

OMIC DIGEST

Ophthalmic Risk Management Digest

Hidden Costs of Non-Traditional Revenue Sources

By Anne M. Menke, RN, PhD, OMIC Risk Manager

Long before the national presidential debates focused attention on health care, ophthalmologists were experiencing firsthand the many obstacles to quality, affordable medical services. They have watched as increasingly complex health care delivery systems demand more but pay less. Judging by calls to OMIC's Risk Management Hotline, the poster child for the injustices of this medical pressure cooker is the on-call physician, who at times is forced to provide uncompensated back-up for hospital emergency rooms. Drawing upon the innovative and entrepreneurial spirit that has long characterized ophthalmology, some eye surgeons have responded to financial pressures by offering new health care products, such as diagnostic testing or interpretive centers, cosmetic skin care clinics, and "Medispas." Others promote their ability to serve as independent medical examiners (IME) and expert physician witnesses (EW) in professional liability, workers compensation, and disability litigation and disputes. These business ventures tend to be characterized by a more limited physician-patient relationship, fee-for-service payment, and delegation of care—and even operations—to non-physician staff. Eyes fixed on the financial prize, some physicians ignore or remain unaware of the risks and duties these relationships entail. Whether provided in the trenches of a crowded emergency room or amid the soothing luxury of a Medispa, ophthalmic care poses medical-legal hazards, professional liability insurance coverage issues, and patient safety pitfalls.

ER Call

One of the most frequent reasons OMIC policyholders call our Hotline is for clarification of their ER-call duties. They wonder about hospitals where they have no privileges, other hospitals in a hospital system, patients in other states, and days when they are not on call. Their next question involves outpatient care of patients with or about whom they have had no contact, but who may show up, call for an appointment, or simply have discharge documents containing the physician's name. Depending upon the circumstances, your duties range from none to diagnosis, treatment, and follow-up. The **Table** on page 5 and the **Closed Claim Study** provide brief remarks. See "EMTALA: An Overview" and "EMTALA: On-Call Issues" at www.omic.com for detailed answers.

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MESSAGE FROM THE CHAIRMAN



I have often used this Message to point out the many services OMIC provides to its policyholders, and indeed our profession, that other professional liability carriers cannot. Here is another very recent example of the prompt, specialty-specific advice OMIC is poised to provide.

Within days of the 18 June 2008 announcement in the American Academy of Ophthalmology's *Academy Express* that the FDA had approved an injectable triamcinolone acetonide suspension (TA) for ophthalmic use, OMIC began to revise its consent form and anticipate associated medicolegal issues.

Trivaris,TM manufactured by Allergan Inc., is the second approved drug; it joins Alcon's Triesence.TM These drug approvals come just 18 months after ophthalmologists received a "Dear Doctor" letter from Bristol-Myers Squibb advising them that KenalogTM was not approved for ocular use. In 2006, OMIC policyholders called our confidential Risk Management Hotline to ask if their policy would cover them if they still administered Kenalog.TM OMIC reassured ophthalmologists and assisted them by preparing and distributing a sample consent form to help patients understand that the use of an approved drug in an "off-label" fashion is a legal and often necessary aspect of the practice of medicine.

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Forensic Consultations

During the course of litigation and disputes, insurance companies, employers, employees, plaintiffs, and defendants often need an objective opinion of the nature, cause, and prognosis of eye conditions. In this *Digest*, we will focus on expert witnesses and independent medical examiners in the context of medical malpractice lawsuits. Expert witnesses are hired by either the plaintiff or defense attorney to review medical records and testify under oath whether or not a physician has breached the standard of care. When the opinion of the expert witnesses differ, or the patient has not recently been evaluated, the disputing parties may ask a physician to conduct a single independent examination of the patient as well as a review of medical records; the physician's written report is submitted to the requesting party and generally made available to the opposing party. For more on acting as an EW or IME, see the **Table** on page 5 as well as the **Hotline**. For a discussion of theories of liability, see "Forensic Consulting: From Immunity to Liability," *OMIC Digest*, Summer 2003, Vol. 13, No. 3, at www.omic.com.

Diagnostic Services

Comprehensive ophthalmologists, primary care providers, and optometrists may lack the expertise or (latest) equipment to provide their own patients with visual field testing, fundus photography, IOL (intraocular lens) calculations, OCT (optical coherence tomography), fluorescein angiography, or corneal topography. Rather than request a formal consultation, which involves an examination, testing, interpretation, and treatment recommendations and may result in a transfer of care, these health care providers sometimes prefer to exercise greater control over their patients and send them for "testing only." Our policyholders report being asked to either provide

specialized tests or interpret them. At times, these requests come not directly from health care providers but instead from companies that serve as an intermediary between patients and experts. Requests tend to vaunt the benefits for the ophthalmologist. In the case of testing only, the requesting party points out that such tests can be carried out by technical staff, may be billed to the patient's insurance company, and relieve the physician of the risk of misinterpreting the results. Mindful of the cost of the latest version of his or her notoriously expensive ophthalmic equipment and the talent and skill of staff, the physician may feel inclined to say yes. Companies that provide interpretation of tests emphasize this as a way to increase income, and note that the physician can access and report on the tests at his or her convenience using the internet. What is rarely mentioned is that risks persist that must be mitigated. Moreover, whether providing or interpreting diagnostic tests, ophthalmologists have duties to the patients who undergo them.

The physician who offers tests may be liable for delays in diagnosis caused by malfunctioning equipment and has vicarious liability for training and supervising employed staff. Insurance companies may withhold or challenge payment if the physician is not present in the office during the exam or bills for interpretive services. And patients who are not advised of the limited role the physician plays in the testing may sue the physician for direct liability. To reduce your risks, give patients and referring physicians a copy of the results and a document explaining that: 1) the physician who owns the equipment has an independent practice; 2) the patient is being referred only for a test; 3) the test will be conducted by non-physician staff; and 4) the physician who owns the equipment will not review records, examine or treat the patient, interpret results, or provide recommendations.

