MEDICAL PRACTICE: LIABILITY AWARENESS

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I am not an attorney and this is not legal advice.

I am not trying to scare you out of the practice of medicine.
Objectives

After completing this activity, learners will be able to:

- Name three liability concerns for a medical practice
- Describe factors contributing to negligence claims
- Identify two strategies aimed at decreasing liability in the medical practice
POTENTIAL LIABILITIES

- Medical negligence (malpractice)
- Medical Board actions
- Contractual
- Regulatory
  - HIPAA
  - Billing
  - ADA, OSHA
  - Employment
Defendant = Doctor
Plaintiff = Patient
Claim = A demand for money
Indemnity = Money paid to settle a claim
Economic damage = Quantifiable expense
Non-economic damage = Non-quantifiable expense
MEDICAL NEGLIGENCE

Duty

Statute of Limitations

Breach
- Admission
- Experts
- Res ipsa loquitur

Proximate Cause

Standard of care and Damages

Damages
- Economic
- Non-economic
WHERE DO CLAIMS ARISE?

Site / Facility
2007 - 2014

- Hospitals, 44%
- Physician Office, 28%
- Ambulatory Surgery Facility, 17%
- Diagnostic and Treatment - Primary Care Clinic, 5%
- Misc. (dialysis, substance abuse treatment, etc.), 3%
- Skilled nursing facility, 2%
- Psychiatric facility, 1%
### TOP FIVE BY INDEMNITY

<table>
<thead>
<tr>
<th>Rank</th>
<th>Specialty</th>
<th>Average Indemnity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Neurosurgery</td>
<td>$445,843</td>
</tr>
<tr>
<td>2</td>
<td>OB-GYN Surgery</td>
<td>$422,296</td>
</tr>
<tr>
<td>3</td>
<td>Neurology – non-surgical</td>
<td>$418,819</td>
</tr>
<tr>
<td>4</td>
<td>Pediatrics</td>
<td>$399,357</td>
</tr>
<tr>
<td>5</td>
<td>Radiation Therapy</td>
<td>$380,228</td>
</tr>
</tbody>
</table>

**All specialty average – $328,815**
<table>
<thead>
<tr>
<th>Rank</th>
<th>Specialty</th>
<th>Closed Claims (10 yrs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Internal Medicine</td>
<td>13,525</td>
</tr>
<tr>
<td>2</td>
<td>OB-GYN Surgery</td>
<td>11,083</td>
</tr>
<tr>
<td>3</td>
<td>General Surgery</td>
<td>9,179</td>
</tr>
<tr>
<td>4</td>
<td>General &amp; Family Practice</td>
<td>8,996</td>
</tr>
<tr>
<td>5</td>
<td>Orthopaedic Surgery</td>
<td>7,652</td>
</tr>
</tbody>
</table>

**Total claims closed – 94,228**
CLAIMS RESOLUTION

- Dropped, withdrawn or dismissed, 65%
- Settled, 24%
- Verdict - Defendant, 7%
- Verdict Plaintiff, 1%
- ADR / Contract, 2%
- Unknown, 1%

PIAA 2014
WHY PATIENTS SUE

- Lack of communication
- Dissatisfaction with treatment
- Unexpected outcome
- Patient and/or family anger
- Provider attitude
Top Allegations

- Errors in Diagnosis
- Inappropriate Treatment
- Failure to Monitor
- Medication Errors
ERRORS IN DIAGNOSIS

- Failure to diagnose
  - Cognitive bias
  - Use of outdated test

- Delay in diagnosis
  - Lack of referral
  - Lack of follow up
INAPPROPRIATE TREATMENT

- Improper management or failure to treat
- Delay in treatment
- Improper performance of a treatment
- Wrong or unnecessary treatment
IMPROPER PERFORMANCE

- Many allegations are commonly accepted risk
- Retained foreign body
- Wrong site/patient surgery
- Informed consent?
FAILURE TO MONITOR

- Therapeutic medication levels
- Chronic conditions
- Life-threatening condition
MEDICATION ERRORS

- Dosage errors (LA, ER, SR, XL, CR)
- Inappropriate medication
  - Look alike/sound alike
  - EHR drop down boxes
- Side effects
- Drug/drug interactions
CONTRIBUTING FACTORS

