Mandatory malpractice insurance: Can they do it?

With the increasing magnitude of the malpractice crisis, more and more hospitals and other health care institutions throughout the nation are adopting policies or resolutions requiring practitioners and other allied health personnel to maintain professional liability (malpractice) insurance as a condition of continued or initial employment or staff membership. This has become a rather sensitive political issue in many health care institutions, since, not only is it alleged to encroach the prerogatives of the individual practitioners, but also the rapidly escalating cost of malpractice insurance makes such a requirement more and more expensive to comply with.

The obvious motivation of the health care institutions is to counter the developing trend for health care professionals to go "bare," that is, practice without protection of professional liability insurance.

In any malpractice case, it is customarily a requirement that the plaintiff's counsel direct the presentation of the case to the culpable defendant. However, hospitals very pragmatically contend that the plaintiff's counsel also has another responsibility, which is, to ensure that in the event of a verdict in favor of his client, that money damages will be collectable. If the party is uninsured or has low limits of liability insurance, the plaintiff's attorney is faced with a dilemma, the solution of which is to alter the presentation of the case in accordance with the probability of collecting a verdict.

In many states, the law does not permit contribution among joint tortfeasors. Each culpable defendant is jointly and separately liable for whatever verdict is entered in the case. For example, if a hospital and two practitioners are found guilty of professional negligence in a given case, the jury assesses one verdict against all three in a hypothetical sum of $100,000. The plaintiff's counsel then has the option of requiring any defendant of the three found guilty to pay the full verdict of $100,000. The defendant who is required to pay has no recourse or other cause of action against the other defendants to get them to contribute to the satisfaction of that judgment. Although, as a matter of practice, plaintiffs normally execute against all defendants equally, requiring each to pay one-third of the total judgment, or in our hypothetical case $33,333 per defendant.

If, however, one of the two practi-
tioners has only $10,000 of insurance coverage, the plaintiff would have the option of accepting the limits of the insurance policy of $10,000 and then compel the two remaining defendants to satisfy the $90,000 remaining of the judgment, paying $45,000 each. If one of the practitioners has no insurance, the plaintiff has the option of requiring the other practitioner's insurance company and the hospital to fully satisfy the judgment.

Compromise settlements

Similar problems arise when dealing with the potential compromise settlements. Attorneys and courts often attempt to evaluate the degree of responsibility of each defendant. Therefore, although occasionally a case may deem to have a settlement value of $100,000, the defendants typically agree among themselves as to the amount of contribution by each. It is in these informal settlement conferences that attempts are made to determine the responsibility of each party; and therefore, the practitioner who “slipped” will in all probability pay a greater portion of the settlement. The presence of a party with no insurance or with low limits of liability insurance greatly reduces the ability to negotiate settlements and places full responsibility for any significant settlements on the insured defendants.

Under this scenario, it becomes obvious that it is in the best interest of the hospital and the other practitioners working at the hospital to protect against an increased liability exposure, due to the fact that a staff member elects, for his or her own economic benefit, to become uninsured. There had been few reported cases which test the legal propriety of such a mandatory malpractice insurance situation. However, the existing body of the law, which defines the legal relationships of the hospital and its staff, seems to indicate that such action is legally permissible.

It is well established that the ultimate responsibility for the operation of the hospital and for the performance of surveillance of the quality and adequacy of the health care rendered within the hospital is held by the board of directors. The hospital board of directors generally delegates to the staff the responsibility to initially perform the credentialing function and to formulate recommendations regarding the granting of staff membership and clinical privileges. In performing its credentialing function, the staff (acting through its organized subcommittees) serves as an agent for the institution. Within the legal framework of our discussion, the staff is not an independent body, but rather an agent of the hospital to which some functional autonomy has been granted.

The issue, however, has been dealt with in Louisiana. In Pollock vs. the Methodist Hospital, (392 Fed. Supp. 393-Louisiana), the United States District Court held that a requirement that a medical staff member submit a statement of insurance in the amount of at least $1,000,000 was within the authority of the hospital and that immediate suspension of the plaintiff who had not complied with that requirement was also appropriate. That physician's suspension was revoked, pending a hearing. After the hearing, the Board of Directors again suspended the medical privileges. The court also held that the doctor had no liberty or property interests sufficient to invoke due process requirements of the Fourteenth Amendment and further found that the hearing afforded the doctor was more than adequate procedural due process.

I do not necessarily advocate that all nurse anesthetists petition their respective hospitals to adopt a mandatory malpractice policy. Such a policy would, however, afford the nurse anesthetist who has adequate insurance protection additional protection for hospital liability for acts performed by an uninsured or inadequately insured surgeon or supervising anesthesiologist. Furthermore, if such a policy is proposed at your hospital, it should be evaluated relative to the extent of the malpractice crisis within your state and local factors.