

3. Failure to Maintain Proper Malpractice Insurance

While malpractice insurance is not inexpensive, it is necessary in order to protect physicians from the significant legal fees, expert witness costs, and liability exposure associated with defending lawsuits. The proliferation of the personal injury lawyer industry shows no sign of slowing down, and a sympathetic jury system, coupled with experts willing to testify that a doctor committed malpractice under complicated circumstances that a jury can never understand provides good cause for maintaining appropriate malpractice insurance coverage.

Many advisors and clients believe that a practice need only maintain the lowest limits of liability coverage because "they will always settle for your limits," but the author has found that, in many cases, plaintiffs will not settle for low limits of medical malpractice insurance liability where there are other significant assets exposed. Physician clients will sleep better and have a greater sense of financial security, as well as significantly less personal exposure, when they have higher levels of liability insurance than the legally required minimum.

Many physicians will obtain malpractice insurance coverage from low-cost carriers that turn out to be infirm and go bankrupt, leaving doctors high and dry to defend their own claims and without any coverage whatsoever for legal and expert expenses.

Any opportunity to pay significantly less than the going rate for malpractice coverage should be reviewed carefully with the above concerns in mind.

Also, the income tax laws permit a medical group to form its own "captive insurance carrier" and deduct premiums paid to the carrier company. Under the tax law, the carrier company may not have to include premiums received as income unless or until it is determined what portion of the premiums will be used to pay claims as expenses and what portion of the premiums will be profits. Profits taken out later may be taxed at favorable capital gains rates.

Nevertheless, there is a significant economic risk taken since the carrier could "go under" if there are extensive claims, and when there are multiple doctors being insured by the carrier, one or two doctors who make a lot of mistakes could cost all of the equity for the other doctors.

Further, unlike conventional malpractice insurance, which requires a carrier to offer tail malpractice insurance coverage at the request of each doctor, captive insurance carrier reinsurance contracts will commonly not bind the reinsurance company to even renew the coverage, let alone provide a tail policy on termination, leaving an entire group of doctors without any coverage whatsoever. Successor carriers will not provide tail coverage for periods of time that no other carrier is on the hook for.

The laws of most states require that malpractice insurance be provided by a state-registered carrier. Doctors who have malpractice insurance furnished by an unregistered carrier may be considered to be "going bare" under state law, and may therefore have to notify patients that the doctor is "bare." A possible loss of license can occur if a doctor cannot satisfy a claim by reason of not having malpractice insurance or the financial wherewithal to pay a claim.

Many doctors are not aware that for a small additional premium, they can have a separate "corporate" malpractice insurance policy issued by the same carrier that provides individual policies that covers the medical practice company in order to effectively double the limits of malpractice insurance that would be available to pay on a claim and to assure that the company will have coverage if one of the doctors leaves and refuses to buy tail malpractice insurance.

Also, nurse practitioners and registered nurses can often qualify for insurance with high limits of liability for very low cost. Many physicians will not treat certain types of high-risk patients unless they, at all times, have a nurse practitioner in the room with them to make sure that there is plenty of coverage, witnesses to what is said, and appropriate follow-up.