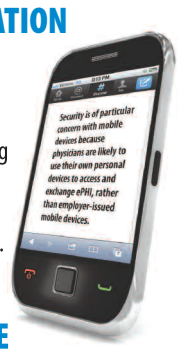
Michigan
Medical Law Report
A Quarterly Publication of THE DOLAN COMPANY
Legal news for the medical community

Vol. 8, No. 2
Summer 2012
$10.00
www.mimedicallaw.com

Inside MedLaw

MOBILE COMMUNICATION



There are legal risks that physicians and providers should be aware of when using mobile devices and apps that collect patient information. **See story, page 3**

COMPLIANCE

The appropriate selection of E/M codes is a complicated process that also has an element of subjectivity, and should be considered a risk area that is addressed in a providers' compliance program. **See story, page 6**

REGULATIONS

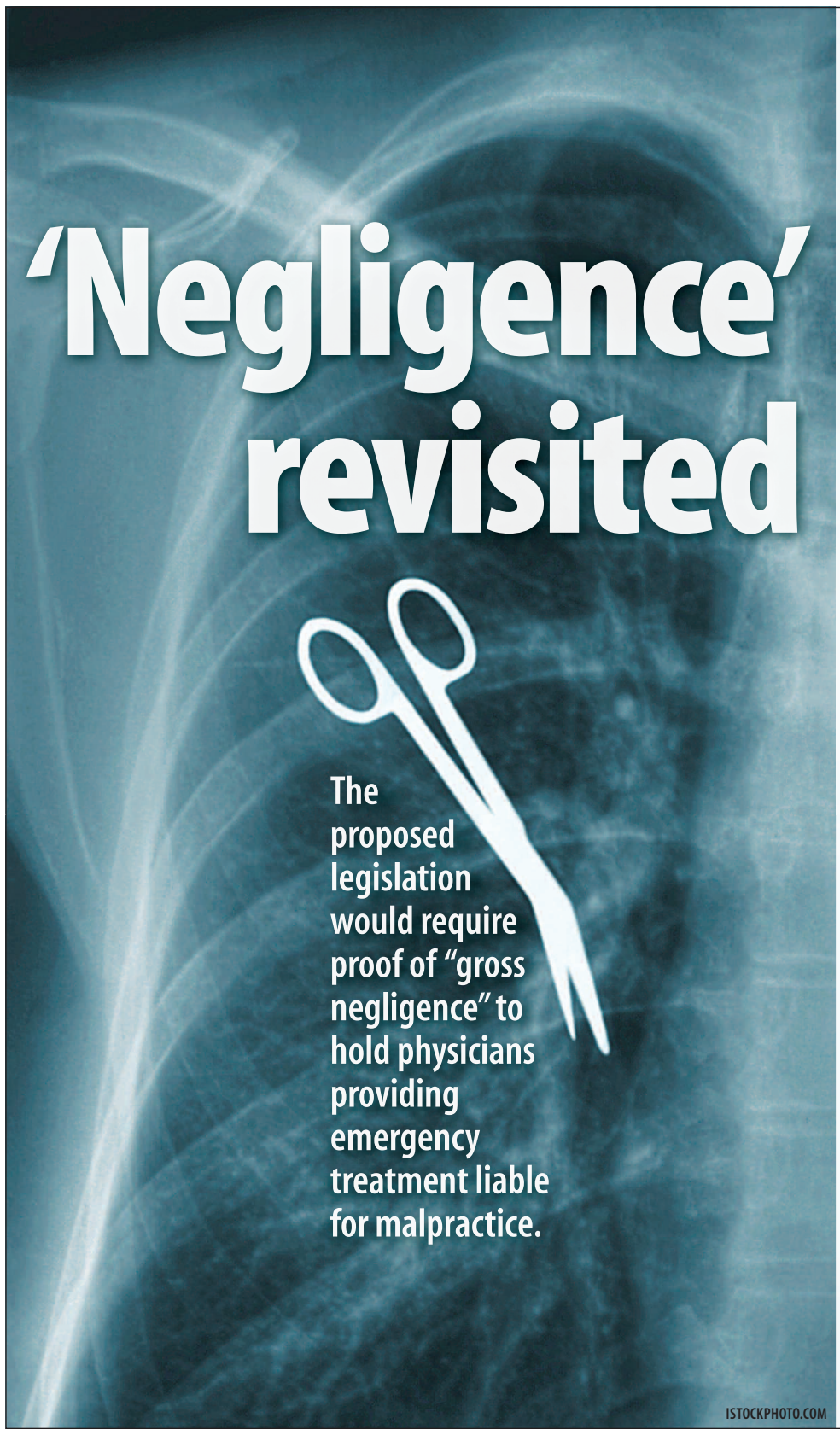
As a recent $100,000 civil penalty to a small practice proves, no matter the size of a practice, health care providers can and will be held accountable for HIPAA Privacy and Security Rules violations. **See story, page 12**

