## Chapter 4

### RISKY BUSINESS: MANAGING RISK AND DEFENSES TO LAWSUITS

**Chapter Checklist**

- Explain why quality improvement is important within the medical office
- State why it is necessary to have a risk manager/compliance officer within the office
- Define “burden of knowledge” and describe what to do if you suspect someone in the office has committed malpractice
- List and describe the four Cs of malpractice prevention
- Describe how employees with responsible attitudes can help to decrease the likelihood of the physician being sued
- Explain the importance of continuous staff training
- List the defenses that may be used for professional liability suits
- Explain the importance of professional liability insurance for medical assistants
In times long past, people sometimes settled disputes with duels. Today, people often settle their disputes with lawsuits. We’ve all seen the TV ads encouraging viewers with injuries—or possible injuries—to “protect their rights” by calling an attorney, as the lawyer’s phone number appears on the screen.

Lawsuits and the fear of being sued have changed the face of health care. Physicians practice medicine differently, and medical offices operate differently as a result. Some changes are probably for the good. Others clearly are not. Malpractice suits are one reason the cost of health care in the United States has increased. They’re also a reason that some physicians no longer provide certain services to patients.

You’ll learn more about these trends as you read this chapter. You’ll also learn how medical offices reduce the risk of being sued, and how these practices affect your job as a medical assistant.

**Why People Sue**

Compared to the number of patients a medical office sees every week, the number of patients who decide to bring a lawsuit is quite small. However, this small minority of patients can have a long-lasting impact on the daily goings-on in a medical office. Patients sue medical practices and individual health care providers for many reasons. However, the most common reasons can be grouped into two major categories.

- **Medical reasons.** These lawsuits relate directly to the medical treatment the suing patients received. A medical professional may have made a mistake. Or the patient may have suffered an injury or not received the outcome expected.
Chapter 4  Risky Business: Managing Risk and Defenses to Lawsuits

- **Personal reasons.** These lawsuits relate to a different kind of “treatment”—the manner in which patients are dealt with by the physician and staff. The old saying in health care that “the rude get sued” is generally true! Once again, this is why customer service is vital to the success of the medical practice.

**THAT WASN’T SUPPOSED TO HAPPEN!**

Of course, treatment errors and other “bad acts” that harm patients can lead to lawsuits. You read about negligence and malpractice in Chapter 3. Other medical factors that can cause patients to sue are:

- poor outcomes
- unrealistic expectations
- poor quality of care

However, in all these cases—and sometimes even with actual malpractice, too—the attitude of the people who work in the practice can make the patient less or more likely to contact an attorney. Sometimes, just acknowledging if you made a small mistake—and saying you’re sorry—is all a patient really wants to hear.

**Poor Outcomes**

The practice of medicine is not an exact science. Patients don’t come in with a diagnosis plastered on their foreheads. Unfortunately, the signs and symptoms for one disease can be the signs and symptoms for several diseases. It’s up to the physician to determine which disease or ailment the patient is suffering from. Sometimes, despite everyone’s best efforts, the result is not what was hoped for or expected. Unless there was malfeasance, misfeasance, or nonfeasance, a bad outcome is not malpractice.

On the other hand, if someone in the office has promised the patient a cure, the patient could argue that a contract had been made. The patient’s attorney could then sue—not for malpractice, but for breach of contract. This is one reason why you should never try to reassure a patient by telling him that he’s going to be fine.

**Unrealistic Expectations**

Unrealistic expectations are related to poor outcomes. Medical treatments and technology are now so advanced that some patients expect

*Never make any promises to the patient about treatment. This could put you and your office at risk of a lawsuit.*
more than is medically possible. Then, when the outcome is not what they expected, they believe they’ve been treated poorly. This is another reason to avoid telling patients they’re going to be okay.

Poor Quality of Care

Sometimes, a health care provider may not meet the duty or standard of care owed to the patient. At other times, the attitudes and behaviors of the provider or of her co-workers may cause the patient to feel that he has not received acceptable care. In either case, a lawsuit may result.

UNDERSTANDING PATIENTS’ NEEDS

Patients like to feel that their physician sees them as individuals. That can be a challenge in today’s medical world. A physician is more likely to be part of a group practice or a multiphysician clinic. He is also more likely to be a specialist than someone who treats an entire family’s illnesses. In addition, some health insurance companies set quotas for the number of patients a physician should see in a day. The close physician-patient relationship of the

THE CONTINGENCY FACTOR

Many patients’ attorneys take malpractice suits on contingency. This means that the patient does not have to pay the lawyer unless the lawyer wins. The lawyer then gets between 25 and 40 percent of the money the physician must pay.

