Medical liability: Missed follow-ups a potent trigger of lawsuits

Failing to reconnect with patients after no-shows leads to significant legal dangers for physician practices, experts say.

By ALICIA GALLEGOS — Posted July 15, 2013

John Davenport, MD, remembers a recent case of a patient who was admitted to a hospital after experiencing chest pains. A physician recommended the patient undergo a cardiac catheterization procedure, but the patient wanted to consider the treatment and return at a later date.

The doctor relented, and the patient went home, where he had a heart attack and died. His family sued the doctor.

“The family argued the doctor should have told them how critical it was for him to have the procedure,” said Dr. Davenport, a physician risk manager and attorney in Irvine, Calif.

The physician had told the patient about the risks, but “what killed the case was that the physician had no real documentation of that discussion in the chart. The [family] won the case,” he said.

Medical liability experts say missed appointments and failures to follow up pose some of the greatest legal risks for physicians. The legal dangers appear to be on the rise as team-based care grows and patients are handed off to a wider scope of health professionals.

In a survey of 723 patient care sites by medical liability insurer The Doctors Company, 53% of respondents said referrals and scheduling follow-up appointments were their top risk-management problems. The study, posted online in May, surveyed a range of practice environments in 2011 from small medical practices to large integrated delivery systems, hospitals and outpatient facilities.

The survey found the most frequent risk-management issues were failure to contact patients after missed appointments and a lack of tracking to ensure appropriate follow-up care was completed. The survey also showed that medical record documentation was a risk-management problem in 47% of the offices surveyed.

A separate review of 2,466 claims between 2007 and 2011 by The Doctors Company found that 36% of patient injuries resulted from patient factors such as noncompliance with follow-up calls and not adhering to treatment regimens. Twenty-four percent stemmed from communication breakdowns between patients and health professionals. Communication failures among physicians contributed to 7% of injuries, and failures or delays in obtaining consultations/referrals led to another 7% of injuries.

Lawsuits related to follow-up failures are becoming more frequent as health care models change, said Beth Cushing, vice president of claims for CRICO, a professional medical liability insurer in Massachusetts.

These claims “are very common and becoming more common as the entire nation moves to a more ambulatory system, where patients are getting care out in the community versus at the city hospital,” she said. “We are very concerned about office-based risks. How do you get the patient to come back in when they're supposed to have a colonoscopy or check on their blood pressure?”
But taking steps to improve follow-up care can prevent lawsuits and save physicians significant time and expense, legal analysts said. Doctors should start by pinpointing holes in their staff communication systems and ensuring that appropriate actions are taken after missed appointments, said Daniel Wright, vice president of patient safety for The Doctors Company.

“Effective risk management is a team effort,” he said. “Training office staff and office employees is critically important in mitigating potential risks. The physician, office manager and staff should all be involved in uncovering areas in the practice that could create liability risks.”

**How absences lead to problems**

A common claim in lawsuits that involve missed appointments is lack of informed refusal, Dr. Davenport said. The allegation arises when patients admit they declined or ignored treatment recommendations, but allege they were not adequately educated about the medical risks of their decision.

Attorneys often see this legal scenario in instances where men failed to show up for their colonoscopies, Cushing said. In most cases, the colonoscopy was ordered and scheduled, but the patient never arrived for the procedure. When the patient later develops colon cancer, the physician is blamed for failing to properly inform them of the treatment's necessity, she said.

“You have to be able to demonstrate the efforts that you took to have that person evaluated,” Cushing said. “If you don't have that kind of documentation as to your efforts, then it becomes your word against theirs.”

Juries generally take into account the educational background of plaintiffs, their level of understanding and whether they speak adequate English. More fault can be assigned to a physician if a language barrier existed or if a patient had less education, Cushing said.

Another factor that courts weigh in such cases is whether a physician-patient relationship was established, said Nancy Lamo, RN, an attorney and clinical risk consultant for Lockton, an international insurance broker.

“Once there's a patient-physician relationship, then that duty to meet the standard of care kicks in,” she said. “If you're a patient, and you make a half-hearted attempt to reach out to a doctor and then you have a bad outcome, you're going to do what you can to say someone else is responsible. [You're going to] say, 'Why didn't they get back to me?'”