COMPLIANCE

When a provider or supplier bills Medicare, it opens itself up to possible investigation by Medicare contractors for overpayments — and Medicare contractors do not follow what we think is very clear law and guidance. **See story, page 8**

REGULATIONS

CMS recently issued its two final rules, aimed at reducing unnecessary, obsolete or burdensome regulations on hospitals and health care providers — and resulting in $5 billion in savings over five years. **See story, page 13**



Proposed bills would lighten malpractice standards for doctors

Medical Malpractice

By Christopher Ryan, Esq.

In May of this year, five bills were introduced in the Michigan Senate that would make significant change to medical-malpractice law. The bills, introduced by Republican members of the Senate, have been referred to the Committee on Insurance.

The proposed legislation would require proof of "gross negligence" to hold physicians providing emergency treatment liable for malpractice. One piece of the proposed legislation would require a case to be dismissed if the physician exercised reasonable "professional judgment." The following is a summary of the most drastic changes.

Emergency medical care

Senate Bill 1110 would require a plaintiff to prove by clear and convincing evidence that the health care professional's actions constituted "gross negligence" in cases involving emergency medical care in an emergency room, obstetrical unit, surgical operating room, cardiac cath lab, or radiology department.

A simple breach of the standard of care (the current law) would not suffice. Although the bill does not define "gross negligence," other statutes and case law define it as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

The law would apply to bona fide emergency services rendered to a patient after the onset of a medical or traumatic condition that is manifested by acute symptoms. The bill would not apply to care provided to the patient after they are stabilized, or to care unrelated to the initial emergency.

See "Malpractice," page 14

Pre-Sorted Standard
U.S. Postage Paid
Lansing, MI
Permit No. 50

Address Service Requested

Michigan Medical Law Report
7013 Orchard Lake Road, Suite 110
West Bloomfield, MI 48322

Navigating the system

Uncovering the mystery surrounding the National Practitioner Data Bank

Compliance

By Robert Iwrey, Esq.

Q: What results in physicians being reported to the National Practitioner Data Bank (NPDB)?

The reporting requirements vary according to the entity that is filing the report with the NPDB.

State medical boards must report certain adverse licensure actions related to professional competence/conduct and revisions to such actions for physicians.

Hospitals and other health care entities must report professional review actions related to professional competence/conduct that adversely affects clinical privileges of a physician for more than 30 days.

ISTOCKPHOTO.COM

They also must report a physician's voluntary surrender or restriction of clinical privileges while under investigation

See "Data Bank," page 5

Have you violated the NLRA? Check your social media policy

Social Media

By Michelle Bayer, Esq.

Last winter, I co-wrote an article for the *Michigan Medical Law Report*, entitled "Health care has unique issues in social media" (6 M.L.R. 4 (Winter 2011)).

We focused on proscriptions by the AMA and State Licensing Boards regarding the doctor-patient relationship and social media, as well as privacy considerations.