Some people believe this practice encourages lawsuits because the patient has nothing to lose financially by suing his physician if he’s unhappy with his care. Others argue that it discourages such suits because a lawyer will not take a weak case on contingency, since she’ll get no money if the patient loses. They also argue that there are people with strong cases who could not afford to sue except on a contingency basis.

On the other hand, the physician’s lawyer must be paid whether the physician wins or loses. This causes physicians to sometimes settle even weak malpractice suits out of court if the settlement amount is less than the cost of a trial. In such cases, the patient’s lawyer gets her contingency fee from the settlement paid to the patient.
past is now largely gone. Today, some patients fear that their physician views them not as people, but as conditions, diseases, or one more patient toward the daily or monthly quota.

But What About Me?

A physician’s office can be a busy place with a hectic schedule. Medical assistants want to move quickly to get patients into the treatment rooms and then on to x-ray or the lab for tests, or out the door. Sometimes, physicians may see four to six patients an hour, which leaves little time for small talk.

This frantic pace can make patients feel frustrated—and even angry—about being treated with so little apparent regard. The patient may interpret the physician’s casual attitude as a lack of caring or empathy. If the physician’s hurried schedule leaves the patient with unanswered questions or unexpressed concerns, the patient’s frustration may be even greater.

It’s your job as a medical assistant to help make up for what the patient may view as the physician’s failing in this area. Showing empathy and caring will be an important part of your job—whether that patient feels rushed by the physician or upset by office delays.

The secret is in communication. You’ll read more on this subject later in this chapter. For now, just remember that patients who are upset over how they are treated are more likely to sue if they’re unsatisfied with their medical care.

Common Complaints

Surveys of patients consistently show that problems with even getting to see a physician are a major source of frustration. These delays and scheduling problems cause headaches for both staff and patients.

The Scheduling Crisis

Patients complain about long waits in scheduling appointments. People who aren’t feeling well understandably want to get treatment so they will feel better. They are often frustrated that their illness might worsen before their appointment date arrives.

While scheduling appointments will always be a challenge, it’s a good idea to leave some open slots for emergencies. Also, always keep a positive attitude when trying to manage difficult schedules with patients.
The Physician Will Be with You Shortly . . .

Often, patients must sit in waiting rooms for a long time. The physician may be behind schedule, and there may be good reasons for the delay. However, long waits make patients feel unimportant and that the office has little concern for their own schedule and inconvenience. Keep patients updated about the status of their appointments, and be realistic about the time. As a medical assistant, do what you can to make their waiting time as pleasant as possible.

Offer the patients options when the physician is running behind. If possible, contact the patient before he leaves work or home and let him know that the physician is running an hour behind. This allows the patient to come in an hour later or reschedule his appointment. If you’re unable to contact the patient prior to the appointment, let him know when he arrives. You may suggest that he wait in the office in case the physician catches up, or you may suggest that the patient return at a certain time or reschedule the appointment if desired. When you offer patients options, they are less likely to become agitated because they’re taking part in the decisionmaking process.

The Trouble with Overbooking

Some offices “double-book” two patients into the same time slot or schedule all the patients the physician will see during an hour at the same time. This can cause long delays for some patients. It can also lead to a very crowded waiting room. If this happens frequently in your medical office, the staff might want to brainstorm more effective ways to schedule patient appointments.

Managing Risk

You won’t be alone in your efforts to prevent lawsuits. Most medical offices follow practices that are designed to reduce the risk of injury to patients and employees—and therefore the risk of lawsuits. This activity is known as risk management.

THE RISK MANAGER’S DUTIES

A risk manager or compliance officer usually organizes the office’s risk management program. Her job is to coordinate the various parts of the program and make sure that each part or portion is being carried out.

The risk management process involves identifying possible dangers and other problems and then taking steps to prevent or
eliminate them. There are several basic parts of an effective risk management program.

**Name That Job Description**

Every position in a medical office should have a written job description. It should list:

- the position’s responsibilities
- the tasks to be performed by the employee who holds the position

Some job descriptions also list the skills required for the position. See the sample job description below.

**MEDICAL ASSISTANT JOB DESCRIPTION**

**What is the chief objective of this position?**

The chief objective of this position is to provide clinical and administrative support to the medical office and the patients the office serves. In this capacity, the incumbent is constantly exposed to internal and external scrutiny, stresses, ambiguities, and confidential patient information. Therefore, the employee must respond to these conditions in a professionally acceptable manner.

