

Preventive Action

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The Physician-Patient-Police Relationship

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Of course, there is no such thing as a physician-patient-police relationship and the very real relationship between doctor and patient must never be allowed to morph into one. Yet the crystal-clear tenets of confidentiality can become murky to some physicians with the mere flash of a badge. Few would deny the wilting affect that law enforcement can have on the right to privacy. However, it is important to remember that only under very narrow circumstances may the physician-patient relationship be penetrated and its right to confidentiality breached.

Not surprisingly, uncertainty regarding the right to privacy most commonly arises during criminal investigations and in particular pain management patients. Typically, such patients come under investigation when suspected

of “doctor shopping” and prescription fraud. Before criminal charges are brought, (and on occasion even after formal charges are filed) police may seek production of the patient’s “Narcotics Agreement”. However, unless a Narcotics Agreement contains language giving the physician the right to notify and cooperate with law enforcement in the event of a violation of the agreement, the document must remain confidential. It should also be noted that a Narcotics Agreement is an “instruction” or an “agreement” and as such is a medical record and thus subject to the confidentiality protections afforded medical records in most states. These liability caveats are not limited to pain management patients, but apply to virtually all patients under criminal investigation.

Consider a recent case involving an internist providing limited pain management services. A police detective appeared at his office, informing the doctor that his patient had been arrested for fraudulently seeking narcotics prescribed by the physician. The police officer produced documents from the criminal investigation and requested that the physician produce the patient’s Narcotic Agreement and prescription orders. Although the doctor was reluctant to produce these portions of the patient’s medical records, the detective intimated that failure to “turn over” such information would be tantamount to obstructing a criminal investigation. Feeling intimidated, the physician furnished the records. The patient later entered into a consent agreement on the

criminal charges and then filed a civil action against the physician for breach of confidentiality. Because the Narcotic Agreement did not contain language permitting disclosure, the doctor was forced to pay monetary damages to the patient – an admitted criminal. Adding insult to injury, a disciplinary action against the physician followed.

“ The often intimidating presence of a police officer, FBI agent, or any other branch of law enforcement should not be allowed to usurp the confidentiality of the physician-patient relationship. ”

Absent patient authorization, a court order, or issuance of a search warrant, it is illegal for a physician to produce medical records, disclose personal health information, or discuss a patient’s medical condition with law enforcement. The often intimidating presence of a police officer, FBI agent, or any other branch of law enforcement should not be allowed to usurp the confidentiality of the physician-patient relationship. This is not to say that cooperation with the appropriate authorities is discouraged or will not ultimately be provided but

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For comments, questions or to obtain additional copies contact the First Professionals Insurance Company Risk Management department at 800-741-3742, ext. 3016.

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rather, that a physician confronts serious civil remedies when violating the privacy rights of a patient. This remains true even in cases where the patient is criminally charged and prosecuted.

The best way to handle a law enforcement officer's request for information or medical records is to ask under what legal predicate they are traveling. Ask what statutory citings permit the right to access and the duty to disclose such information. Do not be surprised if the investigator is chagrined. In cases when it may be permissible to do so, seek legal or risk management guidance before releasing any information.

Risk Management Guidelines

- Ensure that pain management patients execute a Narcotics Agreement containing language permitting the right of disclosure to law enforcement in the event of violation or breach of the agreement
- Do not disclose confidential information without patient authorization, a court order, or search warrant
- Verify the validity of legal instruments before disclosure of confidential information is made
- Request that law enforcement provide the specific legal predicate for access to confidential patient information
- Seek legal or risk management guidance when uncertainty arises

CMS Delays Reporting Requirement

The Medicare Secondary Payer Act [42 U.S.C. 1395y(b)(7) & (8)] requires that all liability carriers report payments made to any Medicare plaintiff/claimant to the Center for Medicare and Medicaid Services ("CMS"). This reporting requirement may also apply to payments made directly by a physician and by "self-insured" physicians.

