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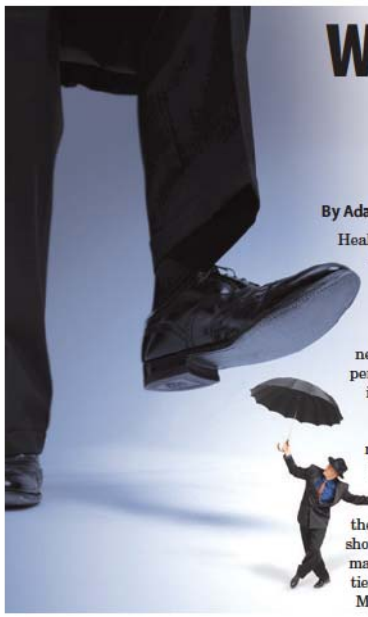

Who does your insurance agent represent?

By Adam Kutinsky, Esq.

Health care providers are well aware of the importance of maintaining adequate professional liability insurance.

But, while maintaining adequate insurance may be universally appreciated, that same appreciation may not necessarily extend to the selection of the person or agency from whom the insurance is purchased.

Consider for a moment that a provider could instantly improve upon its risk management program by selecting an insurance agent that serves its best interests — few providers would hesitate to make that selection. However, before the selection may be made, the provider should understand the types of agents in the marketplace and their qualifications and duties under Michigan law.

Michigan has imposed a range of duties on insurance agents through the years, from the most basic duty of an insurance company agent who takes orders from a proposed insured, to the duty of a fiduciary for the insurance company or the insured, depending upon each particular circumstance.

Generally, these duties have arisen from three separate legal sources — legislation, contracts and common law (i.e., court cases).

As a result, Michigan law may appear somewhat convoluted on the issue of what an insurance agent's duties are to its potential insured.

For a starting point, it is important for a provider to understand that an insurance agent will usually fall within one of two different classifications: a captive agent, one who is employed by the insurance company and sells policies for that company exclusively; or an independent agent, one who is an independent contractor with the right to sell policies for several different insurance companies.

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Health care has unique issues in social media

By Michelle D. Bayer, Esq., and Suzanne D. Nolan, Esq.

Social media has transformed the communication landscape, reshaping the way in which people interact and communicate with one another.

But social media also has provided businesses with a very effective way to market their products and services to the millions of consumers who use Facebook, e-mail, Twitter, blogs, YouTube and websites.

Health care providers are no exception, as many use social media to advertise their practices, communicate with patients and employees, distribute and find health information and educate patients.

Such uses of social media can provide tremendous benefits to both providers and patients, and can advance the laudable goal of improving the delivery of health care services to patients. However, there are legal and ethical concerns surrounding the use of social media that are unique to health care providers.

To help address these issues, in November 2010, the American Medical Association (AMA) issued a new policy to guide physicians' use of social media. Although directed to physicians, this guidance is relevant to all health care professionals. The AMA guidelines list a number of "considerations" which physicians

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Information is power

Negotiating hospital contracts needn't be complicated, but look out for the details

By Jane Pribek

Negotiation 101 isn't included in the medical school curriculum.

But maybe it should be. For physicians these days, chances are, at some point in your career, typically the beginning, you'll bargain the terms of an employment contract.

Amednews.com reported last month that hospitals and hospital-owned medical groups are an increasingly popular employment option.

Many physicians who've been extended offers believe they should just sign on the bottom line of the hospital's employment contract and hope for the best.

So says Boston attorney William Mandell, who has participated in hundreds of negotiations between hospitals and physicians, on both sides of the table.

"I spend a good chunk of my time trying to educate physicians as to why that mindset is not an accurate read on the current situation for physicians in every specialty who are looking into becoming employees," said Mandell, a partner with Pierce & Mandell.

"It doesn't have to be a big 'legal thing.' Most experienced lawyers can go over a contract in an hour or two, and give the client some bullet points," said Troy attorney David L. Haron, who typically represents physicians or providers other than hospitals at negotiations.

Then the client can decide if she wants the lawyer to be involved in negotiations, or if she just wants to take that list into the hospital, said Haron, of Frank, Haron, Weiner & Navarro, PLC.

Assessing your leverage

In any negotiation, "information is power," Mandell said. You need to research the market for physicians in your area with similar qualifications and their

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Social

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should weigh when maintaining an "online presence," including:

- Protecting patient privacy and confidentiality in all environments, including online, and proscribing the online posting of protected health information (PHI);
- Using privacy settings on social media sites to safeguard the physician's personal information and content, while recognizing that such privacy settings may not adequately protect such information;
- Monitoring their own presence on the Internet with a goal to ensure personal and professional information they — and, to the extent possible, others — post is accurate and appropriate;
- Maintaining appropriate boundaries of the physician-patient relationship when interacting with patients online by separating personal and professional content online, and;
- Recognizing that online actions and content can negatively affect one's reputation and medical career.

