Mobile Communication

There are legal risks that physicians and providers should be aware of when using mobile devices and apps that collect patient information. See story, page 6

Compliance

The appropriate selection of E/M codes is a complicated process that also has an element of subjectivity, and should be considered a risk area that is addressed in a provider’s compliance program. See story, page 6

Regulations

A recent $100,000 civil penalty to a provider or supplier bills Medicare, it opens itself up to possible investigation by Medicare contractors do not follow what we think is very clear law and guidance. See story, page 8

Compliance

When a provider or supplier bills Medicare, it opens itself up to possible investigation by Medicare contractors. See story, page 8

Regulations

CMS recently issued its two final rules, and will be held accountable for HIPAA Privacy and Security Rules violations. See story, page 12

Compliance

As a recent $100,000 civil penalty to a provider or supplier bills Medicare, it opens itself up to possible investigation by Medicare contractors. See story, page 12

Emergency Medical Care

Senate Bill 1110 would require a plaintiff to prove by clear and convincing evidence that the health care professional’s actions constituted “gross negligence” in cases involving emergency medical care in an emergency room, obstetrical unit, surgical operating room, cardiac cath lab, or radiology department. A simple breach of the standard of care (the current law) would not suffice. Although the bill does not define “gross negligence,” other statutes and case law define it as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” The law would apply to bona fide emergency services rendered to a patient after the onset of a medical or traumatic condition that is manifested by acute symptoms. The bill would not apply to care provided to the patient after they are stabilized, or to care unrelated to the initial emergency. See “Malpractice,” page 14

Navigating the System

Uncovering the mystery surrounding the National Practitioner Data Bank

Compliance

By Robert Howe, Esq.

Q: What results in physicians being reported to the National Practitioner Data Bank (NPDB)?

The reporting requirements vary according to the entity that is filing the report with the NPDB. State medical boards must report certain adverse licensure actions related to professional competence/conduct and revisions to such actions for physicians. Hospitals and other health care entities must report professional review actions related to professional competence/conduct that adversely affects clinical privileges of a physician for more than 30 days. The proposed legislation would require proof of “gross negligence” to hold physicians providing emergency treatment liable for malpractice.

Proposed bills would tighten malpractice standards for doctors

Medical Malpractice

By Christopher Ryan, Esq.

In May of this year, five bills were introduced in the Michigan Senate that would make significant change to medical-malpractice law. The bills, introduced by Republican members of the Senate, have been referred to the Committee on Insurance.

The proposed legislation would require proof of “gross negligence” to hold physicians providing emergency treatment liable for malpractice. One piece of the proposed legislation would require a case to be dismissed if the physician exercised reasonable “professional judgment.” The following is a summary of the most drastic changes.

Emergency Medical Care

Senate Bill 1110 would require a plaintiff to prove by clear and convincing evidence that the health care professional’s actions constituted “gross negligence” in cases involving emergency medical care in an emergency room, obstetrical unit, surgical operating room, cardiac cath lab, or radiology department. A simple breach of the standard of care (the current law) would not suffice. Although the bill does not define “gross negligence,” other statutes and case law define it as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”

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Have you violated the NLRA?

Check your social media policy

Social Media

By Michelle Bayer, Esq.

Last winter, I co-wrote an article for the Michigan Medical Law Report, entitled “Health care has unique issues in social media” (6 M.L.R. 4 (Winter 2011)).

We focused on prescripions by the AMA and State Licensing Boards regarding the doctor-patient relationship and social media, as well as privacy considerations.

In addition to those concerns, all employers, including health care providers, need to be aware of the provisions of the National Labor Relations Act (NLRA), which governs the right of employees to self-organize and collectively bargain, and protects such employees from retaliation for engaging in “concerted activity.”

Most people think of the NLRA as applying only to union settings. That is not the case.

Recently, there has been an increase in litigation for violations of the NLRA relating to concerted activity in both union and non-union workplaces.