While the initial implementation date was April 1, 2010, it has been delayed to January 1, 2011. All insurers should currently be registered as "responsible reporting entities" and testing of the reporting system should continue throughout 2010. Insurers that feel they have satisfactorily completed testing may begin submitting reports earlier if desired. It is not clear at this time if all claims paid to Medicare beneficiaries in 2010 will have to be reported, or if only those claims paid in the immediately preceding quarter will have to be reported.

First Professionals will continue to provide updates regarding this requirement as necessary. For more information, please contact our Risk Management Department at (800) 741-3742, ext. 3016 or send an e-mail to rm@fpic.com.

New Data Bank Will Help Hospitals with Background Checks

After years of delay, a national data base for background checks on licensed medical professionals from all 50 states will be available for hospitals to examine on March 1. Hospitals can already access the National Practitioner Data Bank, which contains records on physicians and dentists, such as license or privilege suspensions, and malpractice payments that are reported by state and federal oversight agencies and health plans. Now, restricted access data stored in the separate Healthcare Integrity Protection Data Bank, which records adverse licensure actions for all medical professionals, including nurses, technicians, chiropractors, and podiatrists, will be added to the NPDB for hospitals to examine. HIPDB has been available only to health plans, state and federal oversight agencies, and individual medical professionals for self-queries. "This means there will be a wider variety of information available to hospitals on healthcare professionals whose information wasn't available before," says Health Resources and Services Administration spokesperson David Bowman. "They will have access to a broad array of information that will assist them in making their due diligence when they are in the hiring process." The data will be collected by sources that include malpractice payers, state licensing and certification boards, hospitals, peer review organizations, accreditation organizations, and professional societies that conduct peer review. It will be available for hospitals, healthcare professional societies that conduct peer review, state medical and dental boards, law enforcement, and for self-queries from medical professionals. (HealthLeaders Media, 1/28/2010) —

Changes in Resident Hours Proposed by Industry Group

A non-profit group is proposing tighter regulation of resident physicians' duty hours in hospitals to reduce their fatigue and ensure patient safety. Members of The Institutes of Health in Washington recommend physician residency programs provide regular opportunities for sleep each day and better monitoring of duty hour limits. Dr. Martha B. Mainiero, a radiologist, says current duty-hour requirements state residents must not work more than 80 hours per week on average and must be provided one day in seven free of resident responsibilities. These requirements were set in 2003 by the Accreditation Council for Graduate Medical Education. However, the accreditation council's annual anonymous resident surveys and periodic site visits indicate a significant number of residents work beyond those limits. (UPI, 1/6/2010) —

Survey: Hospitals Not Ready for Meaningful Use of EHRs

A fall 2009 survey has revealed that hospitals of all sizes are not ready for meaningful use of electronic health records requirements. Computer Sciences Corporation conducted the survey this past fall and only recently released the results. Two-thirds of surveyed hospitals have identified gaps in their current systems to meet meaningful use requirements, according to the survey. But only one-quarter met at least 70% of the readiness criteria within the survey. Hospitals generally had the highest scores for privacy and security and the lowest for use of required EHR capabilities. For example, 70% of surveyed hospitals have systems capable of supporting

computerized physician order entry (CPOE). But only 8% of respondents—all large hospitals—have CPOE throughout the facility with at least 75% of orders entered by physicians. (Health Data Management, 1/4/2010) —

Florida Hospitals Must Warn Patients about Limits on Lawsuits

The Florida Supreme Court has ruled that hospitals must warn patients about a state law that bars medical professional liability (MPL) lawsuits for birth-related neurological injuries. Hospitals that fail to do so, the court said, can be sued even if a patient's doctor provided a notice, as required by a law designed to reduce MPL cases against obstetricians. Patients who received proper notification cannot sue, but they receive limited no-fault compensation if something goes wrong. The ruling came in two cases involving Bayfront Medical Center in St. Petersburg. It reversed lower court rulings that said hospitals are covered by doctors' notices. The justices said the law clearly requires hospitals as well as doctors to notify patients. (Insurance Journal, 1/20/2010) —

