When is a physician–patient relationship established?

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Plaintiffs who sue for medical malpractice must show that there was a physician–patient relationship that created a legal duty. OMIC has addressed the issue of a duty being established when the physician has not personally seen the patient in the context of on-call coverage for the emergency department, coverage arrangements with colleagues, and new referrals from other physicians. Articles and recommendations related to these situations can be found at www.omic.com. This article reviews an ophthalmologist’s duty to a patient that may arise from appointments with prospective patients and curbside consults.

Q When is a legal duty established between physician and patient?

A The general rule is that an appointment by a prospective patient to see an ophthalmologist by itself is not sufficient to establish a physician-patient relationship since an appointment does not necessarily mean the ophthalmologist has affirmatively acted or agreed to diagnose or treat the patient. However, since there is no “majority rule” on these issues, if a prospective patient misses a scheduled appointment, OMIC advises documenting your efforts to contact the prospective patient. Ophthalmologists generally may decline a request for an appointment but should have a policy to inform the prospective patient of the decision not to examine, diagnose, or treat and provide information about other options for care, e.g., the local hospital emergency room, local medical society, etc. When an ophthalmologist has granted an appointment for a specific consultation or procedure within his or her area of expertise, a duty to the patient can arise even prior to actually seeing the patient. However, if upon meeting and examining the patient, it is determined that the anticipated care is not needed or is beyond the ophthalmologist’s area of expertise, the patient should be referred to someone who can provide treatment. Once treatment has begun, regardless of whether it is within the ophthalmologist’s area of expertise, a relationship has been created and withdrawing from care at an unreasonable time or without affording the patient the opportunity to find a qualified provider may make the ophthalmologist liable for a claim of patient abandonment. OMIC insureds are encouraged to call the risk management hotline when they have concerns about withdrawing from care.

Q Can an appointment establish the physician-patient relationship?

A In the recent past, an informal opinion about a patient provided as a professional courtesy to a colleague did not typically establish a physician-patient relationship. Generally, if the patient’s identity was not disclosed, the patient was unaware of the consultation, and the consulting ophthalmologist did not bill for the advice, most courts would not have found a physician-patient relationship. Now, however, courts are increasingly allowing medical malpractice suits to proceed against specialists consulted informally. For that reason, it is important to follow general rules to avoid unintentionally establishing a physician-patient relationship when providing a curbside consult:

1. When consulted by other physicians, (a) frame responses in very general terms; (b) suggest several possible answers, noting that all are dependent on the specific circumstances of a particular case; and (c) include disclaimer statements to emphasize that there is no formal consulting relationship.

2. Beware of evaluating test results of any kind and rendering a specific diagnosis.

3. Keep all such conversations/communications short. If contacted by a treating physician a second time, consider suggesting a formal consultation.

4. Document any such consultations with the date of the inquiry, the inquiring physician’s name, the nature of the inquiry, and any advice given. Without a record of the advice given, the consultant will be defenseless should a claim arise regarding the consultation.

Q Can an informal “curbside consult” establish a physician-patient relationship?

A Unfortunately, there are no statutes specifically outlining and providing guidance to physicians on the circumstances that create this duty towards the patient. Instead, the legal basis for the physician-patient relationship arises out of court decisions that create precedents and vary by state. While there is no majority consensus, in general, the duty is established when a physician affirmatively acts in a patient’s care by diagnosing or treating the patient, or agreeing to do so. This area of law has evolved over decades so that now a physician-patient relationship may be established even when the physician does not personally see the patient, refuses to see the patient, or is unavailable to see the patient. Once the relationship is entered into, the physician owes a duty to the patient either to continue care or to properly terminate the relationship.