

Med/Mal 101



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Most Malpractice Suits Are Due to Failure to Do the Basics

- Inadequate Hx & PE
- Inappropriate Tests
- Poor Communication

Two Components to Patient Care

1. Technical Side – the Scientist
2. Human Side – the Healer

Three Components to Malpractice Suits

- Communication
 - Outcome
 - Documentation
-
- ◆ Bad Communication + Bad Outcome
= Malpractice Suit
 - ◆ Good Communication + Good or Bad Outcome
= Usually no suit

Communication

– exchange of information –

- Story (“History”)
- Family
- Nonverbal
- Verbal – language
- Atmosphere in ER

Communication

- A. Let the patient talk
 - 80% of pt “stories” are < 60 sec.
- B. Give the family a chance to comment
- C. Introduce yourself. Touch. Dress Code. Eye Contact

Communication cont'd

D. Verbal

- Non-chief complaint
- Medical – “ease”
- Team player

Top 10 reasons for malpractice claims against primary care physicians

- Errors in diagnosis
- No medical misadventure - The doctor was named in a lawsuit, but there was no allegation of inappropriate medical conduct on his part
- Improper performance
- Failure to supervise or monitor case
- Medication errors
- Not performed - The physician allegedly failed to perform an indicated treatment or procedure, and that failure was the main reason for the malpractice action.
- Failure/delay in referral or consultation
- Performed when not indicated or contraindicated
- Failure to recognize a complication of treatment
- Delay in performance

Top Procedures Docs are Sued

- Diagnostic interview evaluation, or consultation
- Prescription of medication
- General physical exam
- No care rendered
- Injections and vaccinations
- Diagnostic radiologic procedures excluding CT scan and contrast material
- Diagnostic procedures involving cardiac and circulatory functions
- Misc. manual exams and non-operative procedures
- Diagnostic procedures of the large intestine
- Misc. non-operative procedures

Most Frequent Source of Claims

1. Wound Complications
2. Extremity fx and complications
3. Myocardial infarction (1 / 3 of all \$ awarded against ER-MD)
4. Appendicitis
5. Head Trauma
6. Aortic aneurysm/dissection
7. Medication Errors

RED FLAGS

- Time of care
- Change of shift
- Unscheduled return visit
- Language problems
- Uncooperative pt
- Compromised pt (diabetes, alcoholics, anticoagulants)

How do we prevent lawsuits

- Tracking and follow-up: Don't neglect either
 - Establish Tracking or Follow-up procedures
 - Labs and X-rays you've ordered are performed.
 - The physician reviews reports before they go into the chart.
 - Patients are told to come in for follow-up visits.
 - juries appreciate and understand that doctors have noncompliant patients. What juries struggle to understand—and to forgive—is a perceived lack of effort on the physician's part to manage information on a timely basis and follow up with the patient. A practice that doesn't have a suitable system can get itself into an indefensible position

How do we prevent lawsuits cont.

- Putting it in writing: The importance of documentation
 - You are expected to keep careful, complete records
 - The problem might involve the record's content or legibility, or whether the practice keeps track of things like patients' medication history and allergies
 - The medical record can provide the most striking evidence that you've done right by your patient. “
 - As lawyers, we need to use the medical record to show that the doctor we're defending got the appropriate history, ordered the appropriate tests, and told the patient that he or she needed to be seen again
 - The record should also indicate that the doctor instructed the patient about any changes in symptoms that might suggest a more serious problem
 - No right or wrong way to document – but be consistent
 - Errors in documentation – simply cross out and re-write – Don't White out!

Documentation

1. Hx addresses chief complaint
2. Include pertinent negatives
3. High risk Dx excluded
4. Repeat Exam
5. Time and notes about consults conversation
6. Repeat abnormal vital signs
7. Discharge Instructions

Discharge Instructions

- Short and clear
- Written in standard English
- Give them a doctor
- Close the ring - Finale

How do we prevent lawsuits cont.

- Keeping in touch: Communicate with patients
 - You must establish good doctor-patient—and doctor-doctor—communication channels before an adverse event occurs.
 - In many malpractice claims, either the doctor failed to tell the patient something, the doctor's instructions were misunderstood, or the doctor failed to pass along important information to a referral physician.
 - In an adverse event, first the patient experiences surprise, then disappointment, and finally anger.
 - Most physicians who have a disappointed patient, a treatment failure, or a complication naturally tend to avoid the patient. That's a big mistake.
 - Perceived arrogance or disinterest on the doctor's part is a key reason a disappointed patient turns angry and visits a lawyer
 - Many times, patients just want empathy, and to know that what happened to them won't happen to someone else

Louisiana “I’m Sorry Law” (LSA RS 13:3715.5)

- **Any communication**, including but not limited to an oral or written statement, gesture, or conduct by a health care provider expressing or conveying apology, regret, grief, sympathy, commiseration, condolence, compassion, or a general sense of benevolence made to a patient, a relative of the patient, or an agent or representative of the patient, **shall not constitute an admission** as defined in Code of Evidence Article 801(D)(2) or a statement against interest as defined in Code of Evidence Article 804(B)(3), **and shall not be admissible in evidence to establish liability or for any other purpose**, including impeachment, in a medical review panel proceeding, arbitration proceeding, or civil action brought by or on behalf of the patient or by or on behalf of an heir, survivor, statutory beneficiary, or agent or representative of the patient against the health care provider who made the communication. A statement of fault, however, which is part of, or in addition to, any such communication shall not be made inadmissible pursuant to this Section.

