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Changes to Legal Malpractice Coverage: Just What the Doctor Ordered

An expert suggests that attorneys should disclose the coverage levels of their legal malpractice insurance to their physician clients, and that the minimum legal malpractice coverage held by an attorney defending a medical malpractice litigation should be increased to $5 million.

By Eric S. Poe

Disclosure and trust—two critical factors in any attorney-client relationship. Yes, attorneys must believe that their clients are truthful, but trust is a two-way street. Clients have the right to know that their needs are valued and protected, and that their attorney is trustworthy. In fact, it can be argued that one of the most sacred components of the legal profession is an attorney's ethics.

When a patient sues a doctor and alleges that an injury, often tragic in nature, could have been avoided if it were not for the negligence of a physician, hospital or other health care worker, it is among the most personal and distressing experiences that the medical professional will ever experience. Health care workers frequently put themselves in harm's way to help the greater good—something dramatically clear today amid the COVID-19 pandemic. So to later be accused of causing these injuries is something they are often unprepared to face, emotionally and financially.

Compounding the highly personal nature of the attacks to the professional during the litigation is the fact that, on average, medical malpractice cases take over five years from filing of the lawsuit to verdict. Finally, if there is a verdict from a jury in New Jersey, that verdict comes with no guidelines for compensation. "Just and adequate compensation" is the open question jury members complete when they are asked to determine the amount of a patient award. As a result, the verdict could result in a judgment that far exceeds the level of a physician's malpractice insurance coverage.

Knowing the possible ramifications of a medical malpractice lawsuit, it goes without saying that doctors should be able to reasonably expect that their own attorney, who is assigned by their medical malpractice insurance company and not chosen by the doctor, must disclose their own legal malpractice coverage limits

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for professional liability. Further, these defense attorneys should also maintain a higher level of malpractice insurance coverage for themselves to assure the doctor of protection if the attorney fails to properly adhere to their professional obligation to defend that physician. In my opinion, a recommendation of $5 million per case should be the minimum.

The very purpose of this suggestion is to further the public policy and safeguard those who are unaware of their lack of protection. This is particularly critical within the medical malpractice arena, when physicians do not

realize that the attorneys are independently liable to perform their job, separate from the insurance carrier. Thus, if an attorney commits malpractice in the course of defending the doctor which leads to the physician's liability, the insurance company can be completely insulated, as the verdict would be due to the professional negligence of the attorney, not the carrier.

Unfortunately, while most doctors assume that attorneys would disclose and maintain adequate legal malpractice coverage, the reality is there is no such requirement on the part of attorneys. In light of the concerns raised by physicians who face personal and professional devastation as the result of their attorney's negligence during the course of defending a medical malpractice action, I believe that this matter deserves a closer look.

After an in-depth review of Court Rule 1:21-1, I recently submitted a memo to the New Jersey Supreme Court to bring to light, and suggest amendments to, two specific issues regarding legal malpractice requirements for attorneys who represent doctors in the medical malpractice arena. First, I feel strongly that the Supreme Court should mandate that an attorney disclose the coverage levels of their legal malpractice insurance to their physician client. While physicians can certainly ask for this information, there is no requirement for the attorney to disclose this coverage level. Most physicians simply assume that the insurance company would be responsible for the negligence of the attorney assigned to the doctor.

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Recently I was shocked to learn that some of the most experienced New Jersey law firms in medical malpractice that defend doctors, often times against allegations of paraplegia and death, only carry $1 million of legal malpractice policy limits. It is this discovery that led me to recommend the minimum legal malpractice coverage held by an attorney defending a medical malpractice litigation should be increased to $5 million.

Given the sheer tragic and sympathetic nature of the personal injuries suffered in these cases, and thus the potential award when a medical malpractice plaintiff prevails, any attorney practicing in this arena should be mandated to carry a higher level of legal malpractice coverage than is presently required. It goes without saying that such cases mandate that attorneys who handle these matters should have levels that exceed the minimum required of attorneys practicing in other areas of the law where the potential liability is simply not as high.

A Brief History

Both of the issues raised above were addressed by the New Jersey Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance. In the Committee's June 2017 Report, it was recommended that attorneys in New Jersey should not be subject to mandatory insurance requirements. (*See* June 2017 Report at pg. 131-36.) Further, the Committee recommended that attorneys without legal malpractice insurance be required to disclose their uninsured status to clients. (*Id*. at 141.) While the 2017 Report rightly identified "whether an attorney is insured by a professional liability insurance policy is a material fact that a prospective

client has the right to know" (*id.* at 144), the New Jersey Supreme Court rejected the Committee's recommendation to implement mandatory reporting.

When reviewing the two issues, the 2017 Report focused largely on the impact that requiring insurance would have on attorneys, irrespective of practice area or specialty. (*Id.* at 134.) The discussions and research found that 11.02% of the surveyed attorneys were not covered by a malpractice insurance policy. (*Id.* at 135.) The findings also showed that many solo practitioners and part-time attorneys would find mandatory insurance coverage requirements to be significantly burdensome. (*Id.* at 136.) Finally, the 2017 Report illuminated that attorneys who are solo practitioners, work in small firms or work part time are often most accessible to middle- and lower-income clients. (*Ibid.*) Thus, the overall concern of the 2017 Report was that requiring mandatory legal malpractice insurance in New Jersey would have a chilling effect on the business and practice of law, especially for those serving more underserved populations. (*Ibid.*)

While an understandable and laudable conclusion, the challenges depicted are not at odds with the needs of physicians against whom allegations of medical malpractice have been filed. Physicians who are faced with such actions do not generally comprise the same group of consumers as identified as underserved populations in the 2017 Report. Further, it is unlikely that there is an overlap in the attorneys servicing these clients.

In the present landscape, attorneys who specialize in these matters are those most often called upon to defend physicians named in medical malpractice actions. These attorneys are often well-established in this field and have a sufficient client base and referral system for generating ongoing business. Indeed, given the weight of the matters handled by such attorneys, it would be to everyone's benefit for their malpractice insurance coverage limits to be sufficient to properly cover claims arising from the defense of these cases.

Moving the Bar Forward

Based on this analysis, I respectfully suggested that the Supreme Court Committee reconsider its 2017 Report findings and recommended a specific and limited requirement that attorneys who defend health care professionals in medical malpractice litigations maintain sufficient legal malpractice coverage and should be required to disclose such coverage information to clients.

To address these two matters, a rule change is warranted, and can properly and appropriately balance both the challenges outlined in the 2017 Report with the rights of physician-defendants. Such a change would simply require attorneys representing health care providers in medical malpractice actions to disclose the amount of legal malpractice liability coverage to their clients and maintain $5 million in such coverage.

A Matter of Ethics

In closing, this issue circles back to a matter of ethics. As attorneys, we are bound to follow the Rules of Professional Conduct, which guides us to represent clients to the best of our ability within the bounds of the New Jersey and the United States constitutions and law. For those of us representing health care professionals, this includes assuring the necessary protection for physician clients in the unfortunate situation of a medical malpractice action, as these doctors put their lives and livelihoods in the hands of an attorney assigned to their case.

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