

Case Studies: Best Practices to Avoid Malpractice

Presented by Rebecca Kenny, JD

Prepared by Jacqueline Olexy, JD, MSN, RN

Definition of Medical Malpractice

- Provider owed patient duty;
- Provider breached the duty by departing from proper standard of medical practice recognized in the community;
- Provider's acts or omissions proximately caused the patient's injuries.
 - Blaukamp v. UNMH, 1992-NMCA-048

Establishing the Standard of Care

- In [treating] [diagnosing] [caring for] a patient, a health care provider is under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified [health care provider] practicing under similar circumstances, giving due consideration to the locality involved.

- NM Uniform Jury Instruction 13-1101

Expert Testimony Most Always Required

- Expert Testimony is required to establish the standard of care owed by a healthcare provider to the patient.
- In [treating] [diagnosing] [caring for] a patient, a health care provider is under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified [health care provider] practicing under similar circumstances, giving due consideration to the locality involved.

- NM Uniform Jury Instruction 13-1101

Triggering A Claim or Complaint

- Unexpected or unexplained outcomes often trigger inquiry & patient's request for review of medical record is always a first step.

Medical Records Become Key

- Medical Records
 - Defined by statute.
 - Owned by organization rendering the care.
 - Conversion to EHR has largely occurred.
 - EHR has changed availability and amount of data/ documentation to prove or defend a lawsuit.

Know Your EMR

- What you see is *not* what you get: Familiarize yourself with what the paper record looks like compared to the screen views.
- EHR Related Claims have steadily increased over the past decade with contributing factors that include copy & paste of repetitive errors and less space for free text.
 - EHR Closed Claims Study, The Doctors Company 2017

Direct v. Third-Party Claims

- NPs may work for company that contracts with a hospital or free-standing ER.
- The language between your employer and the hospital/facility with which it contracts oftentimes provides when there is a legal basis to join the NP as a party to the matter.

Medical Malpractice Litigation is Alive & Well in NM

- Anecdotally, given rise in NPs and presence in ER and inpatient settings, exposure for claims may correlate.
- Be educated on at least the basics of your professional liability policy.
- If your employer provides professional liability insurance, ask for details.
- Most employer provided professional liability insurance excludes coverage for licensure actions.

If a Claim is Filed

Before a claim is ever filed, have some understanding of how you are insured and what your coverage provides. Does it exclude coverage for licensure actions.

If a claim is filed, Immediately notify your professional liability carrier, and if applicable, Risk Manager.

Insurance assigns counsel and you work with that attorney in defending the claim.

NM Medical Malpractice Act

- NM Medical Malpractice Act, N.M.S.A. 1978 §§ 41-5-1 et seq., historically does not apply to NPs.
- Passed in 1976, with stated purpose being to “promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico.” N.M.S.A. 1978 § 41-5-2.

Med Mal Act Cont.

- As defined in the Act, health care provider “means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services by a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician’s assistant.” N.M.S.A. 1978 § 41-5-3.
- Amendments to the Act must be through the Legislature.

No Fail-Safe Way to Prevent Claims

- Unreasonable to advise making charting or any other specific task your priority – your patients and the care you give them is always the priority.
- But awareness and appreciation of minimizing risk go a long way.

Thank you for
your attention.

- This presentation is for educational purposes only and should not be construed as providing legal advice.