Protect Your Medicolegal
The practice of medicine is arguably as much a legal exercise as it is medical. The long-standing reminder of this often unhappy union perhaps is best stated in one word: malpractice. A symbolic thorn in the sides of physicians—whether they have dealt directly with legal suits or not—malpractice appears on the rise in the United States, along with physicians’ growing concern about it. And yet, although medical malpractice is a legitimate cause of added stress and worry, it does not encompass the full spectrum of potential medicolegal pitfalls that sometimes befall practicing physicians. Beyond malpractice, physicians can easily find themselves embroiled in many other legal entanglements often resulting from simple oversights and seemingly trivial actions. Below we will take a closer look at eight of the more common legal pitfalls of medical practice and examine practical ways in which physicians can avoid legal action wherever possible.

1. Diagnoses and Follow-Up

According to Daniel Bernick, JD, MBA, Vice President and Principal of The Health Care Group, Inc. in Plymouth Meeting, PA, one of the most prominent sources of legal lapses involves diagnoses and follow-up. In medical practice, “follow-up” is a malleable term that can be associated with any number of legal slip-ups. “Specifically, in dermatology, the failure to follow-up on potentially cancerous lesions is one of the more basic roots of legal action,” explains Mr. Bernick. This may include failing to treat a particular lesion aggressively enough or not providing the patient enough guidance and information about living with potentially precancerous lesions.

Incorrect diagnoses of pre/cancerous lesions is more of a cut-and-dry issue, but with more ambiguous situations there is a lot more room for various interpretations, which can often favor the patient in legal matters. For example, the patient could claim the physician didn’t make him/her aware of certain aspects of skin cancer or any other condition that may have been diagnosed. Mr. Bernick suggests maintaining as direct a line of communication as possible with patients, especially in circumstances in which diagnoses are not clear-cut.

2. Tail Coverage

Tail coverage is just a small but important example of the importance of malpractice coverage, says Mr. Bernick. Like many aspects of medical practice, insurance has come to represent a complicated field full of intricacies that may ensnare doctors who switch practices or leave a group practice and start a new one. Mr. Bernick explains that an insurance “tail” is necessary for “claims made” policies. Without the tail purchase, “claims made” coverage only covers the doctor when both the malpractice incident and the lawsuit occur within the policy period. If the malpractice incident occurs during the policy period but the lawsuit comes afterwards, the doctor has no insurance protection, unless he/she buys the tail. The tail covers these post-policy period lawsuits. Although tails are often costly (up to one to 1.5 times the annual premium), Mr. Bernick believes they are worth every dime. “You wouldn’t consider practicing without malpractice insurance,” he notes. “‘Tail’ coverage is part and parcel of that essential coverage.” Because it is so important, some states, such as Pennsylvania, will revoke a physician’s medical license if s/he does not purchase tail coverage when needed, Mr. Bernick notes.

3. Coding Cautions

One of the largest legal risks in medical practice, coding can become a great source of frustration for practitioners and staff members. Problems of coding may range from upcoding to coding erroneously. If a commercial claim is coded wrong, the practice is subject to recoupment claims for the carrier.
These recoupment claims can be substantial if the coding error is repeated again and again, as is typically the case. The stakes are even higher with Medicare patients. In addition to recoupment claims, fines/penalties and interest may be assessed for such “false claims.”

When it comes to correctly coding medical procedures, each physician or practice will have different methods that may work. Generally, though, Mr. Bernick recommends an initial chart audit of 10-15 charts for each doctor to identify each physician's coding misconceptions and documentation lapses. The results of this audit should be used for an “in-service” seminar for physicians and billing staff, so that each can learn the flaws of current methods and correct them. The audit should be repeated at six months to identify any lingering or residual problems and then annually thereafter. This internal audit process forces physicians and staff to stay up-to-date on coding issues and nips billing problems in the bud before the error is repeated again and again.

Apart from these organizational check-ups, Mr. Bernick suggests making minor tweaks wherever possible, such as monitoring new staff members or physicians to ensure that they comply with practice standards of coding. “Whenever new doctors or staff members come aboard, you have a great opportunity to emphasize your established coding system to the entire staff as well as learn about methods to adjust it to the changing rules and standards of coding.” Mr. Bernick notes. Maintaining a receptive attitude toward the often frustrating pace of changes is essential for keeping up with that curve.

Mr. Bernick also stresses the importance of good, clear documentation. One of the more common problems occurs when physicians or staff members code correctly but don’t document sufficiently. “The saying is, ‘if it isn’t documented, it didn’t happen,’” says Mr. Bernick, “and that’s exactly the way the government will view it. Without adequate documentation, it’s as if you are billing for services you didn’t render—the classic ‘false claim,’” he says.

4. Limited Liability Practice Entities
Mr. Bernick recommends using either a corporation or a limited liability company (LLC). By law, no corporation or LLC can protect the doctor against his own individual malpractice. That is what malpractice insurance is for. However, the corporate or LLC shield is effective in protecting against liability for acts and omissions of partners and employees, as well as general liability (e.g. slip and fall claims). Of the two entities, an LLC requires less paperwork (corporate resolutions, Board minutes, bylaws, etc.), but it does require the doctors to pay estimated tax, which is an inconvenience, and requires personal spending discipline. By contract, the shareholders of corporations are also employees, so normal W-2 withholding applies.

