

MMAP NEWS



A Risk Management Publication of the Mississippi Medical Malpractice Availability Plan

Issue 6 – April 2006

Noncompliant Patients Can Be Hazardous to Physicians

Methods for Avoiding Liability When Patients Are Negligent

By David Karp

Patients who are noncompliant with their doctor's recommendations or medical advice risk injury to themselves and pose a liability threat for their physician. Noncompliant patients typically are those who do not follow post-treatment instructions; don't keep appointments; don't report information about worsening symptoms; fail to follow through on referrals to a specialist; don't get recommended diagnostic tests; or don't take their medications properly.

Reasons for noncompliance

Noncompliance is not always a deliberate act. Among the reasons some patients do not follow their doctor's advice:

- they didn't understand instructions;
- they forgot the doctor's oral advice;
- they didn't appreciate the seriousness of a medical condition or the urgency of recommended follow-up visits or referral;
- medication instructions confused them;
- a language barrier, hearing impairment, fear, mental confusion or illiteracy impeded their ability to understand;
- an appointment time was inconvenient;
- they received conflicting advice from multiple treating physicians; and
- they couldn't afford to purchase medication, or lacked insurance coverage for diagnostic tests, surgery or additional visits to the physician.

Physicians' role in noncompliance

A physician's words, actions, inattention or silence can contribute to a patient's noncompliant behavior. For example, when a patient is advised during an initial office visit to stop smoking or alter eating habits, but the subject is not mentioned again, the patient might conclude that the doctor does not consider the advice significant enough to repeat. "He knows I still smoke, but he hasn't said anything more, so it can't be much of a problem."

Physicians can contribute to a patient's failure or refusal to comply with medical advice in other ways. Patients may infer an issue is not of great importance if their doctor spends too little time to explain the significance of a medical finding, the recommended treatment and alternatives, and the expected outcome of treatment. Some doctors impart almost all of their medical advice orally to patients, sometimes in language too technical for the average patient to absorb. Other physicians discourage patients from asking questions by showing impatience, belittling patients' complaints, or by offering unrealistic advice. Merely telling an obese patient to "cut back on your calories" might be sound, yet impractical medical advice,

unless the patient is told *how* to reduce calories. Similarly, it may be a futile exercise to advise patients to “stop smoking” or to “drink less,” without considering the patient-specific factors that prevent their immediate compliance. Physicians who give advice that they do not follow themselves are less likely to get patients to comply.

Noncompliance leads to litigation

Noncompliant patients are liability risks for several reasons. First, they may have a viable claim if they can prove their noncompliance resulted from a physician’s unclear, inadequate or omitted advice. For example, a patient who has not been informed of the known, potentially serious and treatable side effects of a prescribed medication while taking the drug may not seek timely medical attention and suffer injury; a patient may be injured if he or she has not been adequately advised of precautions to follow while taking the drug, such as avoiding driving or alcohol or other drugs. Similarly, a patient may claim a physician was negligent for telling the patient to “take it easy,” rather than giving more specific advice, such as “don’t raise your arms above your shoulders for at least 3 days.”

A second reason noncompliant patients are a liability risk for physicians is that some do not share the doctor’s advice with family members, so that when noncompliance leads to the patient’s death, survivors may believe the physician’s inaction was the cause:

Such was the case in a malpractice claim filed by the heirs of a seemingly robust man who died of a massive heart attack at age 49. The patient’s physician had repeatedly advised the man to see a specialist after an EKG showed abnormal results and the patient reported symptoms associated with cardiopulmonary disease. The doctor documented his advice, but neglected to note the fact that he repeated the recommendation for more than a year. The decedent’s family refused to believe the patient would have ignored such advice if the doctor had given it. Liability insurers report that this scenario and its variations are at the heart of hundreds of malpractice claims against physicians.

Guilty feelings that result from failure to follow the doctor’s advice are another reason noncompliant patients are increased liability risks. Many lawsuits are filed by patients or grieving family members whose own actions may have contributed to the patient’s injury or demise; often, these individuals try to blame others, particularly the patient’s doctor, to assuage their own guilt. A recent case is illustrative of scores of claims insurers find are inspired by survivors’ guilt:

A single mother with four children had to leave work to take three of the children to the doctor for treatment of otitis media. When her two-year-old child developed symptoms similar to those experienced by the other three, the mother called the doctor’s office for more medication. But after the mother described the child’s symptoms, the pediatrician advised her to bring the child to the office right away for an exam. “This doesn’t sound like a simple ear infection,” the pediatrician said. The mother said she couldn’t afford to leave work again and the baby sitter had to remain at home with the other children. The mother pleaded for a prescription that she would pick up on the way home from work. The doctor reluctantly agreed to call in a prescription, but added, “If Cindy isn’t better by the time you get home, I want you to take her to the emergency department and have them call me.” On arriving home at 6 pm, the mother prepared dinner for the older children and put them to bed. By 8:30 pm, she was tired and although Cindy’s condition seemed unimproved at best, the mother administered the antibiotics and put the child to bed. The next morning, the baby’s condition was noticeably worse. An ambulance took the child to the hospital, where she died of infectious meningitis within a few hours. The mother sued the pediatrician and charged her with failure to diagnose meningitis. She cited the antibiotic prescription as evidence the physician did not regard the baby’s condition as serious. Fortunately for the doctor, she had dictated a detailed chart note of her conversation with the child’s mother. The suit ultimately was dismissed.

