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The Legal Issue

An Ounce of (Lawsuit) Prevention: Negative Patient Perceptions Can Incite Medical Malpractice Claims

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In my years of defending physicians and other healthcare providers in court rooms and before professional boards, the same issue emerges: how physicians and their staffs relate to their patients. This article will help physicians understand the most common practice pitfalls in order to help them avoid lawsuits.

In the course of representing healthcare professionals in almost every area of medicine, I've found that the primary drivers of medical malpractice claims include:

- Poor bedside manner
- Indifferent/impersonal office staff
- Imprecise treatment documentation
- Informed consent issues

Bedside Manner Matters

Many medical malpractice lawsuits stem from a single bad conversation or interaction between a patient and his or her physician.

Despite phyicians' best efforts, they have bad days or personal issues that roll over into their work lives. Patients expect a kind and caring encounter with every physician visit, making it important for you to treat every patient encounter like it's the only one that counts. Even on your worst days, you must do your best to set aside personal issues when you walk into the exam room. Personal irritability can be perceived as impatience, or even worse, insensitivity to your patient's needs. This advice might be hard to follow, given increasing pressures to treat a higher volume of patients in a workday, but it's important to remember.

When discussing sensitive issues or delivering bad news, physicians should consider how they would have that conversation with their mother, child or best friend. That's not to suggest that a physician needs to change his or her personality, or to not be human. The key is for physicians to remember that good customer service goes a long way. Even seemingly no-nonsense physicians can establish a quality rapport with their patients, as long as the patients believe their physician is taking their concerns seriously and being attentive to their needs. Although you are an educated, trained professional, you still are providing a service, and in our fast-paced service-filled lives, patients want "service with a smile." Remember: When patients perceive that their physician is unsympathetic, inattentive or uncaring, then legal troubles can start to brew.

Office Staff Colors Patient Perception

Patients spend the majority of their healthcare visits interacting with nonphysician staff. Yet physicians easily can overlook patient perceptions of the office experience, including the environment, front-office personnel, staff nurses and medical assistants, waiting times, cultural sensitivity, and office policies. Each of these elements impacts a patient's healthcare experience and how he or she perceives the physician.

Further, under the legal principles of agency and vicarious liability, physicians are liable for the conduct of their employees. That includes liability for any injury to a patient due to the negligence of a physician's employees or agents. So, even if a physician personally provides outstanding care and patient service, he or she may be subject to liability based on missteps committed by the staff. Not every negative staff encounter will turn into a legal issue, but it might result in the loss of a patient, which impacts your bottom line.

Not only must the patient like you, but also your staff. If a patient perceives your staff as rude, indifferent or inconsiderate, then that perception directly reflects upon you, which can result in the loss of a patient, a bad Internet review or, in the worst case, legal action.

Documentation Helps Define Patient Care

Poor record-keeping can result in poor legal outcomes. In many cases, a detail included or omitted from a patient's medical record can make the difference in obtaining a favorable result in a dispute with a patient. Physicians can follow several simple, but effective, methods when documenting patient care.

1. Document contemporaneously with the care provided, and record the date and time. Hospitals and other healthcare facilities have rules about this, so be sure to comply. When physicians document their care as it is being provided, they are more likely to be accurate and less likely to exclude key elements.

2. Be specific and thorough, but concise. Include every relevant element of your examination — tests performed, objective findings, interventions taken — but leave out subjective commentary or filler language. While some caregivers adhere to the concept of documenting only the pertinent positives, there are real legal benefits to documenting everything evaluated, even if the evaluation results in a negative (normal) finding.

3. Be clear about what the patient is reporting (his or her subjective complaints) versus your objective findings. A patient's perceptions are important, but your clinical findings are more so. Document inconsistencies between the two.

4. Keep your language clear and jargon-free, and write legibly. Medical documentation should be professional, but written so that a layperson would have a basic understanding of the care provided. If your handwriting is difficult to read, then dictate or use Electronic Medical Record software.

5. Beware of preprinted forms and electronic medical records. For example, know whether you should circle what is relevant, versus crossing out what is irrelevant, and be consistent. EMRs have their own pitfalls. It's important to know your office or hospital's EMR program, and to not rely solely on the drop-down menu when inputting data. In addition, don't carry over findings, diagnoses or medications that no longer are applicable to the patient's care.

Every time you update a patient's chart, ask yourself whether you could defend your care based on your notes. If the answer is "no," then it's time to adjust the medical documentation style or procedures.

Informed consent: Get it in writing

Under Texas law, a healthcare provider who performs a procedure without the patient's permission commits medical battery, unless it is an emergency. Thus, before performing even the simplest of procedures, physicians need to inform the patient of the procedure, including the purpose, alternatives, risks, and benefits, and obtain the patient's consent.

Regardless of the complexity of the procedure being performed, the point is to ensure that you and the patient are on the same page with respect to the procedure, so that you are not later susceptible to a claim regarding lack of consent or lack of knowledge of the risks involved. You also must be familiar with the Texas Medical Disclosure Panel (Part 7, Chapter 601 of the Texas Administrative Code), which dictates the specific risks that must be discussed to provide adequate informed consent under the law for certain procedures.

Documentation of the informed consent process is critical to substantiating permission, as well as the patient's knowledge and understanding of the alternatives, risks and benefits. While the law does not necessarily require that the risks be disclosed in writing, there is a legal presumption that the risks were properly disclosed to a patient if they are in writing and signed by the patient. On the other hand, if the informed consent discussion is not in writing and is not signed by the patient, then a patient (and his or her attorney) can claim that the risks were not disclosed. This puts the physician in a he said/she said situation, which is never desirable in a legal matter.

Always use a legally adequate consent form, signed by the patient, for all invasive procedures. It is also good practice to separately document your informed consent conversation in the patient's medical record. Even a note as simple as "discussed the risks and benefits in detail with the patient and her husband" will further substantiate that the informed consent discussion took place.

While building good relationships with patients, keeping sound medical records and obtaining written medical consent won't prevent all lawsuits, these practices amount to conscientious medical care. That's one outcome everyone can agree upon. **DMJ**

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