

PRF NEWS

Volume 11, Number 3

Covering Practice and Risk Management Issues for Physicians

Medical Records and Risk Management

BY JOSEPH R. BORICH III, JD, LL.M

The 2003 Health Insurance Portability and Accountability Act (HIPAA) is Congressional legislation requiring that all medical care facilities insure that there are privacy and security standards in place for the protection of the patient's paper and electronic medical records. If these records are not protected and there is negligent or intentional wrongful disclosure of the patient's information, the physician may be subject to malpractice claims, privacy lawsuits, civil monetary penalties, license revocation, or even criminal incarceration. Although the enabling legislation under HIPAA does not provide that your patient can sue you directly under the act, your patient can still sue you for breaches of privacy in federal or state court. Less drastic consequences could include the loss of the patient's confidence, the loss of your professional reputation in the community, and financial operation losses and costs for correcting the mistakes.

To avoid these potentially drastic penalties, the solution is to set up a professional compliance program.

How does one go about instituting policies and procedures that institute reasonable, appropriate, and cost effective safeguards as required by the HIPAA law? Here's how:

- Appoint a health care compliance officer.
- Conduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of patients' personal health information.
- Set up reasonable and appropriate privacy and security policies and procedures for the processing of medical records.
- Train your personnel.
- Develop the highest level of good record keeping.

After your organization identifies its privacy and security risks it is then necessary to find reasonable and appropriate security measures that are cost effective. These security measures are identified in HIPAA as being administrative safeguards, physical safeguards, and technical safeguards.

Administrative safeguards include having

a security management process with assigned security responsibility, workforce security, information access management, security awareness, training, and evaluation, security incident procedures, and contingency plans.

Physical safeguards include facility access controls, workstation use, workstation security, device, and media controls.

Technical safeguards include access controls, audit controls, integrity, person or entity authentication, and transmission security.

The compliance officer must also remember that there are risk management requirements under the privacy regulations of HIPAA as well. **Most important is the necessity to have an appointed privacy officer.** The privacy officer must develop a privacy training program, establish a complaint and sanction system, and provide the mandated privacy notice to patients. The privacy notice is required to have boiler plate content including identifying all the patients' rights under HIPAA, identifying all the covered entities' duties under HIPAA, a patient communication policy and procedure, and a comprehensive release of records policy and procedure.

Good medical record keeping is essential in a health care facility. Bad record keeping can

(continued on page 4)

Inside PRF News

Medical Records and Risk Management

The way to avoid penalties under HIPAA is to set up a professional compliance program.

1

Liability Associated with Allied Health Professionals

When physicians supervise allied health professionals, they incur vicarious liability exposure. Here's how to manage the risks associated with employing physician extenders.

2

Medical Board Coverage: Always Good to Have But Not to Use

While it is reassuring to have coverage against actions by the Medical Board of California, here are some suggestions to help avoid having to use it.

3

Liability Associated with Allied Health Professionals

BY W. GORDON PEACOCK, MD

Allied health professionals (AHPs), such as nurse practitioners and physician assistants, are widely utilized in medical practices because they improve patients' access to health services and increase practice revenues for supervising physicians. Patients not only generally report high satisfaction with the care delivered by these mid-level practitioners, but AHPs can reduce the potential for medical liability exposure by educating patients about preventive aspects of health care.



AHP APPLICATIONS

Applications for physician extenders can be found online at PRF's website, <http://www.prfrg.com/>. (Click "Applications," scroll down and click "Physician Extenders.")

Yet the physicians who supervise AHPs incur liability exposure for the actions of these practitioners ("vicarious liability"). Awareness of the following four potential liability exposures can help physicians and AHPs improve the delivery of safe patient care.

- **Inadequate Supervision.** The physician must be available to provide consultation, either on site or by telephone. In addition, there needs to be routine complete chart documentation by the AHP, and careful chart review by the physician (documented by the physician's dated countersignature).
- **Failure to Diagnose.** Because failure to diagnose is often associated with a lack of physician supervision or consultation, AHPs should seek consultation if they are unclear about information provided by the patient, uncertain about the diagnosis, or encounter clinical situations beyond their scope of practice or expertise.
- **Untimely Referral.** An AHP should make a referral if the patient does not respond to treatment or

if management of the patient's condition is beyond the practitioner's skill level. Documentation of the reason for referral or lack of referral in the medical record is essential.

- **Inadequate Examination.** The AHP should not only obtain and document all the elements of the history, regardless of the narrowness of the complaint, but also perform a thorough physical examination; follow up on suspicious or positive clinical findings; and document those findings and plans for management.