In addition to those concerns, all employers, including health care providers, need to be aware of the provisions of the National Labor Relations Act (NLRA), which governs the right of employees to self-organize and collectively bargain, and protects such employees from retaliation for engaging in "concerted activity."

Most people think of the NLRA as applying only to union settings. That is not the case.

Recently, there has been an increase in litigation for violations of the NLRA relating to concerted activity in both union and non-union workplaces.

In particular, social media policies and adverse employment action for employee posts and comments on social media sites have become hot legal issues for the National Labor Relations Board (NLRB), the agency that enforces the NLRA.

"Concerted activity" is not specifically defined in the NLRA, but is generally considered to occur when two or more employees are acting together in furtherance of matters of mutual interest, aid and protection, and include compensation,

See "NLRA," page 12

Keeping track of malpractice

Data Bank knows what you're doing and is sharing that info

Compliance

By Richard Joslin Jr., Esq. and Tanya Juarez Lundberg, Esq.

According to Statehealthfacts.org, last year in Michigan there were 311 medical-malpractice claims that resulted in some payment to the plaintiff.

Whenever a medical-malpractice case is being considered for possible settlement, one of the most common questions we receive is what impact the settlement will have on the practitioner.

The majority of practitioners are aware of the existence of the National Practitioner Data Bank, but fewer are aware that a report also is made to the Michigan Department of Licensing and Regulatory Affairs (LARA).

In 1986, the federal government created the National Practitioner Data Bank (Data Bank). By law, each entity (health care facility, hospital, insurance company, etc.) that makes a payment in settlement of or in satisfaction of a claim or judgment against a practitioner (including physicians, dentists and other practitioners if they are licensed or otherwise authorized by the state to provide health care services), must report the payment to the Data Bank. The report must be submitted to the Data Bank within 30 days of payment.

Only payments of money made as a result of a written complaint or demand based on a practitioner's alleged malpractice must be reported. The report should include a detailed narrative of the claim. Practitioners making such payments on their own behalf using personal funds are not required to make a report to the Data Bank.

Information reported to the Data Bank is confidential, and may only be disclosed to eligible entities. Eligible entities include:

- Hospitals requesting information concerning a practitioner on their medical staff or to whom they have granted clinical privileges, or with respect to professional review activity;
- Health care entities (including hospitals) which have entered, or are considering entering, employment or affiliation relationships with a practitioner or to which a practitioner has applied for clinical privileges or appointment to the medical staff;
- Practitioners seeking information about themselves;
- State licensing boards;
- Attorneys or individuals representing themselves under limited circumstances; and
- Persons or entities requesting information in a way that does not identify any particular entity or practitioner.

Contrary to popular belief, insurance companies may not query the Data Bank. However, an insurance company may require a practitioner to perform a self-query and disclose the results to the insurance company.

After a report is made to the Data Bank, a notification of the report is mailed to the subject practitioner. A practitioner may add his or her own statement to the report. A practitioner may dispute the factual accuracy of a report or whether the report was required to be made.

Practitioners often ask about how the amount of the payment will be perceived.

See "Keeping track," page 6

Data Bank

Continued from page 1

for professional competence/conduct, or in return for not conducting an investigation.

Professional societies must report professional review actions based on reasons relating to professional competence of the physician or conduct that adversely affects professional society memberships.

Medical-malpractice payors must report payments made for the benefit of physicians in settlement or in satisfaction, in whole or in part, of a claim or judgment against such physician.

The Office of Inspector General for Health and Human Services reports physician exclusions from the Medicare/Medicaid programs.

Q: What are scenarios that could lead to a report that physicians may not realize?

A malpractice settlement or court judgment that includes a stipulation stating that terms are kept confidential must be reported. Also, if a physician is involved in a settlement that names multiple practitioners, a report is filed for each practitioner.

A licensed physician is responsible for any unlicensed students that he or she is overseeing. Incidents are not reported for the student, but under the supervising physician. This is not true for licensed students, residents or interns.