Communication

Documentation

Systems
COMMUNICATION

- Among providers
- With patient/family
  - Health literacy
- Multiple providers with no identified leader
- Failure to read the medical record
Incomplete notes, missing clinical rationale
Illegible records
Incorrect information
Documentation not timely
Copy / paste, pre-populating templates in the EHR
Discharge summary missing information
FOLLOW UP SYSTEMS

- Failure to follow up on labs, tests, consults
  - Lack of a system
  - System breakdown
  - Failure to close the loop

- Critical value items

- After hospital discharge
COMPONENTS OF A LAWSUIT

- Preliminary work
  - Information gathering
  - Affidavit on standard of care, causation, damage

- Notice of Intent

- Discovery/depositions

- Dismiss/settle/trial
COMPONENTS OF A TRIAL

- Opening statements
- Trial testimony
- Closing arguments or summation
- Verdict by the jury
- Appeal or post-verdict action if necessary or appropriate
THE AFTERMATH

- Reports after a settlement or plaintiff verdict
  - National Practitioner Data Bank
  - Board of Medicine
  - CMS

- If case is dismissed or defendant verdict…
ASSIST IN YOUR DEFENSE

- Know your case
- Teach your attorney the medicine in your case
- Don’t keep secrets from your attorney
- Respond to your attorney in a timely manner
- You know medicine, your attorney knows law
  – If you have a question in your mind, ask your attorney
DEPOSITIONS

- Listen to your attorney (prime directive)
- Understand the question before you answer
- Tell the truth – don’t lose credibility
- Be objective when answering questions
- Never guess at an answer
- Never lose your temper
DOH Complaint

- Notification
- Investigation
- Probable Cause Panel
- Administrative Complaint
- Hearing
  - Informal
  - Formal Administrative
PERSONAL CONDUCT

- Prohibited practices or unprofessional conduct
  - Behavioral issues
  - Inappropriate patient relationship
  - Substance abuse
  - Conviction or no contest plea in a felony charge
  - Non-payment of student loans
Failed to meet the standard of care

- Failure to practice in a manner consistent with public health and welfare
- Subject to disciplinary action taken by Peer Review including hospital actions
- Repeated medical malpractice that evidences incompetence likely to endanger the public
INADEQUATE RECORDS

- Often added to the scope of the complaint by MB reviewer after review of documentation
  - Incomplete
  - Not timely
  - Illegible
PAIN MANAGEMENT

- Chronic, non-malignant pain
- Must note “prescribing physician” on profile
- Complete H&P, consults as necessary
- Establish clinical grounds to justify therapy
- Establish a treatment plan
- Monitor for medication abuse/E-FORCSE®
IMPROPER SUPERVISION

- Supervision agreements (direct or indirect)
- Reviews as part of a quality assurance and performance improvement program
- You may be responsible for
  - Nurse practitioner
  - Physician assistant
  - Medical assistant
IMPLICATIONS

- Emergency suspension, revocation, restriction
- NPDB reporting
- Posted in DOH profile (public information)
- Actions in other license jurisdictions
- Third party payors
  - Contract termination
  - List of excluded individuals and entities (LEIE)
RISK MANAGEMENT STRATEGIES

- Immediately report any notice from the Medical Board to your carrier
- Do not respond on your own
- Be prepared to deal with the uncertainty
- Don’t have a negative attitude
- Participate in the process of your complaint
HIPAA

- Privacy and Security Rules
  - Notice of privacy practices
  - Patient access to records
  - Business Associate agreements

- Staff
  - Training, documentation
  - Policies and procedures
  - Data encryption and backup
WORKING WITH FEDERAL DOLLARS

- Medicare, Medicaid, TRICARE, CHIP
- False Claims Act
  - Overbilling, not medically necessary, upcoding
  - Stark Law
  - Anti-kickback statute
- Treble damages + $11,000 to $22,000 per claim
RISK MANAGEMENT STRATEGIES

- Don’t cut corners
- Return phone calls
- Be kind to patients and staff
- Be professional with your colleagues
- Know the Medical Board rules that apply to your practice and follow them
- Document, Document, Document
RESPONDING TO INQUIRIES

- Contact carrier
- Know your rights
- Seek counsel before responding
- Never alter charts
- Do not discuss details outside of your defense team
CONCLUSION

- Risks are always present – manage them
- You are neither the first nor the last to be sued
- Respected and trusted colleagues have been sued and survived
- Partner with others
- Commit to a culture of patient safety
THANK YOU

We relentlessly defend, protect, and reward the practice of good medicine.