**What knowledge, skills, and abilities should an employee bring to this position?**

Current clinical and administrative support experience:

- knowledge of the principles and skills needed for clinical care to provide care and treatment
- knowledge of examination, diagnostic, and treatment room procedures
- knowledge of medications and their effects on patients
- knowledge of common safety hazards and precautions to establish a safe work environment
- skill in using various types of equipment for examination and treatment procedures
- skill in taking vital signs
- skill in maintaining records

Administrative skills:

- skill in answering the phone in the proper manner and scheduling patients for various appointments within
the office as well as outside appointments, including hospital admissions

- knowledge of basic bookkeeping
- knowledge of basic insurance terms and procedures needed to provide patients with the correct information regarding their coverage
- knowledge of HIPAA
- basic computer skills

Interpersonal skills:
- skill in establishing and maintaining effective working relationships with patients, medical staff, and the public
- ability to maintain quality control standards
- ability to recognize problems and recommend solutions
- ability to react calmly and effectively in emergency situations
- ability to interpret, adapt, and apply guidelines and procedures
- ability to communicate clearly with excellent verbal and written communications skills and experience in clinical documentation
- ability to organize tasks and manage time effectively
- ability to work with a minimum of supervision
- ability to respond efficiently and calmly in a medical emergency
- ability to interact effectively with people of diverse backgrounds and temperaments
- patience during times of stress

Level and type of experience:
- a minimum of graduation from an accredited Medical Assisting curriculum (two years of experience in a physician practice setting preferred)

Education or training (cite major area of study):
- Graduation from an accredited Medical Assisting program required
- Must have valid certification or registration as a medical assistant and current provider CPR certification
THE LAW OF AGENCY

The law of agency controls the relationship that is formed when one person agrees to perform work for another person. It makes an employee the “agent” of her employer and the employer therefore legally responsible for her actions. This is the principle on which the doctrine of respondeat superior is based.

The law of agency works best when there’s a written job description that clearly defines the employee’s duties. As long as the employee performs only those duties, she is protected by the law of agency. But, if her actions are not part of her job description, then the law of agency and respondeat superior do not apply.

How Should I Do This Again?

The risk manager or compliance office is responsible for maintaining a procedures manual. A separate, written, step-by-step procedure should exist for every clinical and administrative task performed in the office. Following set procedures reduces the risk of misfeasance. Copies of the manual should be available for employees to refer to, if necessary.

Know the Policies

A policy manual consists of general statements of the office’s practices, standards, and goals in basic areas of operation, including:

- patient privacy
- clinical treatment
- patient communications
- documentation

The tasks described in the procedures manual should be aimed at carrying out the policies in the policy manual.

QUALITY IMPROVEMENT

Quality improvement (QI)—also called quality assurance (QA)—is the measures an office takes to help guarantee a high quality of patient care. In many offices, the risk manager or compliance officer is responsible for the QI program. In many
practices, the office manager takes on these responsibilities. His responsibilities can be broad and include the following:

- making sure that all government regulations are being followed
- monitoring office activities to be sure that proper procedures are being followed
- monitoring the checking of all administrative, clinical, and lab equipment to make sure they are working properly
- making sure that the drugs, other medications, and clinical supplies being used are not out of date and there is proper disposal if any are found to be out of date
- ensuring that all biohazard waste is disposed of properly
- arranging for or monitoring the continuing education and training of staff to make sure they’re current on the skills and knowledge they need to do their jobs including annual training on bloodborne pathogens and current CPR certification for necessary staff
- maintaining the office itself so that no hazards, such as broken furniture or frayed electrical cords, can injure patients or employees

**DEFENSIVE MEDICINE**

Risk management shapes the way physicians practice medicine. Some physicians now order more lab tests, x-rays, consultations, and referrals than they did in the past. They want to make sure their diagnoses are accurate and that no one can sue them for missing something they should have caught. As you read earlier, all this fear and extra precautions contribute to the rising cost of health care.

Another result of defensive medicine is increased specialization. Fewer general practitioners are willing to deliver babies or fix broken bones. Even many Ob/Gyn physicians have given up the obstetrics (childbirth) part of their practice because the risks of being sued are greater than for the gynecology part of their practice. (Gynecology is the treatment of the female reproductive system.)

**Avoiding Risk**

Physicians sometimes refuse to accept new patients with serious or complicated problems. Some refer treatment of these patients to other, more highly specialized physicians. Physicians may also be unwilling to try new treatments, procedures, or drugs. Why?
WHEN BAD THINGS HAPPEN

If a patient is injured or you make a treatment mistake, it’s important to follow proper procedures.

