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Legal Risks for Physicians

in today's healthcare climate

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In today's business and legal landscape, there are a number of potential pitfalls all physicians should be aware of. More than in any other profession, potential legal issues or problems can arise in almost all aspects of physician practice. Here, we cover some common legal issues and problems affecting physician practices.

Malpractice

There is no question that malpractice lawsuits pose the largest ongoing risk to physicians. While in many instances there is nothing a doctor can do to prevent a malpractice case, there are some measures that a physician can take to help minimize the likelihood of these lawsuits. One of the more obvious safety measures is to maintain clear, detailed and legible medical records of any particular case. There is an axiom that if something is not documented in medical records, then it is as if it did not occur. For purposes of malpractice lawsuits, lack of documentation of an event will call into question whether it occurred. A skilled plaintiff's attorney will be able to take full advantage of mistakes or omissions in a physician's medical records to imply the worst possible scenario. If a doctor has any doubt whether to document an apparent event or point of information, then it is better to err on the side of over-documentation.

It is equally important to document unusual circumstances or events in a case. Any unusual event could potentially lead to legal action and should be well documented. Finally, any time a physician adds to or amends a patient record, the date of the amendment and the fact that the amendment occurred should be noted clearly in the record to avoid any claim that a physician is trying to misrepresent when an amendment occurred.

While thoroughness of medical records can provide physicians with important defenses in malpractice matters, less clinical aspects of care can help minimize the likelihood of malpractice suits as well. Not surprisingly, a patient's "experience" with a particular physician or practice can influence or avert the filing of a suit. Factors like pleasant bedside manner and friendly and professional support staff will have a positive impact on the patient's overall experience and will decrease the likelihood that the patient is displeased with the care provided. Even expressions of sympathy or compassion to patients by a physician cannot be used to show any liability on behalf of the physician under the California Evidence Code. The idea is that physicians should not worry that expressions of sympathy or compassion towards a patient will later be used against the physician.

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Potential Issues with Employees

A second potential area involving legal pitfalls for physicians is the management of employees in the medical practice. A number of statutes in California specifically protect employees in healthcare settings who complain about issues relating to patient care or safety. If an employee is terminated for speaking out regarding patient care or a safety issue, a claim could be made that the termination was in retaliation for that employee's advocacy. If any employee makes a complaint regarding patient safety, that complaint should be investigated.

In addition to statutes specifically related to healthcare practices, physician practices are as susceptible to unlawful discrimination lawsuits as any other business. To avoid allegations of discrimination or harassment, a practice should always maintain a high degree of professionalism. The management of the practice should not tolerate harassment or discrimination by any employed individuals, even if it is intended to be a joke. Certainly, if an employee complains regarding harassment or discrimination, the practice should take that complaint seriously and investigate its legitimacy. Physicians need to also be familiar with the labor commissioner rules governing employee hours, overtime pay, and timeliness of final payments to employees after separation. But for a few exceptions, employees must receive their payment of final wages within 72 hours of separation from the medical practice. Delays in paying final wages can result in fines and penalties to the employer.

One way to avoid the headache of potential legal issues with departing employees is to offer severance pay in exchange for a "release of claims." An employee may be willing to release the employer from all claims he or she may have in return for a severance payment following the termination or resignation. This is often a win-win for both the employee and medical group.

On the other side of the coin are the many physicians who choose to practice as employees within medical groups. Any employment agreement between a physician and his or her employer should be in writing and clearly state the agreed upon terms. A physician who is entering into an employment agreement with a medical group should diligently review the agreement (often with the help of an attorney) for fairness and for adequate protections to the physician. Areas to focus in on when reviewing an employment agreement include the termination or resignation section, the compensation structure and the scope of malpractice liability.

Prohibition against the Corporate Practice of Medicine

Regulatory bodies continue to enforce violations of the ban on the corporate practice of medicine. The prohibition against the corporate practice of medicine requires a physician to have control over all decisions (medical or business) made in the medical practice. These decisions should not be left in the hands of a layperson. This includes the hiring and firing of physician extenders (typically, nurse practitioners and physician assistants), the purchasing of medical equipment and any agreements entered into between the medical practice and third-party payors. A layperson manager or management company is prohibited from engaging in decision-making regarding medical or business aspects of the medical practice. These decisions are solely within the purview of a physician owner.

Financial Interest Disclosures

Medical practices should ensure that they have up-to-date and compliant business disclosures. Any

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physician who refers to or seeks a consultation from any organization in which the physician or a family member has a financial interest must disclose this in writing to patients (or the parent or guardian of a patient) at the time of referral. In some cases, though not all, the disclosure rule can be met by posting a conspicuous disclosure statement in the waiting room.

In-Office Dispensing of Drugs

More and more physician offices are dispensing drugs in offices. Physician practices that do dispense drugs must comply with specific patient disclosure requirements that include notification to the patient that they may obtain the prescription from a pharmacy of the patient's choice, i.e., not necessarily from the medical practice, and to offer to provide a written prescription that the patient may elect to have filled by any pharmacy. These disclosures, which are found primarily in California Business and Professions Code section 4170 et seq., are intended to inform patients that they are free to fill any drug in an outside pharmacy as opposed to in a physician's office.

Patient Assignment of Benefits

For those out-of-network providers who provide services to insured or managed care patients, an assignment of benefit form executed by the patient is required to transfer to the physician any rights or benefits the patient has under his or her health insurance or managed care contract. The purpose to assigning benefits is so that the physician can receive payment directly from the insurer. Unfortunately, it is becoming increasingly common for insurance companies to refuse to comply with assignment of benefit forms and issue payments to the insured patient rather than to the physician. This puts the physician in the difficult and uncomfortable position of trying to collect debts from patients.

The above is a snapshot of some of the business and legal issues physicians deal with on a day to day basis. Of course, as the business and legal landscape of medicine changes, so do potential issues facing providers. It is important for physicians to remain vigilant with respect to complying with employment and regulatory rules governing their practice to avoid potential legal pitfalls.

Benjamin J. Fenton is a litigator with significant trial and appellate experience. He regularly advises and represents healthcare providers and entities in healthcare business disputes, hospital peer review actions, and state and federal administrative actions and investigations. Ben regularly represents physicians and other healthcare providers before the Medical Board of California, the Osteopathic Medical Board, the Board of Registered Nursing, and other healing arts licensing agencies. Ben has extensive experience representing healthcare providers in Medicare and Medi-Cal disputes, such as overpayment demands, terminations or suspensions, and audits and investigations. Ben also regularly litigates business disputes in court, representing physicians and medical groups both as plaintiffs and defendants. He also represents healthcare providers in the defense of RICO, False Claims Act and Fraud and Abuse litigation.

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