

TMLT — positioned for the future

by Tom Cotten, President and Chief Executive Officer

1999 was a banner year for TMLT. We celebrated our 20th year in business and watched our policyholder count grow to 10,000. Indeed, reasons to celebrate. But, 1999 has also been a year replete with increased malpractice claims, high damage awards, insurance pricing wars, and conflicting information about medical liability insurance rates.

An article published in the December 1999 issue of *Texas Medicine* may cause some confusion about the current state of malpractice insurance rates in Texas. As you will read in TMLT's formal response to this article in the January issue of *Texas Medicine*, TMLT is experiencing an increase in both claims frequency and severity. Currently, 35.4 claims are filed for every 100 physicians we insure. This is up from 22.1 in 1996 and 18.1 in 1997. In 1999, TMLT's average paid claim was \$180,000, compared to \$136,000 in 1995 and \$152,000 in 1994. Essentially, more TMLT policyholders are having claims filed against them, and it is costing TMLT more money to settle or close those claims.

Based on this information, and on recommendations from our actuary, the Board of Governors approved rate adjustments for the year 2000. Specific information on rate adjustments will be provided with your policy renewal materials. Additionally, we will be distributing TMLT 2000 information kits to all policyholders. These kits will further explain the rate adjustments, answer commonly asked questions and provide sources for further information.

Despite this increase in claim activity, TMLT continues to fight harder than ever to protect your professional reputation. Our trial record remains outstanding. So far in 1999, we've won 72 of 80 cases taken to trial, and we closed more than 85 percent of claims without indemnity payment.

Our success in the courtroom aside, of great concern to TMLT is the

cause of this increased claim activity. More and more physicians are being sued, and we need to find out why. TMLT will participate in the TMA claim frequency and severity data study, along with two other malpractice carriers. However, our preliminary information indicates the tort reform initiatives passed in 1995 were a temporary fix, and the long-term benefits have not occurred. We are currently experiencing pre-tort reform levels of claims frequency.

Lawsuit abuse continues to be a serious problem. TMLT and other insurance companies across the state spend millions of dollars, your premium dollars, defending meritless lawsuits. Physicians are forced to spend time away from their patients, their practices, their families to meet with attorneys, complete paperwork or sit in a courtroom. Health care costs swell as the price of health care liability is reflected in the cost of everything from prescription drugs to medical equipment. Health care delivery is seriously impaired when physicians fearing a lawsuit either quit or refuse to enter high-risk specialties or practice in high-risk areas.

Equally disturbing is the public's perception of physicians in light of national media stories on medical errors, such as a report from the National Academy of Sciences' Institute of Medicine. This report cites studies showing between 44,000 and 98,000 people die each year because of mistakes by medical professionals. In light of this study, President Clinton is forming a federal task force to address patient safety and the prevention of medical errors. A public that has little faith in its physicians is a public that will continue to sue them.

We must seek long term solutions. Additional tort reform measures, such as limits on non-economic damages and limited attorney contingency fees could discourage meritless lawsuits. TMLT will be working with the TMA

to address tort reform during the legislative session in 2001, and we urge you to become involved in the process. For additional information, please visit the TMLT web site at www.tmlt.org, and watch your mail for your TMLT 2000 information kit.

Despite all the challenges facing TMLT over the next year, we will continue to provide physician-centered service and unique benefits.

“More and more physicians are being sued, and we need to find out why”

Our Risk Management practice reviews are designed to provide you with instant feedback. We will continue to present CME courses across the state for physicians and their office staffs. We will also be offering four new online CME courses through our web site. These courses include:

- Medical Records Handbook
- Medication Errors
- Failure to Diagnose Cancer
- Avoiding Disaster in the Medical Office: Lessons from the Titanic

By participating in these Risk Management programs, you can earn premium discounts and accredited CME, including ethics hours.

Also for 2000, we have restructured our premium discount programs. Policyholders with favorable loss experience can now receive premium discounts through TMLT's Claim Free Discount Program or Experience Discount Program. Contact your Underwriter for additional information.