1. Your first action should be to tell the physician immediately, if she is available, or your supervisor, so that any possibly harmful effects of the event can be dealt with.

2. Most offices also require that such events be reported on forms called incident reports. You’ll be asked to write a description of what happened, what was said and by whom, and who else witnessed the event. It’s important that you only document your own conversations and actions; you should never write an incident report documenting someone else’s experience!
3. You should avoid making statements about what caused the event or what (or whom) is to blame. Your task is to state the facts only, without providing your opinions, theories, or conclusion.
They fear the possible legal consequences if the outcome is poor. A wall of suspicion and mistrust has grown between many physicians and patients.

**The Conspiracy of Silence**

It’s difficult or impossible in many situations to find a physician who’s willing to testify in court against another physician in a malpractice suit. Some physicians have pity on their colleagues and picture themselves in the place of the accused. Others fear that they’ll be outcasts in the medical profession if they testify against other physicians. So, they remain silent.
Like any business, a medical practice must ensure that its premises are safe. (Premises are the building and grounds, or the part of a building, where the business is conducted.) No hazards should exist that might injure customers or employees.

Managing premises risk is especially important for a medical office. That’s because many of your patients may have medical conditions that increase their chances for accident and injury. All employees are responsible for reporting or correcting hazards that could cause injuries.
Despite the conspiracy of silence, you have a responsibility to come forward if you’re aware of wrongdoing in the office. It’s a violation of professional ethics and your duty of care if you don’t do so. In ethics, your duty to speak out in such situations is known as the burden (duty) of knowledge. That means if you know something went wrong, you have an ethical duty to reveal it.

As a medical assistant, you may be greeting patients as they arrive or escorting them to treatment rooms. Here are some things you can do.

- Pay special attention to your work area.
- Be on the lookout for waiting room hazards, such as broken chairs or magazines that have fallen on the floor, where patients might slip on them or injure themselves.
- If you’re working as a receptionist, walking though the waiting room several times a day to look for hazards is a good risk management behavior.

**MANAGING PRODUCT RISKS**

Medical offices use drugs, medicines, and other products that can have side effects. Some also may have a potential for harm if used improperly. In either case, providers owe a duty of care to use the products correctly and to warn patients of possible side effects. They also have a duty to instruct on proper use of products they send patients home with. “Failure to warn” is a major cause of lawsuits!

For example, suppose you administer a medication to a patient that can make her drowsy. But you fail to warn her of this possible side effect and don’t caution her about driving. If she falls asleep while driving home and gets into an accident, she can sue you and your employer.

In one case, a medical office sent a patient home with some chemical heat packs to use on his sore muscles. But office
employees failed to tell him how to use the pack properly. So he applied it directly to his skin, without placing a towel as insulation. The patient suffered serious burns as a result. The court found the medical office liable, or legally responsible, for the injury.

**Practicing Preventive Medicine**

Preventive medicine includes medical practices that focus on preventing diseases instead of just curing them. But there’s another way to think of preventive medicine, too. That’s practicing medicine in a way that will prevent lawsuits.

The key to this kind of preventive medicine is behavior. That means treating patients in ways that reduce their anxiety and frustration with the situation. It means showing the right attitude—cheerful, helpful, understanding, and professional. And showing a professional attitude includes how you treat your job as well as how you treat patients.

**EQUIPMENT FAILURES**

Some malpractice suits have been based on charges that office equipment didn’t work properly. Equipment failures include machines that break, causing injury to the patient. Another risk is improperly functioning machines that produce inaccurate results. For example, a glucose meter reports a falsely low glucose level in a patient’s blood, causing the physician to miss a diagnosis of diabetes.

Courts have ruled that a medical office is responsible for having equipment that is safe and working properly. This is why OSHA requires documentation in various logs to show you have run controls on such equipment. However, the reasonable person standard also applies. If the defect was not apparent to reasonable inspection, the office is not liable for any harm the equipment caused. The equipment’s manufacturer or servicer may be liable, however.
Every employee of a medical office has a responsibility to act in ways that help prevent lawsuits or that make any suits that are filed less likely to succeed. In fact, risk management includes four areas of behavior that are known as the four Cs of malpractice prevention.

- **Caring.** A sincere concern for patients is probably the most important attitude you can show.
- **Communication.** Being a good communicator will help you gain patients’ trust and respect.
- **Charting.** A patient’s medical record is important evidence that can help defend against lawsuits.
- **Competence.** Knowing and following the requirements of good medical practice will help you provide patients with a high standard of care.