Georgia Non-economic Cap in Jeopardy

A case pending before the Georgia Supreme Court may have a dire impact on tort reform. In 2005, the state enacted a cap of \$350,000 in non-economic damages. Now, a case argued recently before the court will determine whether the cap stays in place. The case concerns a 71-year-old woman who, against her doctor's advice, had a full face lift and a chemical peel. The procedures wrecked havoc on the blood vessels in her face, and she ended up severely disfigured. The trial court jury awarded her \$900,000 in non-economic damages, greatly exceeding the \$350,000 cap. But the presiding judge said that capping damages was unconstitutional, because it violated three rights: right to trial by jury, separation of judicial and executive powers, and equal protection under the law. The defendant appealed, and the decision is now in the hands of the Supreme Court. (Clinical Advisor, 1/19/2010) —

Georgia Supreme Court reversal of Ketchup: Informed Consent Requirements come from the Legislature

In June, 2009, the Supreme Court of Georgia issued its opinion that the only informed consent requirements in the state of Georgia come from the legislature. (see *Blotner v. Doreika*, Supreme Court of Georgia. S08G2016). This decision holds that there is no basis for a claim of lack of informed consent unless a plaintiff's allegations fall under the specifics of a statute or regulation. Therefore, a physician is only required to provide informed consent to a patient who undergoes a procedure involving general anesthesia, major regional anesthesia, spinal anesthesia, amniocentesis, or a diagnostic study that involves the use of contrast. Informed consent is not required by statute for treatment and procedures that fall outside of the aforementioned categories. However, a physician still has a common law duty to truthfully answer a patient's questions regarding medical or procedural risks. Therefore, it is an important risk management measure in those instances where informed consent is not required by statute, that the medical record be documented to the effect that the patient "did or did not have any questions" as well as the answer(s) if any, that were provided to questions regarding the treatment or procedure. —

EMMI Program



Physicians have a legal duty to disclose the known risks and complications of proposed treatments or procedures. Malpractice claims based on misunderstandings and unrealistic expectations can be prevented. Establishing realistic patient expectations and obtaining informed consent that will stand up in court requires effective patient education.

Because of the importance of patient education in the informed consent process, First Professionals has partnered with Emmi Solutions, an innovative tool designed to educate patients and provide documented informed consent for physicians.

What is Emmi?

Emmi (Expectation Management and Medical Information) is a series of interactive web-based programs that will walk your patient through their upcoming surgical procedure or treatment. As the patient learns about the surgery, alternatives, risks and benefits, Emmi tracks the individual's responses. The patient's viewing experience is captured using the Emmi communication platform. The communication platform documents the patient's interaction with the program and stores this information in a secure, HIPAA-compliant database called EmmiManager. Emmi will:

- Eliminate any uncertainty regarding the issues surrounding informed consent
- Improve patient satisfaction and knowledge retention levels
- Enhance operational efficiencies
- Save time and money

Emmi covers a wide variety of surgical and medical procedures, including gastric bypass, LASIK, commonly performed obstetrics/gynecology procedures, plastic surgery, cardiovascular surgery, orthopedics, and oral surgery. There is also a suite of modules that provides general educational instruction on issues such as hypertension, asthma, depression, diabetes and many others. These features are an excellent way for a practice to differentiate itself from other providers.

Many programs are available in Spanish. All of the web-based programs have been developed by board-certified physicians within their respective fields.

Policyholders of First Professionals will receive a substantial discount from the Emmi program annual subscription fee. The annual subscription allows each physician unlimited access to the complete library of Emmi modules.

For a complete product introduction and demonstration please visit www.emmidemo.com. To register for Emmi or specific product questions, contact our Risk Management Department at (800) 741-3742, ext. 3016 or send an e-mail to rm@fpic.com. •



Case Study: Failure to Diagnose and Treat Meningitis

Editor's Note: This case analysis reflects an actual First Professionals' case.

