



# Professional Liability Insurance

A PRACTICAL GUIDE  
FOR THE MEDICAL  
PRACTITIONER

By Padraic B. Deighan, M.B.A., J.D.

legal case of the month

In the last issue, I addressed the consequences of providers who practiced outside the scope of their licensure and the risk they faced with their professional liability insurance. An entire course could be devoted to the subject, but several of the pertinent issues are discussed here.

## THE HISTORY OF MALPRACTICE INSURANCE

For many years, professional negligence insurance was pretty simple. Historically, we called it "malpractice insurance," and today "professional negligence" is the term of art. Essentially, physicians would indicate their specialty and

answer a few questions about the services relative to their specialty. The physicians then decided whether they desired "claims made" or "occurrence" coverage. The premiums reflected the desired coverage. Most policies were essentially the same once the "claims made" or "occurrence" coverage was selected.

In the mid to late 1990s, heavy losses in the insurance sector and reinsurance markets as a result of escalating professional negligence awards caused

many insurers to no longer offer "occurrence" policies. Physicians then had to consider "tail" coverage to protect them against a gap in coverage.

Also in the mid 1990s, cosmetic medicine began to rapidly accelerate via the development of newer laser technology and filler substances.

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Surgical procedures also began to evolve into less expensive options and shorter periods of down time for

the patient. Predictably, there was a significant increase in the number of cosmetic medical procedures. Also predictably, non-“core” physicians entered the delivery system. The “core” physicians were typically the plastic surgeons, dermatologists, and facial and oculo-plastic surgeons who customarily would perform virtually all mainstream cosmetic medical procedures.

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Even more recently, many of these same procedures are being performed in spas and medical spas by non-physicians (frequently in legally unsupportable manners). Medical spa franchises have emerged as well, and this added another type of facility to an already confused industry.

The insurance industry was already in turmoil from liability losses and now had to confront new issues that included higher risk and underwriting challenges. Coverage was already being limited, and many physicians could not get insurance regardless of cost.

The coverage concerns have, to a large extent, corrected themselves in the insurance market. Fortunately, claims from cosmetic procedures have not been as dramatic as initially feared. This is the good news.

### **A NEW BREED OF POLICIES**

This situation has fueled the rise in new insurance products. This has

resulted in confusion. The goal of this article is to convince you that it is VERY important for you to review your coverage in view of the issues discussed here.

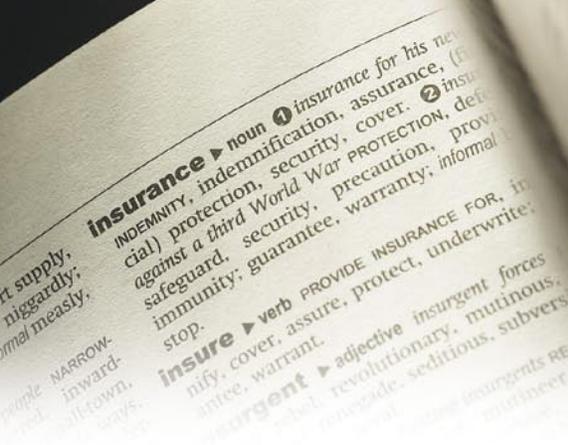
There is now a wider variety of professional negligence policies, and care should be taken in the decision process. The traditional professional negligence policies still exist. However, the policies now have varying languages that clearly limit or restrict coverage. The policies require a physician to do more than just submit an application or yearly

renewal. For example, I recently became a consultant for a medical professional negligence insurance

company. During a strategy meeting with their risk managers, one stated to me that they deny coverage for employees of physicians unless the employees are specifically named in the policies! This was a new one on me! I inquired where that was written, and after some discourse they admitted that they may not be able to enforce that. However, they clearly will try; and this will cause delay in litigation and resolution and cost physicians additional and unnecessary time and money.

Accordingly, I advise clients to send a copy of ALL advertising with applications or renewals. Send them certified mail or other confirmed delivery. This somewhat shifts the focus on the insurance company to





inquire further of the physician if there are underwriting issues.

