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Medical Professional Liability
Property/Casualty

Defense Department

Patients are sidestepping the courthouse and taking their concerns about doctors to state medical boards.

by Chad C. Karls and Susan J. Forray

"How low can it go?" In most circles, this question would be about the stock market, housing values or interest rates. But for those in the medical professional liability industry, it could well be about claims frequency.

While the overall frequency of this line's claims has decreased (and may have bottomed out), one type of claim has shown a significant increase in its frequency over the past few years—defense-cost-only claims arising from investigations by state medical boards or similar regulatory agencies.

Sometimes referred to as "med-defense" or "sub-limit" claims (because of the separate sub-limits that often apply to them in medical professional liability policies), they arise from covering the costs of legal representation in state medical board hearings. Most medical professional liability insurers began covering these types of claims in the mid-1990s, although some provided coverage as early as the 1980s.

The coverage addition allowed these insurers to more effectively compete during the soft market. It also alerted insurers to possible liability claims that might first manifest themselves as med-defense claims, and allowed them to help their policyholders navigate a sometimes intimidating and stressful process.

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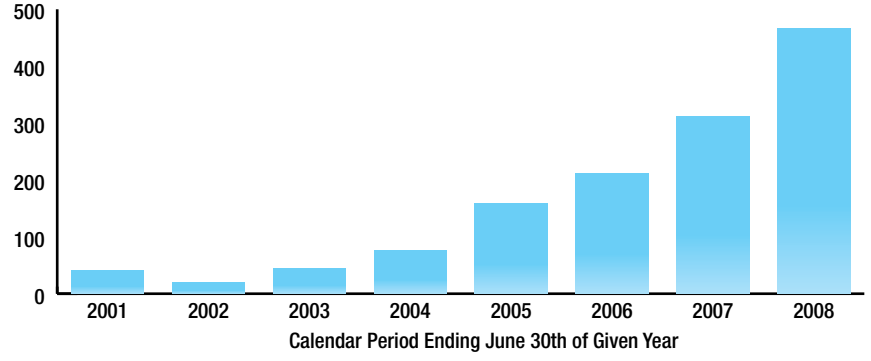
▶ **The Situation:** The overall frequency of medical professional liability claims has decreased during the past few years.

▶ **The Issue:** However, defense-cost-only claims arising from investigations by state medical boards or similar regulatory agencies are rising.

▶ **The Next Step:** Medical professional liability insurers must accurately measure the impact of med-defense claims during both the rate-making and reserving processes.

Figure 1
Med-Defense Claims Reported — Individual MPL Carrier



Source: Proprietary client data. Used with permission.

Figure 1 shows the number of med-defense claims reported to a medical professional liability carrier over the past eight years. From a low of fewer than 20 reported med-defense claims in calendar year 2002, the number of reported claims increased to more than 450 in 2008.

This upward trend appears to be the norm. With a typical severity between $5,000 and $10,000, this represented an additional per-annum cost to the carrier of an estimated $3 million.

Claims Behaving Inversely

It's no coincidence that the number of med-defense claims has been increasing while the number of professional liability claims has decreased. In fact, data available from the National Practitioner Data Bank and the Federation of State Medical Boards show

that these two data sets have typically moved in either opposite or level directions for as long as a common history of the claims is available, as shown in Figures 2 and 3. Further, the inverse relationship between the data sets becomes more pronounced when considering the resolution-lag differences between liability claims (on average three to five years) and med-defense claims (on average one year or less).

The inverse relationship between these two claim types has been most pronounced since 2002, when the number of liability claims against physicians began to decrease across the country. At the same time, prejudicial actions taken by state medical boards, in response to claims filed with them, began to increase.

Perhaps for the first time, prejudicial actions by state medical boards have been decreasing in number over the past few years in tandem with a continued decrease in liability claims. However, the number of claims brought before state medical boards may not be decreasing. Instead, the insured health care providers may have become more aware of the provision in their policies granting coverage for attorney representation before state medical boards. They may be successfully fighting the allegations presented in these claims with the assistance of their insurer-funded attorneys.

Another possibility is that some state medical boards may have a backlog in responding to complaints, and the decrease in prejudicial actions represents, in part, their inability to respond as promptly now as they once did.

Consider Texas as one example of this inverse relationship between claims. The pre-eminent example of tort reform in the past decade was the state's passage of Proposition 12, which went into effect in 2003. The proposition allowed the legislature to limit noneconomic damages, but its indirect effect was a significant reduction in frequency, as shown in Figure 4.

Not greatly discussed has been the corollary to this decrease: a marked increase in claims brought before the Texas Medical Board and resulting prejudicial actions, which have roughly doubled since the time period preceding tort reform. (See Figure 5.)

