

LEGAL TRAPS TO AVOID

It doesn't take a law degree to learn to recognize top legal traps for physicians. Here's our guide to 13 trouble spots and how to avoid them. **BY JEREMY N. MILLER, J.D.**

WITH DECLINING reimbursement and increasing overhead and compliance costs, building a successful medical practice is tougher than ever. The last thing physicians need is costly legal problems. In my experience, many of the legal wounds suffered by physicians are self-inflicted. This article discusses areas where physicians regularly get themselves into legal trouble, and how many of these problems can be avoided.

1 The Medical Board. The Medical Board of California, among other things, decides who gets to have, and keep, a medical license. Physicians who engage in "unprofessional conduct" can lose their licenses. Conduct that you should avoid includes: misusing or improperly prescribing prescription drugs; using false or misleading advertising; making misrepresentations or omissions when applying for or renewing your medical license; paying or receiving kickbacks; having sexual relations with patients; engaging in fraudulent billing; gross professional negligence; and improperly using physician assistants, registered nurses and medical assistants. If you are contacted by the MBC in connection with an investigation, you should immediately contact an attorney who is familiar with handling such matters.

2 Medicare and Medi-Cal. Medicare and Medi-Cal payments can represent a significant source of a physician's practice income. Many of the activities to be avoided when dealing with these programs apply to private payers as well. These include: billing for one physician's services using another physician's provider number; routinely billing higher evaluation and management codes than is justified ("upcoding"); billing for medically unnecessary services; failing to adequately document the services that you provide; miscoding in order to bill for uncovered services; billing hospital-based services as if they were rendered in a physician's office; routinely waiving or reducing copayments; paying or receiving referral fees; and making misstatements or omissions when applying for a provider number. Physicians should understand that it is not a good defense to a charge of improper billing to say that it was the biller's fault and that you did not know about claims that were submitted in your name. Any investigations concerning improper billing must be handled with great care. You should never ignore a request for charts, which is how many investigations begin. If there is a determination of an overpayment,

make sure you understand your appeal rights and when you need to exercise them.

3 Personnel Issues. Federal and California employment laws have become as complicated and treacherous as the Stark law (which governs physician self-referral for Medicare and Medicaid patients) and fraud and abuse laws. Yet, most potential employment law problems are not that difficult to anticipate and avoid. Generally, the employment laws apply to both non-physician and physician personnel.

4 Independent Contractors. Don't hire people as independent contractors when they really should be treated as employees. The Internal Revenue Service and California Franchise Tax Board see this as a common area of abuse, and can impose significant penalties for non-compliance. If you do not pay workers compensation insurance for an "independent contractor," and they are injured on the job, you will be subject to a personal injury claim. The photocopier repairman is an independent contractor; anyone who works in your office full- or part-time is likely your employee.

5 Overtime. If non-exempt employees work overtime (more than 40 hours per week or more than 8 hours in a day), they need to be paid time and a half. Physicians are usually exempt from the overtime rules.

6 Vacation Time. "Use it or lose it" vacation policies may not be enforceable. If you do not adopt a "reasonable" accrual policy, you could end up owing the employee for years of unused time off. While the law is not crystal clear, you are probably safe if your policy allows the employee to accrue up to a maximum of 1.75 times his or her annual time off.

7 Retirement Plans. If your practice has a 401K or other qualified retirement plan, be sure it covers all eligible personnel. Mischaracterizing someone as an independent contractor or forming one corporation for the physicians and another for the staff, will not enable the physicians to avoid covering the staff. The penalties for non-compliance include disqualification of the plan and having to pay taxes on prior plan contributions.

8 Sexual Harassment. Avoid sexual harassment and other mistreatment of your personnel. If you learn about any instance of harassment, you must deal with it immediately and demonstrate by word and deed that such conduct will not be tolerated. The same strict rules apply whether the harasser is the head of the billing department or the group's founding physician.

9 Termination. All terminations need to be handled very carefully. Absent an agreement to the contrary, and except as noted below, employees in California are "at-will" and can be terminated at any time. However, other than in extreme circumstances, such as endangerment of patients or co-workers or theft, it may be better to give the employee a written warning of any problems and a reasonable opportunity to correct them. Further, even at-will employees cannot be terminated for an improper reason, such as race, gender, sex, age, religion or national origin, because of a disability that could be reasonably accommodated, or in retaliation for complaining about improper medical care or billing practices. Finally, when you terminate an employee, on their last day of work you must pay the employee his or her final wages, including any accrued paid time off. If an at-will employee quits without notice, you have 72 hours to give them their final check. Any improper delay will result in the practice being liable for waiting time penalties. You may also want to consider obtaining employment practices liability insurance coverage for your practice.

10 Physician Disputes. To paraphrase Thomas Hobbes, physician disputes are frequently nasty, brutish and long—and that means expensive. Physician disputes are often about issues such as control of the group, compensation, termination and buy-outs. The single most important thing to do to reduce the likelihood of such disputes—and a bad outcome if a dispute arises—is to have well thought out and carefully drafted employment, shareholder and partnership agreements. These documents should clearly define the rights, obligations and duties of the physicians and the group. Compensation formulas, voting rights, buy-out provisions, non-compete and non-solicitation restrictions, and dispute resolution mechanisms need to be carefully considered and expressed in writing. It is equally important for the group to regularly review its key documents to make sure they still reflect the will of the group members and are in compliance with current laws.

11 Malpractice Claims. The best thing to do, of course, is to consistently deliver high-quality care. But mistakes can and do happen. Many studies have shown that when problems occur, the incidence and cost of claims can be reduced through good communication with the patient. You

should read your malpractice carrier's newsletters and attend loss-prevention seminars. If a claim is filed, or you believe that something has occurred that could give rise to a claim, report it to the carrier promptly. Make sure that you have adequate malpractice coverage with a highly rated insurance carrier or mutual protection trust. When filling out an application for insurance, you must provide accurate and complete responses. Inaccurate or incomplete answers can result in a loss of coverage. If you change carriers, purchase an extended reporting endorsement ("tail") policy from your old carrier or prior acts ("nose") coverage from the new carrier.

12 Embezzlement. Sole practitioners and small groups are at particular risk of embezzlement. The warning sign may be that you seem to be working harder than ever, but the cash flow does not reflect it. Is it a problem in the billing department or theft? Sadly, the profile of the "typical" embezzler is the longtime, trusted office manager. When the embezzler is finally caught (and they usually are), they have already spent the money to support the lifestyle they believe they deserved. Physicians can do a number of things to reduce the risk of embezzlement, including understanding the practice's finances, reviewing the bank statements each month, not giving anyone a signature stamp, controlling who has access to the checkbook, and requiring two signatures for checks above a certain amount. Insurance coverage for employee theft should also be considered.

13 Dealing with Enforcement Officials. If you are contacted by a California or federal enforcement official or agency (such as the California Medical Board or Medicare) about a potential problem, you should always take the matter seriously. If you receive something in writing, don't ignore it or respond late if there is a deadline. Of course, any written response you make must be carefully prepared. If you are contacted by telephone or there is a visit to your office, be very careful about what you say. You may think that you will have no problem handling the investigator, but you are likely to be wrong. Investigations are their specialty, not yours. In general, unless someone shows up with a search warrant or otherwise has the right to make an unannounced inspection of your office, such as the Medi-Cal program, you should not allow it. Rather, you should ask the person to leave their card, and then immediately contact your attorney.

There is no way to guarantee that your medical practice will never have a legal problem. Fortunately, however, there are many things you can do to reduce the likelihood of such problems. An ounce of physician prevention can be worth many pounds of legal cure. ■