The TMLT web site will serve as your source for instant information in the year 2000. Visit the site to find out about TMLT's products and services, the latest information on tort reform and medical liability issues.

TMLT offers physicians practice-based CME

by Lesley Lopez, Education Coordinator

Traditionally, continuing medical education (CME) has been provided at seminars and workshops or as self-paced programs, such as videotapes and home-study programs. To augment traditional CME, TMLT has developed an innovative practice-based CME program that incorporates an optional CME activity into the currently available Risk Management practice review to provide practical, individualized CME for TMLT insured physicians.

Beginning January 1, 2000, the Risk Management practice reviews that are performed at the request of a TMLT insured physician will include an opportunity for the physician to earn 2 hours of Category I CME credit, in addition to the premium discount currently available. The education theory supporting the awarding of Category I CME credit for practice-based activities is that the learning process takes place when the physician reflects on and analyzes his or her practice and is coached on ways to improve.

The TMLT Risk Management practice review includes the completion of an office evaluation form prior to the visit; a tour of the facility for patient/staff concerns; a discussion of the practice's policies and procedures; medical records review for charting strengths and weaknesses; scheduled time with the physician(s) to discuss the recommendations; and a written follow-up letter with recommendations for physician review and required responses. The process takes an average of 5 hours.

In order to receive the two hours of CME, the physician must first complete a self-assessment survey tool. This tool must be requested at the time the practice review is scheduled and completed prior to the visit. It will not be available on the day of the actual practice review.

Secondly, at the conclusion of the practice review, the physician must participate in a one-hour discussion with the Risk Management representative regarding identified areas of potential liability, recommended risk management interventions, and

other risk management issues. Upon completion of the CME portion of the practice review, the physician will be able to reflect and analyze aspects of his/her medical practice that have critical risk management implications; and discuss potential risk management improvements relative to his/her own medical practice.

All TMLT insured physicians may participate in the Practice-Based CME program, and doing so is highly recommended in order to gain maximum benefit from the process. Evaluations will be conducted and data from these evaluations will be used to improve the effectiveness of the program.

For more information on Risk Management practice reviews and the associated CME program, call Shanna Homann at (800) 580-8658, ext. 5910.

Y2K: legislative update

In July of 1999, President Clinton signed into law a bill that may limit lawsuits related to Y2K computer problems. Under the law, businesses will have 90 days to repair a computer-related Y2K problem before a lawsuit can be filed. The 90 day period begins when the officers of the business are notified of the problem. The law also sets a ceiling on punitive damages facing small businesses. The bill narrows the extent of an aggrieved class in a class-action lawsuit and attempts to ensure that most defendants will be held liable only for the share of any damages that they cause.

In Texas, House Bill 40, which deals with limiting liability for damages related to computers and software failing to recognize and accurately process dates in the context of Y2K, was returned to committee by the 76th Legislature. This interesting piece of legislation is dead for now, so it will not be in place for New Year's Day, 2000.

Sources: Texas Legislature Online, August 30, 1999; *New York Times on the Web*, August 27, 1999.

CONSENT for the treatment of MINORS



Six-year-old Brandi is back in your office again with an upper respiratory bug. With Brandi is someone who identifies herself as Brandi's neighbor and shows you a court order indicating that she has temporary custody of Brandi. She says that Brandi's mother is in a drug rehabilitation facility and nobody knows where her father is. When you look in Brandi's chart, you see that Brandi's mother has requested her child's records with a signed form and has called three times demanding the records immediately. Situations like this one happen every day, so here is a review of some important information related to the treatment and medical records of minors.

A minor is a person under age 18 who has never been married and never been declared an adult by a court. Texas law gives parents the duty to provide the child with medical and dental care and the right to consent to the minor's medical, dental, psychiatric, psychological and

surgical treatment. These rights are subject to a court order affecting the rights and duties of the parents (Texas Family Code §151.003). In a divorce situation, the rights of the parents to consent to medical care are usually spelled out in the decree.

