Feds target effective communication enforcement

By KAREN S. ELLIOTT, Esq.

Karen S. Elliott, Esq. is a partner at Eckert Seamans LLC. She specializes in defending businesses against employment law claims.

As places of public accommodation, medical practices must provide free of charge effective communication to deaf or hard of hearing patients and/or their companions. While most physicians know of this basic requirement, the complex standards the federal government will require practices to meet to avoid fines and penalties may come as a shock. Most likely your practice does not have the human resource and administrative processes in place to meet the government's compliance standards.

In July 2012, the United States Justice Department (DOJ) announced its Americans with Disabilities Act Barrier-Free Health Care Initiative. The DOJ Civil Rights Division has now partnered with more than 40 U.S. Attorneys' offices across the nation to target enforcement efforts against healthcare providers. If the patient and/or his/her companion complain to the DOJ that a physician's office failed to provide "effective communication," the DOJ may well initiate an investigation. And unless the practice has implemented the DOJ's guidelines, it is at significant risk of paying monetary damages to the complainant plus a civil penalty for a first violation of up to $75,000 and $150,000 for subsequent violations.

Finding explicit written guidance proves challenging. As a place of public accommodation under the Americans with Disabilities Act Title III (ADA), physician practices must furnish "appropriate" auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. The type of auxiliary aid or service may vary depending on the "nature, length, and complexity of the communication involved." The published federal regulations require the practice to consult with the individual to determine the appropriate aid needed, "but the ultimate decision as to what measures to take rests with the practice, provided that the method chosen results in effective communication." The regulations further provide that the "auxiliary aid is a flexible one" and thus do not provide precise guidance.

The DOJ's Technical Assistance Manual and 1994 supplement also fail to provide well-defined guidelines. For example: For "[r]outine doctor's visits exchange of notes is likely to provide an effective means of communication." "When there is a serious medical situation, including surgery, an interpreter is *likely* to be necessary for effective communication given the length and complexity of the communication involved." (Emphasis added.)

These examples mislead the practitioner to believe that a high level of discretion exists. A review of the DOJ's settlement agreements, however, shows that the DOJ expects practices to follow a much more stringent process than indicated by the published regulations.

The DOJ's published settlement agreements enumerate the detailed standards the DOJ demands of practices. The DOJ publishes its agreements on its website.

Key procedures that the DOJ states practices must institute for ADA compliance include:

- Posting a notice in the office and on the practice's website about the availability of auxiliary aids free of charge.
- Using the model communication assessment form attached to the settlement agreements at the time the appointment is made or on first visit, whichever is first.
- Charting to include:
  - The completed assessment form.
  - Documentation that the assessment has been made, the decision regarding the auxiliary aid chosen and why.
  - Conspicuous labeling on the chart to indicate that the patient or companion is deaf or hard of hearing and a clear statement of the mode of communication selected.
  - A record of the ongoing provisions of auxiliary services provided for each visit and why.
- Maintaining a log of:
  -Qualified interpreters
  -Interpreter requests
- Training staff:
  - To make sure the assessment is conducted.
  - How to properly order an interpreter which must include written communication to the interpreter and written confirmation back from the interpreter.
  - On the various degrees of

"Feds," continued on page 14

Use legal citations and websites to help you deal with effective communication issues:

The Statute 42 USC 12182-12188
www.ada.gov/pubs/

The Regulation 36 CFR 36
www.ada.gov/

DOJ Technical Assistance Manual
www.ada.gov/

DOJ Technical Assistance Manual 1994 Supplement
www.ada.gov/

DOJ Settlement Agreements
www.ada.gov/

Virginia Guidance
www.vddhh.org/

"Feds," continued from page 13

hearing impairment, language and cultural diversity in the deaf community.
- To identify communication needs of persons who are deaf or hard of hearing.
- On the recommended and required charting procedures.
- On the types of auxiliary aids and services available.
- On the proper use and role of qualified interpreters.
- Regarding criteria to be used to select an interpreter who is qualified.
- In the proper use and role of video remote interpreting services.
- On how to make and receive calls through TTYs and the relay service.

The DOJ agreements state practices must provide a qualified interpreter for the following situations:

- Discussing a patient's symptoms and medical condition, medications and medical history.
- Explaining medical conditions, treatment options, tests, medications, surgery and other procedures.
- Providing a diagnosis and recommendation for treatment.
- Communicating with a patient during treatment, including physical and occupational therapies, testing procedures and during physician rounds.
- Obtaining informed consent for treatment.
- Providing instructions for medications, pre- and post-surgery instructions, post-treatment activities and follow-up treatments.
- Discussing powers of attorney, living wills and/or complex billing and insurance matters.

The ADA provides that physicians bear the burden of hiring the interpreter and determining qualifications. As Virginia does not require interpreters to be licensed, physicians must understand the certification designations. Virginia has a helpful publication (see sidebar) explaining the types of certifications offered nationally and the appropriate interpreting situations applicable to each level of certification. As the Virginia designations referenced in the above publication pertain only to interpreters for state agency needs, the safest process would be for a practice to require national certification. Physicians need to be certain that the interpreter showing up for the visit holds the proper level of certification applicable for the nature of the visit so staff must be trained to know what certification level to request when initiating contact with the interpretative service. Failure to do so may lead to a complaint, investigation and damages and penalties. R

In July 2012, the United States Justice Department (DOJ) announced its Americans with Disabilities Act Barrier-Free Health Care Initiative.