**I CARE!**

Communication is the key to showing patients that you care. It includes how you listen as well as what you say and how you say it. Your attitude, behaviors, and body language are also forms of communication.

Genuine caring requires that you communicate three things to patients:

- understanding
- empathy
- compassion

**Understanding**

Caring involves showing patients that you understand. It means that you’re aware patients may be anxious, fearful, angry, frustrated, or filled with a variety of other emotions that often accompany having a medical problem. Understanding also involves showing patients that you recognize and value their points of view.

**Empathy**

Showing that you care also includes showing empathy. You read about empathy in Chapter 1. It’s a form of communication that’s deeper than understanding. Empathy involves sharing the patient’s feeling rather than just understanding him. It’s the ability to imagine what it would be like to actually be that patient, with all that he’s going through.
Compassion

Compassion is a desire to help others. It’s one more step beyond understanding and empathy. A compassionate health care provider not only understands and feels the patient’s “pain,” he tries to ease that “pain.” It’s the final step in caring. But remember, while it’s important to help a patient feel better, it’s also important to avoid making any promises about her medical condition or treatment.

CASUAL, CARING, AND CONCERNED

You don’t want to be uptight or appear overly serious. Communicating these attitudes can make you seem cold and unapproachable or make the patient more anxious. You want to be friendly and casual with patients, but not too casual. Many patients view an overly casual attitude as a lack of concern. In either case, when patients view health care workers as cold, unconcerned, or uncaring, they are more likely to sue if something goes wrong.

Caring and Co-workers

Remember that your attitudes and behaviors with co-workers are as important as those you have with patients. Avoid inappropriate or unprofessional behavior anywhere in the office. This includes:

- loud laughing
- horseplay
- displays of secrecy or extreme excitement

Also, never criticize another health care worker in front of patients. Likewise, never criticize another medical practice or physician in front of a patient. Remember, if patients see you acting one way with co-workers and another way with them, they may question whether your caring attitude is genuine and sincere.

LET’S TALK

Patients who view a medical office’s workers as friendly and helpful are less likely to sue. You can help create this feeling by using good listening skills and other good communication techniques.
Chapter 4  Risky Business: Managing Risk and Defenses to Lawsuits

COMMUNICATION GUIDELINES

Here are some communication guidelines that will help prevent lawsuits.

- Maintain the privacy of all conversations with patients. Never discuss patient information in front of other patients.
- Put all special instructions for patients in writing.
- Return patients’ phone calls as soon as possible. Give patients emergency phone numbers to use when the office is closed.
- Listen carefully to all patients’ remarks, concerns, and complaints and take them seriously. Report them to the appropriate office employees.
- Learn to recognize when the symptoms patients report require the physician’s immediate attention and when patients should be told to seek emergency care.
- Discuss fees and payment policies with the patient before treatment begins.

For example, sitting rather than standing when you talk with a patient communicates the attitude that you care and are interested in what the patient has to say.

It’s important that patients never feel hurried or “brushed off” when they talk with you. They need to feel that the time you give them is not rushed. Making eye contact as you talk also communicates your attention and interest. The use of appropriate touch, such as a hand on the shoulder or forearm, also indicates genuine concern.

IF IT’S NOT IN THE CHART . . .

Another way to practice “preventive medicine” and avoid lawsuits is to be sure that patients’ charts are accurate. Patient records are often used as evidence in malpractice suits. Improper or insufficient documentation could cause the office to lose a malpractice case.

Each patient’s medical record should clearly show:

- what procedures and other treatments the patient received and when each was done, including the date and time of each procedure
- all test results
- medications prescribed, including refills

This information is needed to show that nothing was overlooked or neglected in caring for the patient, and that the patient’s care clearly met the standards required by law.

You’ll read more about documentation and patient records in Chapter 7. But here are some areas that need special attention to manage risks and defend against possible lawsuits.

**Patient Contacts**

All patient contacts should be documented in the chart. This includes documenting all calls made to or received from the patient, with a summary of their content. If the patient is discussing symptoms or complaints, try to document her exact words if possible. Use quotation marks when documenting to show exactly what the patient has told you.

**Missed Appointments**

You should attempt to contact all patients who miss an appointment or cancel it without rescheduling. Document these calls and their outcome in the patients’ charts. Also indicate “no show,” “cancelled,” or “cancelled and rescheduled” in the office appointment log and keep these records.

**Referrals**

If the physician refers the patient to another physician, clarify whether your office will schedule the appointment or if the patient is to schedule the appointment. Make sure the patient understands how to proceed and document it in the chart. If the office makes the appointment, record the appointment time and date in the chart and note that the patient agreed to it. If the patient is to schedule the appointment, provide her with all information about that practice, including the phone number, contact person, and address.