The Texas Family Code lists instances where a minor child can consent to certain types of medical treatment on his or her own. A physician may rely on a written statement by the minor containing the grounds on which the minor has capacity to consent to treatment:

- A minor on active duty with the armed forces of the United States can consent to any medical treatment.
- A minor who is 16 years of age or older, residing apart from his or her parents, managing conservator or guardian regardless of the duration of the residence, and manages his or her own financial affairs, regardless of source of income, can consent to any medical treatment.
- A minor who is unmarried and pregnant can consent to treatment related to the pregnancy other than abortion. Physicians must comply with the parental or judicial bypass notification requirements found in Chapter 33 of the Texas Family Code prior to performing an abortion on an unemancipated minor.
- A minor can consent to diagnosis and treatment of any infectious, contagious or communicable disease that is reportable to the Texas Department of Health.
- A minor can consent to examination and treatment for drug or chemical addiction, dependency, or any other condition related directly to drug or chemical use.
- A minor can consent to counseling for suicide prevention, chemical addiction or dependency, or sexual, physical or emotional abuse (Texas Family Code §32.004).
- An unmarried minor who has "actual custody" of his or her own

biological child can consent to medical, dental, psychological, and surgical treatment for the child (Texas Family Code §32.003).

Note that the Family Code does not appear to give minors the right to consent to contraceptives or other prescription birth control devices. Under the Family Code, a physician may, with or without the consent of the child who is a patient, advise the child's parents, managing conservator, or guardian of the treatment given to or needed by the child.

Divorced Parents

The parent appointed sole managing conservator (the parent who has custody of a child) has the right to consent to medical, dental, and surgical treatment involving invasive procedures, and the right to consent to psychological or psychiatric treatment of a child (Texas Family Code §153.132).

During the period that the parent appointed possessory conservator (the parent who does not have custody of a child) has possession of the child, he/she has the right to consent to medical and dental care not involving an invasive procedure, unless specifically limited by a court order (Texas Family Code §153.074). Only during an emergency involving an immediate danger to the health and safety of the child, does the possessory conservator have the right to consent to invasive medical, dental and surgical treatment (Texas Family Code §153.073). The possessory conservator has at all times the right of access to medical, dental and psychological records of the child. This parent also has at all times the right to consult with a physician, dentist or psychologist of the child (Texas Family Code §153.073).

In 1995, the 74th Texas Legislature made major changes to Texas laws governing dissolution of marriage and child custody. While the previous practice was for a court to name a

managing conservator and a possessory conservator, the law today is that, unless the court finds that appointment of a parent would not be in the best interest of the child, “both parents shall be appointed as joint managing conservators of the child,” (joint custody) (Texas Family Code §153.131). The court granting the divorce may allocate the rights and duties of the joint managing conservators, which effectively means that either both parents may have the right to consent to invasive procedures or only one may have that right.

For all situations involving divorced parents, the physician should ask the parent and document the answer. If any doubt remains, it is wise to request to see a copy of the court order. Any conservator has the right to be designated on the child’s records as a person to be notified in case of an emergency.

Non-parents

There are exceptions to the rule that only parents may consent to their children’s medical treatment. If a non-parent brings a child to a physician’s office, that non-parent may be able to consent to the medical treatment of the child, depending on his or her relationship to the child. The Family Code lists other persons and entities who may consent for medical treatment of children when the person having the power to consent cannot be contacted and actual notice to the contrary has not been given (Texas Family Code §32.001):

- grandparent
- adult brother or sister
- adult aunt or uncle
- any educational institution in which the minor is enrolled and that has written authorization from persons having power to consent
- any adult who has actual care, control and possession of the minor and has written authorization from a person having the power to consent
- a court having jurisdiction over a suit affecting the parent-child relationship of which the child is the subject

- an adult responsible for the actual care, control and possession of a child under the jurisdiction of a juvenile court or committed by a juvenile court to the care of an agency of the state or county

- a peace officer who has lawfully taken custody of a minor, if the peace officer has reasonable grounds to believe the minor is in need of immediate medical treatment

