



# THE NEW YORK STATE SOCIETY OF ANESTHESIOLOGISTS, INC.

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## SPHERE

### Albany Report

#### Purchasing Malpractice Insurance Coverage

Purchasing malpractice insurance coverage requires careful review and analysis. The purpose of this memorandum is to outline key areas to consider. As well, attached is a memorandum prepared by Stanley L. Grossman, M.D., President of the Medical Liability Mutual Insurance Company ("MLMIC"), dated February 12, 2007, and entitled "Alternative Insurance Cautions." Dr. Grossman's memorandum provides helpful information that I would recommend you consider as well. The Medical Society of the State of New York ("MSSNY") and NYSSA endorse MLMIC.

Please keep in mind, as you conduct due diligence in selecting a carrier, that an insurance policy is a very sophisticated, legally binding, contract between you, the insured, and the carrier. That is, in exchange for paying the premium, the carrier agrees to provide you defense and indemnification against claims of professional negligence. You must, however, become familiar with the "fine print."

Listed below are some areas to review.

A. **Defense and Indemnity Protection:** In an article entitled "How to Make Sure You Get the Best Defense" from Medical Economics (August 4, 2006, Vol. 83, No. 15), part of an article entitled "Sued? You May Never Get Your Day In Court", Berkeley Rice, Senior Editor, the author provides the following advice:

To avoid being bulldozed into settling a case against your will, here's a brief list of what you can do to evaluate your carrier and the defense attorney assigned to represent you:

Check the Insurer's Reputation. Before you buy or renew a policy, ask your colleagues, lawyer friends, or your local or state medical society which carriers have a good reputation for defending claims aggressively, and which ones seem too eager to settle. Also ask which defense firms the company uses to defend its policyholders, and try to check their reputations.

Find Out About a Consent Clause. Read your policy carefully. If it doesn't contain a clause giving you the right to consent to settle, it may be a bad deal regardless of the price. Unfortunately, fewer carriers are offering consent clauses these days, or they'll charge an extra premium to include one. If the policy doesn't contain a consent clause, ask if you have the right to appeal if you and the carrier can't agree on whether to settle.

Check the Attorney's Reputation. Once you're sued, find out which lawyer has

been assigned to represent you. Then ask your colleagues if they know any doctors he's defended. If they do, call them, and ask about their experience.

Ask the Attorney These Questions. When you meet with your attorney, ask how vigorously your carrier controls his defense costs, and what financial restrictions he's under. Ask how much experience he's had with cases like yours, and how many he's taken to trial. "It's like choosing a surgeon," says Fitzpatrick. "You want someone who actually does a lot of procedures."

Watch For Potential Conflicts. If there are co-defendants in your case—other physicians, your group, or your hospital—ask the attorney if he represents them, too. (If they're covered by the same insurer, he may.) If he does, you might want to insist on separate counsel because their interests and liability in the case may conflict with yours.

Know When to Hire Your Own Attorney. Depending on the circumstances of the case, it may be worth hiring your own defense attorney to provide advice and to monitor how the carrier's lawyer handles your defense. That means finding an experienced malpractice attorney, not your group's business lawyer, or your brother-in-law who happens to be a lawyer and says he'll do it as a favor.

If the carrier wants to settle, and you don't, your own attorney can offer an independent opinion. If he agrees with you, he may be able to convince the other attorney to take it to trial. Or if you want to settle and the carrier doesn't, he can help you push for a settlement.

Even if your attorney gets more involved in the case, and the price goes up, it may be worth it. After all, you could end up facing a multimillion-dollar verdict. And if you've already lost several previous cases, one more verdict against you could endanger your career by making you uninsurable.

B. **Carrier's Finance Rating:** Is the carrier financially stable? What is the company's rating? What does the New York State Insurance Department have to say about the company? How long has the company been providing professional insurance?

C. **Name on Policy:** Is the policy written in your name or the group's name?

D. **Limits of Liability:** What are the limits of liability, and are the limits adequate to satisfy the hospital's requirements as set forth in the Medical Staff Bylaws and possibly a Exclusive Services Agreement. As well, consider whether the group (e.g., the LLC or PC) is afforded separate "entity" coverage.

E. **Consent to Settle:** Does the policy contain a consent to settle clause? That is, is your consent required prior to the carrier settling a claim? The author, David Karp, in a Medical Economics article entitled "Should You Sign a Consent to Settle?" (October 20, 2006, Vol. 83, No. 20) notes that if your policy has a clause that requires your consent to settle, consider yourself fortunate and the article further highlights three key points:

- A prematurely signed consent to settle form gives the insurer a blank check.
- Physicians should know the penalties for refusing to settle a claim deemed indefensible by defense experts.