In either case, follow up with a phone call to the other physician’s office to make sure the appointment was kept. Document the call in the chart. Note whether a report was received from the other physician, and document her recommendations for further care of the patient.

**Consent and Refusal**

Make sure that each patient’s record contains the signed and dated consent forms necessary for treatment. If a patient refuses an examination, treatment, or test, document the patient’s
refusal in his chart. If possible, have the patient sign a statement that he’s refusing and place the statement in his chart.

**KNOWLEDGE IS KEY**

It’s your ethical duty as a professional to have the knowledge and skills you need to do your job. Remaining competent means updating old knowledge, procedures, behaviors, and skills to keep up with changes in the office or in the general practice of medicine. Your employer will expect this of you and, in many cases, may require it.

**Professional Competence**

There are several ways you can keep up with current developments and show competence in your profession, such as:

- reading journals and newsletters
- interacting with other medical assistants
- obtaining or maintaining credentials as a Certified Medical Assistant (CMA) through the AAMA or a Registered Medical Assistant (RMA) through the AMT

Many employers offer staff training. You should make the most of these opportunities, even if doing so is not required. Voluntary attendance is further evidence of your professionalism and desire to improve your knowledge and skills.

Colleges, professional associations, and other organizations offer many educational opportunities outside the office. Attending professional meetings, conferences, and noncredit classes are excellent ways of keeping your skills and knowledge up to date. Employers will often pay the costs of this continuing education.

**Workplace Competence**

Being a competent professional requires a good knowledge of your field. This knowledge adds to your competence in the workplace by making you more aware of your abilities and limitations.

Know the requirements of good medical care for each patient, but always work within your scope of practice. Never try to do something that you’re not trained to do.

**BEHAVIORS THAT REDUCE RISK**

Here are some everyday behaviors that will reduce your employer’s risk of being sued.

- Always act within your scope of practice.
- Keep equipment in safe and working order and ready to use.
• Keep floors clean and clear.
• Open doors carefully.
• Dispose of biohazardous waste in the proper containers.
• Thoroughly document all contact with patients.
• Never promise a recovery or cure.
• Maintain the confidentiality of all patient information.
• Acknowledge long waits and give patients a reason for their wait.
• Treat all patients with courtesy and respect.

**By the Book**

**MAKING SURE YOU KNOW**

In a busy medical practice it’s easy to imagine how a hurried provider might give a wrong treatment to a wrong patient. However, there are standard procedures to prevent this from happening.

• When you prepare a medication for a patient, check it three times. Check it first when you take it from the supply cabinet, again when you prepare the dose, and a third time when you return the container to the shelf.

• Always look for the patient’s name and date of birth on his chart or on the physician’s order for a treatment or medication. Instead of asking, “Are you John Smith?” ask the patient to state his name and date of birth. It’s possible that the patient is not listening and will answer in the affirmative. But if you have him tell you his name and possibly another identifying mark such as date of birth or Social Security number, you can be sure you have the correct person. Make sure the physician’s order and the patient match before giving the treatment or medication. If they don’t, stop and make sure you’ve got the right patient!
A Good Defense Is the Best Offense

You’ve been reading in this chapter about ways to manage risks and avoid lawsuits. But lawsuits happen! And when patients sue, health care providers can defend themselves in a number of ways.

There are three main kinds of defenses:

- assertions of innocence
- technical defenses
- affirmative defenses

The innocence defense denies that wrongdoing took place. If any of the patient’s charges are true, this defense won’t work. Another defense will have to be used.

TECHNICAL DEFENSES

Technical defenses are defenses that depend on legal points and principles rather than on the evidence and facts in the case. Here are four technical defenses that might be used against a malpractice suit:

- the statute of limitations
- release of tortfeasor
- res judicata
- the borrowed servant doctrine

The Statute of Limitations

Probably the first thing the defense attorney will investigate is whether the statute of limitations has expired on the alleged wrongdoing. As you read in Chapter 2, the statute of limitations is a state law that limits the length of time a plaintiff has to bring charges. That time limit generally depends on three things:

- the state in which the alleged wrongdoing took place
- whether the alleged wrongdoing violated civil law or criminal law
- the specific type of wrongdoing involved

In most states, the time limit for filing malpractice suits is two years. But as you read in Chapter 2, that time limit can vary in some states if the patient is a child or if the injury takes time to appear.