- for immunizations only, a guardian or any person authorized under the law of another state or under a court order to consent for the child; if these persons are not available, any one of the persons listed above may consent

The Family Code specifies that, when a non-parent gives consent for treatment, the consent must be in writing and must include:

- name of the child
- name of one or both parents, if known
- name of any managing conservator or guardian of the child

from what reasonably appears to be a life-threatening injury or illness and whose parents, managing or possessory conservator, or guardian, is not present.” Naturally, the appropriate staff should continue efforts to notify a parent and secure consent for continuing treatment. In a divorce situation, both the managing conservator and the possessory conservator have the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child (Texas Family Code §153.073).

Access to Medical Records

The duty to provide treatment and the right to consent to treatment logically imply the right of access to information necessary to make treatment decisions.

The Texas Family Code provides that, unless limited by a court order, a parent appointed as a “conservator” (managing or possessory) of a child

For all situations involving divorced parents, the physician should ask the parent and document the answer. If any doubt remains, it is wise to request to see a copy of the court order.

- name of the person giving consent and his or her relationship to the child

- statement of the nature of the medical treatment to be given
- date the treatment is to begin (Texas Family Code §33.002).

Specific written consent is not required or advised for parents who accompany the minor.

Emergencies

In a case where a minor’s condition requires prompt attention for the preservation of life and limb, such attention should be given immediately regardless of whether parental consent has been received. The Health and Safety Code (§773.008) provides that “consent for emergency care for an individual is not required if the individual is a minor who is suffering

has at all times the right of access to medical, dental, psychological, and educational records of the child. Both the managing conservator and the possessory conservator have the right of access to the child’s medical records and the right to consult with a physician, dentist or psychologist about treatment. The physician does not need the consent of the other conservator to release health information. In joint custody situations, both joint managing conservators have access to the child’s medical records unless specifically limited by the court granting the divorce.

This article was reviewed by Mary Angela Meyer, JD, law firm of Franklin, Cardwell & Jones, Houston, TX.

in the last 20 years . . .

As TMLT celebrates 20 years in Texas, here's a review of a few noteworthy events from the last two decades:

- 43.9 million people have been born in the U.S. (U.S. Census Bureau).
- The population of Texas has grown to 9.8 million (Texas Department of Economic Development).
- The population of the world has increased to an estimated 6 billion (World Health Organization).
- 42,900 Texans have earned medical licenses (State Board of Medical Examiners, licenses issued since January 1, 1979).
- More than 27 percent of the human genome has been sequenced. By spring 2000, 90 percent of the human DNA sequence will be available as "working draft" to researchers (National Human Genome Research Institute).
- Smallpox was eradicated from the earth. The first and so far only disease destroyed by medical science (World Health Organization).
- More than 90 percent of *Staph aureus* strains are resistant to antibiotics. As many as 40 percent of strains of *pneumococci* are partially or completely resistant to antibiotics. In 1992, death from hospital-acquired infection became the 11th leading cause of death (Centers for Disease Control and Prevention).
- American life expectancy rates have increased from 70.1 years to 73.8 for men and from 77.6 to 79.4 for women (Bureau of Vital Statics).
- 8.7 million Americans have died from cancer (Bureau of Vital Statistics).
- 4.8 million children have been diagnosed with Asthma (estimated, the American Lung Association).
- 13.4 million Americans have died from heart disease (Bureau of Vital Statistics).
- AIDS has killed 13.9 million people worldwide (Centers for Disease Control and Prevention).
- The American with Disabilities Act was signed into law in 1990.
- Minimum wage rose from \$2.90 to \$5.15 (Bureau of Vital Statistics).
- An estimated 70 million Americans have used the internet (Nielsen Media Research).
- First heart-lung transplant was performed in Texas at Methodist Hospital in Houston (1985).
- The first artificial heart transplant was performed (1982).
- Magnetic Resonance Imaging was introduced.
- Scottish scientists cloned an adult sheep producing a lamb named Dolly (1997).
- In 1997, the FDA approved the use of irradiation to control disease-causing microorganisms in meat products (Food and Drug Administration).
- Nearly 90 percent of patient-care physicians have at least one managed care contract. An estimated 161 million Americans belong to some form of managed health care plan (U.S. Department of Health and Human Services).
- The bacterium *Helicobacter pylori* is found to be a cause of duodenal and gastric ulcers (The National Institutes of Health).
- Worldwide, about 8 million new cases of Tuberculosis occur each year (Centers for Disease Control and Prevention).
- Human insulin was first produced through genetic engineering in 1982.
- New refractive eye surgery procedures were introduced, including photorefractive keratotomy (PRK), automated lamellar keratoplasty (ALK) astigmatic keratotomy (AK) and Laser in-situ Keratomileusis (LASIK).
- Cancer death rates declined in the U.S. by an average of 0.6 percent per year between 1990-1996. The incidence rate for all cancers has decreased an average 0.9 percent per year between 1990-1996 (National Cancer Institute).
- Researchers discover genetic errors are responsible for an estimated 3000-4000 diseases, including Huntington disease, sickle cell anemia, and cystic fibrosis. Altered genes are also found to play a part in cancer, heart disease and diabetes (National Institutes of Health).
- Lithotripsy was introduced to treat kidney stones and gallstones.
- Researchers discovered that humans create new brain cells in adulthood (1998, *Nature*).
- The drug Cyclosporin was made available for clinical use, dramatically improving the success rate of organ transplants.
- Laparoscopic and endoscopic surgical procedures were advanced, leading to a new era of minimally invasive therapy (*Laparoscopic Surgery Update*).
- The National Cancer Institute began initial clinical trials of the anti-angiogenesis drug endostatin. The NCI estimates that 20 angiogenesis inhibitors are currently being tested in human trials.
- In 1996, spending on health care exceeded \$1 trillion.



