

**FASB**  
**Director @ FASB.org REF. EITF-100F**

**Regarding: Health Care Entities (954)**  
**Legal Costs of Medical Malpractice 8-24- 2010**

**By: Dr. Joseph S. Maresca CPA, CISA**

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Colleagues,

I thank you for the opportunity to comment on this emerging issue.

Background

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The main provision would allow expensing legal fees as incurred or accruing legal fees when the claim is made.

In evaluating the issuance, a number of factors may be considered:

- (1) Are there factors which may require the accrual of legal fees before they are incurred?
- (2) Requirements may differ for internal or external legal costs
- (3) Is a change in an accounting system needed to implement changes pp.2

The ultimate costs of malpractice claims or contingent liabilities include costs of litigating and settling claims which shall be accrued when the incidence which gave rise to the claim occurred.

A health care facility should review incidents giving rise to the claims and accrue a liability. 954- 450- 25- 2

Also note that the risk of an adverse deviation may be an added cost factor. The lower the credibility factor- the greater the blending of data.

Critique:

The various medical boards and the Joint Commission on Hospital Accreditation issue guidance to the medical profession on the various areas of medical care delivery including ambulatory care, critical access hospitals, labs etc. Very often, the determination of medical error will be intuitively obvious to these governing bodies.

The source documents for the care are the medical encounter form, memoranda from the patient, prescriptions and the results of MRI, x-ray exams, ultrasounds and other diagnostics. The carrying forward of a patient's medical encounter form from another medical institution may be pertinent to the entire medical history.

The medical encounter form contains the medical history , the staff preparing the form, medical tests to be taken, the results of medical tests taken, the original diagnostic impression and the final diagnosis based upon the medical tests taken. Memoranda to the physician

may be cross-referenced or summarized. In addition, there should be cross-referencing if the physician has changed institutions and carried forward a previous medical record.

The determination of physician error should be obvious in the instant case. The next question is the differential impact of the error on the patient's quality of life over a definable period of time. These issues are argued between the legal participants.

The standard of review of the Court and the standard of review of the professional bodies may differ substantially. While the Court may examine the preponderance of evidence in totality, the various professional bodies may excuse no error on the part of the physician or medical institution because the public welfare is at stake.

Sometimes physician or institution errors may be repeated on more than one case and the differential impact on the community may not be known until claims are presented. Medical errors can impact both the patient and his/her employer because the failure to diagnose can impact productivity adversely.

In the case of repeated medical errors, the accrual of legal fees may be justified if there is a common thread which appears in multiple cases throughout the community. pp.2

A change in the accounting system may be warranted to track common errors by validation checks internal to the computer. For instance, an unidentified person might record the medical history. A validation check of the medical staff code number would appear on an exception report.

The failure to record a returning diagnostic test result could produce an automated followup by the medical records system. There are automated medical record routines which can detect omitted or incomplete information. The trend toward a common patient history key or card is an attempt to limit medical errors significantly.

Administratively, expensing legal fees as incurred would appear to facilitate the record-keeping on individual cases where facts may differ. On class action suits, an accrual may make more sense. These types of suits may lend themselves to accrual before fees are incurred.

