

## How to Manage Your Malpractice Risk

**M**alpractice lawsuits are more common than you might think. During a typical 30-year career cycle, “31% of physicians will have three or more claims filed against them, with only 5% having none,” said Hans Bruhn, MHS, risk manager at Ophthalmic Mutual Insurance Company (OMIC) in San Francisco.

What’s more, plaintiff payout amounts are increasing. “There has been more volatility with regard to claims over the last several years because most attorneys who represent damage-seeking plaintiffs are taking on cases that have compelling merit and therefore result in larger settlements,” said Ryan Bucsi, OMIC claims manager. However, he added, while there were “more million-dollar plaintiff verdicts awarded than ever in 2017, the frequency of claims and lawsuits filed has remained stable during the past six years.”

In the current malpractice environment, risk management experts advise that ophthalmic practices take a few basic steps to help prevent and mitigate claims.

### Purchase Comprehensive Malpractice Insurance

With so much at stake, it is essential to purchase insurance that covers patient liabilities resulting from direct patient care and the risks associated with that treatment. Medical malpractice insurance works by putting in place substan-

tial safeguards against allegations of medical negligence directed toward a physician or practice.

Make sure that your malpractice carrier understands the work you do, said Linda D. Harrison, PhD, director of risk management at OMIC. “Risk management staff should possess both a depth and breadth of knowledge in general health care risk management as well as issues specific to the field of ophthalmology.” They should also assist you with the less critical issues that may arise in your daily encounters. Whether you are confronted by patients who are dissatisfied with their LASIK procedure or patients who have major objections to their most recent bill, incidents should be managed in tandem with your insurer to avert or mitigate the threat of a claim, she said.

**Keep insurance documentation current.** Some ophthalmology practices may undergo changes that could affect their professional liability, such as addition of satellite locations, surgical suites, or new procedures. Even if the changes do not necessarily require a change to the type of insurance policy, they may need to be specifically underwritten and endorsed to the policy, Mr. Bucsi said. “It is always best to have a conservative view of insurance coverage and contact your carrier to verify requirements since it will often be too late to add coverage after an incident has occurred.”

### Identify and Manage Your Risk

Purchasing insurance is not your only line of defense, however. Knowing the risks for patient dissatisfaction and litigation can help your practice address potential issues before they turn into a lawsuit.

**Prioritize patients.** Of course, excellent patient care is central to effective risk management. “A breakdown in any of the multiple processes involved in patient care can result in patient dissatisfaction, patient harm, and a claim being filed against the insured. When dealing with patients, staff must listen carefully, communicate clearly and promptly, act with integrity, and be exquisitely sensitive to patient confidentiality,” said Dr. Harrison.

**Recognize the warning signs.** It’s also important to know which patients are more likely to bring a suit. Ellen Adams, MBA, compliance officer at Ophthalmic Consultants of Boston, has observed several characteristics that indicate you might be dealing with a litigious patient. “Noncompliance [e.g., when the patient has a high frequency of missed appointments or refuses to follow physician instructions], failure to pay copays and other out-of-pocket expenses, displaying disruptive behavior in the office, and having unrealistic treatment expectations and unreasonable demands are clues—sometimes subtle, sometimes overt.”

In addition, Ms. Adams said, “Notes in a patient’s chart that indicate a level of dissatisfaction that does not correlate with the patient’s vision is an automatic ‘red flag’ for me.” She offered the

example of a patient with a premium intraocular lens and 20/20 vision who was complaining bitterly about having poor vision. She said that practices should heed these cues and promptly respond by following practice protocols and involving their insurance carrier when necessary.

**Educate staff.** The ability to quickly ask for advice is often effective in preventing a situation from escalating into a formal claim, Mr. Bucsi said. To best prepare your staff for the wide variety of situations they may face regarding malpractice risk, he suggested prominently displaying your insurer's number in your office where all staff (and not patients) can see it, and giving verbal instructions about using the service to staff. He also recommended posting those instructions in writing on a bulletin board or common area of your office. It is particularly important for ancillary personnel to know whom to call if the physicians are not present or available, he said.

