

by GEORGE MATLOCK

When the medical malpractice crisis of 2001 and 2002 hit Florida, many physicians found themselves scrambling to find insurance coverage as insurance companies failed or left the Florida marketplace. Many physicians had no choice but to go bare. To practice medicine without insurance, they agree to pay any judgment up to \$250,000 or face the loss of their license. Others, looking at insurance premiums so high that their economic livelihood was at stake, had no real choice but to go bare as well — it became economically advantageous to self insure.

How “bare” do you want to be? In order to avoid an “emperor has no clothes” result, the general plan is to protect your assets through an asset protection attorney or specialist, then hope that the plan withstands a determined plaintiff. The problem with this is that a large portion of the cost of any claim is the cost of defending it. The successful defense of a medical malpractice claim, if tried to a conclusion, involves the selection and hiring of expert witnesses, attorneys fees, court reporter fees and other costs. No asset protection plan can prepare the physician for paying these defense costs.

So why would you choose to go bare if you didn't have to? The reason for this is one of simple economics and is largely based on Florida's rather well developed insurance company bad faith laws. First, a plaintiff's lawyer would much rather collect from an insurance company than from a physician who has protected his or her assets. Second, under the bad faith law, if an insurer decides to try a case in which damages exceed the policy limits, the insurance company can be held responsible for its failure to protect its insured. In such a case, the policy limits become meaningless and the insurance company has

unlimited liability up to the amount of the judgment. As a result, plaintiff attorneys want and try to set the insurance company up for bad faith — the bare physician is, economically, a much less appealing target for a plaintiff's lawyer.

In 2003, over 4,000 physicians in Florida had chosen to go bare. At that time, Gulf Atlantic Legal Defense Insurance, Inc. formed as the first legal defense insurance company specifically aimed at the purpose of providing a defense for bare physicians. Since then, other companies and law firms have begun to offer defense products for the bare physician. If you are bare, or if you are considering going bare, you should carefully consider “how bare you want to be” and be informed about these competing products.

**The key to coverage is understanding:**

## 1) CLAIMS-MADE COVERAGE

Many physicians understand how claims-made coverage works, because it is the standard of coverage for medical malpractice insurance in Florida. A claims-made insurance policy covers you for claims made against you and reported to the company while the policy is in force. Claims-made policies also can include “prior acts” coverage by providing a retroactive date, i.e., a prior date from which your professional services will be covered if the claim were made today.

Once you report a claim that is covered under the policy, the legal defense company will pay all costs associated with the claim up to the limits of the policy for the claim. If the policy cancels the day after the claim is reported, the claim is still covered, but future claims will not be covered, unless you purchase extended reporting coverage (“tail coverage”). Most companies offering claims-made coverage offer extended reporting coverage options

as well.

Generally, premiums for claims-made coverage start low because the risk of a reported claim is low (during the first year of coverage, the professional services would have to be performed and the claim reported in that same year). As the exposure increases, the premium increases until the policy reaches a “mature” premium, or a premium that reflects the full exposure. Claims-made policies mature over a period of three to five years. If you purchase prior acts coverage, your premium is determined based upon where the retroactive date falls in the maturity cycle of the policy — so if you wanted coverage for claims made for professional services performed over the last five years, you would pay a fully mature premium.

Nose coverage is similar to claims-made coverage. If you purchase nose coverage, you are covered for a claim made against you while the policy is in force regardless of when the services giving rise to the claim were performed. In essence, nose coverage is the same as a fully mature claims made policy. Sometimes, companies will sell nose coverage that provides coverage for claims made for services performed while this policy or any continuous predecessor policy issued by the company is in force.

This is another way of selling claims made coverage without prior acts. The things to look for when purchasing nose coverage are whether you can purchase extended reporting coverage when the policy is terminated, and how the policy wording describes your coverage. Make sure that you can obtain prior acts coverage if you need it. In some cases, attorneys offer “Retainer Agreements,” which look very similar to “claims-made” coverage. In this case, you will be quoted a premium for coverage, offered as a retainer, which will offer unlimited defense coverage in

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the event a claim is reported while the coverage is in force. The premium will be very attractive. When you review the agreement, however, you will find that the law firm only has to provide legal services as long as you keep paying the annual retainer.