The most significant legal issue presented by the use of social media is the protection of patient privacy.

HIPAA and state privacy laws limit a provider's ability to engage in a social media dialogue about a patient, as doing so would generally result in the disclosure of PHI.

Importantly, social media networks are not HIPAA compliant and cannot be made so by changing privacy settings. Providers should not use such sites to communicate with patients about specific health conditions, diagnoses, or treatment.

Additionally, care must be taken to avoid lapsing into casual conversations and inadvertently disclosing PHI. Responding to or even confirming PHI posted by a patient can result in a HIPAA violation.

Instead, such communications should be conducted through private, encrypted e-mail exchanges or offline. Further, any communications with patients that involve health information should, consistent with state law, become part of the patient's medical record.

Physicians also must be careful about responding to requests for medical information online. While providing general medical information on a website, blog or other posting is permissible, the position of the AMA, the Michigan Board of Medicine, and many other state medical boards is that physician-patient relationships cannot be formed online and should be established by performing a physical examination and taking a medical history.

Diagnosis and prescribing a specific course of treatment through online communications (without an existing physician-patient relationship) also is discouraged and, if discovered, will likely result in disciplinary action. Other disciplinary issues could arise if treatment is provided outside of the physician's license to practice.

The use of social networking sites also raises ethical issues related to preserving the boundaries of a professional relationship with a patient. In light of the AMA guidelines, becoming a Facebook friend with a patient, with whom the health care professional does not have a pre-existing personal relationship, can be viewed as crossing this boundary.

There should be a clear delineation between "personal" pages and "professional" pages that represent the physician's practice, and physicians should not use their personal Facebook pages for business situations or medical advice or treatment. Patients should not be given access to the physician's personal pages, but can and should be encouraged to become fans of the practice.

The most significant step health care professionals can take to properly utilize social media is to educate themselves, and their staff, about the ethical and legal obligations regarding professionalism and privacy.

Adopting a social media policy for health care staff and office staff that, among other things, prohibits all staff from discussing any information regarding current or former patients and responding to questions about medical treatments, is essential if a provider has an online presence.

The most significant legal issue presented by the use of social media is the protection of patient privacy.

Providers are often hesitant to adopt such policies, claiming that they cannot control what their staff members do on their own time. However, the actions of employees can expose the provider to liability if it appears the employee is speaking for the provider. Staff members will likely be receptive to these policies once they understand how their own actions may negatively affect the provider or lead to HIPAA violations.

In addition to social media policies for staff, health care practices with an online presence should establish and distribute clear policies to patients on how the practice handles online patient communications, and have patients acknowledge receipt of the policy in writing.

Patients should be advised not to use Facebook or other public social media outlets to report symptoms or seek medical advice. Patients can be advised to use secure e-mail communications for such purposes, if the practice wishes to adopt such a practice.

If e-mail is available, patients need to be informed of that fact, and how often a physician will be monitoring the communications. There is potential malpractice exposure if a physician does not respond to a patient communication within a timely manner and the patient's health suffers.

As with all compliance policies and procedures, health care providers should consult with legal counsel regarding their use of social media to ensure compliance with these ethical and legal considerations, as well as to ensure that such communications comply with applicable laws including health care laws, copyright laws, false advertising laws and laws governing the use of testimonials.

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Wait no longer

Amended NOI doesn't create second notice period

Medical Malpractice

By Brian Frasier, Esq.

An original notice of intent begins the 182-day notice period regardless of whether an amended notice is later filed, the Michigan Court of Appeals said.

The court also allowed the second notice to begin tolling the statute of limitations because the first notice did not.

The decision reinforces the purpose of the notice of intent (NOI) statute, said Royal Oak attorney Mark Granzotto.

GRANZOTTO

"The purpose of the NOI is not to trip up people," he said. "The NOI statute is designed to try to settle cases before litigation ensues."

In *Hoffman v. Boonsiri* (Lawyers Weekly No. 07-73969, 10 pages), Corinne Hoffman filed a NOI on Aug. 9, 2007, 17 months after the alleged medical malpractice. She later filed an amended NOI to add one more theory that wasn't in the original notice on Feb. 21, 2008. She filed her complaint June 23, 2008.

The trial court granted the defendants' motions for summary disposition, reasoning that the second NOI couldn't be used to give Hoffman "the ability to … '[enjoy] the benefit of multiple tolling periods.'"

The Court of Appeals vacated the trial court's decision.