Release of Tortfeasor

As you learned in Chapter 3, a tortfeasor is someone who is guilty of committing a tort. Release of tortfeasor is a legal doctrine that often applies in situations where there’s more than one tortfeasor.
Suppose a driver injures someone in an auto accident. The physician makes a medical mistake when treating the victim. In most states, the driver is liable for any harm caused by the physician’s malpractice. That’s because the driver was responsible for the victim’s need to go to the physician in the first place.

If the victim sues the driver for the injuries, the victim can’t collect damages from the physician, too. That’s because the money the driver must pay the victim also releases the physician from liability. The physician would use this release of tortfeasor defense if the victim tries to sue her.

*Res Judicata*

*Res judicata* is a legal doctrine that a claim can’t be retried once a lawsuit has been decided or settled. It’s a Latin term that means “the thing has been decided.” For example, if a physician is found innocent of a wrongdoing in a lawsuit, the patient can’t bring the same suit with a different attorney based on the same evidence.

Here’s another example of *res judicata*. Suppose a patient didn’t pay his bill. When the physician sues him, his defense for not paying is that the physician was negligent. If the physician wins her suit, the patient can’t turn around and sue the physician for negligence. That’s because the negligence issue has already been decided in the physician’s favor. It was determined when the jury in the physician’s suit rejected the patient’s defense for not paying his bill.

*Borrowed Servant Doctrine*

The *borrowed servant doctrine* is the legal principle that releases an employer from liability for an employee’s actions if the employee is working for someone else. For example, suppose your employer
Chapter 4  Risky Business: Managing Risk and Defenses to Lawsuits

affirms you to help out at a nearby practice that’s currently understaffed. If you make a treatment error at the other practice, your employer can’t be held responsible for your wrongdoing.

AFFIRMATIVE DEFENSES

Affirmative defenses present evidence that the harm to the patient was due to a reason other than the provider’s negligence. The four most common affirmative defenses are:

- contributory negligence
- comparative negligence
- assumption of risk
- emergency

Contributory Negligence

Contributory negligence is a defense that claims the patient’s own actions caused or contributed to his injury. Even if the health care provider admits to

What’s the Verdict?

WHO’S RESPONSIBLE?

A medical assistant gave a patient a medication and failed to warn him of its possible side effects. Soon after returning home, he developed a reaction to the drug. A rash appeared all over his body, and he began to have difficulty breathing. Over the next few hours, his breathing difficulties increased. Finally, he went into respiratory arrest and died. The patient’s family sued the medical office for negligence and wrongful death because of the medical assistant’s failure to warn the patient.

The Verdict: The medical assistant should have alerted the patient to the drug’s possible side effects. But the patient was also negligent because he never called the office after experiencing problems. A reasonable person would have recognized a possible connection between receiving a medication and severe symptoms that develop soon after receiving it and would have called the office to report a problem. Had the patient done that, medical intervention could have prevented his death. The medical assistant was negligent in failing to warn the patient. However, a contributory negligence defense would be effective against the wrongful death claim.
negligence, if she can prove that the patient was also partly at fault, the patient can’t collect damages.

**Comparative Negligence**

Comparative negligence also argues that the patient was partly responsible for his injury. But unlike contributory negligence, this defense allows the patient to recover damages based on how much of the injury was not his fault.

For example, suppose a medical assistant accidentally cut a patient’s arm. She bandaged the arm and told the patient to replace the bandage with a new one every day. The patient failed to do that, and the cut became infected. If the patient is suing for $100,000 and the court determines he was 60 percent responsible for his injury, $40,000 is the most he can collect if the medical assistant is found negligent.

**Assumption of Risk**

Assumption of risk is a defense based on the claim that the patient knew the risks involved in the treatment when she agreed to go ahead with it. To succeed with this defense, the provider must prove both of the following circumstances.

- The patient was aware of the risk of bad outcomes.
- Those bad outcomes were the cause of the patient’s injury.

**By the Book**

**OBTAINING INFORMED CONSENT**

Proving assumption of risk is much easier if the patient has signed a consent form that lists the risks involved in the treatment. The patient must be aware of the risks of having the procedure, the risks of not having the procedure, and any alternative procedures that may exist. A patient’s agreement to a treatment after being educated about its possible benefits and risks is called informed consent.

Obtaining informed consent is the physician’s responsibility. It’s not your job as a medical assistant. However, a medical assistant does owe a duty of care to the physician to make sure that properly signed and dated consent forms are in the patient’s chart before the treatment is performed. Often, the physician will ask the medical assistant to witness a signature.
Emergency

**Emergency** is an affirmative defense in which the provider claims that the care was given during an emergency situation and should therefore not be held to as high a standard as non-emergency care. To succeed, this defense must prove the following.

