

Protecting Your Practice

A MEDICAL MALPRACTICE INSURANCE CHECKLIST

By Megan K. Packard, Professional Liability Solutions, LLC

In today's litigious society you have to make sure none of your actions as a healthcare provider leave you vulnerable to a lawsuit. Reducing your risk of a medical liability lawsuit entails many proactive steps that you can take, such as documenting properly, providing thorough information on the potential outcomes, benefits, and possible consequences of the procedure. But also factoring in is the medical liability insurance policy that protects you. What happens when a claim comes in and your insurance policy does not cover you for that procedure? In essence, it is the same as being bare – being without insurance – and, therefore, leaving you exposed to face the lawsuit on your own, while also leaving both your financial assets and personal reputation at stake.

ATTENTION TO THE DETAILS

It is prudent to get medical liability insurance to cover you against potential lawsuits. But what are the important aspects to keep in mind to ensure proper protection? Purchasing malpractice insurance requires attention to the details. It is always easy to understand premium, but decisions about medical liability insurance should never be made based on premium alone. The "devil is in the details," as they say, and without attention to the details, you could be leaving yourself exposed to potential problems when faced with a potential lawsuit.

What follows is a list of some of the important points to consider when securing medical liability insurance (in no particular order):

1 FINANCIAL STABILITY OF INSURANCE CARRIER – WHAT IS THE CARRIER'S A.M. BEST OR STANDARD POOR'S RATING?

Standard insurance carriers, as a part of their regulation by the State's Department of Insurance, must participate in and contribute to the State's Guarantee Fund. These State

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Guarantee Funds provide a "back-up" of financial support, should one of the standard carriers become financially insolvent and not be able to meet its financial obligations to

its policyholders (such as paying out claims on behalf of its insureds). Surplus carriers do not participate in the State's Guarantee Fund. Therefore, it is of great importance to make sure that the surplus carrier is a financially stable company. Rating companies such as A.M. Best and Standard Poor's provide a basis for which insureds can learn about the financial stability of the carrier – whether it is a standard carrier or

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surplus carrier. These ratings create a benchmark for assessing the insurers' financial strength. In recent years, ratings have become increasingly important in helping healthcare providers make decisions on which insurers to buy coverage from in order to protect their financial well being and career reputation. What we often find is that many of the surplus carriers are just as strong as, if not stronger financially than the standard carriers.

2. CORPORATE LIABILITY – ARE THE BUSINESS ASSETS PROTECTED?

Corporate liability determines the extent to which a corporation as a fictitious person can be liable for the acts and omissions of the persons it employs. It is sometimes regarded as an aspect of vicarious liability. This means that the corporate assets can be

taken into account for the damages to be paid for a lawsuit/claim.

Selecting the type of ownership structure will depend on how risk will be distributed and the profits will be shared. Incorporating your business will provide limited liability to the owner. Limited liability means that the individuals running the business are typically insulated from the liabilities of the corporation itself. This is true so long as the business is properly capitalized and administered with the necessary corporate formalities. Remember, though, the physician or other healthcare professionals can still remain personally liable for

