

# Noncompliance: A Frequent Prelude to Malpractice Lawsuits

**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 legal advice is desired or needed. Information contained here 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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Patients who do not show up for appointments or follow treatment recommendations represent a significant professional liability risk for ophthalmologists. This document will outline the issues and provide risk management recommendations to promote patient safety and protect physicians and their staff.

 **EXAMPLES OF NONCOMPLIANCE THAT PUT THE PATIENT, STAFF, AND**

 **PHYSICIAN AT RISK**

* Glaucoma patient not taking medications as prescribed.
* Patient with symptoms suggestive of a CNS tumor refusing imaging studies or a neuro-ophthalmology consult.
* Parents of baby with ROP not bringing baby to ophthalmologist for follow-up examination.
* Patient with a retinal detachment refusing to see a retinal specialist as recommended.
* Patient with proliferative diabetic retinopathy refusing laser treatment.
* Postoperative cataract patient not notifying ophthalmologist as instructed about eye pain and vision loss.
* Parent of child not enforcing patching regimen.

 **WHY IS NONCOMPLIANCE A PROBLEM?**

When a patient refuses to follow the physician’s recommendations, the physician-patient relationship is adversely affected. The physician and staff feel frustrated by wasted time, money, and resources, and may feel unappreciated or taken advantage of. The physician can become distracted from the primary focus of diagnosing and treating the patient and may not listen as well or take complaints as seriously. The patient may become too embarrassed to explain the reasons for the unwillingness, such as financial problems or an inability to read or understand instructions, or become defensive, demanding, and hostile, and feel that the doctor or staff doesn’t care. Many become less likely to inform physician and staff of problems.

Patients who refuse recommended care put their safety at risk: their vision-, health-, or life-threatening condition progresses because it is not effectively diagnosed or treated. And they put the physician at risk, because even though they refuse the care, they may sue for not receiving it.

 **RELATIONSHIP BETWEEN NONCOMPLIANCE AND PATIENT’S RIGHT TO**

 **MAKE HEALTHCARE DECISIONS**

Adult patients have the right to accept or refuse recommended care. Just as with informed consent, the patient must have sufficient information to make a meaningful decision. The patient should be presumed “ignorant until educated” by healthcare providers, so physicians need to demonstrate, through documentation and materials provided to the patient, that they have adequately disclosed the consequences of not getting the recommended care. If a physician is found negligent, but the physician also demonstrates that the patient was warned, and the patient’s noncompliance contributed to the poor outcome, the jury may assign the patient a portion of the blame under a theory called “contributory negligence” or “comparative negligence.” With such evidence, a jury might also find that the physician was not negligent at all, and that the patient’s noncompliance was the sole cause of the injury. To reduce the likelihood of poor outcomes, physicians would be well-advised to take steps to improve the patient’s adherence to the treatment plan. If such adherence cannot be accomplished, the physician can reduce his or her liability exposure by managing refused care and missed appointments by implementing the following strategies.

1. **ENGAGE THE PATIENT IN THE TREATMENT PLAN**

Engage the patient in making treatment decisions when the patient has a new diagnosis, diagnostic procedure, consultation, treatment, or medication. Involve staff in educational efforts. Confirm that the patient understands the health consequences of refusing care.

* Carefully explain the diagnosis and treatment plan.
* Give patients written treatment and medication instructions in patient-friendly language.
* Inform patients of common problems implementing treatment plans.
* Consider giving patients with chronic or high-risk conditions an information sheet of FAQ’s. Your FAQ’s might include recommendations for the following:
	+ - Difficulty paying for prescriptions;
		- Transportation problems getting to tests and appointments;
		- Confusion about why a test or medication is needed;
		- Different ideas about what is wrong with the eye and what is needed to treat it;
		- Difficulty administering the drops;
		- Problems with side effects.

