



Understanding your Meddefense coverage —

about TMLT's benefits for TMB and other disciplinary actions

TEXAS MEDICAL LIABILITY TRUST

901 S. Mopac Expressway South
Barton Oaks Plaza V, Suite 500
Austin, TX 78746-5942

P.O. Box 160140
Austin, TX 78716-0140

800-580-8658
512-425-5800
Fax: 425-5996
www.tmlt.org

The only health care liability claim trust created and endorsed by the Texas Medical Association.

Published January 2010.

Understanding your Medefense coverage is published by Texas Medical Liability Trust as an information and educational service to TMLT policyholders. The information and opinions in this publication should not be used or referred to as primary legal sources or construed as establishing medical standards of care for the purposes of litigation, including expert testimony. The standard of care is dependent upon the particular facts and circumstances of each individual case and no generalizations can be made that would apply to all cases. The information in this publication is not a binding statement of coverage. It does not amend, vary, extend, or waive any of the terms, agreements, conditions, definitions, and/or exclusions in TMLT's policy or Medefense Endorsement. The information presented should be used only as a resource, selected and adapted with the advice of your attorney. It is distributed with the understanding that neither Texas Medical Liability Trust nor Texas Medical Insurance Company is engaged in rendering legal services.

© Copyright 2010 TMLT.

Preface

This brochure has been designed for physicians who want to learn more about TMLT's Medefense Endorsement. Medefense provides reimbursement for legal expenses for disciplinary proceedings and tax audits. Many TMLT policyholders do not realize that they have coverage that will reimburse them for the majority of legal fees and expert witness fees incurred in defending a Texas Medical Board (TMB) complaint and other types of disciplinary proceedings as defined in the Endorsement.

At TMLT, we have encountered a number of cases where physicians did not hire an attorney and/or notify TMLT when, for example, they received the initial written notice from the TMB. These physicians believed they could prepare a sufficient response to the Board and the matter would simply go away. Subsequently, when the physician learns the case is not going to disappear — as he or she has received a notice of investigation or notice that the matter is set for an Informal Settlement Conference — the physician decides to hire an attorney. At this point, the attorney may be at a disadvantage in preparing the physician's defense for a number of reasons.

This brochure will explain the details of the Medefense Endorsement, instruct physicians on how to report a Medefense claim, and provide some background information on the disciplinary function of the TMB.

For questions related to TMLT's Medefense coverage, please call 800-580-8658 and ask for the Claim Department.

About TMLT's Medefense endorsement

All TMLT policies that cover *individual physicians* include a Medefense Endorsement, which provides reimbursement for legal expenses for disciplinary proceedings and tax audits. According to the endorsement, disciplinary proceeding(s) means and is limited to the following:

- “1. any professional review action against the Named Insured by professional review body of a hospital, health maintenance organization, preferred provider organization, or managed care organization, which action is taken for the purpose of adversely affecting previously conferred clinical privileges or membership;
2. proceedings instituted by a state medical licensing authority against the Named Insured for unprofessional conduct;
3. proceedings instituted against the Named Insured by a professional review organization pursuant to part 1004 and 1005 of Title 42, Chapter V, Code of Federal Regulations for the purpose of imposing sanctions [these regulations deal with compliance issues under Medicare rules];
4. proceedings instituted against the Named Insured by a state department of insurance, state worker's compensation commission, state department of health and human services, or the United States Department of Health and Human Services, including the Centers for Medicare and Medicaid Services, alleging the Named Insured has performed medical services in violation of guidelines for appropriate utilization of services;
5. except as excluded by paragraph V(3) of this endorsement, proceedings by a state or federal governmental agency, including private contractors authorized to review the Named Insured billings to Medicare/Medicaid, against the Named Insured involving allegations of non-compliance with Medicare and/or Medicaid regulations or procedures;
6. proceedings against the Named Insured alleging violations of the Emergency Medical Treatment and Active Labor Act (EMTALA);
7. proceedings against the Named Insured alleging violations of the Health Insurance Portability and Accountability Act (HIPAA);
8. proceedings against the Named Insured alleging violations of sections 1877 and 1903(s) of the Social Security Act (Stark Law).”¹

The Medefense Endorsement also provides reimbursement for audit expenses associated with an individual physician's U.S. income tax return under examination by the Internal Revenue Service.

