"The failure to prevent the psychiatric patient from harming herself or himself or others is a known legal risk for therapists," says DeLoss. "It is less well-known and less common for the primary care provider."

The physician needs to be aware of the possibility, monitor patient comments or warnings, and report or disclose the information to protect the patient or others, as may be allowable under federal and state laws, he says. Primary care physicians have a duty to refer patients with a psychiatric condition in some cases, adds DeLoss. "Just as a medical condition may require a referral to specialist, so may a psychiatric patient need to see a psychiatrist or other professional," he says.

If the physician is aware that the patient intends to harm a specific third party, the physician may be under a duty to warn or to take steps to protect others, says DeLoss. The Health Insurance Portability and Accountability Act (HIPAA) recognizes the need to disclose information to protect third parties, and it specifically allows a physician to disclose health information without an authorization to carry out the notice needed.[1]

To sustain a cause of action in tort predicated on a therapist's alleged duty to warn third parties of the potential violent acts of a patient, the plaintiff must demonstrate that the patient made specific threats of violence, that the threats of violence were directed against a specific and readily identifiable victim, and that there is a direct physician-patient relationship between the defendant and the victim or a special relationship between the patient and the victim, says DeLoss.

California, Michigan, Minnesota, New Jersey, Pennsylvania, and New York similarly hold that a cause of action against a therapist exists when the patient has communicated to the therapist serious threats of physical violence against reasonably identifiable victim(s), says DeLoss.[2-8]

• There are specific state laws governing mental health information in most states that differ from what HIPAA generally requires.

If there is substance abuse treatment information involved, federal law under 42 Code of Federal Regulations Part 2, "Confidentiality of Alcohol and Drug Abuse Patient Records," may govern, adds DeLoss. *(To view the regulations, go to http://bit.ly/WUyNQ5.)*

The physician must understand that these laws function differently from HIPAA and generally are more restrictive about what mental health data a physician may disclose, and when, he explains.

• The provider should not assume that the patient understands the consent form or the standard explanation utilized by the provider during the consent process.

"State laws provide additional protections and rights in this area that may govern," says DeLoss. "The physician should comply with state law and document the consent process."

References

1. 45 C.F.R. § 164.512(j)]
2. Eckhardt v. Kirts, 534 N.E.2d 1339, 1344 (1989), citing Kirk v. Michael Reese Hospital, 513 N.E.2d 387, 399 (1987).
3. Cal. Civ. Code § 43.92(a)
4. MCLS § 330.1946(1).
5. Minn. Stat. § 148.975.
6. N.J. Stat. § 2A:62A-16
7. 49 Pa. Code § 41.61.
8. NY CLS Men. Hyg. § 33.13. ✦

Translation shortcuts might get you sued

Untrained interpreters pose legal risks

The biggest liability risk physicians face when caring for limited English-proficient (LEP) patients requiring interpreters is using untrained bilingual people such as staff, family members, or friends of the patient to interpret, instead of professional interpreters, according to **Lisa Diamond**, MD, MPH, an assistant attending at Memorial Sloan-Kettering Cancer Center in New York City.

"Professional interpreters have proficiency in both English and the target language that has been assessed," Diamond explains. "They go through many hours of training, including medical terminology and ethics, and are now certified under a national examination process."

In 32 of 35 cases analyzed by researchers at the University of California at Berkeley School of Public Health, healthcare providers did not use competent interpreters, according to a 2010 study that analyzed medical malpractice claims related to failure to provide appropriate language services.[1]

"Untrained bilingual people may not be proficient in either English or the target language. They may not know medical terminology or its nuances, and they may add, edit, or omit important parts of the information being relayed," says Diamond. Here are some legal risks faced by physicians treating LEP patients:

• Allegations of breach of the standard of care.

The physician's risk of breaching the standard of care in treating LEP patients does not differ from the risk posed when treating any other patient, so long as the physician did what a "prudent physician" would do to facilitate effective communication with the patient, says **John W. Miller II**, principal of Sterling Risk Advisors in Marietta, GA.

Though it doesn't directly bear

on determining the standard of care, a 2003 guidance issued by the Department of Health and Human Services (HHS) provides a framework of what the government expects of physicians treating LEP patients, notes Miller. *(To view the guidance, go to: http://1.usa.gov/pvbiE9.)*

"This is certainly a fact a jury will take into consideration, should there be any questions of whether the physician should have more effectively acquired additional information or disseminated a treatment plan through the use of an interpreter," says Miller.

• Allegations of failure to obtain "informed consent."

"As many attorneys and risk managers will concur, physicians obtaining informed consent from patients is more than their signature on a form," says Miller. "Relying upon the signature on the form as proof that effective informed consent took place is potentially dangerous for physicians in some venues."

Informed consent is the process by which a physician explains the risks and benefits of a procedure, and decides with the patient what course of care the patient desires once those risks and benefits are weighed, says Miller. "This sort of communication warrants a higher level of certain communication by the physician and the patient," he advises. "The litigation risk associated with allegations that the patient did not understand the risks of the planned procedure can be significant."

Miller recommends physicians use a professional interpreter who is adept at explaining complicated medical terminology for the informed consent process whenever an invasive procedure is planned. "Further, it is good practice to have the patient repeat back through the interpreter the physician's instructions and their understanding of all information they have received," he says.

• Allegations of violating Title VI.

Title VI of the Civil Rights Act of 1964 prohibits healthcare providers who receive federal money from Medicaid, Medicare, or any other government program from discriminating on the basis of national origin, which the courts have determined includes language discrimination, says Miller.

Under Title VI, according to the HHS guidelines, physicians and other HHS recipients must take "reasonable steps" to ensure meaningful access to their LEP patients. Failure for physicians to comply with these requirements usually means an investigation by the HHS Office of Civil Rights (OCR), warns Miller.

"I've had several practices investigated by the OCR for LEP violations and for violations relative to deaf or hearing-impaired patients," he reports. "The compliance costs alone after a visit have resulted in many of my clients wishing they had paid for interpreters for their patients all along."

Executive Summary

Use of untrained bilingual individuals when caring for limited English proficient patients can result in medical malpractice claims. Physicians should consider:

✦ Using professional interpreters who understand medical terminology.
✦ Having informed consent communication done by a professional interpreter for invasive procedures.
✦ Having the patient repeat the physician's instructions back.

Reference

1. Quan K, Lynch J. The high costs of language barriers in medical malpractice. *National Health Law Program*, 2010.

SOURCES

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Suspect lawsuit is coming? Know how to report it

Too-late notice to your insurer might negate coverage

Most medical malpractice policies have a clause that requires physicians to notify the company of all claims in a timely fashion, advises **Karen Kelly**, vice president of claims operations for The Doctors Co., a Napa, CA-based medical malpractice insurer.

While the defensibility of a claim is primarily driven by the facts of a case, late notice might preclude the carrier from providing physicians with direction and advice that will ensure their interests are protected, she adds.

"Late notification may limit the carrier's ability to retain the best defense attorney and experts for a particular case, as they may already be retained by another involved party to the claim," warns Kelly. "A delayed response may also result in a default judgment being rendered against the physician."

Ensure coverage

If an insured has provided written notice of a potential covered claim during the active policy period, The Doctors Co. will accept that as notice under the policy, says Kelly.

"Even if the insured is no longer with