OMIC
OPHTHALMIC MUTUAL INSURANCE COMPANY
A Risk Retention Group

Risk Management Recommendations

Sponsored by the American Academy of Ophthalmology

Confidentiality and privacy issues during the investigation and litigation of a medical malpractice incident, claim, or lawsuit

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Purpose of risk management recommendations

OMIC regularly analyzes its claims experience to determine loss prevention measures that our insured ophthalmologists can take to reduce the likelihood of professional liability lawsuits. OMIC policyholders are not required to implement risk management recommendations. Rather, physicians should use their professional judgment in determining the applicability of a given recommendation to their particular patients and practice situation. These loss prevention documents may refer to clinical care guidelines such as the American Academy of Ophthalmology's *Preferred Practice Patterns*, peer-reviewed articles, or to federal or state laws and regulations. However, our risk management recommendations do not constitute the standard of care nor do they provide legal advice. Consult an attorney if you desire legal advice. Information contained herein is not intended to be a modification of the terms and conditions of the OMIC professional and limited office premises liability insurance policy. Please refer to the OMIC policy for these terms and conditions.

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Physicians often have questions about sharing protected health information (PHI) with their professional liability carrier or an attorney during the investigation and litigation of a medical malpractice incident, claim, or lawsuit. The following discussion provides general information; please call your professional liability (PL) carrier or your practice attorney if you need more assistance.

General confidentiality obligations of a treating physician

- Patient confidentiality, and your duty to protect it, are established by:
  - Physician-patient privilege
  - Patient's constitutional right to privacy
  - Patient's right to privacy of medical information (state law and HIPAA)
- The physical records belong to the physician or facility, but the patient owns the information in the medical records.
- Types of disclosures
  - Mandatory, e.g., reporting obligations for communicable diseases

- For treatment, payment, and healthcare operations under HIPAA; these are called "permissive disclosures"
- Permitted only with the patient's written authorization, e.g., disclosure to employer or other third parties

Scenario #1: Poor outcome, precautionary disclosure to PL carrier

- Disclosure to your professional liability carrier or attorney is usually allowed without authorization in anticipation of litigation in order to prepare a defense. Check with your PL carrier or personal attorney.
- HIPAA states that disclosure to a professional liability carrier or attorney is allowed without authorization under healthcare operations.
  - Ensure that you have a business associate agreement with your PL carrier or attorney to ensure that they will protect the confidentiality of PHI.
  - The minimum necessary rule applies, but they might request the entire medical record, including billing, to review care.
  - No accounting or disclosure to the patient is required since this is part of healthcare operations.
  - Make sure that each patient has signed a HIPAA form and maintain it in the medical record.

Scenario #2. Informal interview or discussion with the attorney of a patient who is suing another physician

- Contact your PL carrier before agreeing to talk to the patient's attorney. Your carrier may elect to assign an attorney to protect your interests. There is no duty to discuss your care unless there is a court order or valid subpoena.
- Authorization for you to discuss your care and treatment **must** be obtained from the patient.
- Some physicians who have discussed their care with the plaintiff attorney have ended up as a defendant.

Scenario #3: Informal interview or discussion with the PL carrier or defense attorney of another physician

- Contact your PL carrier before agreeing to talk to the patient's attorney. Your carrier may elect to assign an attorney to protect your interests.
- Authorization for you to discuss your care and treatment **must** be obtained from the patient.
- There is no duty to discuss your care unless there is a court order or valid subpoena.
- Some physicians who have discussed their care with the plaintiff attorney have ended up as a defendant.

Scenario #4: Testifying about care rendered to a current or former patient who is suing another physician

- Contact your PL carrier if you receive a subpoena or informal request for your deposition or testimony at trial. Your carrier may elect to assign an attorney to protect your interests.
- When a patient brings a lawsuit based on medical care, the physician-patient privilege and constitutional privacy rights are generally waived as to the care at issue. State laws vary, so consult your PL liability carrier or attorney.
- The requesting attorney obtains the patient's authorization, or subpoenas the records if the matter is in litigation, which enables you to release your records and testify about your care.
- Once you are notified that the case is over, shred any medical records that were sent to you to review, unless advised otherwise by the attorney who sent you the records.

Scenario #5: You are retained as an expert for the plaintiff

- The plaintiff attorney will obtain the patient's authorization for healthcare providers to discuss care and treatment.
- If you have not treated the patient, you will receive the patient's medical records for review. It is your duty to protect confidentiality by using the PHI only for purposes of your review and testimony.
- At the end of the case, destroy records by shredding, unless advised otherwise by the attorney who sent you the records.

Scenario #6: You are retained as an expert for the defendant physician

- Under HIPAA, no authorization from the patient is required because the defendant physician's liability carrier and defense attorney are performing healthcare operations on his/her behalf. They sign a "business associate agreement" with the defendant physician, and must protect the confidentiality of PHI.
- Once you receive the medical records from the defendant physician's attorney, you are considered a "downstream user" of the PHI. You may be asked by the PL carrier or defense attorney to sign a "Reasonable Assurances" letter, which confirms that you will protect the PHI by using it only for purposes of your review and testimony.
- State law may be stricter than HIPAA and require an authorization. In such states, the defense attorney or liability carrier will obtain the patient's authorization for you.
- Once you are notified that the case is over, destroy records by shredding, unless otherwise advised by the defense attorney or insurance carrier.

OMIC's Risk Management Department can be an important source of information and support for policyholders engaged in these evaluations and discussions. Please call 1.800.562.6642, option 4 or email us at riskmanagement@omic.com.