DON'T LET THE PATIENT LEAVE IN A HUFF:

How to Handle Patient Complaints

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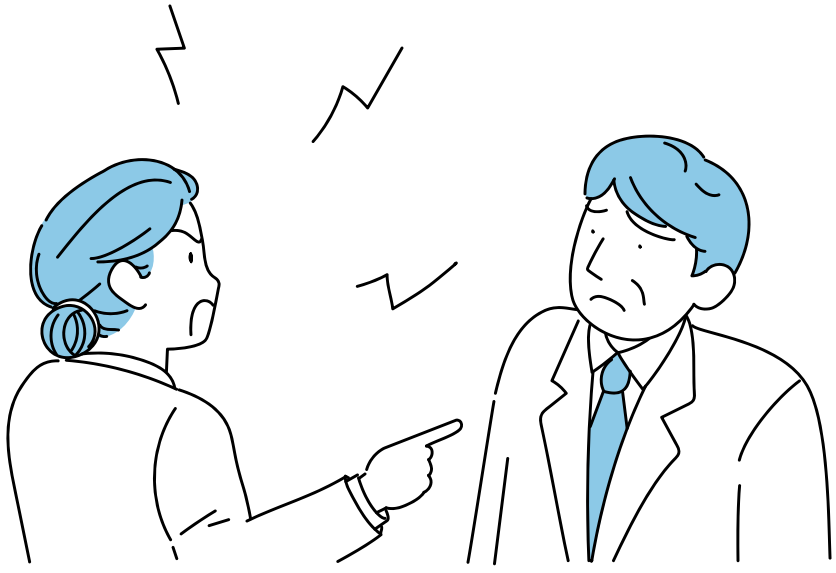


What should I do if a patient becomes upset about a bill? Can I ask my patients if they are vaccinated against COVID-19? How do I handle patients who refuse to wear a mask in our office despite our policy?

These are some of the questions that we receive at the Mutual Insurance Company of Arizona (MICA). As medical practices return to the routine of seeing patients in the office, physicians and their staff often face situations where patients become upset and even angry. In response the risk management team at MICA developed this reference guide to answer the common question: how can my practice turn patient concerns into patient satisfaction?

ABOUT **MICA**

MICA's Risk Management Services department can address member's immediate medical professional liability questions and less urgent questions about daily operations. MICA members can call the Risk Management Hotline 800-705-0538 to schedule complimentary on-site or online education, professional liability risk assessments, and telephone or Zoom consultations. Risk management inquiries can also be emailed to rm_info@mica-insurance.com.

To learn more about MICA coverage or request a quote, visit https://info.mica-insurance.com/mpl, or call 800-681-1840. Or contact your insurance agent.

IN HONOR OF COMPLAINT MANAGEMENT

Treating complaints with prompt action can lead to patients feeling more positive about their experience and offer your practice valuable lessons.

Good reviews by patients, whether online, on a satisfaction survey, or when talking to someone new to their neighborhood, promote the growth and success of a medical practice. Just as important are your patients' stories of a problem they experienced that you and your staff immediately and fairly addressed, especially if those patients are still your patients.

If you ignore or superficially manage complaints, your former patients will tell only that part of the story, leaving out the part about your quality medical care. You and your staff may also miss out on valuable lessons and opportunities for care quality improvement. Responding appropriately to patient complaints may also help physicians, advanced health care professionals, and practices stave off medical professional liability lawsuits ("MPL") arising out of these complaints.

THE COMPLAINT

The patient made an appointment with an ear, nose, and throat specialist, Dr. Enteman, for excess ear wax. While this was the patient's first appointment with Dr. Enteman, she had seen other physicians for wax removal in the past and assumed Dr. Enteman would perform the same procedure.

While examining the patient's ear canal, Dr. Enteman identified a small benign cyst and performed a more in-depth procedure than cerumen removal. Dr. Enteman did not tell the patient about the cyst or obtain her informed consent for cyst removal. Based on prior experience with other patients, he assumed the patient would just agree. He then documented his examination, rationale, and the procedure.

When the patient received a bill for $100 more than expected, she called the practice and demanded that the practice take the cyst removal off the bill. Dr. Enteman and the practice manager were highly concerned and discussed the situation.