The State of California requires standard written protocols and procedures that are developed and approved by the supervising physician. These protocols should address the scope of practice of the individual AHP and outline situations that require direct physician supervision and/or consultation. Written procedures help physicians and AHPs solidify collaborative practices, minimize liability risks and deliver appropriate patient care. Physicians who employ a nurse practitioner (NP) or physician assistant (PA) in their practices should be familiar with the official California website for the em-

ployee's corresponding profession. Using these websites, a physician can annually verify licensure and obtain updates as the legislature continues to amend the scope of practice of these professionals.

Physician Assistant information may be found at: <http://www.pac.ca.gov/>. The site's "Frequently Asked Questions" tab provides a question and answer format for the supervising physician. It includes information regarding license verification and scope of practice. Additionally, the "Forms and Publications" section includes a sample Delegation of Services Agreement and important "Informational Bulletins," including one for the supervising physician.

Nurse Practitioner information is found at: <http://www.rn.ca.gov/regulations/np.shtml>. This site also has a "Frequently Asked Questions" tab, which contains similar information to that found on the Physician Assistant site. An explanation and the sample Standardized Procedures can be found at: <http://www.rn.ca.gov/pdfs/regulations/npr-b-20.pdf>.

PRF recommends these additional steps to manage the risks associated with employing AHPs:

- Develop and implement at least two emergency plans: one when the physician is

(continued on page 3)

Medical Board Coverage: Always Good to Have But Not to Use

BY STEPHEN J. SCHEIFELE, M.S., M.D.

For an additional premium, PRF offers coverage against actions by the Medical Board of California. This coverage provides up to \$35,000 for attorney's fees and the cost of defense but does not cover the cost of any judgments made by the board or subsequent litigation.

Whenever there is a malpractice action that results in a settlement or a judgment, the Medical Board is notified and frequently conducts its own investigation. While it is reassuring to have Medical Board coverage, here are some suggestions to help avoid having to use it.

The most common citation by the Medical Board is the failure to maintain adequate and accurate medical records. It is actually written into the Business and Professions code that "The failure of a physician and surgeon to maintain adequate and accurate records . . . constitutes unprofessional conduct." Your best defense before the Medical Board or in court is having clearly documented

your care. Excellent record keeping skills can satisfy the Medical Board's concerns and prevent an investigation from going forward. Here are some suggestions for your medical records:

- Records should be complete and legible.
- Document the reason for the encounter, an appropriate history and physical, and a review of the lab data.

- A written assessment and plan of care should reflect the thought process and complexity of your decision making.
- Adverse events and errors need to be documented as well as your disclosure to the patient.
- CPT/ICD-9 billing codes should be supported by the documentation.

As medicine becomes an in-

creasingly competitive environment, more physicians are advertising to promote their practices. Yet misrepresentations can result in discipline against your medical license. Advertisements that intend (or are likely) to create false or unjustified expectations of favorable results are a violation of the Business and Professions Code. A substantial number of complaints alleging false advertis-

(continued on page 4)

Allied Health Professionals

(continued from page 2)

present in the office and one when the physician is out of the office. Both plans should include calling 911 and transferring the patient to the hospital if needed.

- Ensure that your AHPs practice within their scope of practice and that physicians delegate only those tasks that fall within the realm of the physician's own competence and expertise.
- At the time of hire, supervising physicians need to verify from the primary sources that the AHP has met educational, licensure and certification requirements.

- Conduct training of the AHP to ensure that their roles do not exceed the legal scope of service.
- Assure that the AHP is not only aware of their own appropriate scope of patient care, but also of the scope of care of any other AHP with whom they work.
- Periodically review written protocols and procedures and update them whenever the scope of practice or duties change, or when there is a change of personnel.
- Cultivate a climate where your AHPs feel empowered to consult with a supervising physician whenever they need help.

- Supervise only the number of AHPs allowed by law (4), and not more than can be competently supervised.

PRF Allied Health Professional Coverage

In order to meet the changing professional liability needs of its physician insureds, in 1996 PRF began offering professional liability coverage for AHPs. Physician extenders requiring a separate policy include Certified Nurse Midwives, Nurse Practitioners, Licensed Physician Assistants, Lab Technicians, Embryologists, Physical Therapists, and X-Ray Technicians.

PRF's premium rates for AHPs are reasonably priced. Approved AHP applicants are issued their own policy number and their own Declaration. AHPs have the same (yet separate) contract of insurance

as PRF's physician Insureds and the same limits of coverage (\$1 million per occurrence / \$3 million per policy period). In the event a medical malpractice claim is asserted, PRF will provide the AHP Insured with the same consideration and excellent legal defense that PRF provides its physician Insureds. An allied health professional insured by PRF is entitled to the same coverage and the same level of service that PRF provides its physician Insureds. ■

Dr. Peacock, a retired obstetrician/gynecologist, was a founder of PRF and currently chairs its Peer Review Committee.