In particular, social media policies and adverse employment action for employee posts and comments on social media sites have become hot legal issues for the National Labor Relations Board (NLRB), the agency that enforces the NLRA. "Concerted activity" is not specifically defined in the NLRA, but is generally considered to occur when two or more employees are acting together in furtherance of matters of mutual interest, aid and protection, and include compensation.

See “NLRA,” page 12
Keeping track of malpractice

Data Bank knows what you’re doing and is sharing that info

Compliance
By Richard Joslin Jr., Esq.
and Tanya Juarez Lundberg, Esq.

According to Statehealthfacts.org, last year in Michigan there were 311 medical-malpractice claims that resulted in some payment to the plaintiff. Whenever a medical-malpractice case is being considered for possible settlement, one of the most common questions we receive is what impact the settlement will have on a practitioner’s license.

The majority of practitioners are aware of the existence of the National Practitioner Data Bank, but fewer are aware that a report also is made to the Michigan Department of Licensing and Regulatory Affairs (LARA).

In 1986, the federal government created the National Practitioner Data Bank (Data Bank). By law, each entity (health care providers, liability insurers, etc.) that makes a payment in settlement of or in satisfaction of a claim or judgment against a practitioner (including physicians, dentists and other practitioners if they are licensed or otherwise authorized by the state to provide health care services), must report the payment to the Data Bank. The report must be mailed to the Data Bank within 30 days of payment.

Only payments of money made as a result of a writing, complaint or demand based on a practitioner’s alleged malpractice must be reported. The report should include a detailed narrative of the claim. Practitioners making such payments on their own behalf, such as for defending an action against the physician’s license to practice, are not reportable.

Information reported to the Data Bank is confidential, and may only be disclosed to eligible entities. Eligible entities include:

- Hospitals requesting information concerning a practitioner on their medical staff or to whom they have granted clinical privileges, or with respect to professional review actions based on reasons to restrict or surrender clinical privileges.
- Health care entities (including hospitals) that have entered, or are considering entering, employment or affiliation relationships with a practitioner or to which a practitioner has applied for clinical privileges or appointment to the medical staff;
- Practitioners seeking information about themselves;
- State licensing boards;
- Attorneys or individuals representing themselves under limited circumstances;
- Persons or entities requesting information in a way that does not identify any particular entity or practitioner.

By contrast, private companies may not request the Data Bank. However, if the individual practitioner is required to report a malpractice claim, the Data Bank will return a report if the practitioner does not request a privacy exemption.

Therefore, the practitioner would be able to either avoid a data bank report, if possible, and/or mitigate the consequences of a report by negotiating the wording of the report with the reporting entity.

Typically, physicians looking to obtain staff privileges at hospitals or ambulatory surgical centers must provide additional information regarding the matters reported in order to convince such entities to allow them to obtain such privileges.

If the report’s wording is severe, no explanation or additional information may be adequate. Severely worded reports can be the death knell to a physician whose specialty requires him/her to have staff privileges at a hospital (e.g., a neurosurgeon or obstetrician).

Moreover, state licensing boards also routinely query the Data Bank. A severely worded report can trigger a licensing action against the physician’s license to practice medicine. As such, physicians should attempt to gain as much input into the process of wording the report as they can in the event that a report cannot be avoided.

In addition to the wording of the report, there are certain classification codes and basis for action codes used in the report that must be used, for which there can be negative implications as well.

Physicians are well advised to gain input into the process of selecting these codes as well as to investigate the adverse impact of a report to the NPDB. Obtaining learned health care legal counsel early in the process increases the likelihood that the physician will be able to either avoid a data bank report, if possible, and/or mitigate the consequences of a report by negotiating the wording of the report with the reporting entity.

Q: What are the effects of being reported?

The negative impact of a data bank report depends, of course, on the wording of the report and the underlying events that gave rise to the report.

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