THE NO SURPRISE BILLING LESSON

Dr. Enteman and the practice manager had heard of the new federal No Surprises Act but weren't sure if this fell under the Act or how to comply if it did. They called the hotline and learned that the Act and its related rules went into effect January 1, 2022, and apply to all physicians, other licensed health care professionals, facilities, and hospitals.[1]

They also learned the following:

Physicians and practices must determine if patients are uninsured or paying the bill themselves without the benefit of a health insurance plan.

They must provide self-pay or uninsured patients with a good faith estimate ("GFE") of the expected charges within three business days of the patient's request and within one business day after scheduling the procedure.[2]

If the final bill exceeds the GFE by $400 or more, a patient can challenge the bill by initiating a dispute resolution process through the U.S. Department of Health and Human Services.[3]

Failure to comply with the rules may result in enforcement actions by state or federal agencies, corrective action plans, and/or civil monetary penalties up to $10,000 per violation.

This patient's bill was well below the $400 threshold but at the end of the phone call to MICA the physician and practice manager decided to rescind the fee and evaluate their communications and processes for compliance with the new rules. The patient was perturbed at first but weeks later made an appointment for another problem.

THE INFORMED CONSENT LESSON

Dr. Enteman's practice manager recalled learning in a MICA Risk Management Services hotline call that lack of informed consent is a common allegation in MPL lawsuits and licensing board investigations.

The legal standard of care generally requires physicians to obtain a patient's informed consent and document that consent prior to performing that procedure on the patient. "Obtaining" consent is a conversation about the purpose, benefits, and potential risks of, and alternatives to the procedure. The conversation should also include time for patient questions. "Documenting" means summarizing the conversation in a medical record entry and, ideally, in a consent form signed by the physician and the patient.

THE COMMUNICATION LESSON

From MICA's risk management resources, Dr. Enteman and the practice manager knew that miscommunication between physicians, clinicians, practice staff, and patients drove the anger behind most MPL lawsuits and licensing board complaints. They reviewed some of the MPL data available through MICA and noted the following:

An analysis of over 20,000 closed claims filed nationwide showed that communication was a factor in 30% of them.

> An analysis of over 20,000 closed claims filed nationwide between 2009 and 2013 showed that communication was a factor in 30% of the cases.[4]
>
> Over half of those claims stemmed from deficiencies in physician or clinician-patient communication.[5]
>
> Of those communications, nearly one-third involved inadequate informed consent, medication education, or an unsympathetic response to a patient complaint.[6]
>
> Patients are more likely to report a better overall care experience with physicians, clinicians, and practice staff who are effective communicators,[7] which may translate into more positive online reviews and fewer board complaints.

While talking to a MICA Risk Management Consultant, they also learned that during a panel discussion for the Arizona Society of Healthcare Attorneys Health Law Conference, the Executive Director of the Arizona Medical Board observed that better communication with patients would likely reduce complaints against physicians.[8] They decided then to invite a MICA Risk Management Consultant to do a live and online or in-person presentation of effective communication closed claim data and ideas for improvement for the rest of the practice's clinicians and staff.

Treating complaints with the same gravity that occurs during peer review, licensing board investigations, and MPL lawsuits will inspire current patients to tell the whole story with a happy ending. Even if patients are not pleased with the result, they won't end the story there and will go on to share their experience of validation and sincerity.

YOU CAN ASK ABOUT VACCINATIONS

An explanation of what is covered under HIPAA Privacy Rule when it comes to asking your patients about their status on vaccinations.

Physicians, other health care professionals, and their offices or practices often ask patients whether they have been vaccinated against specific diseases, such as COVID-19. Some patients may reply by asking, "Well, are you vaccinated?" Other patients may answer by saying they do not have to provide that information because their vaccination status is protected by the Health Insurance and Portability and Accountability Act of 1996 (HIPAA). A member of Congress has even said that a vaccine status question itself would be a violation of a patient's HIPAA rights. These exchanges do not have to result in conflict or ruined relationships. Instead, they create opportunities to build or fortify trust through patient education.

Privacy regulations under HIPAA are collectively called the HIPAA Privacy Rule.[1] The Privacy Rule governs uses and disclosures[2] of protected health information (PHI) by physicians, clinics, hospitals, psychologists, dentists, chiropractors, nursing homes, pharmacies, and other clinicians who electronically transmit PHI as part of a defined transaction.[3] The Privacy Rule also governs the business associates of these physicians, clinicians, and health care organizations.[4] The Privacy Rule does not govern patients or their uses or disclosures of their own PHI.