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TO OUR READERS:

As you can see from the masthead, a change in *Reporter* staff has occurred. The new Managing Editor is Barbara Rose, Risk Management Representative.

We welcome your comments or suggestions for change and articles to be considered for publication. Our goal is to determine your preferences and respond with meaningful information that will improve risk management practice for physicians and their staff.

Mail, phone, fax or e-mail Barbara. We look forward to your input.

All articles and any forms, checklists, guidelines and materials are for general information only, and should not be used or referred to as primary legal sources nor construed as establishing medical standards of care. They are intended as resources to be selectively used and always adapted — with the advice of the organization's attorney — to meet state, local, individual organizations and department needs or requirements. The Reporter is distributed with the understanding that neither Texas Medical Liability Trust's Risk Management Department nor Texas Medical Liability Trust is engaged in rendering legal services.

Inside INSURANCE

Time for a check-up

In the last five years, physicians have formed groups at a rate never seen before. Health care networks are employing many physicians who previously were in individual practices. Today, many physicians find themselves part of an entity that affects their liability in ways they never imagined. At the same time, busy physicians are turning to licensed, well qualified individuals to perform some of the tasks they used to perform themselves. Increasingly, complex and specialized procedures are being delegated to staff.

When was the last time you took a look at the overall insurance status of your practice, your group, or your

network? Do you know what risk exposures you have? It may be time for a review of insurance policies, including professional liability policies. If new physicians, nurses, or other licensed individuals have begun to practice with you, you would want to be sure that all licensed individuals are covered. Are there any gaps in coverage? Are tail coverage policies in place for physicians and other licensed individuals who have been previously employed by your group or network? Are the policy limits what you remember them to be?

Maintaining certificates of insurance for professional liability on all licensed individuals working in your

group may be an advantage should a claim be alleged against them for a negligent act or omission. Your TMLT underwriter can advise you of how this is done and how you can assure that individuals working with and for you, or providing services, have adequate insurance. This may reduce the opportunity of becoming responsible for someone else's liability. Consider the need for coverage for the following individuals, among others: CRNA, part-time employed physicians, locum tenens, radiology tech, equipment service technician, registered nurse, and certified nurse midwife.