Another step would be speaking with the agent or underwriting department to clarify the issues. It would then be prudent to send a letter confirming the substance of the conversation and any resolutions discussed. This should be done yearly.

### LIMITATIONS IN COVERAGE

The difficult challenge is that the coverage language has changed and clearly limited coverage. Many procedures are now excluded. Physicians who are practicing out of their specialty are at specific risk. Why do you think the carrier inquires about your specialty? It determines the risk. OB/GYNs traditionally pay the highest premiums because they have had the highest exposure on liability risks. This is unfair and it is unfortunate, but it is the historical and actuarial basis for the higher premiums. When you disclose your specialty, the carrier is going to assume that these are the

services you are providing; and in the past, this would have been true. The irony is that an OB/GYN doing exclusively cosmetic procedures (whether advisable or not) would probably have a decrease in his or her premiums!

This is all why it is essential to specifically disclose what you are doing. However, even if you do this, there are probably "gaps" in your

coverage because regardless of notice to the carrier, the services may be outside of coverage. In these instances, you may need to obtain an additional policy to cover those risks. This is one of the changes in the insurance industry. There are now ala carte additions to existing coverage. This additional coverage is achieved via rider (at a cost) to the existing policy. There are also separate policies that supplement existing coverage.

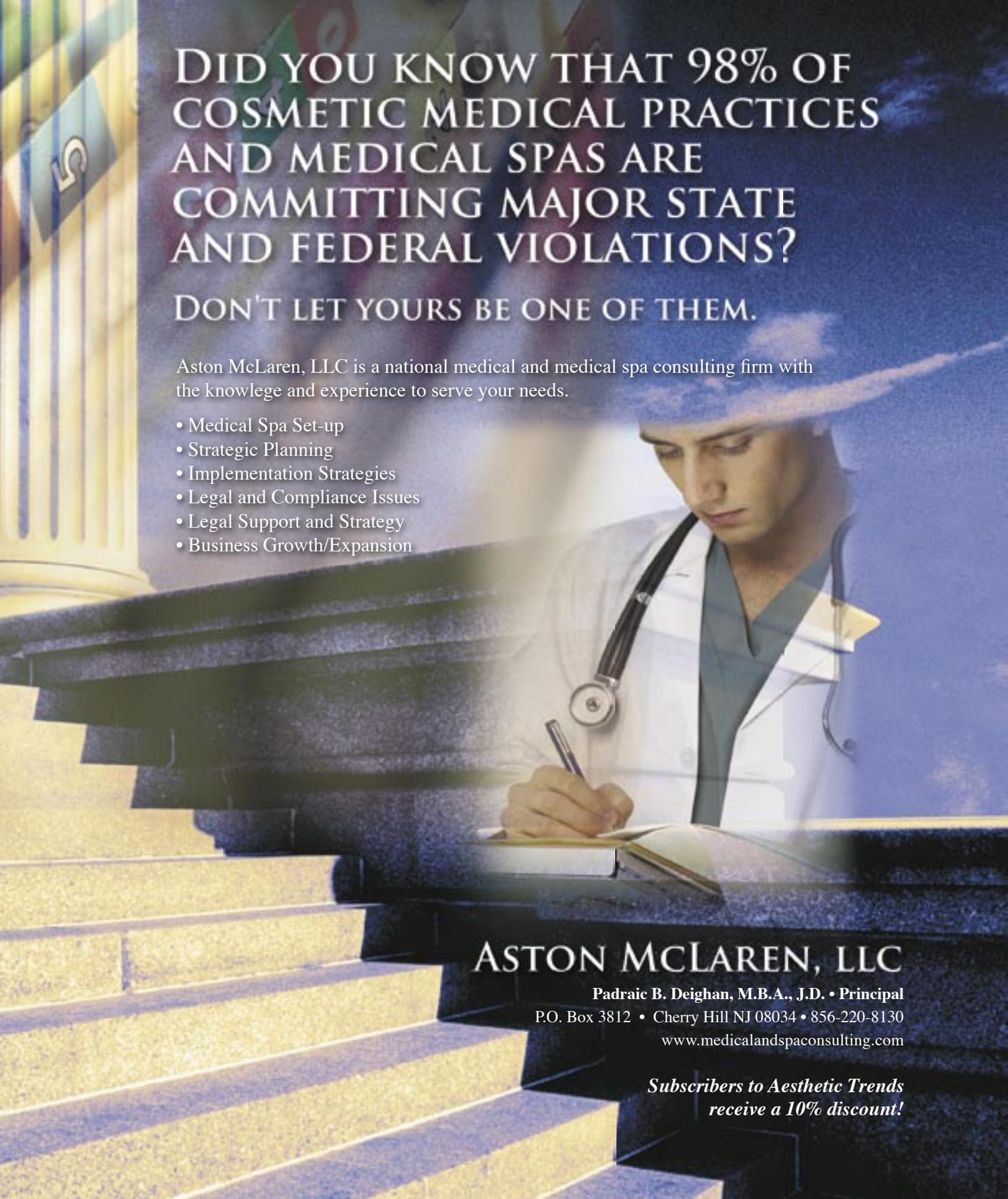
Physicians are accustomed to believing that they have coverage if they pay the premiums. This may be true, but they may not have the coverage for the services they are offering. Hence the need for riders to an existing policy or entirely separate supplemental loss policies. I frequently review policies for physicians and discover that the coverage is unacceptable or incomplete and not what the physician believed it to be.