Similar malpractice claims have been brought by spouses and other family members who concede they were not as insistent as they might have been in urging a loved one to get medical treatment, follow a doctor’s advice or obtain a diagnostic test:

A man whose wife died of metastatic breast cancer two years after a suspicious mass was identified was unsuccessful in his suit against a family physician when deposition testimony of friends revealed the man had repeatedly said of his wife’s refusal to have a suspicious lump biopsied, “It’s her breast and she can do what she wants.” In his lawsuit, the patient’s husband alleged the doctor did not adequately advise the patient of the consequences of a delay in getting a biopsy. This unmeritorious claim was dismissed in large part because of the doctor’s progress note that read, “Firm ½ cm lump, L[eft]

breast around '10 o'clock.' Pt says she noticed a month ago; thinks it's larger now. Rec[commended] biopsy stat. Could be cancer. Consult. with Dr. Gale, Thurs, 4/17, 3 pm." The fact that the patient's physician had arranged an immediate surgical consultation (which the patient did not keep or re-schedule) was solid evidence of the doctor's concern for the seriousness of his exam findings and the patient's history.

Protecting the doctor

As the above cases illustrate, documentation of a patient's noncompliance is clearly one of the more effective ways to protect the doctor against the actions or inaction of others. A sufficiently-detailed, timely handwritten progress note affords protection, but in cases in which multiple conversations about a problem took place, prudent physicians rely on a dictated note that includes details of exam findings, discussions and recommendations. Documenting events adequately and following these added steps shield physicians from malpractice claims by noncompliant patients or their survivors:

- **Give clear instructions.** Written information often is needed to ensure patients understand a medical problem, its treatment and sequelae. Newly-diagnosed conditions such as hypertension, diabetes, hyperthyroidism and cancer, to cite a few, have many aspects a patient may not appreciate after only a brief oral explanation. Physicians are encouraged to supplement oral explanations, instructions, advice and recommendations with written information, so that patients and their family can re-read and re-review it as often as they need to. Dispense written information for medications; specify the name of the drug, what it is for, how it should be taken, significant side effects that should be reported to the doctor, precautions while taking the drug and what the patient should do if he or she misses a dose.
- **Schedule appointments practically.** Allocate appointment slots according to patients' needs. Some practices schedule elderly patients at the end of the day, so that if more time is needed with them the rest of the schedule is not delayed. Other doctors set aside blocks of time before 8:00 am and after 5:00 pm to accommodate patients whose work schedule makes mid-day appointments difficult. Set aside a free time slot or two each day to accommodate urgent drop-ins. A flexible schedule, based on patients' medical problems, reduces haste and assures most patients will have adequate time with the doctor.
- **Recognize communication barriers.** Encourage elderly, non-English-speaking, hearing-impaired or other patients who have difficulty comprehending advice to bring a family member with them. Document in the patient's chart the names of interpreters or others who assisted the staff or doctor to communicate with the patient.
- **Stress the level of urgency.** Tell patients how urgent a recommendation is to obtain a diagnostic test, see another doctor, or to follow other medical advice. Patients can prevail in malpractice litigation if they prove that although the doctor gave the appropriate advice, he or she did not mention the potentially serious effects of delay.
- **Obtain an informed refusal.** Patients have the right to decline a physician's advice for tests or treatment. The doctor is best protected if he or she documents that patients were informed of the consequences of their decision to refuse recommendations.
- **Be a good listener.** Avoid body language that signals impatience or inattention. When discussing serious matters with patients, sit at eye level, rather than stand or hover in a doorway. If the patient does not seem to understand plainly-worded information, consider sending the patient a letter that summarizes your findings and recommendations. Such a letter can be an expanded reiteration of a progress note.
- **Document noncompliance.** Ask your staff to note failed appointments in patients' charts. Use a reminder system to contact selected patients whose missed appointments put them at risk. Consider advising chronically noncompliant patients that you may discharge them from your practice if they continue to refuse your advice.
- **Keep colleagues informed.** Physicians who co-treat patients should let the patients' other doctors know about conditions or medications that could influence diagnosis or treatment. Copying progress notes to colleagues, sending periodic reports, and asking patients to relay information (and documenting you have done so) are effective ways to keep colleagues apprised.

- **Encourage questions.** Many patients are reluctant to “bother” the doctor with questions and need “permission” to telephone the office if something troubles them. Others won’t volunteer information. “If he thought it was important, he would have asked about it,” these patients typically contend. Doctors who ask, “is there anything else you’d like to tell me,” and who encourage their patients to speak freely learn more than colleagues who assume that a patient’s silence is evidence that all is well.

© 2006, David Karp Associates, Consultants to the Health Professions, Post Office Box 69, Cloverdale, CA 95425-0069. Reprinted with permission. Articles are not intended as legal advice.