#

# 2. MANAGE REFUSED CARE

# ICEDD Approach (Identify, Clarify, Educate, Decide, Document)

* **IDENTIFY** the non-compliance.
	+ Know what treatment was ordered. To do so, review prior medical record entries before each visit.
	+ Implement a test and referral tracking system to verify that patients obtained recommended tests, procedures, and consultations.
		- Step 1: Disclose to patients and document in the record the order for the test/referral.
		- Step 2: Ask staff to enter the information into a tracking system:
			* Follow-up tracking form
			* Logbook or card file
			* Computer tracking
		- Step 3: Review, date, and sign the test/procedure/consultant report.
			* Ask staff to call for the report if it is not received in the usual time.
			* Ask staff to contact patients who did not show up for the test/consultation.
		- Step 4: Communicate results to patients, document the discussion in the medical record, file the report, and complete the tracking form.
		- Step 5: Communicate and document the treatment plan:
			* Patient advised: No further follow-up needed
			* Patient advised: Follow-up appointment scheduled for \_\_\_\_
			* Patient advised: Referred to Dr. \_\_\_\_ for \_\_\_\_\_\_
			* Patient advised: Additional test/procedure needed.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Patient**  | **Test****Problem****Procedure****Referral** | **Date** **Ordered** | **Date** **Of****Results** | **Follow-up** **Needed** | **Date****Completed** |
| Kim Garcia | To Dr. Allen | 10/1 | 10/7 | Schedule appointment | 10/8  |
| Bob Pearce | MRI | 10/3 | 10/20 | To Dr. Hall | 10/21  |

* + Question patients about how/whether the treatment plan was implemented by asking open-ended questions in a nonjudgmental manner.
		- Medication:
			* “I see Dr. Jones prescribed a new medication for your glaucoma at your last visit. Could you tell me how you are using it?”
		- Diagnostic procedure/test/consult ordered by the ophthalmologist:
			* “We called to get the results of your MRI and were told that you had cancelled it. Was there some kind of problem? Could you tell me why you didn’t have this done?”
* **CLARIFY** the reason why the patient did not follow the treatment recommendations. Here are some common examples:
	+ Never scheduled the test or procedure, or did not get the prescribed medication due to:
		- Financial difficulties.
		- HMO authorization problems.
		- Transportation difficulties.
		- Childcare problems.
		- Confusion about disease or need for treatment.
		- Fear of the significance of the results of the test, procedure, or consultation.
	+ Not using medication as ordered
		- Not following the dosing schedule.
		- Not instilling drops correctly.
		- Confusion about how to implement treatment recommendations.
		- Misunderstanding of why treatment is needed or consequences of not having treatment.
		- Problems with side effects.
* **EDUCATE** the patient about the disease process, treatment recommendations, and consequences of not following the treatment plan.
	+ Target the education to the reasons for the non-compliance.
	+ Identify social service resources that may help.
		- Learn which pharmaceutical companies provide free or reduced-cost medications.
		- Know the enrollment criteria and process for state and federal assistance.
		- Be aware of transportation services for patients.
	+ Act as a patient advocate and appeal authorizations denied by the patient’s insurance plan.
	+ Verify that the patient understands the points being made.
		- Ask the patient to demonstrate how to use medication.
		- Ask the patient to explain in his or her own words why the medication was prescribed, or the test ordered.
	+ Give written material whenever possible.
	+ Use visual teaching aids, such as videos, charts, diagrams, or models of the eye.
	+ Document which educational materials were provided.
* **DECIDE** on the treatment plan and whether to continue care if the patient still refuses to follow recommendations.
	+ - Document the plan and the discussion if the patient agrees to follow the original recommendations or if the physician and patient have agreed on a new treatment plan.
		- Decide how to proceed if the patient continues to refuse the treatment plan. **Give the patient more time.** This approach is best if the physician-patient relationship is still effective, and the physician wants to continue the treatment dialogue.
		- **End the physician/patient relationship.**
			* The ophthalmologist is not able to persuade the patient to accept treatment.
			* The ophthalmologist is not comfortable with the patient safety and liability risks of refused treatment.
			* The patient is disruptive, hostile, or violent.
			* ***Follow OMIC’s “Termination of the physician-patient relationship” guidelines, which includes sample letters*** (availableat<http://www.omic.com/terminating-the-physician-patient-relationship/>).
				+ Evaluate possible abandonment issues.
				+ Give written notice sufficiently in advance to allow the patient to establish other care.
				+ Obtain written authorization for the transfer of records.
* **DOCUMENT** the findings, discussion, and decision.
	+ - Document the discussion, especially the reason the patient gives for not agreeing to the treatment recommendations, and the warnings provided about the consequences.
		- Provide a written document that explains the consequences if the patient risks significant vision loss or other harm. Choose **one** of these options:
		- Send a “refused care” letter via regular mail (**see Letter 1 at end of document**) that clarifies the consequences of not getting the recommended care. Add the words “Address Service Requested” on the front of the envelope (either below your return address or above the patient’s address). This signals the Postal Service to forward the letter if needed, and to notify you of the new address.
			* Consider using certified mail for high-risk patients who may lose significant vision or pose a serious liability risk. If you send the letter by certified mail, send it also via regular mail with “address service requested.”Consult OMIC’s Risk Management Hotline for guidance by calling 800-562-6642, option 4, or by emailing riskmanagement@omic.com.
		- Ask the patient to sign an informed refusal document (**see sample form at end of document**) and give the patient a copy.