How do we prevent lawsuits cont.

- Medication errors: What patients don't know can hurt them
 - Doctors should tell clinical staff that as part of the intake process, they need to ask what medications patients are taking, including over-the-counter and herbal remedies, and what medications they've had problems with.
 - Recommend asking patients to bring all their medications to the office so the staff can actually see what they're taking
 - With the huge increase in the number of drugs available, adverse drug reactions and interactions have become a major malpractice snare
 - Physicians should meet with pharmaceutical representatives so they have a clear idea how to use new medications
 - You need to write scripts clearly and avoid abbreviations that can be misunderstood
 - Refilling prescriptions in perpetuity without seeing the patient invites trouble

Top Ten List for Avoiding Med/Mal Suits

1. Tell the truth, the whole truth, and nothing but the truth: Avoid subjective comments, complete all insurance forms, and document any lack of diagnostic uncertainty.
2. Write well and write often: Your notes should be legible, thorough, and accurate. Don't write data in the margins. Noting patient quotations can be helpful if you're ever sued.
3. See your patient before making the diagnosis: If possible, don't order medication without examining the patient, or at the very least make sure you review the patient's medical history before issuing prescriptions.
4. Pay attention to the little things: Watch nonverbal cues, be courteous, and reassuring.
5. Never underestimate vital signs: Always record and review temperature, BP, weight, height, and pain analog scales.

Top Ten List for Avoiding Med/Mal Suits

6. Communicate as if your job depends on it: Tell the patient what to expect during an exam, prolong office visits, use appropriate humor, and make sure patients understand their options.
7. Be nice, be yourself: Nice doctors get sued less often.
8. Know that others will read your charts: Don't even think about recreating charts with different information.
9. Consider all diagnoses, not just the common ones: Listen to the patient carefully, and revisit unresolved problems.
10. Stay alert, and don't forget the unusual: Don't rush, and remember "red flags."

YOUR RESPONSIBILITY

- Keep up with CME
- Clear your mind before you walk in – Focus
- Forget your EGO
- Get enough sleep. Keep your sense of humor.

It is ok to “fire” patients

- It's ok to "fire" patients with whom you can't agree after multiple efforts.
- Make sure to choose your words carefully, put it in writing, and, if possible, dismiss them in person.

One of the most effective and most abundant resources available to medical residents is often overlooked, although in plain view....

THE NURSE!

- **Nurses have a lot to offer residents:**
 - Years of experience in caring for the type of patients that the resident may have never before encountered
 - The benefit of having experienced how a number of different physicians have attempted to manage a disease process or clinical presentation
 - Have knowledge of the facility's policies and procedures - which might come into play in the event of an unfortunate patient outcome
 - Have access to a number of resources, such as medical literature, old patient charts.....take out menus
 - Have developed excellent interdepartmental communication - may be able to get you those important lab results back ASAP or know the specific criteria necessary for having a patient bumped ahead in the CT line
 - Usually don't bite - most tend to be nurturing and willing to teach without judgment or arrogance

Building a Relationship with Nursing Staff

- When new to a floor or unit, be certain to introduce yourself and let the nurses know you are glad to be there
- Understand you're in their house - although this is your temporary office, this is where many have worked for years - be respectful of the environment and the unwritten rules of conduct
- Be sure to write orders rather than give them verbally whenever possible; this decreases the number of errors
- Sign, date and time every entry into the chart if the chart is not electronic
- Ask questions - not everything is charted; nurses spend a lot of time with patients and are able to relay trends in clinical status

Building a Relationship with Nursing Staff

- Understand that nurses are accustomed to working as a team; make an effort to be part of that team by discussing the patient's symptoms, progress and plan of care with the nurse
- Be clear and accurate in all orders and communications
- Write legibly
- Follow up on the results of critical tests

Pfiffner v. Correa

- 94-0992 (La. 10/17/94), 643 So. 2d 1228
- Medical malpractice cases necessarily involve complex medical and factual issues which defy a lay person's knowledge.
- In almost all cases a plaintiff must produce expert testimony to sustain the burden of proof.
- Obvious acts of carelessness are excluded
- Plaintiff must establish a causal nexus between any fault and the injury alleged

Hondroulis v. Schumacher

- 553 So. 2d 398 (La. 1988).
- La. R.S. 40:1299.40 creates a rebuttable presumption of valid consent.
- Physician must disclose material risks
- The material risk was realized
- There is a causal connection between the failure to inform of the risk and the realization of the risk.

Hondroulis v. Schumacher

- Determination of Material Risk is a Two Step Process
- 1. Determining the existence and nature of the risk – requires expert testimony
- 2. Determine whether the probability of harm is a risk that a reasonable patient would consider in deciding on treatment – does not require expert testimony

Coleman v. Deno

- 813 So. 2d 303 (La. 2002)
- EMTALA applies only to hospitals, not individual physicians
- Physician transfer of patient to Charity hospital was malpractice and not an intentional tort
- Established a 6 factor test for determining whether conduct constitutes malpractice

Coleman v. Deno

- Coleman's Six Factors
- 1) Whether the particular wrong is treatment related or caused by a dereliction of professional skill
- 2) Whether expert testimony regarding standard of care is necessary
- 3) Whether act or omission involved assessment of the patient's condition
- 4) Whether the incident occurred in the context of physician-patient relationship
- 5) Whether the injury would have occurred had the patient not sought medical treatment
- 6) Whether the tort alleged was intentional

Questions or Comments Please contact:

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