The number of prejudicial actions in Texas hit almost 450 in 2008, and a decrease isn't expected any time soon. The board has a backlog in processing complaints, despite a staffing increase of almost 30% since 2002. The board requested additional resources during the 2009 legislative session in an attempt to reduce the average length of time it requires to resolve complaints, although the bill supporting this remained unapproved as of the close of the session in May.

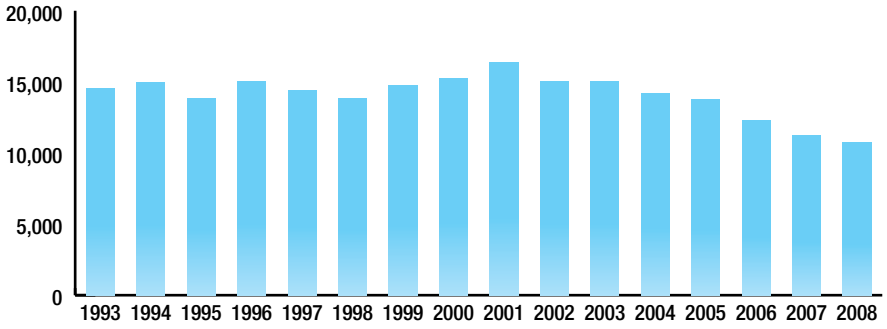
Fair Minded

The process followed by a state medical board is very similar to the one followed by civil courts. The judicial stage of the complaint process provides for:

- A fair and impartial hearing for the accused before the board or its examining committee.
- An opportunity for representation of the accused by counsel.
- The presentation of testimony, evidence, and argument.
- Subpoena power and attendance of witnesses.
- A record of proceedings.
- Judicial review by the courts in accordance with the standards established by the jurisdiction for such review.

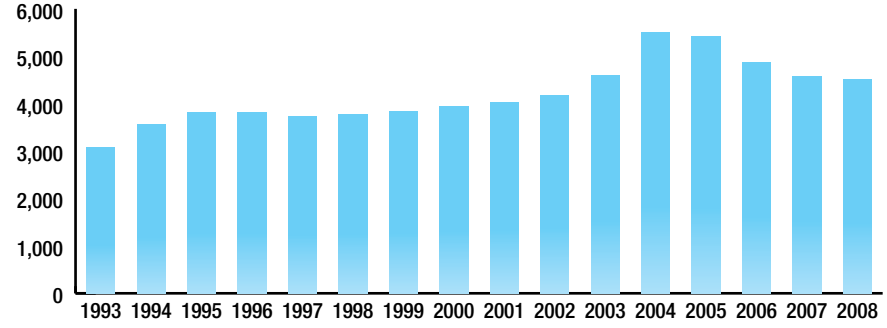
Source: Federation of State Medical Boards

Figure 2
Physician Claims Reported to the National Practitioner Data Bank



Source: National Practitioner Data Bank public-use data file

Figure 3
Prejudicial Actions* by State Medical Boards



*Prejudicial actions are defined by the FSMB as the loss or restriction of a physician's license or licensed privilege or the modification of a physician's license or its privileges, if the modification results in a penalty or reprimand to the physician.
Source: Federation of State Medical Boards

Upon Further Review

The board also has faced complaints that it has become too harsh on doctors in responding to filed complaints. Part of the quid pro quo of the 2003 tort reform in Texas was additional funding for the board, to

allow cases to be dealt with outside of the court system. However, the number of complaints that are determined to merit additional investigation after an initial review has increased from 33% in 2002 to 42% in 2008. Thus, some doctors feel the board has widened its standard for what constitutes a reasonably justified investigation.

Anyone, including a patient, a patient's surrogate or a patient's attorney, is permitted to report information to a state medical board alleging that a physician is unable to competently practice medicine or has engaged in unprofessional conduct. In addition, licensed physicians, other licensed health care providers and the state medical association are required to report such information to the board.

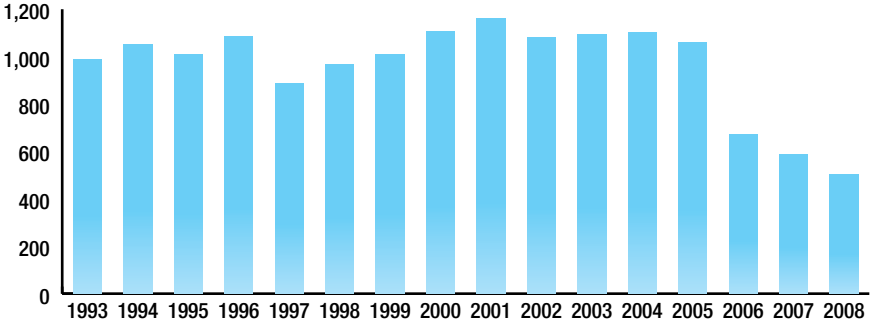
Board staff is responsible for investigating the claims, and notice of the charge is given to the accused. The board has subpoena authority to conduct a comprehensive review of a physician's patient and office records, and has administrative authority to access otherwise protected peer-review records.