Mr. Bernick explains that a regular mistake that physicians make is signing their names personally on contracts and other legal documents, rather than as the president of the company. For example, a doctor may simply sign her or his name, followed by “MD” when signing a lease for equipment, devices, or an order for office pens. “This probably occurs because there are so many various instances throughout a day in which the physician’s signature is required,” says Mr. Bernick. In these situations, vendors can file claims made on individual doctors, meaning that the individual doctor, not the practice, is liable and more vulnerable should any issues about agreements or other details arise. “It is extremely important that physicians document all leases and other items requiring signed consent in the name of the corporation rather than individually,” he observes.

5. Anti-kickback Laws
As specialists, dermatologists often derive substantial referrals from general practitioners and family practice doctors.
Mr. Bernick urges caution when entering into agreements with these referral sources regarding rent or other compensation. For instance, if a dermatologist rents space from a family practitioner who refers to the dermatologist, and the rent paid is more than fair market value, the OIG (Office of Inspector General) could claim that the dermatologist is paying kickbacks for referrals, via the excess rent. Conversely, if the family practitioner is renting from the dermatologist, and the rent is too low, the OIG could argue that the dermatologist is offering a rent subsidy in exchange for referrals. All such lease or other compensatory relationships should be in writing and be reviewed by a health care attorney for compliance with federal anti-kickback rules, the Stark law, and applicable state law fee-splitting rules, Mr. Bernick notes.

6. Employment and Firing
Numerous state and federal laws are in place to protect employees. One of these is the federal Fair Labor Standards Act (“FLSA”), commonly referred to as “wage and hour law.” The FLSA law that tends to be most frequently violated by medical practices, in Mr. Bernick’s experience, is the prohibition against “comp time.” This is when a “non-exempt” (non-professional, non-managerial) employee works more than the required 40 hours in one week and takes the excess off in the next week so that the employer does not have to pay time-and-a-half for the excess hours. “Oftentimes, physicians will offer ‘sunshine’ hours instead of time-and-a-half, or suggest that an employee who works extra in one week can work less next week,” says Mr. Bernick. Many employers still (wrongly) believe that this is legal, says Mr. Bernick, and the potential liability for repeated violations can add up to thousands of dollars. Even when employees like and want comp time, it should not be offered, since the comp time rules of the FLSA cannot be waived by worker agreement.

Often the issue comes to a head when an employee is being terminated involuntarily and is looking for a way to seek revenge. He or she consults with an attorney, and then demands big dollars for past comp time violations, even though he or she previously enjoyed the time off.

Dermatologist employers should also be careful not to permit any jokes or other inappropriate remarks in the office regarding race, sex, national origin, or religion, and, of course, should not discriminate on the basis of such criteria. Failure to do so is a sure way to incur major liability under federal and state laws.

Disability is another sensitive issue; be sure to consult with an attorney before terminating the employment of an employee who might claim that s/he was terminated because of a disability, as the Americans with Disabilities Act affords employees considerable protections. Be especially careful when terminating the employment of a pregnant employee. Even if the employee is incompetent, her pregnancy is a complicating factor that may spell liability for the employer on the basis of sex discrimination. Be sure to consult with a qualified attorney before taking action in such situations, says Mr. Bernick.

7. Credentialing and Provider Numbers
Practicing physicians rarely forget to update their own personal information if they change providers, but they may encounter problems when it comes to other physicians at their practices. “Some practicing physicians run into problems when they want a new doctor to start on a certain date, whether or not she or he is fully credentialed by the practice’s important carriers,” Mr. Bernick says. The temptation is to bill the new doctor’s services as if rendered by the established, senior physician until the new physician gets his or her own numbers, but this exposes the practice to fraud claims, especially with respect to Medicare. Get the paperwork started early, says Mr. Bernick, and even delay the doctor’s start date if necessary if credentials have not yet been obtained for a major carrier.

8. Drug Interactions
Another more practical matter that is medical in nature but could easily become legal is drug interaction. While it is impossible to predict 100 percent of drug interactions, most physicians take every precaution necessary to ensure patient safety when recommending and prescribing medications. In some cases, however, especially when a patient is seeing a primary care physician and a specialist, there can be some discrepancy concerning the drug therapies a patient is taking at a given time. Drug interaction may not be as omnipresent an issue for dermatologists as it is for say, internists or cardiologists, but it still needs close attention.

Just Business
For physicians, the daily pressures of running a well-oiled practice extend beyond the medical and into the territory of the legal. From employee management to documentation, all aspects of a medical practice must adhere to a strict legal code. According to Mr. Bernick, an increased awareness of the relationship between medical and legal components of medical practices will aid in identifying areas that require attention in your own practice. This awareness may also enable physicians to better anticipate and therefore prepare for or avoid medicolegal conflicts so that doctors can focus their interests more appropriately on the medical care of their patients.