On Legal Grounds: An End-of-the-Year Risk Management Check-Up

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Challenging economic times often elicit interesting actions both by patients and attorneys as they concoct creative schemes to avoid payment. Though we've seen several states enact tort reform of some degree during the past year, this has prompted some attorneys to simply refocus their attention away from malpractice in tort reform states, and toward general negligence, privacy issues and deceptive trade practices. Patients also continue to demonstrate increased expectations despite requesting less-invasive surgery, and this economy facilitates difficult patients, risky medical practice decisions and often unwise patient acceptance. The adage, "You cannot fool-proof everything, because fools are so ingenious" may be true, but the schemers featured in the following cases are not foolish – they're merely gaming the system. The following are some examples of what to watch out for in the year ahead.

CASE ONE

Rhoda M. seeks a consultation for hairreduction via IPL. L Grant, MD, recommends IPL and explains its limitations, risks and advantages. After obtaining patient consents, Dr. Grant treats Rhoda in his office. The initial treatment goes well, and the next treatment in the series is performed by the certified technician – under physician supervision – in the medical office and using the same settings. Again, the treatment goes well and no negative visual or patient comments are noted. Later that day, however, the patient calls the practice stating she was "burned" and refusing to return to the practice. Rhoda consults a dermatologist and, a few months later, her attorney sends a letter to the plastic surgeon's office claiming many problems and stating the patient's intention to file a lawsuit for "general negligence" – not malpractice. The general negligence policy is usually a slip-and-fall, theft-type policy and many questions are raised regarding coverage.

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Discussion: Case One

This tactic is used by plaintiffs' attorneys to avoid following tort reform guidelines that might limit damages and require an expert to write a report. Trial lawyers are creative, and they will challenge tort reform by looking for specific cases to bypass it. This case, from Texas, sets general negligence insurance coverage against malpractice coverage. This challenge to tort reform has not been fully answered by the Texas Supreme Court, and the answer will depend on the appellate court in which the case is heard. Until this issue is decided, it might be helpful for plastic surgeons to have patients initially agree that treatment of all types is to be considered "medical treatment." I wonder where the end point might be – botulinum toxin? IPL for skin care? Fillers? Be prepared for more to come.

CASE TWO

Phyllis L., a frequent patient of M. Slaughter, MD, brings in her sister for a breast reduction consultation. Her insurance is verified and the surgery is approved. Unknown to the practice, Phyllis is in the process of a divorce. The surgery is successful, but Phyllis's soon-to-be ex-husband files a complaint of identity theft when Phyllis's insurance is used to cover her sister's procedure – the practice did not follow Red Flag Rules to ensure and document proper identification.

Discussion: Case Two

This case reminds plastic surgeons to be vigilant against identity theft. Patients may try to use any tactic to obtain coverage, which is why the practice must comply with Red Flag Rules – and request a driver's license or photo ID and ensure proper documentation that matches the desired procedure. There are also many considerations when caring for patients in the midst of a divorce, including whether the patient is emotionally ready for surgery, who is providing insurance coverage, and will this expense be covered in the divorce decree? The timing of surgery requests could be inappropriate, but when coverage ends with the finalization of the divorce, there are additional pressures and concerns if further surgery is required. In other words, as the di-

vorce is ongoing with medical coverage provided by the spouse intact, when the divorce is final, that medical coverage may end – leaving both the patient and practice stuck with the bill. This vanishing coverage may be unknown to the practice.

Minors of divorcing parents pose yet another issue when insurance coverage is involved – as well as determining who may give consent for treatments. In this event, look at the divorce decree and document which parent has custody and who controls coverage.

CASE THREE

Ted B. makes an appointment for botulinum toxin consultation and treatment with G. Howard, MD. The patient is informed of precautions, consultation fee and toxin fees. He keeps his appointment, has the injections – but leaves before payment. Ted later calls and complains about headaches and vague symptoms. The practice is unsure whether to pursue the patient for payment, so Ted gets away with it – just as he has at numerous other offices.

Discussion: Case Three

This case's component of theft of both product and the practice's time seems to be increasing nationally. These con artists take advantage of a practice and then complain about the treatment in hopes of avoiding payment altogether. It's wise to consult with patients first and collect any payments – as well as signatures on informed-consent documents and financial agreements – before treatment. Be wary of patients who leave in a rush, no matter what excuse they offer – it may be their method to avoid payment. Before this happens to you, alert the staff and have a good system of checks and patient-friendly exit protocols in place. The real question is whether to proceed with collections or go straight to legal action. It might be wise to have a credit card on file to cover such treatments and merely fill in the amount of charges after treatment is concluded. The patient may still contest and try to block the credit card action, but the better documentation of the financial agreement, the more likely the practice will prevail. Of course, you should "fire" the patient after money is collected.

CASE FOUR

Mary R. has lost significant weight and is seeking improvement of her abdomen. She would benefit from an abdominoplasty and liposuction and schedules surgery with S. A. Niven, MD, who explains to Mary that the procedure is considered cosmetic and will not be covered by insurance. Mary pays her fee but still submits a claim after her surgery, which is approved. This comes as a surprise to the practice, which does accept insurance. The practice must refund her fee, and accept the $950 paid by the insurance provider. To make matters worse, Mary has an out-of-state policy that pays her directly – and she refuses to reimburse the practice stating "I need it more!" The practice cannot bill Mary any additional charges.

Discussion: Case Four

Contract and regulatory requirements such as Red Flag Rules and insurance contract issues, must be updated in the practice. Tort reform has had a beneficial effect where enacted, but as I stated earlier, trial lawyers are searching for areas to bypass these new laws. In states with tort reform, it might be reasonable to include language in the patient information sheet that "all matters concerning your medical care will be considered to be a health care treatment and subject to the Medical Practices Act." Make this state-specific, and have the patient sign the document as part of the HIPAA acknowledgement.

Case Four is more complex. If the practice participates in insurance, then in the gray area of cosmetic surgery procedures such as abdominoplasty and rhinoplasty, have the patient sign a "Consent for Irrevocable Non-Assignment" agreement (a sample is featured above) stating that the procedure is cosmetic; therefore, it would be fraudulent to bill insurance or participate in such a claim. The patient agrees that you do the surgery and waives any right to use a claim for your services.

The additional aspect of out-of-state insurance may include issuance of the check to the patient, and not your practice. Your financial agreement should include language that assigns all payments to the practice – which the patient signs and acknowledges. If such a payment does go to an out-of-state patient who decides to keep your money, you may have a couple of options. One is to hire an attorney in that state and initiate proceedings for the theft. Hopefully, you have documentation to show that the patient approved of the assignment of payment. Infrequently, the insurance carrier will help correct this. The patient might raise a claim of negligence, hoping to derail such an action, but evaluate that specifically. If the money is uncollectable, a second option is to file an IRS Form 1099 for the patient; it's a payment to the patient – and, therefore, should be taxable and reported. I would bet the patient did not report the money as income. This will not return your stolen payment, but it may put a smile on your face.