- A true emergency existed.
- The emergency situation was not caused by the provider’s actions.
- The standard of care was appropriate for an emergency situation.

Malpractice Insurance: A Good Investment

Another way that medical providers manage risks is by carrying liability and malpractice insurance. Then, if they are successfully sued, the insurance company pays the damages to the patient. In most cases, the insurance company will also pay the costs of defending the provider against the suit.

A medical office’s liability and malpractice insurance usually covers its employees’ actions in carrying out their duties. However, many medical assistants also obtain their own insurance. Why do they do this?

Sometimes, in a lawsuit, the parties being sued may not all agree on the best course of action. If the patient has sued both the medical assistant and the medical assistant’s employer for malpractice, the defense the employer pursues may not be best for the medical assistant.

For example, the employer may decide that it’s less expensive to settle a case out of court by admitting to employee wrongdoing when in fact the employee did nothing wrong. If this happens, the medical assistant may want to have his own attorney and defend himself separately from his employer.

Malpractice insurance can be expensive. But it’s likely to cost less than having to hire your own attorney and pay damages yourself if you lose your case. For this reason, many medical assistants view having their own malpractice insurance as a wise investment.
• Medical reasons for lawsuits include poor treatment outcomes, unrealistic expectations for outcomes, and the belief that suing patients have received poor care.

• Patients are more likely to sue when they feel ignored or mistreated. Long delays in seeing the physician add to their feelings of frustration.

• Written job descriptions, procedures and policy manuals, and quality assurance programs are all devices that offices use to help limit problems that can cause lawsuits. Offices also manage risk by practicing defensive medicine, eliminating premises hazards, and reducing harm from misuse of medications and faulty equipment.

• You can help your employer prevent lawsuits by following the four Cs of malpractice prevention: caring for patients; having good communication skills; making sure charting is thorough and accurate; and achieving competence by continuing to update skills and by following proper procedures.

• Technical defenses against lawsuits depend on legal points and principles rather than on the facts and evidence in the case. They include the statute of limitations, the release of tortfeasor defense, the doctrine of res judicata, and the borrowed servant doctrine.

• Affirmative defenses against lawsuits are based on presenting evidence that some factor other than negligence caused the patient’s injury. Common affirmative defenses include contributory negligence, comparative negligence, assumption of risk, and that an emergency situation existed.

• Most employers’ malpractice policies cover their employees. However, the possibly conflicting goals of the employer and the medical assistant in such suits make malpractice insurance for medical assistants a good idea.

**Answer the following multiple-choice questions.**

1. Which factor can cause a patient to sue a medical office?
   a. a poor outcome in the treatment of the patient
   b. the patient’s unreasonable expectations for a cure
   c. the patient’s frustration with experiences with the office
   d. all of the above
2. Which of the following is not part of a good risk management plan?
   a. a written job description for every employee
   b. a conspiracy of silence
   c. a procedures manual
   d. a quality improvement program

3. Who is usually responsible for making sure a medical office’s quality improvement plan is effective?
   a. the risk manager
   b. the physician
   c. the medical assistant
   d. all of the above

4. A health care worker’s ethical responsibility to speak up when she is aware of wrongdoing is known as:
   a. the burden of knowledge.
   b. assumption of risk.
   c. the borrowed servant doctrine.
   d. contributory negligence.

5. Which is not one of the four Cs of malpractice prevention?
   a. charting
   b. communication
   c. confidentiality
   d. caring

6. Which characteristic suggests that a health care worker is a competent professional?
   a. She always carries out the instructions of her supervisor.
   b. She keeps current on new developments in her field.
   c. She is willing to work outside her scope of practice.
   d. all of the above

7. The key employee behavior for reducing the risk that patients will file lawsuits is:
   a. good communication.
   b. showing empathy.
   c. thorough documentation.
   d. respecting confidentiality.

8. Which of the following is not an affirmative defense against lawsuits?
   a. emergency
   b. comparative negligence
   c. contributory negligence
   d. assertion of innocence
9. Which of the following is not a technical defense against lawsuits?
   a. the statute of limitations
   b. the borrowed servant doctrine
   c. assumption of risk
   d. *res judicata*

10. Why might a medical assistant want to purchase his own professional liability insurance?
   a. because the liability insurance of most medical offices doesn’t cover medical assistants
   b. because in defending against a lawsuit, his best interests and those of his employer may not be the same
   c. because his employer’s liability insurance may not pay for his legal defense
   d. because the damages awarded to the patient may exceed the limits on the employer’s liability insurance policy