Key terms related to vaccination status questions are "use" and "disclosure." Use of PHI is the sharing, employment, application, utilization, examination, or analysis of PHI within the medical office, practice, or health care organization.[5] A disclosure is the release, transfer, provision of access to, or divulging, in any manner, of information outside the medical office, practice, or health care organization holding the information.[6] Physicians, clinicians, or practices asking a patient for their COVID-19 or other vaccination status is neither the "use" nor the "disclosure" of a patient's PHI. HIPAA does not prohibit fact-and information-gathering related to the patient's care or the safety of physicians, clinicians, and practices. Physicians, clinicians, or practice staff can ask patients or visitors whether they have received a particular vaccine, including COVID-19 vaccines.[7]

Once the physician, clinician, or practice obtains or receives the patient's answer to the vaccination status question, the physician, clinician, or practice is then positioned to "use" or "disclose" the information. Except in certain situations permitted or required by the Privacy Rule, physicians, clinics, hospitals, psychologists, dentists, chiropractors, nursing homes, pharmacies, and other clinicians must obtain the patient's or patient's representative's authorization before using or disclosing patient's vaccination status or other PHI. The Privacy Rule generally permits the use or disclosure of a patient's vaccination status to the patient's health plan when required to obtain payment for vaccine administration and public health authorities.[8]

When asked about their vaccination status, some patients turn the question on the inquiring physician, clinician, or practice staff, especially after reading or hearing about a physician or nurse who is not vaccinated against COVID-19. The HIPAA Privacy Rule governs physicians, clinicians, and practices as keepers of patients' PHI but not as keepers of their own PHI. Physicians, clinicians, and practice staff may or may not choose to share their vaccination status. The patient asking about your vaccination status may be sincerely fact or information-gathering to assess their own risk for COVID-19 or other infectious diseases. Your positive vaccination status may encourage the patient to pursue vaccination.

MICA's Risk Management Consultants are frequently asked whether the physician or clinician must continue to treat the patient if the patient has not been vaccinated and/or does not intend get vaccinated. Some physicians or clinicians may see the patient's refusal to be vaccinated as a breakdown in the treatment relationship and believe the patient can have a more effective relationship with another physician or clinician. **Before deciding to terminate the treatment relationship, the physician should carefully evaluate the acuity of a patient's medical condition, any special circumstances, and need for uninterrupted care.** High acuity may necessitate continued treatment and tabling consideration of termination until after the patient stabilizes.

One acuity consideration is the availability of a physician to take over the patient's care and how quickly another physician can see the patient. Some specialists may not be able to schedule an appointment for the patient for two to four months. The physician should assess the patient's medications, how closely the medications need to be monitored, the need for prescription refills, and arrange for the patient's medication needs during a transition to a new physician. The physician should take reasonable steps to ensure continuity of care during the termination process to minimize the risk of an alleged injury or adverse outcome before the patient begins treatment with a new physician.

ACUITY CONSIDERATIONS

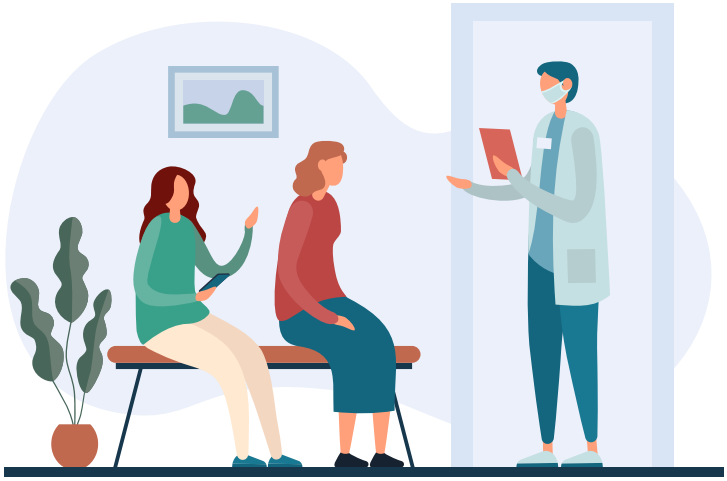
- Availability of appointments with other qualified physicians within a reasonable geographical location
- Medications requiring monitoring and/or refills
- Need for follow up appointments, wound care, and monitoring post-hospitalization or surgery
- Pregnancy stage and co-morbidities
- Medical, mental, and surgical history
- Psychiatric condition and medications