Malpractice payments made on behalf of licensed students, residents and interns are reportable for those individuals.

A summary suspension of hospital privileges is reportable if it is in effect or imposed for more than 30 days. It also is reportable if a physician is assigned a proctor for a period of greater than 30 days and that physician cannot perform a procedure without first receiving approval from the proctor.

It is reportable if a physician voluntarily restricts or surrenders clinical privileges while professional competence/conduct is under investigation or if voluntary restriction is given in exchange for not conducting an investigation. Additionally, it is reportable if a physician's application for a medical staff appointment is denied based on professional competence/conduct.

If a physician's request for clinical privileges is denied or restricted based upon an assessment of clinical competence as defined by the hospital, it is reportable.

Q: Can a physician avoid being reported?

If a medical-malpractice payment is paid by an insurer or any entity other than the individual physician, it is reportable. However, if the individual physician makes a medical-malpractice claim out of personal funds, the payment is not reportable.

ISTOCKPHOTO.COM

If a medical-malpractice payment is made for the benefit of a corporation such as a clinic group practice or hospital, these payments are not reportable. However, payment is reportable when it is made for business entities comprised of sole practitioners.

Investigations alone are not reported to the NPDB. Only the surrender or restriction of clinical privileges while under investigation or to avoid investigation is reportable.

If a proctor is assigned to supervise a physician, however, the proctor's approval is not required prior to the physician providing medical care, then the matter is not reportable.

Physicians at risk of being reported should consult with health care legal counsel to assess whether there are opportunities to avoid a report to the NPDB.

Q: What does it mean for the physician when they get reported?

When a physician "gets reported to the NPDB," it means that a reporting entity such as a hospital has submitted a report regarding the physician to the Data Bank. This report contains certain mandatory information.

The first report of a medical-malpractice payment or adverse action submitted to the NPDB is called the "Initial Report," and will remain in the NPDB for life until a "correction," "void" or "revision to action" is submitted. The physician will be mailed a copy of each report submitted to the NPDB regarding the physician.

A physician may query the NPDB online to see any and all reports filed against him. Once a report is filed, it is virtually impossible to get rid of it absent a provable error.

Information in the NPDB is considered confidential and is not made available to the general public. The information is only available to certain qualifying entities including hospitals and certain other health care entities, state licensing boards, professional societies with formal peer review, certain Federal and state agencies including CMS, and others specified in the law.

Q: What are the effects of being reported?

The negative impact of a data bank report depends, of course, on the wording of the report and the underlying events that gave rise to the report.

Typically, physicians looking to obtain staff privileges at hospitals or ambulatory surgical centers will have to provide additional information regarding the matters reported in order to convince such entities to allow them to obtain such privileges.

If the report's wording is severe, no explanation or additional information may be enough. Severely worded reports can be the death knell to a physician whose specialty requires him/her to have staff privileges at a hospital (e.g., a neurosurgeon or obstetrician).

Moreover, state licensing boards also routinely query the Data Bank. A severely worded report can trigger a licensing action against the physician's license to practice medicine. As such, physicians should attempt to gain as much input into the process of wording the report as they can in the event that a report cannot be avoided.

In addition to the wording of the report, there are certain classification codes and basis for action codes used in the report that must be used, for which there can be negative implications as well.

Physicians are well advised to gain input into the process of selecting these codes as well in order to mitigate the adverse impact of a report to the NPDB. Obtaining learned health care legal counsel early on in the process increases the likelihood that the physician will be able to either avoid a data bank report, if possible; and, if not, mitigate the adverse consequences of a report by negotiating the wording of the report with the reporting entity.

Robert Iwrey is a founding partner of The Health Law Partners PC, where he focuses his practice on licensure, staff privileges, litigation, dispute resolution, contracts, Medicare, Medicaid and Blue Cross/Blue Shield audits and appeals, defense of health care fraud matters, compliance, employment matters and other health care related issues. Contact him at (248) 996-8510 or riwrey@thehlp.com.