Conditions

Under the current Medefense Endorsement (effective January 2010), there is a 60-day reporting condition, meaning the policyholder must notify TMLT within 60 days from the date he or she receives written notice that a disciplinary proceeding or tax audit has been instituted.

When referring to the commencement of any disciplinary proceeding, “instituted” means the time formal written notice of a disciplinary proceeding is served upon the policyholder. For an investigation by a state medical licensing authority such as the TMB, this means the policyholder has received a “notice of complaint letter” (or a “notice of investigation” if the complaint was initiated by the Board themselves) informing the physician that a disciplinary proceeding has been instituted. Notice that a matter is under investigation — other than an investigation by a state medical licensing authority — or notice of a random audit does not constitute institution of a disciplinary proceeding. Instituted, when referring to a tax audit, means the time formal written notice of the tax audit is served upon the policyholder.²

Coverage under the Medefense Endorsement expires 60 days after the expiration of the policy or 60 days after its earlier cancellation date or non-renewal date. The Extending Reporting Endorsement/ tail coverage does not apply to the Medefense Endorsement.

Benefits

Medefense will reimburse the policyholder for reasonable legal and audit expenses up to \$25,000 per policy period. Medefense claims are subject to a \$1,000 deductible and a 10% coinsurance provision (the physician will pay 10% of the reimbursable expenses after application of the deductible). The 10% co-payment clause will be waived if you select an attorney from a panel provided by TMLT.

The coverage for tax audits is limited to a maximum of \$5,000 per policyholder, included in the \$25,000 maximum reimbursable limit. (An insured event is defined in the policy as a tax audit or a disciplinary proceeding.)

Please note: the deductible and co-payment apply only to Medefense and do not apply to medical liability coverage.

The TMB can impose a range of disciplinary actions or sanctions, which can include license revocation and suspension, probation, public reprimand, monitoring or other limitation/restriction on your practice, counseling or treatment, required educational or counseling programs, public service, and an administrative fine. However, Medefense does not reimburse the costs for any CME, counseling, or fines imposed by the TMB (e.g., in an Agreed Order) or the policyholder’s travel expenses to attend an Informal Settlement Conference or State Office of Administrative Hearing in Austin.

How to report

Physicians are strongly urged to do the following as soon as they are notified of any disciplinary action:

1. Notify TMLT as soon as you receive the initial letter from the TMB or other disciplinary authority. The policy states that a policyholder has 60 days to report an insured event to receive reimbursement for covered expenses. “In order to preserve coverage it’s very important that policyholders pay attention to that 60-day window in which to report knowledge of a proceeding,” says John Southrey, a claim supervisor with TMLT.

Please call the Claim Department at 800-580-8658 to report a Medefense claim.

2. Consider retaining an attorney to help draft your initial response to the TMB. Upon request, TMLT can provide policyholders with the contact information of attorneys who have experience handling disciplinary proceedings.

“Retaining an experienced attorney as early as possible in this process can help to shape the case,” says Southrey. “It provides the attorney with the opportunity for early interaction with the Board’s investigator, hopefully before the investigator has formed his or her impressions. It can also facilitate a clear, concise, and objective response to the Board’s complaint without subjective overtones.”

Working with an attorney who is knowledgeable of TMB proceedings can be advantageous because sometimes this can result in an early dismissal of the complaint. “I do not think that you can over emphasize the need to timely and thoroughly respond to the initial investigation letter from the Board,” says Gregory Myers, an attorney with Kroger, Myers, Frisby & Hirsch in Houston. “I have seen too many examples of cases where the physician responds on his own, or forwards a copy of the medical records without a response. Often the physician’s response does not contain what it should and can actually make matters worse.”