### LOCAL, STATE & FEDERAL LAWS

Also check for language that indicates you have complied with "all local, state and federal laws." This type of language has begun to appear. A carrier could theoretically deny coverage upon discovery of a violation of any local, state, or federal law. This may seem benign to you, but let us review a real world situation. A patient is unsatisfied with the treatment, price, or results from BOTOX® Cosmetic procedure. The

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treatment area was the peri-ocular region. A carrier could theoretically deny coverage because this was an "off label" use of BOTOX® Cosmetic. This could arguably be construed to be a violation of federal law. Scary, isn't it?? The better companies would not do this but they could, and the smaller companies would be more inclined to invoke such a provision.



# DID YOU KNOW THAT 98% OF COSMETIC MEDICAL PRACTICES AND MEDICAL SPAS ARE COMMITTING MAJOR STATE AND FEDERAL VIOLATIONS?

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## THE MEDICAL SPA POLICY

Another relatively new concept is the so-called “Medical Spa” policies. These policies do not provide the typical professional negligence coverage for a physician and his or her treatments. They probably cover the medical spa procedures performed by staff. Consequently, there is a gap in coverage for the physician’s services and his or her role as “medical director” of the medical spa facility.

All of the issues discussed above are amplified when discussing medical spa policies. These policies are easier to get and are less expensive. This is because they provide less coverage. They do not provide coverage for “medical director” services either. Such coverage is normally provided via rider to an existing policy. We have discussed this in prior issues.

Medical Spa policies have become popular with physicians who are practicing outside of their specialty because they are easier to obtain, and

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such policies are sometimes the only option for these physicians. Please be aware that there are almost always gaps in coverage for a physician in these policies. The medical spa policy does not replace the need for medical professional negligence coverage. It supplements existing coverage.

The only reason that medical spa policies exist is because the companies know that the claims history on non-surgical cosmetic procedures is low. Laser procedures did not give rise to a significant increase in liability claims. Neither have fillers. However, it appears to be changing. I know that

I have been consulting with more and more attorneys on such cases. As awareness increases so, too, will the number of cases filed. More claims will result, and all of the issues discussed in this

article will be magnified.

There is no better time than now to review your coverage. Please do not wait until the policy renewal because it makes no difference when the changes are implemented. You may have a claim lurking already that has not come to your attention. While it

is good that there are now different types of policies, it means that you need to spend more time ensuring that your existing coverage is providing everything that you need. **ATI**



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