Like the decision to perform a surgery or procedure, appropriate termination of patient relationships should include a discussion with the patient, documentation of the discussion, and sending a letter by mail and, if applicable, email, summarizing the discussion and restating the result. The physician should talk to the patient and explain the decision to terminate the treatment relationship. After documenting the discussion and the patient's replies in the medical record, the physician or practice should send a letter to the patient summarizing the discussion, emphasizing the breakdown in the physician-patient relationship, and the next steps. Sometimes, a physician knows a reasonable conversation with the patient is not possible

and sends a letter to the patient without having a discussion. In that case, the letter should include a simple and short explanation for ending the patient relationship. The physician should edit any template-based letter to the specific patient and situation. In all cases, the physician should sign the termination letter. The practice should put a copy of the letter in the patient's medical record and notify appointment schedulers of terminations.

Finally, in considering whether to terminate a patient relationship based on vaccination status, you may also consider whether the relationship can be maintained by telehealth. Additionally, as noted by the response of some to vaccine mandates in employment, there is the risk that a patient will allege that their refusal to be vaccinated is due to religious belief, and the physician's office engaged in religious discrimination by terminating the patient relationship.

Correctly and respectfully answering patients' HIPAA questions promotes the patient's impression of your competence and care, further strengthening your relationship. The U.S. Department of Health and Human Services (HHS) issued HIPAA, COVID-19 Vaccination, and the Workplace to help ensure clear, unambiguous communication between physicians and clinicians, their practices, and their patients when dealing with the question of COVID-19 vaccinations as well as all other vaccinations. The frequently-asked-questions-and-answers affirm that the HIPAA Privacy Rule 9 does not prohibit physicians, clinicians, or practices from asking patients whether they have received a particular vaccine. Physicians and practices are welcome to print HIPAA, COVID-19 Vaccination, and the Workplace to share with patients and their families and caregivers.



MASK POLICIES FOR THE MEDICAL PRACTICE

Mask use in public places like salons, grocery stores, and concert venues, has declined and, in some locations, outright disappeared. Yet some physician practices and other health care facilities continue to require masks. Here's how to honor public health recommendations for COVID-19 infection control and comply with state and federal laws prohibiting discrimination against people with disabilities.

PUBLIC HEALTH CONSIDERATIONS

As of June 8, 2022, the Centers for Disease Control and Prevention ("CDC") recommends "source control" (well-fitting facemasks or N95 or equivalent or higher level respirators) and feasible physical distancing for everyone in all health care settings. The CDC says masks are particularly important in areas with substantial to high community transmission rates, such as Arizona and most of the counties in Utah and Nevada.

Medical practices have a duty to provide a reasonably safe place for patients. Under the current CDC recommendation, practices may require patients and visitors to wear a mask in the practice, even in the absence of state, county, or local mandates.

In addition to the CDC's recommendation, MICA recommends practices implement the following infection control procedures.

> Monitor the CDC's and state department of public health guidance and consider retiring face mask policies when these agencies stop recommending masks for patients and visitors in ambulatory care settings.
>
> Check community transmission rates using the CDC's COVID Data Tracker, updated daily.
>
> Communicate the practice's mask policy while scheduling/confirming appointments; by recording it as part of telephone hold recorded messages; and by posting it on the practice's website, and in the patient portal and reception and waiting areas.
>
> Keep masks on-hand for patients and visitors who arrive without a mask.

FEDERAL AND STATE LAWS

The Federal Americans with Disabilities Act ("ADA") prohibits discrimination against people with disabilities by medical offices and practices and other health care settings. Most states have

similar laws. Since 2020, the Arizona Attorney General's office has been contacting medical offices and practices to investigate mask-related discrimination complaints filed by patients who claim they were denied care because they were unable to wear a mask.

MICA recommends medical practices use the following strategies to address federal and state requirements and strengthen the defense against potential claims.

Maintain a written policy outlining the practice's face mask requirements, including a procedure for persons with disabilities to request reasonable accommodations of the disability that prevents them from wearing a mask.

Notify patients during scheduling/confirmation that accommodation requests must be made before the appointment.

Use a standard procedure to evaluate accommodation requests and specify the types of information that will be considered.

