

## CHAPTER 7

### NURSING LIABILITY INSURANCE

We have all read many articles on and heard seminar speakers advocate why nurses should not buy professional liability insurance. However, in our opinion, there are a number of excellent reasons why every practicing nurse should carry her own independent professional liability insurance policy.

Most articles on this issue adopt the position that if a nurse has a professional liability insurance policy, this will give her a "deep pocket" and make her more likely to be sued in a medical malpractice case against a physician or a hospital. The authors of these articles also often take the position that nurses are usually employees of hospitals and other healthcare entities and, therefore, their employers will provide a legal defense for them. This latter theory relies, in part, on the legal principle of vicarious liability or respondeat superior, which means that the employer is liable for the negligence of the employee; therefore, the employer has a vested interest in defending the nurse from civil claims.

There are several important facts which these articles often overlook which, in our experience, strongly indicates that a practicing nurse should purchase her own professional liability insurance policy. The "malpractice crisis," previously a problem exclusive to physicians, has recently descended upon the nursing profession. Medical malpractice insurance can help inoculate nurses against the potentially devastating effects of these claims. Today, almost everybody has some form of insurance. We insure our automobiles against collision, our homes against fire, and our persons against injury and death. Many professionals protect themselves from their exposure to legal loss by acquiring a professional liability insurance policy. Nurses may buy professional liability or malpractice insurance to protect themselves from cost of defense and settlement or judgements resulting from a malpractice claim.

This chapter will briefly discuss the circumstances which would make malpractice insurance especially important, some disadvantages to obtaining malpractice insurance, and what a nurse should consider after having decided to obtain personal malpractice insurance.

#### **I. AN EMPLOYER'S INSURANCE MAY NOT PROVIDE COVERAGE**

Many nurses believe they are protected by their employer's insurance. A health care facility typically obtains malpractice insurance to protect itself in the event of a lawsuit. However, some facilities obtain types of insurance which actually have exclusionary provisions, disclaiming coverage for malpractice actions brought against the insured facilities. Personal professional insurance coverage is especially important if a nurse is working at such a health care facility.

Even if the health care facility has malpractice insurance to protect itself, this insurance may not always protect the nurse from the potentially devastating effects of a lawsuit. A lawsuit may be brought against both the nurse, individually, and the employer. The nurse may be held personally liable for the damages caused by his or her wrongful acts or omissions even though a nurse's employer is held responsible for "the negligence of a nurse pursuant to a doctrine of respondeat superior. An employer's malpractice insurance may not apply to a lawsuit alleging conduct outside the scope of employment.

Generally, the health care facility's professional liability insurance only extends to conduct in the ordinary course and scope of a nurse's employment. Thus, for example, if a nurse performs a professional service at the health care facility when not on duty, the employer's malpractice insurance may not apply to a lawsuit resulting from this activity.

Finally, neither an employer's nor a nurse's professional liability insurance may cover lawsuits alleging intentional acts. For example, if a nurse unnecessarily restrains a patient, resulting in a lawsuit alleging assault, battery and false imprisonment, malpractice insurance may not apply to this lawsuit.

### **II. WHEN THERE IS NO "EMPLOYER"**

At times, a nurse may be providing health care services without employment by a health care facility. For example, the nurse may be working as a volunteer, a student or as an independent contractor. In such instances, personal professional liability insurance is especially important and may be required.

When a nurse is providing professional services as a student or independent contractor at a health care facility, even though the facility is not the nurse's employer, it may still be held liable for damages caused by the nurse's negligence. Therefore, a health care facility may require students or independent contractors who are providing professional services to patients within the facility to obtain personal malpractice insurance.

### **III. VICARIOUS LIABILITY DOES NOT ABSOLVE YOU FROM RESPONSIBILITY**

The assumption that vicarious liability or the legal doctrine of "respondeat superior" protects a nurse against a medical negligence claim is a mistaken one. If the employer provides legal representation, the attorney representing the nurse will almost always be the same attorney representing and being paid by the hospital or employer.

In many circumstances, the nurse may conclude that her interests are contrary to those of the hospital or employer, which could result in the attorney hired by the hospital withdrawing from further representation of the nurse. Additionally, it may be necessary for the nurse to raise evidence showing that the injury was caused by another nurse or hospital employee, in order to defend herself. It is doubtful that an attorney representing the employer or hospital would raise this defense since it would prove liability against the employer hospital.

Many employers will not provide legal representation if the matter involves licensing or disciplinary action against the nurse. This could force the nurse to fund all the fees and costs associated with her defense. However, some larger corporations with good risk management programs will provide the nurse with legal representation for such matters.