# 3. MANAGE MISSED APPOINTMENTS

# SIRAD Approach (Schedule, Identify, Review, Act, Document)

Missed appointments can lead to delays in diagnosis and treatment. They may also be the first sign of patient dissatisfaction with a physician’s care. A careful system of scheduling appointments and reviewing missed ones provides the ophthalmologist with the opportunity to intervene before the patient’s health or the physician-patient relationship further deteriorates.

Ophthalmologists often ask how much follow-up of missed appointments is necessary, and when they should stop. There are no clear-cut answers to these questions. The safest approach is to follow up on all missed appointments.

* **SCHEDULE**
	+ Screen telephone calls carefully so the correct type of appointment is scheduled (see OMIC’s “Telephone Screening of Ophthalmic Problems,” available at <http://www.omic.com/telephone-screening-of-ophthalmic-problems-sample-contact-forms-and-screening-guideline/>).
	+ Always indicate the follow-up interval in the medical record and ask staff to schedule the follow-up appointment **before** the patient leaves the office so the patient is in the system.
		- This prevents patients from “falling through the cracks” and affords the physician the opportunity to notice noncompliance with other treatment recommendations, such as diagnostic tests and consultations.
* **IDENTIFY** missed appointments. Ask staff to notify you each day of:
	+ Cancellations
	+ Rescheduled appointments
	+ No-shows
* **REVIEW** missed appointments.
	+ Determine the type and interval of follow up needed. Make this decision yourself, as it is considered a medical decision that cannot be delegated to staff.
	+ Be wary of patients who choose their own follow-up interval for a rescheduled appointment, as they risk not getting the treatment they need in a timely fashion.
		- Example: Parents of a baby with ROP kept rescheduling their appointment but the staff did not notify the physician. Unfortunately, by the time the baby was seen, it was too late to treat the ROP and prevent blindness.
* **ACT** on missed appointments.
	+ CURRENT PATIENTS
	+ Use the “one call, one letter” approach for all patients as soon as you become aware of compliance issues.
		- Instruct staff to call the patient once to find out the reason for the missed appointment and to reschedule, being sure to give the interval:
			* “Call patient to reschedule; needs to be seen within 1 week.”
		- Instruct staff to send one “missed appointment” letter (**see Letter 2 at the end of the document**) right away if there is no answer, staff only reached an answering machine, or the patient refuses to be seen during the recommended interval.
			* Send this letter to patients who you are still willing to treat. The letter informs the patient of the missed appointment, and the attempt to reach the patient by phone.
			* Include “informed refusal” information that addresses the risks of not getting recommended care.
* Send the “missed appointment” letter by regular mail. Add the words “Address Service Requested” on the front of the envelope (either below your return address or above the patient’s address). This signals the Postal Service to forward the letter if needed, and to notify you of the new address.
	+ - Consider certified mail for high-risk patients who may lose significant vision or pose a serious liability risk. Send the letter also by regular mail with address service requested in case the patient refuses to sign for it or is not home when delivery is attempted.
		- Consult OMIC’s Risk Management Hotline for guidance by calling:

 800-562-6642, option 4, or by emailing rriskmanagement@omic.com.

