Five Ways to Win or Lose a Podiatry Legal or Administrative Action

We can learn from others' mistakes.

BY LAWRENCE F. KOBAK, DPM, JD

1. Maintain complete accurate records. Do NOT maintain a skimpy, incomplete chart.

Podiatrists, like every other specialty, often treat close friends or relatives. Often, their charts are not very detailed, if there are any charts at all. Every patient must have a complete and accurate chart. Here is an example of such a matter.

A podiatrist was sued for professional negligence by a (now, former) friend. The podiatrist had called in a prescription of Cipro for her twenty-something friend, who was experiencing a urinary tract infection. Her friend told her that she had taken it in the past for this problem and that it had worked. Her friend also had an erythematous area on the dorsum of her right hallux with no purulence, but with some localized elevation of skin temperature. This was confirmed after an in-person visit the next morning. The podiatrist verbally gave instructions as to how to take the Cipro and that she was prescribing it for the apparently infected area of her right great toe, not the UTI. She was emphatic that her friend must see her primary care provider, gynecologist, or urologist for the UTI for culture and prescription of an appropriate antibiotic.

The apparently infected area of her hallux cleared up in three days. The podiatrist's "friend" never went to a physician for her UTI. In fact, it was not a UTI, it was a venereal disease that was not effectively treated with Cipro. As a result, the patient became unable to conceive. None of this was ever written in any chart. All the doctor's defense attorney had was a prescription bottle saved by the plaintiff that stated on it: "Cipro 500mg 1 tab po qd for infected area." There was no insurance form, as the podiatrist treated her as a favor to a friend. The gist of the litigation was practicing outside the scope of licensure, and the DPM had little with which to defend herself. Fortunately, there had been a prior infection of the hallux, due to a hammer hallux. It had been treated successfully the same way a year or so prior to the matter at issue.

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However, it did not end there. The "friend", when she was unsuccessful with her malpractice case,

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reported the podiatrist to the Podiatry Board. The Board examined the patient podiatry records and found them to be woefully insufficient for the date at issue. The podiatrist had her license sanctioned for inadequate/absent medical records. The moral of this story is to keep complete and adequate records on every patient, including those who you "do a favor for." Of course, have your records state clearly the condition you are treating and to whom you are referring and the reasons why.

2. Once sued or charged, carefully gather all records. Do NOT, upon being sued, after reviewing the records, make whatever changes are necessary to support your legal position.

A podiatrist received a letter from the Special Investigations Unit (SIU) office from a private insurance company. When you see SIU, think fraud and abuse. Often, the first letter is from someone with an innocuous-sounding title and never mentions it is from the SIU. In the next letter, the title often changes to something a lot more foreboding. The podiatrist was being audited for his use of an ulcer debridement code, which required certain measurements as to the size of plantar ulcerations being treated. The DPM was using electronic medical records. Prior to calling a health law attorney, the podiatrist realized that no measurements of the ulcerations were in his patients' charts, just a note that they were being debrided. Each patient did, however, have labeled digital progressive photographs. He went back into the charts and entered measurements for each debrided ulceration that involved that insurance company. The insurance company, upon receipt and review of the medical records, became suspicious as to the measurements provided; out of 104 cases, roughly 1/3 had the same measurements, in three different groups. The odds of that happening are extremely unlikely. Soon, the insurance company sued the podiatrist. During the discovery period of the case, it became apparent that all the patient charts had been "amended" at a date that was after the letter arrived from the SIU unit of the insurance company. This conclusion was reached by obtaining the metadata for the EMR.

By the time the podiatrist engaged an experienced health law attorney, the attorney had no choice but to settle the matter for a lot of money. If it had gone to trial, the issue of insurance fraud would have been testified to in open court. If the podiatrist had just kept a chart with the required information for appropriate reimbursement, this would not have occurred. Changing the chart after you are on notice of a possible problem is a serious offense. Do not do that. Involve a health law attorney very early on so that you are not digging out of a hole of your own creation.