- Settling a malpractice claim can have consequences, including a report to the National Practitioner Data Bank.

F. **Defense Only**: Does the policy contain a “defense only” coverage to provide you reimbursement for engaging an attorney to defend you in an administrative review (e.g., OPMC complaint) or an allegation of negligent billing?

G. **Claims Made v. Occurrence**: It is essential to appreciate the difference between the “claims made” and “occurrence” insuring clause. While lecturing young physicians on contracts, I offer the attached chart “Medical Malpractice Insurance: Claims Made v. Occurrence Coverage.” Please further note that the time frame to purchase “tail coverage” (upon termination of the claims made policy) is generally measured in days (e.g., 30 days). The cost of tail coverage is generally tied to a formula based upon the length of time the claims made policy is in effect. That is, the longer the claims made policy is in effect, the more costly the tail coverage will be. Finally, you are advised to carefully review your exclusive services agreement with a hospital because, with increasing frequency, even if your internal group agreements do not require the purchase of tail coverage, hospitals are imposing this obligation on groups upon termination or separation of a member of the group or upon termination of the exclusive services agreement. Obviously, purchasing tail coverage is essential to ensure uninterrupted coverage; the argument could be made that there is no option not to purchase tail coverage, despite the high cost associated with the purchase and the possible low risk of a claim ever being interposed.

H. **“At Will” Cancellation Right**: Does the policy provide the carrier the right to cancel (or non-renew) by simply giving you notice?

Finally, I appreciate that the cost or premium of purchasing professional insurance coverage is also a key issue. However, as you review the points outlined above, and set forth in the memorandum by Dr. Grossman, you should appropriately weigh all factors.



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## MEMORANDUM

**To:** County Medical Society & Specialty Society Executives  
**From:** Stanley L. Grossman, MD, President  
**Date:** February 12, 2007  
**Re:** **Alternative Insurance Cautions**

We understand that brokers representing a new Nevada-based risk retention group (RRG) have recently contacted some of you about an alternative to insurance coverage from MLMIC. We have reviewed some of their materials and want to point out some important issues which your members should be aware of if they consider this insurance alternative.

**First, what kind of protection are policyholders getting?** MLMIC offers two types of coverage: **occurrence** and **claims made**. Occurrence offers the most comprehensive protection, covering an insured when an incident *occurs* while the policy is in effect, regardless of when it is reported or paid. Claims made covers an insured when an incident is *reported* while the policy is in effect, regardless of when it is paid. It is less comprehensive than occurrence, since it does not cover unreported events if continuing coverage is not maintained, and, therefore, it costs less than occurrence for the first few years.

A new form of coverage offered by the RRG, **claims paid**, is the least comprehensive. It covers an insured only when an incident is *paid* while the policy is in effect. Because it covers considerably less insurance risk initially than claims made or occurrence, it is considerably less expensive than either of these forms for several years; however, it is the insured who assumes the responsibility of *unpaid* and *unreported* claims if continuing coverage is not maintained. Obviously, this creates significant risks for the insured, which they would then bear.

**An important consideration pertains to solvency.** If an insurance carrier becomes insolvent and unable to perform its contractual obligations, the insured becomes responsible for these obligations, unless there is some other form of protection. New York State licensed insurers, such as MLMIC, have access to the NYS Property and Liability Security Fund, which acts as a safety net, protecting insureds for the risks covered by their policies. In the event of insolvency, this fund will pay insured obligations under the policy up to \$1 million per claim. Insurers not regulated by New York (e.g., RRGs, trusts, captives) are typically not covered by the State's guaranty fund.

**What about free physician excess coverage?** Physicians who purchase primary coverage from an insurer not regulated by NYS (like RRGs) may not have access to \$1 million of excess coverage provided by the State. This excess coverage is currently provided at no cost to physicians who purchase primary limits of \$1.3 million per occurrence and \$3.9 million in the aggregate from an insurer regulated by NYS (like MLMIC).

**Hospital acceptance.** Insurance purchased from an insurer not regulated by the State (like RRGs) may differ from what is customarily offered in New York and may well be of significant concern to hospitals granting staff privileges, particularly if there are coverage gaps or shortfalls, as there would be in claims paid coverage, or if physicians are not eligible to receive the excess layer of coverage.