"Absent some basis in the statutory language, defendants' contention that the 'benefit' of tolling should only be available in conjunction with the 'burden' of the waiting period is essentially an attempt to invoke a concept of fairness as a basis for dismissal," wrote Judge Pat M. Donofrio. "But to the extent that fairness is a relevant consideration, it clearly favors plaintiff's position."

Donofrio wrote that Hoffman could have filed her complaint as early as Feb. 5, 2008, so there was no basis to dismiss the complaint for being filed too early.

The court also found no basis for defendant's argument that the second NOI shouldn't toll the statute of limitations. Donofrio reasoned that the first NOI was filed early enough that it provided no tolling of the limitations period, so Hoffman didn't receive multiple tolling periods.

Granzotto, who argued Hoffman's case in the Court of Appeals, said the length of time between the two NOIs and the lack of progress made in the dispute was key to the case.

"It turns out that one of the quirks of this case was that the entire 182 days passed since the filing of the original and before the plaintiff filed the second NOI," he said. "If you look at the purpose, the simple fact was that they had all the time they needed to discuss settlement if that's what they were interested in doing."

He called the decision "a very literal reading of [the NOI statute]."

Granzotto said the early filing of the original NOI helped the case by allowing the statute of limitations to be tolled by second NOI under the Michigan Supreme Court's 2005 decision in *Mayberry v. Gen Orthopedics, P.C.* (Lawyers Weekly No. 06-56932, 12 pages).

The filing of the first NOI didn't toll the statute of limitations because it was filed more than 182 days before the limitations period expired.

"The Supreme Court ruled in *Mayberry* that the statute says you can't stack tolling periods," he said. "In *Mayberry*, the question was: do you get the tolling if you file a second NOI that was mailed with less than six months, and the answer was 'yes.' [The statute] says, if you mail out an NOI, you get the period of tolling called for if your case is going to be subject to the statute of limitations if it will expire during the waiting period."

SLANK

Boonsiri's attorney, Noreen L. Slank of Collins, Einhorn, Farrell & Ulanoff, P.C., said her client was prejudiced by the loss of a statute of limitations defense.

"The statute of limitations defense is a perfectly righteous defense," she said. "That's what's at issue here. To focus on the content of the NOI or the number of days waiting in the aggregate is to put the focus on the wrong thing. This is a statute of limitations issue. The plaintiff needs to get extra time from someplace because she filed her lawsuit late."

Slank said no precedent exists that would allow the plaintiff to get her notice period from a first NOI and tolling from a second one without having to wait out a second notice period.

"What this panel did is they basically divorced tolling from the statute that creates it, that says this good thing comes to those who wait," she said.

The decision violates three recent Supreme Court decisions — *Bush v. Shabahang* (Lawyers Weekly No. 06-70788, 58 pages), *Burton v. Reed City Hosp. Corp.* (Lawyers Weekly No 06-54488, 30 pages) and *Mayberry*, she said.

"Both [*Bush* and *Burton*] say that if you file before your notice period has expired, your case is going to be lost to the statute of limitations because, if you [file] too early, the statute isn't tolled," Slank said. "And in *Mayberry*, the opinion that says that if the plaintiff doesn't need the tolling from the first NOI, they're going to get it from the second one, but they just have to wait out the notice period.

"In this case, the plaintiff didn't use tolling. They came out of the first notice period with time left on the statute. They didn't file the lawsuit. Instead, they mailed a second NOI. *Mayberry* would have said 'You're fine with that. You just have to wait out the period of the second NOI.'"

She said she is considering appealing the decision to the Supreme Court.

Defendant Mercy Hospital's counsel, Beth Wittman of Kitch, Drutchas, Wagner, Valitutti & Sherbrook, didn't respond to *Michigan Lawyers Weekly*'s requests for comment on the decision.

Decision in a Nutshell

The Case: *Hoffman v. Boonsiri* (Lawyers Weekly No. 07-73969, 10 pages).

The Facts: Plaintiff filed a second notice of intent to amend a first defective one.

The Decision: While the statute of limitations was only tolled by the second, non-defective notice, the "notice period" began with the filing of the first one.

From The Decision: "Absent some basis in the statutory language, defendants' contention that the 'benefit' of tolling should only be available in conjunction with the 'burden' of the waiting period is essentially an attempt to invoke a concept of fairness as a basis for dismissal. But to the extent that fairness is a relevant consideration, it clearly favors plaintiff's position. …

"Plaintiff sent defendants notice of her intent to file a claim on August 9, 2007. Thus, she could have filed the complaint as early as February 5, 2008. She filed it on June 23, 2008. The timing of the original NOI and the complaint afforded the parties ample opportunity to examine and settle the claim without formal litigation."

If you would like to comment on this story, please contact Brian Frasier at (248) 865-3113 or brian.frasier@mi.lawyersweekly.com.