If you stop paying, you no longer receive a defense. And even if you don't have a claim, you can't leave because there is no way to purchase extended reporting coverage. You'll be stuck paying for this coverage for 5 to 10 years after you switch, if you do at all. If you are considering this type of coverage, be aware of these hidden costs and the possibility that you'll be stuck in the program for a long time. The life of a malpractice claim can range from two to seven years, or longer.

## 2) REGULATED VERSUS NONREGULATED LEGAL DEFENSE PROVIDERS

A "Legal Expense Insurance Company" is classified as a specialty insurer by the State of Florida. Such a company must undergo a licensing review by the Office of Insurance Regulation (OIR), which reviews the company's business plan, its initial capital, the coverage forms and rates to be offered, and investigates the background of the company's principals. The company is required to maintain a minimum net worth and set aside reserves for claims and for unearned premiums. The OIR periodically conducts financial and market conduct reviews of these companies to ensure that they are operating in accordance with the law.

In addition to legal expense insurance companies, others offer products that purport to provide assistance to bare physicians. The attorney referral network asks you to pay a small premium to receive a listing of attorneys who provide legal services in your area and who have agreed to provide a discounted fee to members of the network. Unfortunately, there is no guarantee that the rate quoted is a discounted rate, and the benefit you receive may be little more than you can

get with a small amount of research and meeting personally with an attorney.

The attorney-sponsored Retainer Agreement, in addition to the hidden costs mentioned previously, locks you into a single, capitated law firm. The premium/retainer you pay is not required to be set aside to pay for your claims when they occur. The law firm can take that money into income today. You are locked into the attorneys you use; therefore, you should investigate the firm carefully up front.

Be familiar with their qualifications and expertise in malpractice lawsuits. Speak to the attorney and determine his or her expertise in the subject matter. Do they have experience trying medical malpractice claims? Ensure that you have input into the selection of expert witnesses. The testimony of the expert can make or break the defense of a claim. Be aware that your attorney will be paid up front for services to be performed later, and those services are "capitated." Their financial incentive in defending the claim may be different from yours.

## 3) REIMBURSEMENT VERSUS CAPITATION

Legal expense insurance companies can offer, by law, two types of plans: reimbursement policies, which reimburse you, or pays defense costs you incur directly; and capitation policies, in which an attorney is prepaid for any representation that is required. Both types have advantages and disadvantages.

Under a reimbursement policy, you can select either from the company's panel (generally at reduced reimbursement levels) or may select any attorney licensed in the state to represent you. The advantage of the reimbursement policy is that you have control of your defense. You select your attorney, you have input into the selection of expert witnesses, and, if you need to, you can fire your attorney and hire another one at any time. You exercise complete control over your case.

If you select from the company's panel of attorneys, you also benefit from the

economies of scale the company receives as a frequent purchaser of legal services, both for attorneys' fees and for other items, such as court reporters' fees. The downside is that your defense costs are limited. Generally, the defense costs will be sufficient to take most malpractice claims to trial, but there is no guarantee.

With a capitation policy, you get whoever the company has contracted to do the work. There is no (or very little) choice. Just like with an attorney's retainer agreement, you are locking yourself into the lawyers who are part of the firm or who have agreed to accept the capitation. The advantage is that there is no cap on expense. They have agreed to provide you with an unlimited defense.

The principal downside is that you lose control over the claim, and the interests of the capitated law firm may be different from your own. For example, if the capitated law firm aggressively defends the claim, they are losing money they have already been paid. If they select a highly paid expert, the cost is coming out of their pocket.

When you go bare, you are taking a large step towards independence from insurance. Frequently, you become an unattractive target to plaintiffs' lawyers trying to make a big score. However, you also take a risk that includes personal exposure for liability in the event a claim is made against you.

A good legal expense policy, or legal expense plan, should be a part of any comprehensive strategy when taking the plunge to go "bare." You have probably taken steps to protect your assets; but, you should also ensure that you can undertake an aggressive, well-funded defense when the claim is made. But when analyzing and buying these products, be an informed consumer. Know the hidden costs, have an exit strategy, and make sure you can take part in an aggressive defense of your claim.

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