

Staking your (Malpractice) Claim

By Gary McCammon, AAPA Insurance Services

Prior articles have emphasized the importance of maintaining professional liability (AKA malpractice) insurance, whether a personal policy you have obtained for yourself or coverage provided under an employer's policy. Due to the severe contraction of the market for malpractice insurance, more and more insurers are not automatically covering advanced practitioners on an employer's policy. Office managers are scrambling to find individual policies for employees who are being dropped. Fortunately, the AAPA-endorsed program is available for PAs.

However, no insurance program takes all comers. This includes the AAPA-endorsed program, although the percentage of applicants who are ruled ineligible is very small. The usual reason for declination is the disclosure of prior malpractice claims in the application. Although a prior claim does not disqualify applicants in all cases, the specific circumstances of the claim and how it is represented in the application are critical to acceptance by the insurer. This is true of all insurers, not just the AAPA-endorsed program. If anything, though, other insurers are even more stringent as the malpractice insurance crisis continues.

The insurer will initially look for two things on the application. First, how many prior claims are disclosed? Most PAs with any claims at all have only one. Those with two, three or more will have a higher mountain to climb for acceptance due to the insurer's inclination to believe that "frequency breeds severity". This means that if a practitioner has a pattern of malpractice allegations, even though minor, it's only a matter of time before one results in a major loss. It may not be a reflection of your individual practice skills, but it could be that your work environment and/or your supervising physician are more conducive to claims. For example, your patients love you, but your physician has the world's worst bedside manor. If the patient sues the physician and you were in any way involved in the treatment, you will be sued also. Frankly, the fact that you are not the culprit doesn't much matter to the insurer. If you are more likely to be sued, for whatever reason, you are a worse risk.

The second thing is the size of the claim payment. You may have only one prior claim, but it settled for \$1,000,000. An insurer will assume that since so much was paid out you must have done something very wrong. Although it is possible for your prior insurer to be outmaneuvered by the patient's attorney and settle for far more than the case was worth, it is unlikely because such insurers would not survive long in this litigious world. Therefore, the insurer reviewing your application will give great credibility to the size of the payment as a gauge of your degree of fault.

In my most recent article, I explained the National Practitioner Data Bank. This can actually help you if a large settlement was made to the patient, but you were only one of many defendants. For example, the case may have settled for \$1,000,000, but the share of the settlement attributable to you was \$20,000, with the physician accountable for \$490,000 and the hospital liable for \$490,000. If you were not actively involved in the settlement negotiations, you may not know that this was how the settlement was split. I have had several applicants who have reported large claim amounts that, upon inquiry, turned out to be the total amount for all defendants. The insurer will not go out of its way these days to verify this. You are more likely just to get a declination of your application due to "claims history". It's always a good idea to query the Data Bank and report the amount attributable specifically to you.

What if you have been sued but the case is still in litigation? Then, there is no payment amount to report. The insurer will ask you to disclose the "reserve" or supply a "loss run". When an insurer defends a claim, it must estimate what will ultimately be paid out. If the insured PA, in the insurer's opinion, was not at fault, the reserve may be zero for the claim itself and maybe \$10,000 reserved for the legal costs to defend the claim. This would be a good thing for getting your application approved. However, if the insurer has a reserve of \$1,000,000, that's a bad thing. The closer you are to zero and the farther from \$1,000,000, the better your

chances of acceptance. A loss run is a computer print out from your prior insurer that provides the basic claims history information, including reserves. If the loss run says, "no claims reported", that too is a good thing.

If you have knowledge of the reserve or a copy of your loss run and it's more of a bad thing than a good one, don't just include it with the application and hope for the best. Reflect on the current circumstances. Did your attorney just tell you "this case is going no where; it should be dismissed any day now" or equally encouraging information? Then go back to your insurer and question the reserve. In one recent case, the PA did just that. The insurer lowered the reserve, which resulted in acceptance of his application.

Unfortunately, some insurers will not disclose the reserve to you and will suppress it on loss runs, showing only actual paid amounts. This is out of the justifiable fear that disclosure of your reserve will somehow get back to the patient's attorney, giving him or her a road map to settlement negotiations. If that attorney thinks he can get a settlement of \$50,000 but then finds out it is reserved for \$500,000, he will be determined to get at least that amount. Although the insurer may have conservatively estimated the \$500,000, it still wants to ultimately settle for as low as possible. In the absence of the patient's attorney knowing of the high reserve, a settlement of \$50,000 would be likely. If you encounter the insurer's refusal to release the reserve, you may have to be insistent and go up the chain of command in the claim department. Emphasize that it is a necessary condition for obtaining malpractice insurance and without that insurance, you cannot work. Commit to nondisclosure except for purposes of the insurance application. If you are given the reserve amount, by all means, do not disclose it to anyone else. They might later testify and reveal it during depositions.

Most applicants do not really give much thought to how effectively they represent their claim histories on applications in spite of it being the single most likely reason for rejection. Once it's declined, it is a much more uphill battle to alter perceptions in your favor. Your application should not be viewed as just a mechanical exercise to get insurance. You are selling the recipient on the concept that you are a good practitioner and therefore, a good risk to insure. In today's market, you do not get an immediate benefit of the doubt.

If we can be of information or assistance, AAPA Insurance Services is at (toll free) 877/356-2272, extension 5029.

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