If you are an agency nurse, a home health agency nurse, a nursing home nurse, an independent duty nurse, or you are not employed by a large hospital chain, then you should consider nursing liability insurance mandatory. It appears that complaints of negligence against nurses working in these positions are far more likely. This may be because of the high turnover of nurses in some types of healthcare

facilities (such as nursing homes), or because when the incident is investigated, the nurse is no longer employed there (for example, in the case of an agency nurse). Additionally, agency nurses may only work in the facility for a short period of time making them less familiar with the facility's policies and procedures, and not a part of the permanent team of nurses who may have established relationships with each other and are more likely to cover for each other.

#### **IV. MOST NURSING LIABILITY INSURANCE ALSO COVERS COMPLAINTS AGAINST YOUR LICENSE, ADMINISTRATIVE HEARINGS, REPRESENTATION DURING DEPOSITIONS AND MANY OTHER MATTERS**

In our opinion the primary reason that a nurse should purchase a professional liability insurance policy is that this type of insurance usually includes coverage for legal defense of licensing and disciplinary action commenced against a nurse. Although most nursing liability insurance includes this coverage automatically, some policies may not. Some insurance companies may offer this type of coverage separately to be purchased for a small additional premium payment.

License defense coverage pays the legal fees and costs associated with defending a nurse when an investigation is initiated that may result in action against her nursing license or disciplinary action against the nurse. Coverage is usually available from the time the nurse receives written notice than an investigation by a state agency has been initiated. It will also cover formal complaints made against the nurse, informal hearings before the Board of Nursing in your respective state, and formal administrative hearings before an administrative law judge.

Since such investigations, complaints, and administrative action may be opened based on such events as patient complaints, hotline calls, Code 15 reports, nursing home and home health agency surveys, newspaper articles, copies of lawsuits, and many other sources. It is far more likely that a nurse will be involved in one of these types of actions than that a nurse will ever be sued for nursing negligence.

As noted above, an investigation against a nurse's license may arise from a number of different sources. Statistics provided by the Medical Quality Assurance Division of the Department of Health (DOH) indicate that for the one year period from July 1, 2001 through June 30, 2002, a total of 1,142 investigations were initiated against nurses. For the one year period from July 1, 2002 through June 30, 2003, a total of 1,302 DOH investigations were initiated. Figures were not available on the number of nursing malpractice lawsuits that were initiated during the 2001-2002 period. However statistics obtained from the Florida Department of Health (DOH) indicate that during the period from 2002 through 2003, only 51 suits for nursing negligence were filed against nurses. We could locate no statistics that indicated the number of notices of intent to initiate malpractice litigation that may have been served on nurses during this period of time; however, a defense for the nurse in these cases would also be covered by such policies. These statistics indicate that a nurse is more likely to be involved in one of these types of licensing actions rather than a lawsuit alleging nursing negligence. These figures show that a DOH investigation is 26 times more likely against a nurse than a malpractice lawsuit.

Professional liability policies which provide coverages for licensure defense will usually provide compensation to the nurse for her out-of-pocket expenses (travel, postage, etc.) that she herself incurs as well as lost wages because of working time missed for hearings, depositions, etc. However, the maximum

coverage available under such policies for licensure defense is usually limited. Usually coverage for licensure defense in most policies for nurses is between \$10,000 and \$15,000. This amount will usually be sufficient to provide for most of the legal fees and costs involved in defense of such a case and will usually be enough for the nurse to be able to afford to hire a highly qualified, experienced healthcare attorney, familiar with nursing law, to represent her.

For example, the editor of this Manual has been retained as independent outside counsel to represent nurses by large national nursing home chains and hospital chains when it was felt that there might be a conflict of interest between the corporation and the nurse. This situation might arise, for example, if the nurse is suspected of having committed a criminal act or an intentional act that might also result in civil liability or discipline against the nurse.

If you are an agency nurse, a home health agency nurse, a nursing home nurse, an independent duty nurse, or you are not employed by a large hospital chain, then you should consider nursing liability insurance mandatory. It appears that complaints of negligence against nurses working in these positions are far more likely. This may be because of the high turnover of nurses in some types of healthcare facilities (such as nursing homes), or because when the incident is investigated, the nurse is no longer employed there (for example, in the case of an agency nurse). Additionally, agency nurses may only work in facility for a short period of time making them less familiar with the facility's policies and procedures, and not a part of the permanent team of nurses who may have established relationships with each other and are more likely to cover for each other.

As mentioned above, a number of different proceedings may be covered by the licensure defense coverage provided for in professional liability insurance. These proceedings may include an investigation by the Department of Health based on a patient complaint or Code 15 report; an abuse investigation (abuse of a child, abuse of a developmentally disabled or vulnerable person, or abuse of an elderly person) by the Department of Children and Families (DCF); allegations of nursing negligence or abuse being investigated by a state "surveyor" by the Agency for Health Care Administration (AHCA); an investigation into allegations of Medicaid over-billing or fraud; an investigation by the Agency for Health Care Administration or on the Attorney General's State-wide Medicaid Task Force; and allegations of improper Medicare billing or fraud.