3. To expedite the reimbursement process under Medefense, promptly send the following information to TMLT:

- a copy of the initial written notice/letter informing the policyholder that a disciplinary proceeding has been instituted;
- copies of all legal expense invoices pertaining to the defense of the claim — the legal or audit expenses should be itemized on an hourly basis showing the services provided, the time incurred, and the hourly rate;
- copies of all payments made to the attorney or law firm representing the policyholder in the matter; and
- a copy of the dispositive letter describing the final outcome so the claim can be closed.

To learn more about Medefense, please contact the Claim Department at 800-580-8658.

The disciplinary function of the TMB

The Texas Medical Board (“TMB” or “the Board”) is a state regulatory agency that licenses, investigates, disciplines, and informs the public about physicians licensed in Texas. The Texas Medical Board consists of 19 members appointed by the governor — with approval by the Senate — and members serve in staggered six-year terms.

There are roughly 150 pages of statute (law) that govern the actions of physicians, and these are found in the Texas Medical Practice Act, which is in the Texas Occupations Code, Sections 151 to 165. Then there are the rules. All the regulations created by the TMB are found in Title 22 of the Texas Administrative Code, Sections 160 to 200. There are roughly 1,000 pages of regulations about the Board and its authority over physicians and the other professions it regulates.³

A violation of these laws and regulations can lead to disciplinary action by the TMB. The consequences of a single complaint can range from a dismissal to license revocation; enormous expenditure of stress and time; and damage to a physician’s professional reputation.

According to TMB statistics, between 2002 and 2009, there was a 219% increase in disciplinary actions and a 66% increase in the number of investigations opened. In fiscal year 2009, the TMB received 6,968 complaints. Of those, the TMB opened 2,873 investigations against physicians. In the same year, the Board disciplined 411 physicians.⁴

Standard of care violations account for 60% of TMB disciplinary actions. These violations can include failure to perform or document adequate physical examinations, failure to use laboratory and imaging studies as tools to diagnose, inadequate treatment and monitoring of a patient, and failure to appropriately assess, diagnose, and act on laboratory results.⁴

In addition to standard of care violations, there are many other ways a physician’s actions can initiate a TMB investigation. Some of the most common non-standard of care violations are listed below. Board rules that are cited can be found at www.tmb.state.tx.us/rules/rules/bdrules.php.

Non-therapeutic prescribing — the Board has taken an increasing number of actions against physicians who prescribe without a valid reason; who prescribe the same “pain cocktail” to every patient, frequently on a cash basis; and who prescribe to known abusers.

Prescribing to self, family, friends, or employees without keeping medical records. This violation can trip up well-meaning physicians. According to TMB rules, such prescribing is a violation if it is done “without taking an adequate history, performing a proper physical examination, and creating and maintaining adequate records.” Most TMB actions related to this violation involve prescribing controlled substances. It is always wise to create a patient record for anyone to whom a physician prescribes.

Impairment due to alcohol or drugs — physicians who practice while under the influence of alcohol or drugs are a danger to themselves, patients, and the public. The TMB has a rigorous drug-testing program for physicians under orders for impairment. A self-reported problem with drugs or alcohol, if there has been no other complaint and no patient harm, may allow for a nonpublic, nondisciplinary order.

Boundary violations — typically entail “inappropriate conduct involving physician-patient relationship.” Sometimes sexual or romantic, sometimes financial, such personal relationships can harm patients and ruin a physician’s reputation. Avoid becoming emotionally or financially involved with patients outside the office.

Inadequate medical records — the bane of many physicians because it can make it difficult to determine whether a physician is practicing within the standard of care. When a patient files a complaint and the records are inadequate to confirm why the physician did what he or she did, the Board may take action on the inadequacy of the records.

Administrative violations — the Board has the authority to enter agreed orders without an ISC for certain violations. These are referred to as “administrative violations” (formerly known as “minimal statutory violations”) and can include the following.