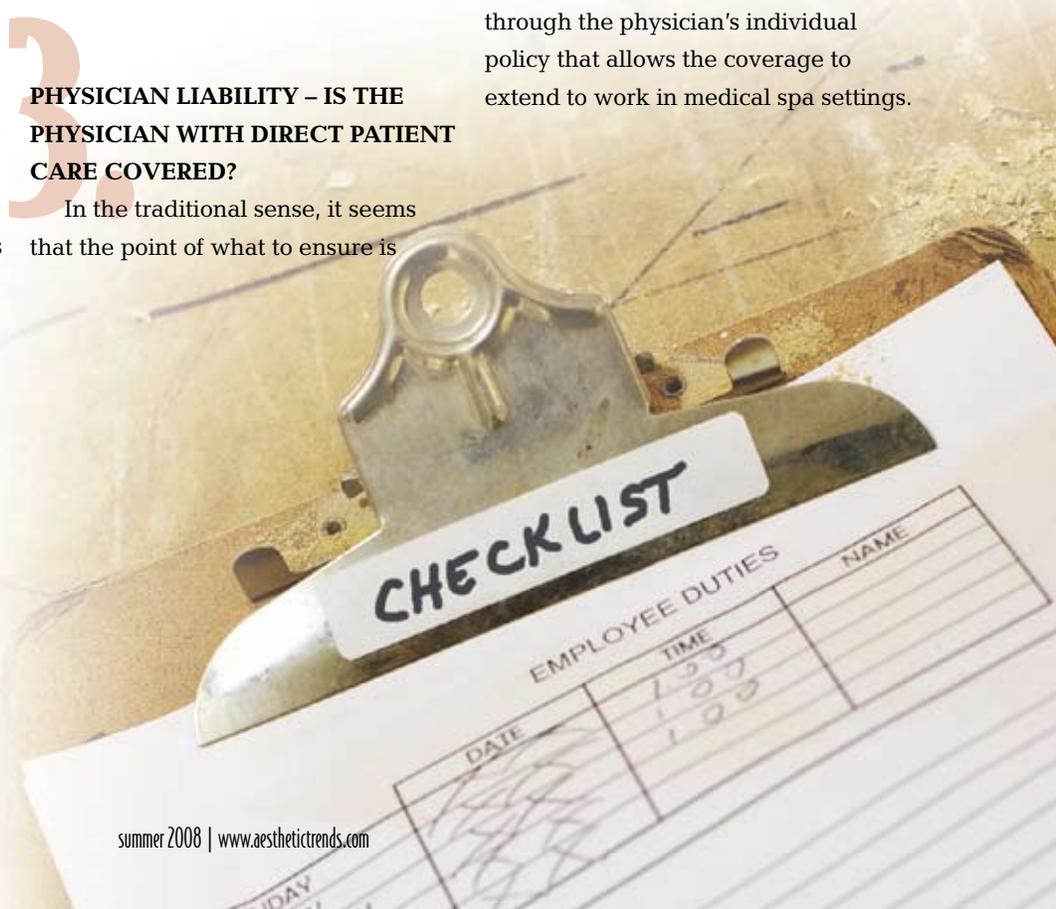
professional negligence (malpractice) that happens within that practice setting.

3. PHYSICIAN LIABILITY – IS THE PHYSICIAN WITH DIRECT PATIENT CARE COVERED?

In the traditional sense, it seems that the point of what to ensure is

covered by a medical malpractice insurance policy should not have to be included. However, as practices evolve, it does become important to incorporate new ownership structures and new employment arrangements and, therefore, ultimately new ways to structure the medical liability insurance policy.

It is easy to understand that a solo physician needs to secure coverage for him/herself. But if a physician is employed by a practice, coverage can be secured on an individual basis as part of a group policy, which then protects the corporate/group entity. What happens in the event that the physician is an independent contractor, such as the case for many medical spas? Some policies may be able to add the independent contracting physician on the medical spa's policy, or coverage may need to be secured through the physician's individual policy that allows the coverage to extend to work in medical spa settings.





MEDICAL DIRECTOR – ARE THE MEDICAL DIRECTOR'S ADMINISTRATIVE DUTIES COVERED?

Again, in the traditional sense, a physician's policy would typically cover medical director duties of his/her primary practice. In the aesthetic practice/medical spa setting, many non-physicians may own the practice/spa and contract with or employ the physician. Even if the physician does not have direct patient care, the physician can be liable for the administrative aspects of serving as medical director.

The medical director is often held liable for the negligence of the staff he/she is supervising, as well as the set protocols to be followed in the practice setting. It is important to know what policy is covering the physician for acting as the medical director.

STAFF – ARE MEMBERS OF THE STAFF WHO PROVIDE DIRECT PATIENT CARE COVERED?

This question always creates interesting conversation. Many physicians' policies will cover the employees by either adding them on as additional named insureds (or "protected parties" – or whatever jargon the insurance carrier may use), as in the case of physician assistants/nurse practitioners/surgical assistants, or by definition of who is covered as an insured (and not by name), such as the case with registered nurses or aestheticians. However, some policies will not add on coverage for the employees.

An important consideration for the medical spa policy is whether the staff member is employed or working as an independent contractor. Many policies that cover the medical spa itself will cover the employed staff members,

but may not cover the independent contractors. Owners of medical spas who cannot add independent contractors on their medical spa policy will want to make sure the independent contractor has his/her

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own insurance in place. Otherwise, the medical spa or the physician policies become the "deep pockets" to which payments for the lawsuit can be made. When these payments are made, the outcome ultimately affects the physician or facility whose policy covers the indemnity.

TYPE OF POLICY – FACILITY VS. HEALTHCARE PROVIDER POLICY?

Two types of policies can cover aesthetic practices and/or medical

spas: either a facility based policy or a healthcare provider based policy. Most providers are accustomed to the individual policy where the primary named insured is that individual. A facility policy is structured to cover the facility (in this case the medical spa or aesthetic practice) as the primary named insured. It then adds on the coverage for certain providers who offer the direct patient care in that facility setting, or it could simply offer coverage for the corporate entity alone. The facility based policy can typically cover all employed staff with direct patient care, but may provide coverage to the work done only in that facility's location. If there are additional locations, they often have to be added on to the policy for coverage to extend to work done in secondary office locations. The individual provider policy allows for the primary named insured to be the healthcare provider, which typically follows the provider to different locations for work. However, there are always exceptions, so it is best to understand where work as a provider will be covered.

