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Will You Be Forced to Settle Your Malpractice Case?

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Introduction

Being sued for malpractice is a terrible experience. The prospect of having to defend your level of care and competence in a court makes many doctors feel as though their malpractice defense attorney is their only lifeline, and the only one who can save them.

It's natural for a physician to think that his malpractice defense attorney shares his single goal: to save the physician from a verdict against him; clear the physician's name, and vindicate his reputation, especially if he's done nothing wrong.

But that's not always the case. Your attorney may have conflicting goals. Every medical malpractice insurance company has to navigate a delicate balance between successfully defending physicians to maintain a reputation as a strong, successful defender of physicians, and on the other hand, staying profitable. These 2 interests sometimes conflict. The cost of defending your case; or the potential for a runaway verdict that would deplete the insurance company's financial reserves may be greater than the cost of settlement -- even where there is little evidence that you've done anything wrong.

Whether you have any say in the decision to fight or settle typically depends on 2 seemingly innocuous policy features. The first is a "consent to settle" clause. This provision precludes your insurance carrier from settling a case without your permission. Without this clause, the carrier can settle a case over your objection.

A second feature of some policies allows physicians to elect to have defense costs "inside" or "outside" the liability coverage limit. This provision can prove equally troublesome. When defense costs are inside the limit, money spent on defending your case (eg, legal fees, expert witness fees, court costs, etc) directly reduces the amount of money available to either settle a case or pay a judgment. For example, if your liability coverage limit is $1 million, and your legal fees, witness fees, and court costs add up to $200,000, you can't settle the case for more than $800,000 -- unless you pay the remainder out of your own pocket. Or if you lose the case and the award is $1 million, you'll need to come up with the $200,000 to reach that amount. By contrast, if defense costs are outside the limit, then the money available limit remains intact regardless of how much money is spent trying a case. However, a company may be more inclined to settle a case if the liability limit is not reduced by expense costs.

These options affect your policy cost. Usually, if you opt to keep the defense costs inside the limit, you'll pay less for your malpractice insurance policy. Similarly, a "consent to settle" clause may increase the cost of your policy.

Your Attorney's Conflicts of Interest

These provisions and terms can create inherent conflicts of interest for malpractice defense attorneys for a variety of reasons:

- Trying a malpractice case is expensive, between legal fees, expert witness fees, and court costs. Some insurance companies will settle if they believe that the cost of settlement is less than the cost of defending a case, even if they believe the case against you has little merit.
- Conflicts can arise from the relationship between insurance companies and the defense attorneys they use. Generally, insurance companies have a limited panel of private attorneys that they use to handle claims, while some companies also use their own in-house counsel. Although the attorney appointed for you has a fiduciary duty to you as the client, the fact remains that the attorney is selected and paid by an insurance carrier that maintains significant influence over the defense of a case. If the attorney consistently refuses the direction of the carrier, it is unlikely that he will remain in the panel.
- By settling a case, a carrier avoids any issues of "bad faith." "Bad faith" laws vary from state to state, but were created to make sure the insurer pays for a verdict in excess of coverage, rather than making the insured physician pay. As a result, insurance companies that do not attempt to settle a problem case within policy limits may be found to have

demonstrated bad faith, and forced to pay for entire award, regardless of its amount.
While these laws are set up to protect insureds, they also force companies to settle some cases they otherwise would not. For example, in a "bad baby case," even if there is little or no evidence that the physician was at fault, the insurance company may still want to settle the case if the policy limit is $1,000,000 and there is a chance of a multi-million dollar verdict.

- Your defense attorney may have another conflict of interest if the suit you've been named in includes other physicians -- especially if some of them are also covered by your carrier. More and more often plaintiff attorneys name as many defendants as possible in an effort to increase the amount of available recovery. Defendants may include an employed physician and her employer; 2 partners, or perhaps several physicians that all work together.

If, for example, you and another physician in your practice are both named, and your company policy covers both of you within the same policy limit, an insurance company will frequently use the same attorney to represent all of the "policyholders," whether individuals, partnerships or larger healthcare corporations. From their point of view, it makes sense.

However, each physician's interests may not align. For example, one physician may have had only limited contact with a patient, while the other physician saw the patient routinely. If the case involves a failure to diagnose, the physician with limited contact may well have been justified in relying upon the incorrect diagnosis determined by the physician who had regular contact with the patient. Yet, both are sued. In these cases, each physician should demand separate representation. Too often companies formulate a defense strategy to address all covered insureds when, in many cases, the best advice for one defendant is not the best for another.

If you're in a situation in which the same attorney is defending you and other doctors, take the time to analyze and understand the ramifications of this strategy. Are you prepared to subjugate your interests to the good of all of the defendants? That could be dangerous. Because any malpractice payment is reported to the National Practitioner Data Bank as well as to many state licensing boards, the best interest of the group may not be your best interest.

What Can Physicians Do to Help Themselves?

One way to avoid having a carrier settle a case that you do not want settled is to make sure you have a "consent to settle" clause in your policy. This is offered as an option in many (but not all) professional liability policies. Although it may add to the cost of the policy, the provision is generally a small percentage of the overall premium.

This clause takes the power to settle a case from a carrier and gives it to a physician. Although physicians should be cautious in going against the advice of a carrier, they may also want to complete the discovery process prior to consenting to a large settlement.

If the carrier advises dropping or settling the case, the physician should say, "No, not yet. I want to complete the discovery process before I decide whether or not to agree." A successful deposition can turn a case around, and physicians should not deprive themselves of that opportunity, unless they believe that further discovery would be pointless and could further damage their reputation or professional standing.

Physicians must be aware of the all the underlying factors in their case, maintain involvement in the decisions of defense counsel, and ask the tough questions if they feel that their interests are not being properly represented. They should be especially concerned when depositions haven't been taken, experts haven't been retained, or motions to dismiss in frivolous cases have not been made. These signs may mean that the carrier has already made the decision to settle, or that your attorney has not given your case the time and attention it deserves.

If you believe your interests are not being properly represented, consider hiring your own attorney to oversee the process and provide an unbiased second opinion. Be sure that the independent lawyer you hire does not have a relationship with any of the carriers involved in your case, to avoid any possibility of mixed loyalty. Your independent counsel may review the situation and will assure you that you can maintain confidence in your carrier-appointed counsel. Or, he or she may give you information you need to demand additional discovery, more aggressive motion practice, for example, seeking to limit the issues before a jury, or separate counsel who does not have a potential conflict of interest with other defendants.

In summary, if you ask probing questions and receive responses that are ethical, strategic and nonbiased, this can strengthen the attorney/client relationship, and help instill confidence on both sides. You might also consult with your insurance agent or other independent consultant, who can be an invaluable resource throughout a legal proceeding and can help keep it on the right course.

To make sure that your case receives the best possible defense, you need to play an active role in the process and understand the inherent conflicts between you and your insurance company and appointed counsel.