- Failure to provide medical records in a timely fashion — the TMB rule requires a physician to provide properly requested records within 15 business days.
- Failure to obtain required CME. Board rules require at least 24 hours of CME each year, with at least 12 hours being category I, and at least one hour in ethics or professional responsibility. Additional requirements can be found in Chapter 166, section 166.2.
- Inappropriate advertising includes advertising that is misleading or contains testimonials. Touting nonexistent board certification, or certification with a non-approved board, is also a violation of Chapter 164 of the Board rules.
- Failure to sign a death certificate. Section 193.005(c) of the Texas Health and Safety Code requires that a physician sign a death certificate within 10 days of receipt.

For administrative violations, the TMB is required to notify the physician that they have evidence of a violation and to offer the physician the option of signing an order and paying a fine instead of appearing at an Informal Settlement Conference (ISC). If the physician wishes to contest the allegation, the option of attending an ISC is still available and the complaint process will proceed.

The new rules are intended to provide incentives for physicians and the Board to resolve administrative violations quickly. Administrative violations will be part of the physician’s public profile and the agreed order will be subject to open records requests. However, administrative violations will not be reported to the National Practitioner Data Bank.

Common sense solutions

Should you find yourself involved in the Board disciplinary process, the following is a list of common sense solutions.

Hire an attorney with experience dealing with the Board. You should hire an attorney knowledgeable about the Board's investigation process and its rules/procedures. Dealing with the laws governing state agencies (known as administrative law) is a rule-specific process, and hiring an experienced attorney will aid you greatly.

Cooperate. There is no reason to be difficult with the Board. The TMB has tremendous authority to gather information and is able to gather the information it needs with or without your help. Why make the Board members angry?

Be honest. If you made a mistake, it is better to admit it; Board members understand that mistakes are made. (Perfection is not the standard of care.) There is no reason to make them think you have something to hide.

Keep good records. Good records can make all the difference in quality of care cases. The Board strongly believes in the axiom: "if it is not documented, it was not done."

Communicate. Most complaints submitted to the Board are the result of poor communication. Patients, their families, staff, and colleagues all feel that the better communicator you are, the less likely you will experience a Board complaint.

Sources and resources

Sources

1. TMLT policy Medefense Endorsement. Coverage agreement, paragraph 1.
2. TMLT policy Medefense Endorsement. Coverage agreement, paragraph 3.
3. Texas Medical Board. Board rules. Available at <http://www.tmb.state.tx.us/rules/rules/bdrules.php>. Accessed December 7, 2009.
4. Brockway L, Holeman J, Porter J, Wiggins J. Understanding the Texas Medical Board — a resource for physicians. *the Reporter*. November-December 2009. Available at <http://www.tmlt.org/services/publications/thereporter.html>. Accessed December 7, 2009.

Resources

For additional information on the Texas Medical Board, please see the following TMLT publications.

Brockway L, Holeman J, Porter J, Wiggins J. Understanding the Texas Medical Board — a resource for physicians. *the Reporter*. November-December 2009. Available at <http://www.tmlt.org/services/publications/thereporter.html>.

Simmons S, Ballard D. Surviving a TMB investigation. *the Reporter*. January-February 2008. Available at <http://www.tmlt.org/services/publications/thereporter.html>.

Porter J, Holeman J. Dissolute documentation? TMB rewrites the rules for medical records. *the Reporter*. March-April 2007. Available at <http://www.tmlt.org/services/publications/thereporter.html>

Wiggins J. Through the labyrinth: the TMB investigation and litigation process. *the Reporter*. March-April 2007. <http://www.tmlt.org/services/publications/thereporter.html>.

Porter J. TMB Investigations — Second Edition. TMLT online CME course, released March 15, 2007. Available at <https://www.tmlt.org/courseinsite/catalog.html>.

Tauzin A. TMB Action? Alert TMLT's Medefense. *the Reporter*. November-December 2006. Available at <http://www.tmlt.org/services/publications/thereporter.html>.

Luckie M. The TSBME in transition. *the Reporter*. September-October 2004. Available at <http://www.tmlt.org/services/publications/thereporter.html>.