**Portability uncertainty.** Insureds who purchase a non-customary insurance product such as claims paid may find it difficult to move that coverage from one carrier to another. Insureds who have claims made coverage often buy prior acts or tail coverage from insurers for unreported claims when they move from one carrier to another. Similarly, claims paid insureds would likely purchase a tail when moving to another carrier, although the premium for that tail would likely be considerably higher than that for a claims made policy, since it would cover both reported and unreported claims. Other liability insurers may not be willing to provide such a quote for claims paid insureds.

**Capital contribution.** New insurers often require a capital contribution from the insured to support the business they will underwrite. This is prudent from a business perspective; however, it is an extra cost the insured will bear and one not likely to be required by established insurers like MLMIC.

**Unique MLMIC features.** MLMIC policyholders benefit from some unique policy features that may not be offered by the RRG. These include:

- a consent to settle provision in the policy, which protects an insured's right to reject a settlement offer if he or she thinks there has been no negligence in the treatment;
- limits of liability that apply to "each person" rather than "each occurrence," such as in birth-related injury cases, giving insureds increased protection if the mother and infant or infants are injured;
- an aggregate policy limit that renews each year on tail endorsements, so an insured has more protection for unreported events;
- defense costs that do not reduce the limits of liability and continue to be paid even if the aggregate limit for a given year is reached;
- low operating expenses, since we do not use brokers or pay commissions on physician policies.

We recognize that, since 2002, inadequate physician rates established by the State, plus our mandatory share of deficits generated by the State's Medical Malpractice Insurance Pool (MMIP) have caused pressure on our financial results. The State also recognizes this and has taken steps to protect its regulated malpractice insurers from insolvency by reinstating a non-liquidation law for them and continuing guaranty fund protection at \$1 million per claim. MLMIC and the other regulated malpractice insurers are currently working with the State to improve this situation.

We hope you will take some time to consider these important issues and will keep your members apprised of the facts. We value the relationship we have built with you and your members over the years and want to remain your members' liability insurer in the years ahead. Of course we all recognize that the only real solution to the exorbitant premiums faced by the physicians in New York remains governmental action to control the costly and inequitable tort system in the State. Obviously, no alternative insurance vehicle can accomplish this goal. If you or your members have any questions, please call the Underwriting Department in New York City at 212-576-9670; in Syracuse at 315-428-1188; in Latham at 518-786-2700; in East Meadow at 516-794-7200.

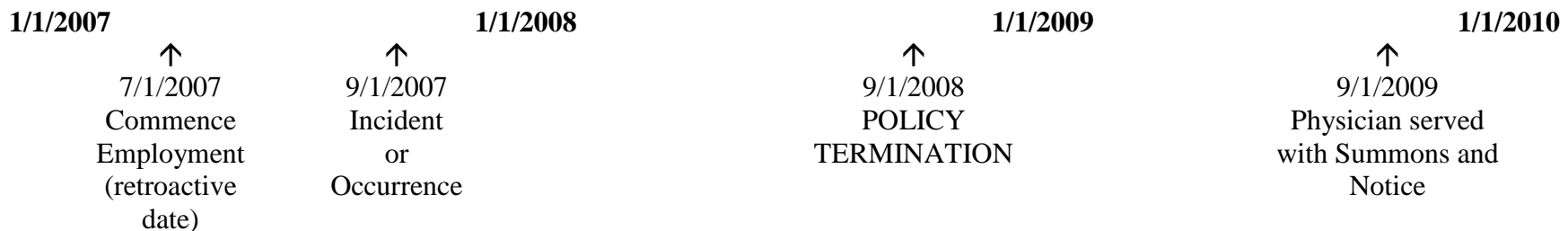
SPHERE

**MEDICAL MALPRACTICE INSURANCE: CLAIMS MADE v. OCCURRENCE COVERAGE**

**Insuring Clause:**

- **Claims Made:** Incident (occurrence) and the claim itself (the commencement of the malpractice lawsuit) must take place during the policy period. If not, the insurance company has no indemnity or defense contractual obligations. [No coverage]
- **Occurrence:** As long as the incident (that led to a malpractice claim) occurred during the policy period, the company has indemnity and defense contractual obligations. In other words, the commencement of the malpractice action is irrelevant.
- **CLAIMS MADE POLICY + TAIL COVERAGE (reporting endorsement) = OCCURRENCE COVERAGE**

Example:



Insurance Coverage:

1. **Claims Made:** If tail coverage is not purchased, there is no coverage.
2. **Occurrence:** Since the incident occurred prior to the policy termination date, coverage exists.