* + Consider sending a termination letter if the physician-patient relationship is no longer effective.
		- You may terminate the relationship with patients who do not comply with treatment recommendations or fail to keep follow-up appointments despite efforts to educate them and advise them of the risks of refused care.
		- Give the patient time to find another physician. Continue to provide treatment that is needed to ensure patient safety during the notice period, which is usually at least 30 days. You do not have to perform elective procedures that can safely be postponed until the patient finds a new physician.
		- ***See OMIC’s “Termination of the Physician-Patient Relationship”*** for limits on when and how to terminate care, and sample letters, available at <http://www.omic.com/terminating-the-physician-patient-relationship/>).

# PATIENTS WITH APPOINTMENTS, REFERRED BY OTHER PHYSICIANS

* + Courts have ruled that a physician-patient relationship may be established when the physician agrees to see the patient and staff schedules an appointment. Once there is an established relationship, the physician has certain follow-up duties.
	+ Use the “one call, one letter” follow-up.
		- Call the patient once
		- Send a “missed appointment” letter via regular mail with address service requested and “cc” the referring physician (**see Letter 2 at end of document).**
			* State that the referring physician feels that the patient has an eye condition that could lead to vision loss if the patient does not receive the appropriate treatment.
		- Notify the referring physician that the patient did not show up for, or cancelled, the appointment by faxing the physician a copy of the missed appointment letter.

# PATIENTS REFERRED BY THE EMERGENCY ROOM

* + Ophthalmologists who serve on-call to the emergency room (ER) of a hospital establish a physician-patient relationship by consulting with the ER physician on the phone or by examining the patient in the ER.
	+ Some hospitals require on-call physicians to provide follow-up outpatient care as a condition of privileges, regardless of whether the ophthalmologist provided telephone advice or saw the patient.
	+ Physicians who establish a physician-patient relationship or who are required to provide follow-up care by hospital staff bylaws are advised to notify their staff when they consult on or see a patient, and to follow up on missed appointments.
		- Use OMIC’s sample after-hours contact form to document consultations with ER physicians.

(<http://www.omic.com/after-hours-contact-form-and-recommendations/>)

* + - Notify staff of such consultations so that they know when to schedule ER patients who call for appointments.
		- Use the “one call, one letter” follow-up system for patients who do not show up for their appointments **(see Letter 2 for no-shows; use Letter 3 for patients who leave when told they need to pay for care).**
		- Send the letter via regular mail and keep a copy.
	+ For additional information about serving on call, see <http://www.omic.com/emtala-overview-for-ophthalmologists/> and <http://www.omic.com/the-ophthalmologists-role-in-emergency-care-on-call-and-follow-up-duites-under-emtala/>.
* **DOCUMENT**
	+ Document all calls with patients and other providers.
	+ Keep copies of letters sent to patients and other providers in the medical record.

**HOW MUCH FOLLOW-UP IS ENOUGH?**

Physicians who have included patients in the decision-making process, educated them about their disease and recommended treatment, as well as noticed and addressed noncompliance by using our “one call, one letter” approach should feel confident that they have met their ethical and professional obligations in nearly all circumstances. Physicians who treat pediatric patients who risk significant vision loss, or adult patients with diminished capacity who are at risk for serious vision loss, may need to take the additional step of contacting adult or child protective services.

**Need confidential risk management assistance?**

OMIC-insured ophthalmologists, optometrists, and practices are invited to contact OMIC’s Risk Management Department at (800) 562-6642, option 4, or at riskmanagement@omic.com.

This sample letter is provided as a guideline only and should be modified according to the situation. Send the letter via regular mail with the words “Address service requested” on the front of the envelope either below your address or above the patient’s address. Consider sending the letter via certified mail to patients who risk severe or imminent vision loss; also send the letter via regular mail with address service requested. **Be sure to place a copy of the letter in the patient’s chart.** You may send your letter for review by fax to 415-771-1810 or by email to riskmanagement@omic.com.

**Letter 1. Sample Letter to Patient Who Refuses Care, Won’t Get Testing, or is Not Following Treatment Recommendations**

(Date)

Dear (Patient):

As you know, you have (indicate diagnosis or symptoms), and I recommended (indicate treatment, test, or referral recommended). You are not willing to consent to/did not show up for (treatment, test, to see Dr. \_\_\_\_\_\_\_). I am writing to share my concerns and to make sure that you understand what could happen if you do not get the treatment/test/consultation I have recommended.

