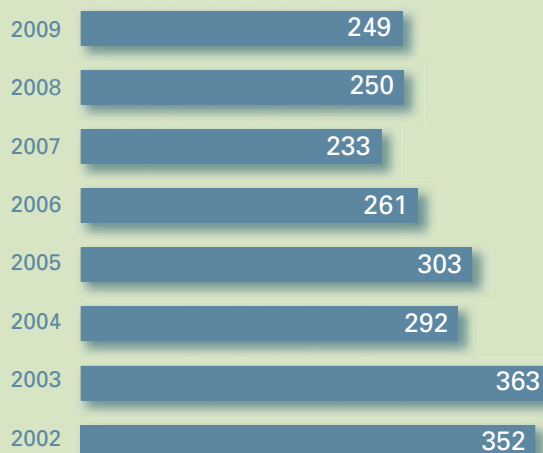
\$12,374,000 were reported in the first nine months of 2009, a 21.28% increase from the \$10,203,000 reported in the same period in 2008. Most of the increase was attributable to a reduction in the drawdown of loss and loss expense reserves set up in prior years due to better-than expected loss experience.

Continued favorable trends in new claims filed since the 2003 high watermark have contributed significantly to the Company's solid operating results.

Other highlights and significant results for the first nine months of 2009 include:

- Income Before Taxes and Dividends:** Income before taxes and dividends was \$6,150,000. This compares to \$15,612,000 for the same period in 2008. The decrease was primarily due to the \$3.8 million decrease in drawdown of loss reserves for prior years' and a \$3,034,000 decrease in realized capital gains. A reduction in earned premiums and an increase in loss adjustment expenses accounted for the remainder of the decrease.
- Pre-Tax Operating Income:** Pre-tax operating income (ignoring capital gains/losses) was \$5,541,000 in 2009 compared to \$11,969,000 in the same period in 2008. The \$6,428,000 decrease was primarily due to the decrease in drawdown of prior year reserves, lower earned premiums, and higher loss adjustment expenses, noted above.
- Net Earned Premiums:** Net earned premiums were \$29,729,000, a decrease of 5.65% from the \$31,508,000 reported in the same period in 2008. The decrease is reflective of rate reductions and relativity changes approved in 2008.
- Insurance Operations:** The Company reported a \$489,000 underwriting gain in 2009, which is significantly less than the \$6,616,000 gain reported in 2008. The primary difference between the two years is the reduction in drawdown of reserves for prior report years, the reduction in net earned premiums, and the increase in loss adjustment expenses.
- Investment Income:** Investment income is \$282,000 lower for the nine-month period in 2009 than in 2008 because of a significantly higher average investment in tax exempt securities.

New Claims Filed (first nine months)



Although claims activity is not consistent year-to-year, the Company has now experienced almost six years with new claims activity significantly below levels seen in 2003 and 2002.

Medical Mutual
Insurance Company of MAINE[®] | *Serving health care providers in
Maine, New Hampshire & Vermont*

One City Center
PO Box 15275
Portland, Maine 04112-5275

Tel: (207) 775-2791 • (800) 942-2791

Fax: (207) 523-8300

www.medicalmutual.com

Email: info@medicalmutual.com