The board also may request clarifying information from both the accuser and the accused physician. This may seem similar to the use of patient records in a professional liability case. However, the investigation of records by the board is much broader; it concerns itself with the overall competence of the physician rather than just the physician's conduct in a single case.

After its investigation, the board may determine that judicial proceedings are unwarranted. In this case, it retains the option of issuing a confidential "letter of concern" to a physician, stating that it has received indications of possible errant conduct and that, if such conduct is substantiated, disciplinary action may result. The board also may choose to request clarifying information from the physician as part of this letter.

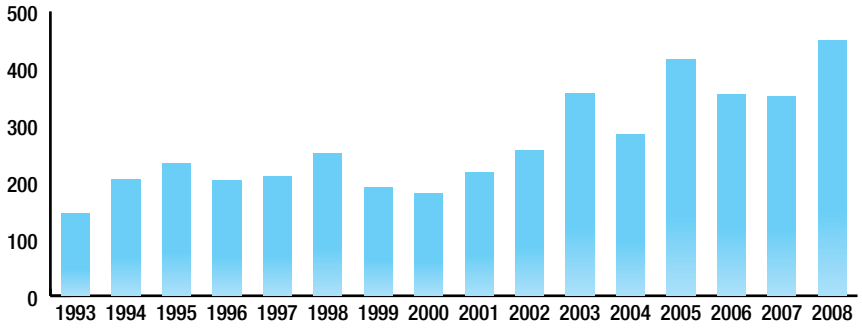
If the board determines judicial proceedings are warranted, it will

Figure 4
Physician Claims Reported to the National Practitioner Data Bank, Texas Only



Source: National Practitioner Data Bank public-use data file

Figure 5
Prejudicial Actions by the Texas Medical Board



Source: Federation of State Medical Boards

Action Steps

The Federation of State Medical Board's *Elements of a Modern State Medical Board* identifies 43 grounds for action upon which a board may take disciplinary action. It also notes that disciplinary action can be taken for any "unprofessional or dishonorable conduct."

Some of the specific grounds for action include:

- The commission or conviction of a gross misdemeanor or a felony, whether or not related to the practice of medicine.
- Violating the confidentiality between physician and patient.
- Negligence in the practice of medicine.
- Commission of any act of sexual misconduct.
- Any adverse judgment, award or settlement against the licensee resulting from a medical liability claim related to acts or conduct similar to acts or conduct that would constitute grounds for action. Thus, a medical liability claim by itself would typically not be sufficient grounds for action—unless the charges underlying the claim would otherwise be defined by the board as unprofessional or dishonorable conduct.

Source: Federation of State Medical Boards

schedule a hearing for the accused physician. The judicial function of the board is kept separate from its investigative function, to ensure fairness.

When license revocation or suspension is possible, the hearings always are open to the public. Other hearings may be closed at the discretion of the board, but any resulting disciplinary action would be a matter of public record.

In addition to revocation or suspension, physicians also may be put on probation; have restrictions placed on their practices; or be reprimanded, fined or required to perform public or charity service.

A significant difference between the judicial processes of state medical boards and of civil courts is that a physician has limited ability to settle the charges against him or her when they are made before a board. While the board's judicial process may be avoided by voluntarily surrendering one's medical license, this is hardly an easy way out. In addition, state medical boards have the power to summarily suspend a physician's medical license prior to a formal hearing when the board believes such action is necessary to prevent an imminent threat to the public health and safety.

Impact on Carriers

A few years ago, med-defense claims were a sufficiently small cost to liability insurers and separate treatment of the claims might not have been required in the rate-making or reserving processes. This is no longer the case for many insurers. Whenever possible, med-defense claims should be segregated in both the rate-making and reserving processes in order to accurately measure their impact.

Rates and reserves may be either overstated or understated by failing to review med-defense claims separately. For example, overstatement may result from count-based methods that apply a historical severity more appropriate to professional liability claims to an increased number of med-defense claims. Understatement may result if med-defense claims are segregated from the analysis but not frequently re-evaluated for their effect on rates and reserves. Even relying on the most recent year's experience in setting prospective rates may prove insufficient, given the continued rise in the number of these claims.

The impact on professional liability carriers will most likely be greater than the increase in prejudicial actions by members of the FSMB would suggest. Many med-defense claims may result in defense costs paid by the insurer, but the underlying charge may be judged not to warrant further action by the board.

During times when the frequency of professional liability claims has increased, the frequency of med-defense claims has not decreased—instead, it has leveled off. This suggests that the significance of these claims in the rate-making process may only continue to increase over the long term. BR