Continued care is essential to the health of your eyes. You have an eye condition that will worsen without proper care **(If the patient has a condition that requires specific care, state the care AND the consequences of no care in clear, patient-friendly language. If the patient has a condition that needs testing, a consultation, or regular follow-up, state when the care needs to be obtained, or the frequency and urgency of the follow-up, AND state the consequences of not getting the follow-up at the recommended time in clear, patient-friendly language.)** Permanent damage may occur, resulting in visual loss or blindness. Kindly realize this letter is not meant to alarm you. I only wish to inform you of the seriousness of your condition, and encourage you to seek proper care.

Please contact our office as soon as possible if you change your mind and agree to have the recommended treatment.

With best regards,

(Physician’s Signature & Name)

**REFUSAL OF RECOMMENDED MEDICAL OR SURGICAL TREATMENT**

**Patient Name:**

1. **Dr. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_provided me with the following information.**
2. I have the following condition(s):
3. The doctor is recommending the following treatment \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
4. The recommended treatment involves \_\_\_\_\_\_
5. The purpose of for the recommended treatment \_\_\_\_\_\_\_\_\_\_\_\_\_
6. I should get the recommended treatment within the following time period\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
7. The possible alternative(s) to the recommended treatment for which I refuse consent are \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
8. The consequences of not proceeding with the recommended treatment or the above-described alternative(s) are \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
9. **I understand that if I do not consent to the recommended treatment, I may endanger my vision, life, or health. I nonetheless refuse to consent to it.**
10. **My reason for refusing this treatment is**

Patient (or person authorized to sign for patient) Date

This sample letter is provided as a guideline only and should be modified according to the situation. Send the letter via regular mail with the words “Address service requested” on the front of the envelope either below your address or above the patient’s address. Consider sending the letter via certified mail for patients who risk severe, imminent vision loss; also send the letter via regular mail with address service requested. **Be sure to place a copy of the letter in the patient’s chart.** OMIC policyholders may send their letter for review by fax to 415-771-1810 or by email at riskmanagement@omic.com.

**Letter 2. Sample Letter to Patient Who Missed/Cancelled Appointment**

(Date)

Dear (Patient):

You have [canceled your follow-up appointment on (date) without rescheduling **OR** you did not show up for your appointment]. We were unable to reach you by telephone.

Continued care is essential to the health of your eyes. You have an eye condition which will worsen without proper care **(If the patient has a condition that requires specific care, state the care AND the consequences of no care in clear, patient-friendly language. If the patient has a condition that needs regular follow-up, state when the care needs to be obtained, the frequency and urgency of the follow-up, AND the consequences of not getting the care at the recommended time in clear, patient-friendly language.)** Permanent damage may occur, resulting in visual loss or blindness. Kindly realize this letter is not meant to alarm you. We only wish to inform you of the seriousness of your condition and encourage you to seek proper care.

Please contact our office as soon as possible to reschedule.

With best regards,

(Physician’s Signature & Name)

This sample letter is provided as a guideline only and should be modified according to the situation. **Be sure to place a copy of the letter in your “On-call” File.** If you do not give this to the patient personally, and the patient’s condition warrants a certified letter, send it both certified and through the regular mail. Copy the Emergency Department physician. OMIC policyholders may send their letter for review by fax to 415-771-1810 or by email at riskmanagement@omic.com.

**Letter 3. Sample letter for ER-Referred patient (who refuses fee-for-service care)**

(On Physician’s Letterhead)

**CERTIFIED MAIL-RETURN RECEIPT REQUESTED**

(Date)

Dear (Patient):

As you know, Dr. (name) of (name) Hospital’s Emergency Department referred you to me for post-discharge care. When you called/came to my office, we learned that we do not accept your insurance/that you have no insurance. My staff informed you that I am available to care for you and offered to help you make a payment plan, but you left without being seen/were not willing to do so.

Continued care is essential to the health of your eyes. The physician in the Emergency Department physician diagnosed you with an eye condition which may worsen without proper care. Permanent damage may occur, resulting in visual loss or blindness. Kindly realize this letter is not meant to alarm you, but to encourage you to take proper care of your eye condition.

Please contact your insurance company or the Emergency Department for the names of other ophthalmologists in our area who accept your insurance and are available for care.

Sincerely,

(Physician’s Signature & Name)

cc: (name of ED physician)