

Property & Casualty

Calm Before the Storm - Is There a Medical Malpractice Storm on the Horizon?

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A little over two years ago, I authored an article for the PLUS Journal that surmised that the volatility of healthcare professional liability may have calmed after 29 years. This hypothesis was promoted, given the influences of better patient safety, transparency of quality measurements and reporting, reduced trial attorney appetite for medical malpractice in the face of stiffened carrier claims handling and lower claims frequency and carriers floating in cash and capacity. Today, many of those variables remain; however, they may be diluted and we remain lulled into a present 'calm before the storm.' This "storm" is the vortex of changes occasioned by federal healthcare reform.

The power and scope of federal involvement in healthcare has been expanded beyond the comprehension of most providers, healthcare institutions and certainly patients. It is suggested that this catalyst of reform will result in changes in malpractice in both the frequency and severity of claim.

The current 'calm'

The professional liability insurance arena is currently enjoying an unprecedented period of 'stability' from the perspective of low frequency and a relatively predictable severity trend. This is resulting in a wealth of insurance financial capacity, continued favorable reserve development and continued low premium levels. As carrier balance sheets have stabilized in the last few years, (in spite of the economic downturn) the industry has continued to see even less pressure on premium levels as investment income has improved.

Frequency remains at historically low levels as measured in claims/100 physicians or as claims/100 Acute Care beds. Severity has trended upwards, with some experts noting an annual trend from 6-9% (this could be a function of adverse selection based on the low number of claims in the claims pool being the more severe claims).

The recent Medical Professional Liability Symposium for the Professional Liability Underwriting Society in March 2010 confirmed the continued calm in a number of presentations, with a minor uptick of frequency noted by one major broker study – in hospital claims frequency. All in all, this is nevertheless a notable calm, given the history of this unique line of coverage.

"It will be like drinking out of a fire hose"

When the Patient Protection and Affordable Care Act (PPAFCA) and its companion legislation of reconciliation was signed into law, we as a nation began the process of bringing some 32 million previously uninsured Americans into healthcare financing, and subsequently improved access to the entire healthcare delivery system.

Many new patients in the system are a result of major featured reforms beginning this year (2010), such as expanded access for children and disabled adults, regulatory reforms to healthcare insurance practices that remove pre-existing condition waiting periods, prohibition on lifetime 'caps' in policies and required coverage for preventive care.

As the healthcare system begins to embrace the bulk of these 32 million Americans over the next few years, we can anticipate that these new entrants may have a number of expected characteristics; untreated or undertreated health conditions (co-morbidities; e.g. diabetes, heart disease, cancer, arthritis, obesity, etc.), and unfamiliarity with the complexities of the healthcare delivery system which could result in potential frustrations and unmet expectations.

Some say that the healthcare system itself is woefully unprepared for a significant increase in the patient loads and demands of such a large influx, and that this could result in a provider/system scenario similar to attempting to "drink out of a fire hose."

Not enough doctors, expanded use of mid-levels

The *Wall Street Journal* recently noted that medical schools cannot keep up with demand - "the new federal health-care law has raised the stakes for hospitals and schools already scrambling to train more doctors." They go on to note that America could face a shortage of as many as 150,000 doctors in the next 15 years, citing the Association of American Medical Colleges. The current number of U.S. doctors now totals about 954,000.

As is well known to the industry, the shortfall is going to be centered on primary-care physicians. The college association estimates the U.S. currently has 352,908 primary-care physicians now, and a need for at least 45,000 more by 2020. This estimate may require updating, given that this estimate is 6 years following the major implementation of reforms completed in 2014.

The WSJ makes the key observation; "A shortage of primary-care and other physicians could mean more limited access to health care and longer wait times for patients." More wait times, higher demand for providers and shorter time available for provider-patient interaction and communication has historically been linked to reduced quality and patient safety in many circumstances.

To help alleviate the pressure on physicians, the Associated Press reported that 'a nurse may soon be your doctor' in an article published April 13, 2010, in which they catalog the 28 states that are considering expanding the authority of nurse practitioners. They go on to state, "With 32 million more Americans gaining health insurance within a few years, the health care overhaul is putting more money in to nurse-managed clinics. Those newly insured patients will be looking for doctors and may find nurses instead."

With the already expanded role of Nurse Practitioners (NP's) in today's systems, an extensive report by CNA HealthPro in March 2010 noted that ultimate average indemnity and expense payments for NPs have increased over the past 10 years.

Undiminished demand for specialists, no one on-call

Exacerbating the capacity of the system to treat current patient demand levels is the continuing reduction in the availability of specialists to respond to Emergency Departments as "On Call" physicians/surgeons. A recent issues brief published by the Center for Studying Health System Change noted that American College of Emergency Physician data indicated that 73 percent of emergency departments report inadequate on-call coverage by specialist physicians. Specialists that are in shortage for on-call are: orthopedists, neurosurgeons, plastic surgeons, trauma surgeons, obstetrician/gynecologists, ophthalmologists and dermatologists. The lack of key providers could seriously compromise hospital malpractice claims frequency, and certainly compromise patient safety and quality of care to meet standards of care.

Resource constraints

Reform will also engender resource constrictions on diagnostic tests, as system administrators and providers look to reduce unnecessary costs that have little or no evidence based value. This in and of itself is probably a good thing; however, if these constrictions overshoot the mark of simply reducing unnecessary testing and they promote a climate of reduced testing when it is actually required or necessary, the potential for misdiagnosis or delayed diagnosis will increase the number of iatrogenic injuries, and result in increased numbers of malpractice claims. In addition, there are many predictions that provider and hospital reimbursements in various arenas will be reduced, resulting in resource constraints as well.

Absence of Tort Reform

Deliberations during the debates over the substance and features of the PPAFCA included a number of pleas by various constituencies to include substantive tort reforms to reduce or diminish the impact of healthcare professional liability claims and costs. The final legislation did not include any specific changes to existing tort laws.

The recipe for a storm

Therefore, PPAFCA has provided a recipe of increased demand and increased expectations mixed with a system that has serious capacity issues in providers; coupled with lower reimbursements that could result in a likely provider behavior of seeing more patients with less time and deliberations.

Not only does reduced time for each patient intuitively produce a reduction in quality physician-patient communications and interaction, but it also degrades the efficacy of providers as they suffer overload and fatigue.

This could be the ingredients of storms that could result in increased frequency and severity of medical malpractice claims and costs in the years ahead.

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