Designate staff to receive and consider accommodation requests. Train them to engage the individual in an interactive process to identify a solution which could accommodate the person's legitimate needs while protecting the health and safety of employees and other patients. The ADA prohibits unnecessary inquiries to determine whether a patient has a disability. Avoid arguing with people about whether they have a disability. Consider alternative, but reasonably effective, face coverings or telemedicine appointments, if appropriate.

Provide written notice of the practice's decision and keep a copy of the notice in the patient's medical record. For denials, list the information considered and the reason(s) for the denial. The letter should be objective, clear, and tactful. Keep in mind that if the individual later files a discrimination complaint or lawsuit, the letter will be reviewed by investigators, lawyers, and/or judges to determine whether the practice complied with ADA requirements.

Maintain **detailed**[1][i] medical record documentation, including the following:

The dates and substance of all communications with the individual concerning a request for accommodation;

The identity of the practice employee(s) who received and processed the request;

Information considered by the employee(s) processing the request;

The practice's final decision on the request, and the specific reasons for that decision;

The dates and specific details of all accommodations offered to the individual; and

The individual's acceptance or refusal of the options offered, including the dates of acceptance or refusal.

Document **all** of the foregoing information even if the patient is not an established patient and ultimately does not come in for an appointment (i.e., new or referral patient calls to schedule initial appointment, requests accommodation, accommodation is considered but denied, and no appointment occurs).

If the practice receives a notice of **any type** of claim, lawsuit, discrimination charge, or investigation by the state Attorney General's office or other state or federal agency, immediately call the MICA Claim Department at 602-956-5276.

Differences of opinions about masks and requests for reasonable accommodations of disabilities don't have to be adversarial. They are opportunities to manage the expectations of new and established patients, educate patients and families, and prevent complaints of discrimination.

IN HONOR OF COMPLAINT MANAGEMENT PG. 2

1 The American Medical Association's Guide to Surprise Billing Provisions in the Consolidated Appropriations Act 2021 is a free overview of the No Surprises Act and rules. Centers for Medicare and Medicaid Services ("CMS")' Ending Surprise Medical Bills toolkit includes fact sheets, policy statements, training courses, and other additional information such as the rules do not apply to beneficiaries or enrollees in Medicare, Medicaid, Indian Health Services, Veterans Affairs Health Care, or TRICARE. These programs include consumer protection requirements.

2 CMS published frequently asked questions and answers specific to good faith estimates for uninsured or self-pay individuals.

3 For more information about the billing dispute resolution process, see 45 CFR 149.620 updated as of March 28, 2022.

4 The Harvard Risk Management Foundation published Malpractice Risks in Communications Failures, a benchmarking report, in 2015. The report includes closed claim data and several case examples.

5 Id.

6 Id.

7 Merlino, J. (2017). Communication: A critical healthcare competency. Patient Safety & Quality Healthcare Analyses. Quality Improvement category. November 6.

8 Arizona Society of Healthcare Attorneys. 2022 Health Law Conference. Executive Professional Board Panel: Audit Trends and Enforcement from the Executive Directors of Arizona's Professional Boards.

YOU CAN ASK ABOUT VACCINATIONS PG. 5

1 The HIPAA Rules are the Privacy, Security, Breach Notification, and Enforcement rules.

2 45 CFR 160.103 defines "use," "disclosure," and "protected health information."

3 A defined transaction carries out financial or administrative activities related to health care. See 45 CFR 160.103 (definition of "covered entity" and "transaction"). See also https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html.

4 See 45 CFR 160.103 (definition of "business associate"). See also the HHS' Direct Liability of Business Associates Fact Sheet at https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/factsheet/index.html.

5 See 45 CFR 160.103 (definition of "use").

6 45 CFR 160.103 (definition of "disclosure").

7 See HHS' guidance HIPAA, COVID-19 Vaccination, and the Workplace.

8 See 45 CFR 164.506(c)(1) & 164.512(b)(1)(i). Disclosure is limited to the minimum information reasonably necessary to accomplish the stated purpose. See 45 CFR 164.514(d)(3) & (d)(3)(iii)(A).

9 For more specific information and details, see HHS' guidance HIPAA, COVID-19 Vaccination, and the Workplace.

MASK POLICIES FOR THE MEDICAL PRACTICE PG 8

1 Documenting more details at the time of the events may strengthen the practice's defense if a discrimination complaint or lawsuit is later filed.

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