THE OFFICE

Listen Up

BY JOSEPH S. EASTERN, M.D.

A recent claim against a physician in New Jersey attracted considerable attention, not because it resulted in a substantial jury award, but because the award was not covered by the doctor's malpractice insurance.

It is a good reminder for the rest of us: Your malpractice policy covers allegations of malpractice only, which is generally defined as negligence or deviation from the standard of care. This case involved a charge of discrimination against a hearing-impaired patient—which meant the physician not only had to fund his own defense, but he was personally responsible for the $400,000 award against him. (The case is now on appeal.)

The Americans With Disabilities Act (ADA) was designed to protect individuals with various disabilities against discrimination in various public situations—including, specifically, "the professional office of a health care professional."

When the disability is impaired hearing, the law requires physicians to provide any "auxiliary aids and services" that might be necessary to ensure clear communication between doctor and patient. In the vast majority of such situations, a pad and pencil will satisfy that requirement. But occasionally, it does not, particularly when complex medical concepts are involved, and in such cases, as the New Jersey trial demonstrated, failure to make the necessary extra effort can be very expensive.

The claim involved a hearing-impaired patient with lupus erythematosus who was being treated by a rheumatologist. For almost 2 years, the patient's partner and her daughter provided translation, but that arrangement was inadequate, the patient testified, because her partner and daughter were unfamiliar with medical terminology, and the patient was "unable to understand and participate in her care," which left her "unaware of risks and available alternatives."

So she repeatedly requested that the rheumatologist provide an American Sign Language interpreter for her office visits. He refused on grounds that the cost of an interpreter would exceed the payment he would receive for the visits, which made it an "undue financial burden," and, therefore, exempt from ADA requirements.

But the "undue burden" exemption is not automatic; it must be demonstrated in court. And the jury decided the rheumatologist's annual income of $425,000 rendered the cost of an interpreter affordable.

The lessons are clear: Physicians must take antidiscrimination laws seriously, particularly when uninsurable issues are involved, and we must be constantly aware of the needs of disabled patients, to be sure their care is not substantially different from that of any other patient.

In the case of hearing-impaired or deaf patients, it is important to remember that forms of communication that are quite adequate for most are not appropriate for some. Lip reading, written notes, and the use of family members as interpreters may be acceptable to one patient and unsuitable for another.

If the patient agrees to written notes and lip reading, you need to remember to speak slowly, and to write down critical information to avoid any miscommunication. And it is crucial to document all communication and the methods.

Should a patient insist on a professional interpreter, the precedent set by the New Jersey case (if upheld on appeal) suggests that you need to acquiesce, even if the interpreter's fee exceeds the visit reimbursement; the ADA prohibits you from passing your cost along to the patient. But any such cost will be far less than a noninsured judgment against you.

If you must go that route, make sure the interpreter you hire is familiar with medical terminology, and is not acquainted with or related to the patient (for confidentiality reasons). Your state may have an online registry of available interpreters. ■

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