7 PROCEDURES / TREATMENTS – WHAT IS COVERED AND WHAT IS EXCLUDED FROM COVERAGE?

Are all treatments and procedures that the provider performs being covered? Many times a physician can add the aesthetic procedures to his/her primary malpractice policy, even if he/she is not a dermatologist or plastic surgeon. In many circumstances, though, the primary policy will

not cover select procedures. It is important to know what the primary policy is covering so that you know what is left exposed and where you need additional coverage.

Does the policy stipulate which type of healthcare professional it will cover for the performance of certain procedures/treatments? For example, the policy may cover lipodissolve claims, but only when lipodissolve is performed by a physician. It may not cover claims of lipodissolve if it is performed by any non-physician healthcare provider. Some policies will keep things as broad as possible and refer back to the application as to what is being covered. This is why disclosure on the application of all procedures is important.

8 LIMIT CONFIGURATION – ARE THE LIMITS OF LIABILITY SHARED OR SEPARATE?

The limits of liability state how much the insurance company will pay on the insured's behalf. For example, a \$1 million per claim / \$3 million per aggregate limit configuration means the insurance company will pay at a maximum during the policy period \$1 million for each claim and a maximum of \$3 million total for the entire policy period (typically a year in length), no matter how many total claims are made against that policy.

One aspect to keep in mind is whether the limits are separate (for each individual and/or corporate entity) or shared between the



corporate entity and healthcare providers. A policy can be set up where the corporate entity, the medical director (with or without direct patient care) and any employed staff all share in the one limit. This means that the insurance company will pay out, at a maximum, the per claim amount for ALL parties combined. Other policies may separate out the corporate coverage and individual provider coverage as two separate limits of liability and potentially two "pots" from which payment can be made...but this, too, is dependent on the overall policy limit configuration.

2. DEFENSE COSTS – INCLUDED INSIDE OR OUTSIDE THE LIMITS OF LIABILITY?

Another consideration is defense costs. Will the policy pay the cost to defend (attorney's fees, expert witness fees, etc.) the insured against any claims? Some policies may not, but many do. If defense costs are covered, how are they covered? Defense costs may be included within the limit of liability, meaning the maximum per claim the company will pay will include the defense costs and the monies that are paid out in damages or in settlement. If the defense costs are outside the limits of liability, then the insurance carrier will pay those expenses in addition to the limit that they will pay in indemnity. Therefore, the amount that can be paid out to the claimant in damages will not be reduced by the legal expenses.

10. COVERAGE TRIGGER – WHEN CAN YOU REPORT A CLAIM TO YOUR INSURANCE CARRIER?

Lastly, you will want to consider how and when you can report a claim to your insurance carrier. Some policies are "incident sensitive," while others are "written demand." Incident sensitive policies allow the primary named insured to report a claim when they expect a medical incident may result in a claim, even if no formal complaint has been made by the patient. This would allow the insured to report the potential claim even if it never turned into anything. A written demand type of policy stipulates that a claim be reported only when a demand for money, services, etc. is made via a written document, whether a letter from the patient, the patient's attorney, a subpoena, formal notice of lawsuit, etc.

UNIQUENESS OF EACH POLICY

While this is a comprehensive list, it is not fully complete. It does show why it is more important to understand the various aspects of the policy rather than just the premium alone. The implications from the above can impact both from a financial standpoint as well as a career/reputation standpoint. Never buy on price alone!

Keep in mind that each healthcare provider's situation is unique and, therefore, not all aspects of a policy may be available. There may also be certain elements that are important which were not touched on here. It

is very important to work with an insurance agent who understands your needs and can diligently work with you to secure the best coverage, given your unique situation, and what is available in the insurance marketplace, and then can explain the implications the policy can have on your career and finances. Running through this checklist should provide a good starting point. 



Megan K. Packard is the Executive Vice President for Professional Liability Solutions,

LLC, an independent agency that specializes in providing personalized, comprehensive insurance and risk-management solutions for healthcare professionals. With offices in both Charlotte and Chicago, Professional Liability Solutions has been helping healthcare professionals protect their practices and assets for over 15 years. Megan works from the Charlotte office, where she focuses her business on the medical spa, aesthetic, anti-aging, and wellness segments of the healthcare industry. Megan received her degree from the University of Virginia. She can be reached by calling 800.372.3268, emailing mpackard@pls-medmal.com or by visiting their website at www.professionalliabilitysolutions.net.