Providing Medical Care, Services, or Products to Employees

Anne M. Menke, R.N., Ph.D.
OMIC Risk Manager

DISCLAIMER: This information is intended solely to provide risk management recommendations. It is not intended to constitute legal advice and should not be relied upon as a source for legal advice. If legal advice is desired or needed, an attorney should be consulted. This information is not intended to be a modification of the terms and conditions of your OMIC policy of insurance. Please refer to your OMIC policy for these terms and conditions.

Version 9/16/2003

Physicians may treat their employees. There are patient safety and professional liability risks, however, if the physician does not provide medical care and services to employee patients in the same manner as any other patient. This risk management recommendation letter will examine those risks and provide recommendations on how to minimize them.

Providing medications as a favor
Imagine your ophthalmic assistant informs you that she has just been diagnosed with a condition by her physician, who prescribed medications she feels she cannot afford. Out of the goodness of your heart, you obtain these medications for her. You do not take a history, perform an examination, or discuss with her the indications, contraindications, or side effects, and do not monitor the medication’s effectiveness and safety. It turns out she had an absolute contraindication to the medication, suffers permanent damage, and sues you. The complaint alleges medical malpractice consisting of negligent treatment, negligent prescription, lack of informed consent, and failure to follow-up.

Elements of medical malpractice
In order to sue you for medical malpractice, your employee would have to show that certain legal elements exist: duty deriving from a physician-patient relationship, and negligence, defined as a departure from the standard of care, which was the substantial cause of verifiable damages. The plaintiff attorney will attempt to prove that by providing your employee with medications, you established a physician-patient relationship with her which required you to treat her according to the standard of care for physicians who treat that condition or prescribe that medication.

Establishment of a physician-patient relationship
Will the fact that you did not intend to become your employee’s physician make any difference? What constitutes the establishment of the physician-patient relationship? The American Medical Association’s Council on Ethical and Judicial Affairs Opinion 10.015 on “The Patient-Physician Relationship” states that it exists when “a physician serves a patient’s medical needs, generally by mutual consent between physician and patient (or surrogate).” While it will be up to the jury to decide
the facts in each particular case, the plaintiff’s attorney may argue that you not only established the relationship, you actually began treatment by providing the medications.

**Patient Safety, Medical Board, and Standard of Care Concerns**

Your problems with your employee could be compounded if the medication you provided is one you do not normally prescribe, one with which you are unfamiliar, or is for a condition you don’t usually treat and follow. First, the patient is at greater risk in all three of these situations. According to the National Institute of Health report, *To Err is Human*, medication errors are the leading cause of patient harm and death among medical errors. Furthermore, lack of familiarity has been shown to be a significant factor in prescribing errors.

In most states, before prescribing a medication, a physician must perform a “good faith examination” whose purpose is to determine that 1) the appropriate indications exist, and 2) the patient does not have contraindications due to medical conditions or interactions with other medications. Failure to perform such an exam could not only be considered below the standard of care, but may also constitute unprofessional conduct, lead to disciplinary action from the state’s medical board, or expose the physician to civil or criminal penalties and actions.

Once a medication has been prescribed, the physician has a duty to monitor its continued need, effectiveness, and safety; this is usually done by reexamining the patient at a later date. If the patient suffers harm from the ongoing effects of the medication and was never reexamined, negligent prescription and failure to follow-up could be alleged.

**Lack of informed consent and duty to warn**

Medications with significant side effects should only be prescribed after explaining the risks, benefits, and alternatives to the patient; this disclosure is part of the informed consent discussion and should always be documented in the medical record. Informed consent may also be required if the medication is being used “off-label.”

Physicians may have additional duties to warn the patient if the medication could lead to dependence or addiction, or impair the patient’s ability to operate machinery or make legal or other decisions. Without such warnings, patients or their families might sue if the patient overdoses, commits suicide, becomes addicted, or suffers harm in an accident. If the patient causes harm to a third party while operating machinery under the influence of such medications, the injured third party might also sue the physician for negligence due to failure to warn.

**Risk Management Principles**

To promote the safety of your employees, and reduce your liability exposure, consider implementing the following risk management recommendations:

- Treat employee patients as you do any other patient.
- Create and maintain a medical record, and document all care, including telephone or in-person conversations that are related to medical care.
- Do not prescribe, provide treatment, or give medical advice for conditions you do not normally treat and follow.
- Do not provide medications unless you have personally prescribed them after examining the patient.
- Obtain and document informed consent for any procedures, and any medication with significant side effects.
• Warn patients of any safety risks, such as impaired judgment or inability to operate machinery.
• Before authorizing a prescription refill, verify the continued need and safety, and that you have seen the patient recently enough to comply with the “good faith” examination laws in your state (in California, for example, the patient must be seen at least once a year for the physician to prescribe medications).
• Establish a policy and procedure for providing employees with medical care and services, and train staff in its use.
  o Clarify what services are available and under what circumstances.
  o Clarify whether the patient is expected to use insurance, pay out of pocket, or whether “professional courtesy” will be extended.
    ▪ Free services and “professional courtesy” may violate anti-kickback, fraud and abuse, state, or federal regulations. Check with your personal attorney.
• Establish a policy and procedure designed to safeguard the confidentiality and privacy of employee medical records, and train staff in its use.
  o Determine a procedure for determining whether the patient is in fact an employee and under what conditions the patient is receiving treatment.
  o Determine the level of access other employees will have to these records. Some physicians keep these records in a separate, locked area.
  o Train all employees on the policy and procedure.

OMIC policyholders who have additional questions or concerns about practice changes are invited to call OMIC’s confidential Risk Management Hotline at (800) 562-6642, extension 641.