PRF NEWS

Covering Practice and
Risk Management Issues for
Physicians

Volume 11, Number 3
November 2008

Stephen Scheifele, MD,
Executive Editor
Robert D. Nachtigall, MD,
Editor

PRF News is produced by
Knox Communications

Physicians Reimbursement
Fund, Inc.
711 Van Ness Avenue
Suite 430
San Francisco, CA 94102
(415) 921-0498 - voice
(415) 921-7862 - fax
June@PRFrrg.com
www.PRFrrg.com

June Riley, MBA
Executive Director

Soad Kader
Director of Membership

DIRECTORS
George F. Lee, MD
Stephen Scheifele, MD
Damian Augustyn, MD
W. Gordon Peacock, MD
Michael Abel, MD
Andrew Sargeant, ACA, CFA
(USA Risk Group of Vermont)

Reuben A. Clay, Jr., MD
*Chair of Patient Care and
Management Committee*

Stephen Scheifele, MD
*Chair of Risk Management &
Education Committee*

W. Gordon Peacock, MD
Chair of Peer Review Committee

© 2008 Physicians Reimbursement
Fund, Inc.

Medical Board Coverage

(continued from page 3)

ing come to the Board anonymously. The Board may not always be monitoring you - but your competitors are. Anyone providing information to the Board that a licensee may be guilty of unprofessional conduct is afforded immunity from civil liability.

Sexual misconduct cases result in the temporary suspension of a medical license more than any other cause. It is always the professional's responsibility to maintain appropriate boundaries with a patient. Any act of sexual abuse, misconduct or relations with a patient constitutes unprofessional conduct. The only exception is for a spouse or domestic partner but even then a good faith exam must be performed and documented if drugs are prescribed. The first sexual misconduct offense is a misdemeanor. A second conviction, or a case involving two or more victims, is a felony. Consent is not a defense. Here are some suggestions to avoid misconduct accusations:

- Have patients disrobe and dress in private.
- Make appropriate cover gowns and drapes available.
- Clearly communicate the need for a particular exam that could be misinterpreted.
- Avoid flirtatious behavior.
- Have a third party review office procedures regarding exams.

There are many other examples of physician behaviors that may be brought before the Medical Board. Some of these actions may also be criminal. The Board is notified whenever a licensee is charged with a felony. The conviction of any offense related to the qualifications, duties or function of a physician is considered unprofessional conduct. In any event the Board must determine if the physician can practice

- Performing unnecessary procedures
- False testimony as an expert witness
- Insurance fraud; up-coding; un-bundling charges; kickbacks from labs or medical devices
- Fronting clinics operated by non-physicians

Most physicians are hardworking, dedicated and intelligent professionals. Nevertheless we are all,

PRF offers Medical Board coverage for a minimal annual payment. Call the PRF office for details.

safely without intervention. The Board may require a mental or physical exam. Common behaviors the Board investigates are:

- Excessive use of alcohol or drugs (including drug samples)
- Self-prescribing of controlled substances
- Excessive prescribing to patients or providing prescriptions without an appropriate exam and medical indication
- Charging a fee for a prescription or internet prescribing
- Disruptive behavior including creating a hostile work environment

at times, vulnerable and naïve. It is important to maintain one's professionalism at all times and recognize our limitations. The standard of care is compromised when patients are not appropriately referred for consultation. The physician is held to the same standard of care that is a specialist whether or not they were trained in that specialty. The Medical Board sees this frequently with pain management. Asking for personal help or seeking consultation may be the best treatment for our patients and may avoid making use of the PRF's Medical Board coverage. ■

Dr. Scheifele is a board member and chair of the Risk Management & Education Committee of PRF.

Medical Records (continued from page 1)

create a privacy liability and be a detriment in the defense of a medical malpractice case. It is critical that good risk analysis be employed by the medical compliance officer to insure that the records have confidentiality, availability, and integrity. The entire medical practice organization must be committed to this goal. The health care professional has a common law and statutory doctor/patient privilege responsibility to insure that the medical records are accurate, accessible,

and confidential.

The practice of medicine is a business and a profession. Besides the normal general business principles that must be complied with, the health care professional must be conscious of ethical standards as well as malpractice standards. Good risk management of your medical records can assist the health care professional in the area of governmental regulatory compliance and malpractice prevention. ■

The author was a former Assistant U.S. Attorney and a U. S. Assistant Attorney General who also spent many years as a litigation attorney. He has delivered more than 400 seminars in the areas of health care, regulatory compliance, risk management, and payment reimbursement, and his current business focus is on medical/legal consulting and coaching of medical practices.