## Work Cooperatively With the Insurer

If you have a potentially litigious patient, it's best to call your insurer so that they can help you proactively manage the issue.

### Call every time questions arise.

There is a common misconception that if an insured calls their insurance company frequently or reports multiple incidents, the insurer will no longer cover them. That simply is not the case, said Mr. Bruhn. "Call early and call often. Insureds should call at the very first sign that a patient is dissatisfied so the incident can be resolved before a claim is initiated."

If the situation has escalated, never respond to a third party, particularly attorneys working on behalf of plaintiffs or patients, without first consulting with your malpractice insurance carrier. Responding without a consultation could negatively impact defensibility of a claim. Furthermore, Mr. Bruhn said that insurance policies often have requirements for the timely reporting of an incident, so you should always report claims promptly to your insurer.

Remember that your medical mal-

## OMIC's Data: Settlements by Subspecialty

To be awarded damages in a malpractice claim, an injured patient must demonstrate that a physician acted negligently when rendering care and that the negligence resulted in an injury with demonstrable damages. Although a claim can be filed against any ophthalmic office, OMIC's data reveal trends that may indicate an increased risk for certain subspecialties.

The majority (73%) of OMIC's claims are related to comprehensive ophthalmology, cataract, and retina cases. However, pediatric cases account for 11% of OMIC's total indemnity payments and garner the highest settlement payouts, even though they account for only 2% of the total claims and suits filed. "This group averages over \$400,000 per claim, with the highest paid claim peaking at \$3.375 million for a case of retinopathy of prematurity," Mr. Bruhn reported.

Other examples of frequency and severity rates among ophthalmic subspecialties include the following:

- Oculoplastics. 7% percent of cases and 8% of indemnity payments
- Refractive. 7% of both cases and indemnity payments
- Glaucoma. 5% of cases and 4% of indemnity payments
- Cornea. 3% of both cases and indemnity payments.

**About OMIC.** OMIC is the largest insurer of ophthalmologists in the United States. Since OMIC's establishment in 1987, approximately 20% of claims made against its clients have been resolved with an indemnity payment, while the remaining 80% have been successfully mitigated.

practice insurer is there to help, and the advice they can offer is extremely valuable.

**Contact the insurer.** Queries can be submitted to most risk management teams either by telephone or email, said Mr. Bruhn. Some insurers, like OMIC, offer risk management hotlines that can and should be used anytime practices have concerns related to potential incidents, existing claims, or lawsuits, said Mr. Bucsi.

OMIC's records show that hotline calls tend to fall into two categories: administrative/procedural and legal.

**Administrative calls.** The most common topics insureds inquire about include "dealing with difficult patients, patient termination protocols, informed consent, responding to patient complaints (with and without a monetary demand), and developing office policies and procedures," said Dr. Harrison.

She added, "When there is an issue in the national lay or scientific press, such as the recent CyPass stent recall by the U.S. Food and Drug Administration, or a state-specific issue that impacts ophthalmologists, we tend to

receive a higher volume of inquiries from our insureds."

**Legal calls.** Mr. Bucsi detailed the types of legal calls OMIC typically receives. These include requests for legal advice and questions about deposition representation in cases in which the physician is not the target of a lawsuit but was involved in the patient's care; handling of medical board complaints; precautionary reporting of unanticipated outcomes that could result in a claim; and actual claims or lawsuits.

## More on Malpractice Lawsuits

Be sure to read this month's "Academy Notebook" section. The "Ask the Ethicist" column (page 56) investigates whether it is acceptable to serve as an expert witness in a malpractice case if you have not recently practiced the procedure in question. The article discusses the responsibilities and implications of malpractice testimony according to the Academy Code of Ethics.