Providing a diagnostic interpretation of a test performed elsewhere can be considered a form of telemedicine, since the images and data are usually sent electronically. Radiologists and pathologists have long furnished this type of medical expertise, and retina specialists may be familiar with centers that read fundus photographs of diabetic patients. More recently, some ophthalmologists have begun remote screening of retinopathy of prematurity. Special underwriting requirements apply to ROP, so contact OMIC immediately if you have not yet had a review of your ROP care. For other kinds of diagnostic interpretation services, conduct a due diligence evaluation of the entity requesting it to determine if its medical directors have the requisite knowledge and experience, and how they are obtaining patient referrals. Ask for a copy of the policies, procedures, and protocols to see if the following issues are addressed there: clinical information provided along with the image, image quality, technical issues, turnaround time, and scope of report (e.g., interpretation only, interpretation plus recommendations for additional tests and treatment, etc.). Check state law to determine if you need a license in the state(s) where the images are taken.

Cosmetic Skin Care Clinics Within an Ophthalmology Practice

As the specialty that pioneered Botox for therapeutic purposes, it is hardly surprising that ophthalmology has also championed cosmetic uses of this medication. Oculofacial plastic surgeons frequently offer many such non-therapeutic services to their patients, ranging from skin care products to laser resurfacing procedures, and we receive calls on our Risk Management Hotline from comprehensive ophthalmologists and other subspecialists who are considering adding cosmetic skin care services. OMIC policyholders need to understand their liability risks and contact us for assistance as needed



when assessing these. State medical practice acts do not limit the scope of practice for physicians, so in the event of a malpractice claim, expert witnesses will focus on the standard of care and whether the ophthalmologist has the training, experience, and current competency to provide specific care.

Sometimes, policyholders themselves do not have this expertise but want to hire non-physicians who do; this raises several concerns. First, prescribing a medication and ordering treatment such as laser skin resurfacing almost always falls within a state's definition of medical practice. If non-physician staff provide Botox, collagen fillers, or laser treatment before a patient is evaluated by a physician and/or without a physician order, they may face allegations of practicing without a license, and the physician may face disciplinary action for aiding and abetting the unlicensed practice of medicine. Many states allow only registered nurses to administer Botox and fillers, and perform laser skin treatment. It goes without saying that malpractice lawsuits arising from such care may be difficult to defend. To reduce liability exposure, contact your state medical and nursing boards to determine what is required of you and who can implement your treatment orders. Ensure that you are competent to supervise all care provided by your staff. If registered nurses manage your skin care clinic, review their evaluation of the patient, confirm patient candidacy, order the treatment, and be available to assist if complications occur.

Medispas Not Associated with a Physician's Practice

Although the name evokes images of comfort and pleasure, serving as medical director of a Medispa could lead to headaches, uninsured legal risks, and licensure action. Regardless of the site of service, medical care is governed by the state's medical practice act and scope of practice and pharmacy laws. Call for assistance before getting involved in a Medispa.

IF I AM YOUR DOCTOR, WHAT DO I NEED TO DO?		
YOUR ROLE	MD-PT RELATIONSHIP?*	YOUR DUTIES AND OBLIGATIONS
Expert Witness	No, UNLESS you already have a physician-patient relationship	<ul style="list-style-type: none"> • None to patient • Provide objective, medically sound testimony: do not act as advocate for plaintiff or defendant • Abide by AAO Ethic Rule 16
IME	Yes, but limited in time and scope	<ul style="list-style-type: none"> • Disclose conflicts and fact that report will be shared with requesting party or parties • Perform evaluation and orally disclose findings to patient • Disclose incidental findings that need follow-up
On-call to ER	Yes, IF all apply: <ul style="list-style-type: none"> • You have privileges at that hospital • You are on-call that day and you provide telephone or direct patient care for that patient • If you choose to respond, even if not on-call, you have all duties 	<ul style="list-style-type: none"> • Respond to call from ER within 30 minutes • Obtain necessary information on the telephone to determine diagnosis and advise on treatment plan • Come to the ER if the ER physician requests it or you feel you need to • Document details of call • Provide outpatient care if medical staff bylaws require it or you have agreed to • Follow-up on missed appointment
Testing only	Yes	<ul style="list-style-type: none"> • Maintain equipment • Train and supervise staff • Provide disclaimer on role of MD • Send test result
Interpretation only	Yes	<ul style="list-style-type: none"> • Obtain medical license(s) in state(s) where image of patient taken AND where results interpreted • Analyze quality of image • Send report of diagnostic interpretation • Provide recommendations for further testing, treatment, and follow-up if required by contract • Include disclaimer that you are not involved in ongoing care
Skin Clinic as part of Ophthalmic Practice	Yes	<ul style="list-style-type: none"> • Determine candidacy • Order medication or treatment • Obtain informed consent (may at times be delegated) • Develop policies, procedures, and job duties of non-physician staff • Maintain equipment • Train and supervise staff • Follow-up missed appointment
Medispa Director	No, UNLESS no other physician performs duties described for skin clinic, in which case you will most likely be deemed the supervising physician	<ul style="list-style-type: none"> • Evaluate state law to see if free-standing Medispa is legal • Determine who may administer treatment under state law • Credential physician who will determine candidacy and order treatment • Credential non-physician staff who will administer treatment • Oversee quality of medical care • Ensure maintenance of accurate, secure medical records

* This analysis of the physician-patient relationship applies in most situations. However, courts may find otherwise in particular jurisdictions or sets of facts.