A nurse might be involved in a Medicaid fraud investigation, for example, in the case of an Advance Registered Nurse Practitioner (ARNP), Certified Registered Nurse Anesthetist (CRNA) or Certified Nurse Midwife (CNM) who has her own provider identification number and is allowed to bill as part of a group practice or independently. This might also occur, for example, in the case of a nurse working for a home health agency which receives its reimbursement for the nurse's services from Medicare or Medicaid. The editor of this Manual has represented nurses in each of these types of cases.

**V. THE COST OF LIABILITY INSURANCE FOR NURSES IS LOW**

High limits of coverage for nursing malpractice insurance coverage are usually available. Most nursing liability insurance policies provide at least \$1,000,000 in coverage. If sought by physicians, this high limit of coverage may be very expensive or often is not available, at all. This professional liability coverage should afford the nurse ample protection in any malpractice case that might be filed against her. Physicians are routinely advised that the best asset protection is having and maintaining good professional liability insurance coverage. There is no reason that this should not apply to a nurse who may have property, savings or other assets she desires to protect.

Nurses can purchase liability coverage rather inexpensively. For example, an excellent insurance policy providing coverage for nurses is available through the Nurses Service Organization (N.S.O.) for less than \$200 per year. Professional liability coverage provided by this type of insurance represents a bargain at these rates.

**VI. POTENTIAL DISADVANTAGES**

There may, however, be disadvantages to nurses obtaining malpractice insurance. For example, carrying personal professional liability insurance could encourage a plaintiff to name nurses, individually, in a malpractice suit. An increase in malpractice suits against nurses may also increase insurance premiums, placing the cost of malpractice insurance outside nurses' financial means. Medical professional insurance, as all insurance, is subject to the cyclical nature of the insurance market.

Additional problems intrinsic to malpractice insurance include potential changes in the legal system, and the effects of inflation and emerging technology in treatment, on ultimate claim values. As a result of these intrinsic problems, the rise in occurrences of malpractice claims and exorbitant jury awards, many commercial insurance carriers have at least periodically discontinued underwriting professional liability coverage. With diminished competition between insurers, premiums can increase and adequate coverage can be difficult to obtain. However, malpractice insurance premiums for nurses have continued to be reasonable.

**VII. FACTORS TO CONSIDER WHEN OBTAINING MALPRACTICE INSURANCE**

After having decided to obtain personal malpractice insurance, the health care professional should contact a knowledgeable insurance agent to select an insurance company and the type of insurance policy that will best serve his or her individual needs. First, the insurance company should have financial stability. An excellent indicator of performance and financial worth is Best's Insurance Reports Property and Casualty.

There are various types of malpractice and professional liability insurance coverage, including, but not limited to the following:

1. occurrence coverage provides insurance for incidents that arise during a policy period, regardless of when the claim is made;

2. claims-made coverage provides insurance for those claims made or reported during the policy period, regardless of when they occurred; and
3. tail coverage provides insurance for acts or omissions that occurred prior to the effective date of the current occurrence policy, but have yet to be reported as claims.

An insurance company should demonstrate a commitment to providing professional liability coverage. In return, the insured should endeavor to maintain a long term commitment to the insurer. Switching insurers each year is especially dangerous if claims-made coverage is purchased. The amount payable by the insurer is determined by the amount of damage incurred by the injured party and/or the policy limits. In any event, the insurance company will pay the claimant no more than that maximum limit stated within the insurance policy. If a jury determines that the damages exceed the policy limit, the insured professional must personally pay the excess.

Conditions are contained within each insurance policy. Failure to comply with these conditions may breach the contract and cause nonpayment of the claims. For example, the conditions of an insurance policy usually require notice within a specified time, and failure to provide such notice could void the insurer's obligations under the policy.

### **VIII. CONCLUSION**

We strongly recommend that every nurse obtain nursing liability insurance coverage. It is inexpensive and will usually cover the most common legal problems nurses encounter, how to obtain and pay for competent legal representation in the face of a complaint against your nursing license, an investigation against you or a deposition involving your care.

Nurses cannot rely on coverage under their employer's malpractice insurance. Under certain circumstances, it is especially important for nurses to carry personal professional liability insurance. There may, however, be some disadvantages to carrying personal malpractice insurance. Once having decided to obtain personal malpractice insurance, a nurse should contact a knowledgeable insurance agent to select an insurance company and the type of insurance policy that will best serve his or her individual needs. Finally, a nurse must comply with the terms and conditions of the policy, especially as to any notice provisions.

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