

Post Script

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National Survey Shows Reduction In Number of Med-Mal Claims, But Increase In Payout Values Over Two Decades



Brigham & Women's Issues Med-Mal Report

On March 27, 2017, the Brigham and Women's Hospital issued a report noting that the number of medical malpractice payments has decreased

by 55.7% over the past two decades. However the median payment value has increased. The report appears in the current March 27, 2017 edition of *JAMA Internal Medicine*.

Researchers at the Brigham and Women's Hospital analyzed paid medical malpractice claims for physicians in the United States from 1992 to 2014, based upon National Practitioner Data Bank statistics. This time frame covered 19.9 million physician years. Payments were adjusted for inflation based upon the Consumer Price Index.

This is the first analysis to evaluate medical malpractice claim payments, by physician specialty, at the national level.

The researchers found that there was an overall drop in the number of paid claims across all specialties. However, the magnitude of the decline was markedly different by specialty. It was found that the overall claim rate dropped 55.7%, with pediatricians enjoying the largest decline of 75.8%. OBGyn claims declined by 55.0%, anesthesiology claims decreased by 44.2%, ER claims decreased by 46.5%, and internal medicine claims declined by 46.1%. Neurosurgery claims decreased by 43.5%, and cardiologists reaped the smallest decline of 13.5%.

After adjusting for inflation, researchers found that the median payment amount increased by 23.3%, over 20 years, and was dependent upon the medical specialty involved. The percentage of payments exceeding \$1,000,000 also increased.

The JAMA article attributes the lower overall number of claims, but increase in million dollar plus payments, to the possibility that plaintiff attorneys are now less likely to prosecute claims with smaller values. The study also cited the potential that some institutions attribute claim settlements to the institution itself, rather than the doctor, when they believe an institutional error occurred. (Institutional settlements are not reported to the NPDB.) The study also cited to programs that resolve claims without requiring a written claim or lawsuit (known as "disclosure" or "apology" programs) as possibly accounting for fewer formal claims being filed.

The overall mean claim payment was \$329,565 for the 20 year period. The mean payment increased from \$286,751 in 1992-1996 to \$353,473 in 2009-2014. Of 280,368 claims paid over the 20 year period, 21,271 (7.6%) exceeded one million dollars.

The largest area of claims was in diagnosis errors at 31.8%, followed by surgical errors at 26.9%, followed by medication errors at 24.5%. By

contrast, anesthesiology was involved in 3.5% of claims.

The study found that 32% of claims involved patient deaths.

Pulmonologists were most likely to be involved in claims of patient death. Neurosurgeons were most likely to be involved in catastrophic cases with large future medical care expenses. Neurosurgery had the highest mean payment amount, and dermatology had the lowest.

The top 1% of claim paying physicians accounted for 7.6% of claims paid. The top 5% of claim paying physicians accounted for 23.3% of claims paid. The top 10% of claim paying physicians accounted for 39.4% of claims paid.

Neurosurgery remained the most likely physician specialty to be sued, followed by OBGyn.

The JAMA article can be found at:

<http://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2612118>

Attorney-Client and Attorney Work-Product Privileges Waived When Hospital Forwards Attorney Letter To Third Party Public Relations Firm



The Superior Court Finds Waiver in [BouSamra v. Excelsa Health](#).

On March 13, 2017, the Pennsylvania Superior Court released its opinion in the case of [BouSamra v. Excelsa Health](#). The Superior Court held that Westmoreland Regional Hospital waived attorney-client and attorney work-product privileges when it forwarded an email and legal opinion letter drafted by legal counsel to a third party public relations firm. The public relations firm was retained directly by the hospital.

Excelsa Health d/b/a Westmoreland Regional Hospital had filed an appeal as of right under Pa.R.A.P. 313 permitting the immediate appeal of a trial court order directing the disclosure of materials over which privilege was claimed.

Pennsylvania Appellate Rule 313 recognizes that the appellate review of orders directing the disclosure of arguably privileged documents cannot await the conclusion of trial court litigation.

Every first year law student has been taught, "You can't un-ring a bell."

The appellate courts recognize that the disclosure of privileged material forever changes litigation. Therefore, any order for the disclosure of arguably privileged material is eligible for immediate appellate review.

Excelsa and Westmoreland conducted an investigation and arrived at the conclusion that two physicians had performed unnecessary cardiac stent implantations. Excelsa and Westmoreland planned to publicly announce the results of their investigation, and the steps being taken to correct the problem.

The hospital retained legal counsel to assess the propriety and potential legal ramifications of making such a public announcement. An email and an opinion letter containing legal analysis was sent to the hospital by counsel. The public release of the physician names was approved by counsel.

After receiving the advice of legal counsel, the hospital hired a public relations firm, Jarrard, Phillips, Cate and Hancock, of Nashville, Tennessee. The Jarrard firm was retained to design a media campaign and instructed that the physician names were to be included in press releases and media.

The hospital forwarded the email and opinion letter from legal counsel to the Jarrard firm. From there, further discussions among Jarrard and Excelsa employees ensued.

It does not appear that there were any direct communications between legal counsel and the Jarrard firm.

The two implicated physicians filed suit. The two physicians alleged that Excelsa and Westmoreland had wrongly accused them of performing unnecessary cardiac stent placements. The defendants countered that the allegations were the result of a quality assurance / peer review investigation. The suit included claims of defamation and interference with contractual relations.

Through discovery, the existence of the counsel email and opinion letter was identified, and listed on a privilege log. The plaintiffs filed a Motion to Compel production of the email, and any related documents.

The Motion was heard by a Discovery Master who found that the documents were protected by attorney-client privilege. The Master did not rule on the claim of work-product privilege.

The trial judge, Stanton Wettick, disagreed. Judge Wettick found that privilege had been waived. Judge Wettick entered an order directing that the materials be produced. Judge Wettick focused upon the fact that Jarrard was not retained by legal counsel, and Jarrard's efforts were directed at designing a media campaign, and not related to legal advice.

An immediate appeal followed.

The Superior Court held that the privileges had been waived when the hospital provided the email and opinion letter to Jarrard.

The Superior Court noted that Excela failed to establish that Jarrard's role was to assist legal counsel. The Superior Court noted that the legal opinion letter was drafted *prior* to the retention of Jarrard. The Superior Court further noted that Jarrard was instructed by the hospital to name the two doctors in the media campaign. Further, there was no discussion between Jarrard employees and legal counsel as to the legal propriety of publicly naming the doctors. Therefore, Jarrard's opinions, whatever they might have been, were not considered by legal counsel as part of the legal review process. The Superior Court opinion suggests that the legal opinion letter was largely irrelevant to the duties assigned to Jarrard.

Following the announcement of the Superior Court decision, plaintiff counsel was quoted as saying, "We're very anxious to see them. I don't know what is in them. We'll just have to wait and see, but I'm expecting that it's something useful."

As of this writing, there is no indication as to whether an immediate appeal will be taken to the Pennsylvania Supreme Court.

Featured Photo
City Hall - Philadelphia

