Mitigating Legal and Ethical Risks

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Conflict of Interest

- We have no conflicts of interest, commercial or otherwise, that apply to this presentation.
- We are receiving no commercial sponsorship or support for this presentation.

Goals

- Provide an overview of the liability system
- Dispel misconceptions
- Provide information that will assist you in avoiding litigation
- Provide information that will assist you in winning a lawsuit

True or False

- There are too many frivolous medical malpractice lawsuits?
  Answer: False
  The number and total value of medical liability payments made on behalf of physicians declined for the eighth consecutive year in 2011, according to the National Practitioner Data Bank.

- Too expensive – attorneys more selective.
  Typically $100,000 in defense expenses (not counting attorney’s fees).

- Only certain types of people sue?
  Answer: True and False
  Patients are predominantly female (62%) and inpatient (63%).
  Mean age = 42 years. Children younger than 10 years old were 70% more likely to receive a large payment and patients older than 70 years were 80% less likely.
  Patient outcomes are the strongest predictor of both payment size and likelihood of a large payment.

- Most medical malpractice cases settle?
  Answer: False
  75-80% of medical malpractice claims were closed with no payment.
  15-20% settled.
  5% go to trial.
  Of the 5% that go to trial, physicians win 90%.
True or False

- Medical malpractice premiums are driving physicians out of business?
  Answer: True and False.

- Nearly 60% of premiums nationwide held steady in 2012, about 26% decreased, and 15% increased.
- Rates fell 1.7% in 2012, they dipped 0.5% in 2011 and 0.3% in 2010.
- Depends on where you live.

Liability Premiums?

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Ob-gyn

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Lawyer Math

- There is a better system?
  Answer: Who knows?

- Depends upon what you believe the liability system is supposed to accomplish.
  - Fair compensation vs. Fault
  - Deterrence
  - Accountability
  - Maximize availability of health care.

What Does Negligence Mean?

- Taking an action or failing to take an action
- That a reasonable physician practicing in the same specialty
- Would or would not take under the same circumstances

Is it a Good Standard?
Did the Negligence Matter?

- An Error in Judgment
- Causation
- There Has to Be a Link
- An Injury
- Damages

What Are They Aiming For?

- Medical Expenses
- Lost Wages
- Physical Impairment & Disfigurement
- Pain & Suffering

Anesthesia Cases
- Reviewed 120 reported anesthesia cases.
- 71 defense verdicts
- 12 verdicts $1-2MM
- 13 verdicts $2-5MM
- 5 verdicts $5+MM (High $33.2MM – rapid detox)

Common Themes
- Wrong level of expertise (CRNA)
- Patient left with resident
- Failure to consider pertinent medical history
- Timeliness of intervention
- Hand off to PACU
- Violation of hospital policy
- Inadequate/missing/altered records
- Anonymous Patient v. Anonymous Anesthesia Team

Avoiding Litigation- Documentation
- “If it’s not in the record, it didn’t happen.”
- Impossible standard, particularly in anesthesia
- We need to see:
  - Information provided by patient
  - Physical assessment
  - Laboratory results
  - Why you select a course of treatment
  - Anticipated follow-up

Avoiding Litigation - Alteration
- Never “change” a medical record after the fact.
- You will be caught.
- You will lose the lawsuit – even if the care was perfect.
- Time + date any amended entries.
- Explain why you are making the amended entry.

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CRASH 2013
Avoiding Lawsuits - Communication

- The quality of care does not affect whether you get sued. *NEJM. Blink.*
- The quality of communication affects whether you get sued.
- Anesthesia is particularly hard.
- If the patient feels treated like a commodity, the likelihood of litigation goes up.
- Communication is a two-way process.

Avoiding Litigation – Informed Consent

- Informed consent is:
  - Substantial risks of the procedure (the patient never hears these).
  - Potential benefits of the procedure (the patient only hears these).
  - The alternatives to the procedure (the physician often forgets to mention these).

Avoiding Litigation - Consultation

- One of the most common problems we see is lack of communication between physicians.
- Vertical and horizontal.
- Everyone has to be on the same page.
- The patient is a lousy conduit of information.

Avoiding Litigation – HMO Directed Medicine

- Realistic or not, patients view medical care as an unlimited resource.
- They resent HMO’s telling them “NO!”
- You must inform of alternatives, even if not covered by insurance.

Avoiding Litigation – Misinformation

- Patients are bombarded with misinformation.
- The “final cure for diabetes” is a combination of bitter melon, cayenne pepper, and licorice extract.
- Your patients are scared.
- You have to correct misinformation.

Avoiding Litigation – Take Responsibility

- Acknowledge when a complication occurs.
- Minimize the consequences.
- Apologize for the situation, not the care.
- “I’m sorry” can’t be held against you, in most states.
- But, even if admissible, why not?
Avoiding Litigation - Integrity

- Patients expect doctors to do the right thing.
- So do jurors.
- Don’t give someone a reason to question your integrity.
- Bad facts = bad law. Moore v. UCLA

Winning Litigation - Engage

- Getting sued sucks.
- The lawsuit will not go away if you ignore it.
- You have two choices:
  - Help your lawyer win the case.
  - Help yourself lose the case.

Winning Litigation - Teach

- You know more about medicine than your lawyer ever will.
- We’ve never had to care for a patient.
- Teach us what doesn’t appear in the textbooks.

Winning Litigation - Select

- We’ve seen the significance of expert witnesses.
- You know the leaders in your field.
- Help us recruit the leaders to support your care.

Winning Litigation - Prepare

- Your deposition is the most important day of the lawsuit.
- The other lawyer is going to be prepared.
- Are you?

Winning Litigation - Attend

- The only thing you “have” to attend is your own deposition.
- You can attend every proceeding.
- Don’t you want to hear what the patient is saying?
- Don’t you want to look the other expert in the eye?
Winning Litigation - Demonstrate

- Boring!
- Jurors watch CSI.
- If you don’t entertain them as you educate them, you’re in trouble.

Winning Litigation - Defend

- The opposing lawyer is attacking you.
- The jury needs to hear you defend yourself.
- If you won’t stand up for yourself, why should anyone else?

Winning Litigation - Relax

- You can’t let a lawsuit get in the way of practicing good medicine.
- We get paid to worry on your behalf.
- Get help if you need it.