Case Analysis

A four-year-old child was brought to the emergency room with symptoms of high fever. The initial impression was that of otitis media. However, a final diagnosis of bacterial meningitis was ultimately made after escalation in the child's condition resulted in severe neurological compromise with permanent damage. A malpractice claim was brought alleging delay in diagnosis and treatment of meningitis. At trial, the physician conceded that, had he been aware of all of the presenting symptoms, his initial impression would have led him to the correct diagnosis much earlier. However, it was apparent from the testimony of the patient's parents and the physician's own admission, that the child's mother had been interrupted in her dialog of the child's symptoms and unable to present all of the signs and symptoms that were actually present.

Risk Management Discussion

Communication is both an art and a science. It is also a significant motivating factor upon which malpractice claims are pursued or avoided. Inadequate, inappropriate or ineffective communication - including electronic communication - increases the chances of diagnostic error, non-compliance, poor medical outcome and the likelihood of being sued. Conversely, effective communication improves diagnostic accuracy, enhances patient decision-making and increases the likelihood of adherence to therapeutic regimens. Loss prevention measures shown to reduce errors, deter lawsuits before they are pursued, and preserve defenses necessary to defeat the unavoidable claim include:

- The first clinical encounter profoundly effects all subsequent interactions
- Communication requires listening
- Do not interrupt a patient who is speaking
- Use open-ended questioning to obtain sufficient clinical information
- To establish a positive perception, utilize verbal and non-verbal signals when speaking to patients
- Use prompters such as "So?...", "And?...", "Such as?..." to coax a recalcitrant patient
- Avoid paternalistic or authoritarian statements
- Paraphrase or restate what the patient said for clarification
- Reword technical medical terms
- Environment can compromise effective communication – such as a hospital hallway
- Physician extender and staff communication is a direct reflection on the physician
- Develop and convey a plan of future care
- Seek legal or risk management advice when uncertainty arises. ➤

This information does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained here are generalized and may not apply to all practice situations. First Professionals recommends you obtain legal advice from a qualified attorney for a more specific application to your practice. This information should be used as a reference guide only.

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Legal FAQs For information specific to your state of practice, contact First Professionals' Risk Management department



Does state or federal law set forth a specific manner in which obsolete patient records must be destroyed?

No. However patient records must be destroyed in a manner that protects patient confidentiality. The best way to dispose of records is by shredding, mutilation or similar protective measures. If arrangements are made with third parties or entities for the destruction of patient records, a written agreement should be obtained clearly obligating the entity to safeguard confidentiality as well as indemnify and hold harmless you and your practice from any breach of confidentiality for which they are responsible. This agreement should be made in addition to the Business Associate Agreement required by HIPPA. Clarify the timeframes of the specific record

retention laws in the state in which you practice.

Are x-ray films the property of the patient?

No. X-ray films are the property of the originating physician, dentist, or radiology group. By law, the patient may access their films and if requested, furnished a copy. However, original films should never be released. The patient may be charged the cost of reproducing x-ray films.

What is a 'tort'?

A tort is a civil wrong or injury for which the court will provide a remedy in the form of an action for damages.

What are 'compensatory damages'?

Generally, damages designed to compensate the injured party. Compensatory damages include past, present and future medical bills, lost wages, and other expenses attributed to the negligent act or injury.

What is meant by the term 'negligence'?

Generally, the failure to use such care as a reasonably prudent and careful person would use under similar circumstances, or the doing of some act which a person of ordinary prudence would not have done under similar circumstances.

May records be furnished to an HMO/MCO without an authorization from the patient?

No. However, most HMO/MCO providers require such authorization as a condition of coverage. Therefore, the HMO/MCO should be asked to furnish a copy, evidencing the patient's authorization.

What action should be taken when a summons and complaint is received?

Immediately notify First Professionals by calling the Claims Department at (800) 741-3742, ext 3047. If you are served, First Professionals only has a limited number of days to assign a defense attorney and prepare a response to be filed on your behalf. It is important to not discuss the case with the patient, the patient's attorney or other parties involved in the care and treatment of the patient. You should gather and secure the patient's records immediately.

Must a physician supply an interpreter at the request of the patient?

Yes, in compliance with the Americans with Disabilities Act. The expense incurred in providing interpreter services may be used as a write off for tax purposes. ●