You cannot threaten an employee with retaliation when they are exercising their legal rights to work in an appropriate work environment.

3. As soon as you find out you are in trouble, call your health law attorney. Do NOT, as soon as you find out you are in trouble, call the patient or employee who reported you and threaten him/her so they will not testify against you.

A podiatrist was served with a cease-and-desist letter from an attorney concerning possible sexual harassment of an employee. Unfortunately, the podiatrist's first phone call was to the employee! At first, he was calm, and tried to explain to her that he was in fact "a nice guy". She directed him to speak with her attorney. When he persisted, getting more and more irate, his employee hung up the phone. She reported back to her attorney that the podiatrist had, in fact, threatened to fire her because she contacted an attorney. Soon, the podiatrist was served with a retaliation lawsuit. In all states, you cannot threaten an employee with retaliation when they are exercising their legal rights to be employed in an appropriate work environment.

This could have been avoided if the podiatrist had engaged a suitable attorney and negotiated terms with the employee's attorney. The settlement might have involved money or might have involved a change of working conditions. It might even have involved the podiatrist taking a sexual harassment prevention course.

4. As soon as you are served with legal papers, contact your health law attorney. Do NOT, upon being served with legal papers, contact your professional colleagues to have them corroborate your story.

You are charged with telling inappropriate jokes to a patient. Your state's Podiatry Board sends you a letter that they are investigating this matter. You immediately begin to line up a colleague or two who work in your office to state that they were in the room with you during a particular visit. You want them to state that nothing untoward occurred with the patient on that date. You even get them to sign an affidavit that they were there and saw nothing unusual in your actions.

You might have sold your state Podiatry Board's investigatory ability short. In a real case involving such a story, the other colleague who signed the affidavit also got in trouble. The state obtained the colleague's patient schedule that day—it seems he was swamped with patients in the same office, but in different treatment rooms. It was not feasible that he was "spending time" during a busy day, as claimed in the affidavit. And it was not credible that the podiatrist had a distinct memory of what went on in the treatment room two years prior!

The better way to have defended this matter was to speak with the front desk and see if the patient had made any complaints after she left the treatment room. Did the patient re-appoint? Did she request to be treated by a different podiatrist in the practice? Did she complain to her insurance

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company? Was her husband there that day? Is he still a patient? Defend yourself with whatever evidence you can find. Do not make up evidence. It often works against you.

Do not speak with the press before, during, or after litigation.

5. As soon as you are served with legal papers, contact your attorney. Do NOT, upon being served with legal papers, call your contact in the local press.

You are served with a complaint involving a high-profile patient, in this case a professional athlete. You performed bunion surgery on her. She claims she can no longer run and jump like she used to, prior to your surgical correction. Your first reaction is to call a friend of yours who works for that city's newspaper. You want to give your side of the story. Rarely, if ever, is this a good idea. Your story will be twisted and distorted to sell newspapers. It is not the newspaper's job to make you look good. In this action, one of the sports reporters contacted the player/patient.

The professional athlete, through her attorney, was only too happy to explain in detail how her professional career was now ruined. By the time the newspaper got finished, this player had garnered unbelievably valuable publicity as to how the career of a young star had been destroyed by the surgery. The story magnified what was a stiff great toe. It was stiff to start with. It helped to poison the jury pool. Do not speak with the press before, during, or after litigation. Consult your attorney prior to doing that. Follow your attorney's advice as to how, when, and if you should speak with the press. **PM**

Dr. Kobak is Senior Counsel in Frier Levitt's Healthcare Department in Uniondale, New York. Larry has extensive experience representing physicians in connection with licensure issues, as well as successfully defending physicians before Medical Boards, OPMC, OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Healthcare Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist prior to becoming an attorney, he served as the international president of the Academy of Ambulatory Foot and Ankle Surgery.