In many cases, an established relationship can be determined based on prior visits and the degree of patient contact and interaction, but gray areas exist, Lamo said. For example, what about new patients who fill out paperwork by mail or online but never show? In this instance, the potential for liability is based on the specific facts surrounding the missed appointment, said Richard F. Cahill, vice president and associate general counsel for The Doctors Company.

“Where there is no clear mutual intent to create the relationship, it is still possible that a court could subsequently determine that the circumstances warrant a finding that the agreement to treat was implied,” he said in an email. “In that situation, the facts surrounding the encounter, including what the patient may have reasonably been led to believe, are crucial. To further complicate the analysis, jurisdictions vary as to what circumstances are sufficient to constitute an implied agreement to undertake an individual's medical care.”

**The role of office staff**

Ohio orthopedic surgeon Anthony Volpe, MD, said he follows up with all patients who complete paperwork, regardless if they've ever been seen.
“If they have any contact with me, including filling out paperwork, I would follow up with them like an established patient,” said Dr. Volpe, medical director of professional liability and risk management for the Medical Group of Ohio.

Dr. Volpe suggests that physicians have a written staff policy for how to handle patient no-shows and that offices implement an appointment reminder system for patients. It's helpful to have a staff member assigned to contact missing patients, and that person should regularly inform physicians of no-shows, he said.

Health professionals and staff should not rely on a note in the medical record to act as the only reminder that a test was not performed or that a patient was not contacted about results, Wright said. “Office staff should make certain that all test results are communicated to patients, including those that are within normal limits,” he said. Letters should be sent “to patients who fail to follow up and cannot be reached by phone [and] office staff should file all documentation and copies of letters in the medical record.”

Placing a written disclaimer on websites and forms, such as on preliminary health care and insurance questionnaires, is another tool to reduce lawsuits. Cahill recommends the disclaimers state that an individual seeking treatment is not considered a patient until the practice has completed a preliminary assessment and thereafter notifies the individual of being accepted as a patient.

“Similarly, prospective patients should be advised at the outset that simply making an appointment is inadequate to trigger the relationship,” Cahill said. “Although no clear body of law yet exists to assess the impact of such disclaimers, they may provide sufficient notice to potential patients of the expectations of the practice. They later may also serve as evidence should litigation arise that the individual had adequate notice that no physician-patient relationship was intended based solely on the preliminary contact.”

### ADDITIONAL INFORMATION

**How doctors can reduce their legal risks from absent patients**

Missed appointments and failure to follow up can lead to negligence claims by patients. Physicians can mitigate the legal dangers by ensuring medical staff proactively address such issues.

**Lab tests/referrals and scheduling/follow-up**

- Train office staff to adequately handle test results and referrals when received, and have a process in place in case of a discrepancy.
- Communicate all test results to patients. Tell them to contact the office if they have not received test results by a specified date.
- Send letters to patients who fail to follow up and cannot be reached by phone; file all documentation in the medical record.
- Utilize the test-tracking capability if using an electronic health record.

**Medical records**

- Maintain a current list with dates of problem identification, reviews and resolutions.
- Use the patient's own words when documenting.
- Indicate in writing or electronically that all results of tests, consultants and referrals were reviewed.
- Keep a current list of all medications.
- Document all after-hours patient calls.
Medication management

- Ensure that the patient understands the reason for the medication, how to take it and when to contact the office about side effects.
- Sign or initial the label and include the name of the medication, dosage and date when preparing medications to be used later.
- Ask that verbal orders be repeated back.
- Identify all high-alert medications and follow guidelines to ensure they are ordered, stored, dispensed and administered correctly.

Communication

- Document all advice in the patient's record. Detail the patient's level of understanding during the informed consent process.
- Ensure that a licensed health professional responds when a patient's question is outside the scope of office staff knowledge.
- Incorporate a standard communication protocol to enhance the hand-off process and reduce errors of omission.

Source: “Frequent Malpractice Risks Faced by Office Practices Revealed in Survey,” The Doctors Company, May 23 (link)