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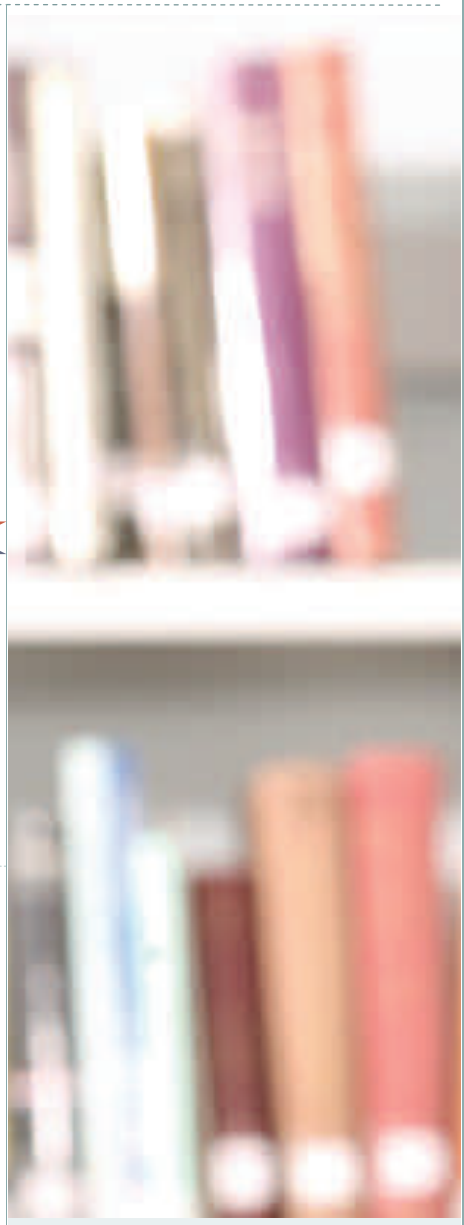
Insights

INTO RISK MANAGEMENT



@RISK: Dodging Professional Liability in Healthcare

Developed by the LRS Loss Prevention Division

This article and the contents within is an enduring activity approved for 1.0 *AMA PRA Category 1 Credit(s)*™ and 1.0 category 1 credit in Risk Management Study. *(See link on p. 8. Please note: the link will expire two (2) years from the date this newsletter is issued.)*

Did you know? New providers get sued within their first five years and 85% of doctors are involved in a suit or claim in some way before they retire.

The New England Journal of Medicine reported that 36% of physicians in low-risk specialties and 88% of physicians in high-risk specialties are projected to face their first claims by the age of 45. By the age of 65, more than 75 percent of physicians in low-risk specialties and 99 percent of physicians in high-risk specialties have experienced a claim.*

Yet another sobering statistic is that on average, physicians spend almost 11% (50.7 months) of their 40 year careers with an open, unresolved malpractice claim.**

Becoming involved in a lawsuit can be a significant event for anyone, including a physician. It can require a great deal of the physician's time and effort, can be emotionally draining and can serve as a psychological blow to the one's professional psyche.

When legal claims arise, physicians must trust their lawyers to address and manage them just as patients must trust their physicians to treat disease.

And just as patient compliance promotes effective treatment, a physician must heed the lawyer's advice and instructions to ensure an effective defense.

Take a look inside yourself. As you read through the next pages on what to do—and not do—when you're named in a lawsuit, crosswalk your behavior against what defense attorneys would like to see.

*Jena, Anupam, B., et al. Malpractice Risk According to Physician Specialty. N Engl J Med. 2011; 365:629-636.

**Seabury, Seth, et al. On Average, Physicians Spend Nearly 11 Percent Of Their 40-Year Careers With An Open, Unresolved Malpractice Claim. Health Affairs. 2013; 32:1: 111-119.

INSIDE THIS ISSUE

SPECIAL POINTS OF INTEREST

- **2018 @ Risk Live Lecture Series Schedule on page 3**
- **FY 2019 Loss Prevention Grant Fund Announcement on page 3**
- **CME link on page 8**

A WHAT'S THE ISSUE?

According to a study perform by Johns Hopkins, published in the British Journal of Medicine in 2016, researchers found that over the last twelve years there has been an unquestionable drop in the total number of paid medical malpractice claims against health care professionals including doctors in the US. The amount spent on these claims has dropped significantly as well.

- **250,000 deaths per year due to medical error**
  - *3rd most frequent cause of death*
- **2.9% of victims of malpractice file claims**
  - *1700 suits filed/year*
- **1% go to trial**
  - *5% prevail**

For example, there were just over 15,000 paid medical malpractice suits against MDs in 2003 in the US. By 2014 that number had dropped to below 8,900 which is more than a 40% drop in twelve years.

The amount paid on these claims dropped by nearly 30% during that time.

But these statistics only reflect filed lawsuits, not claims that are brought, defended and settled with payment to the claimant.

* Found at: *www.**bmj**.com/content/353/**bmj**.i2139*

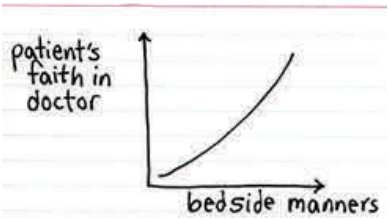
Know the Basics — Focus on Four Key Areas of Liability

Confidentiality: Resist the urge to "share" non-essential PHI. Be aware of who you are disclosing to and why, as well as where you are. *You never know who's sitting at the table behind you in that restaurant…*

Communication: Consult with other providers, the patient's PCP, the patient's caregiver (with the patient's permission) as necessary – *and document that you did so.*

Documentation: A crucial piece of the medical record most often missing is a discussion of why a particular decision was made. Often there is a wide variety of treatment choices to apply to the differential, including information about why a particular course of treatment was selected– or why going with the gold standard wasn't. *Knowing this makes the record more defensible and understandable to a jury*. Because jurors place the greatest weight on the medical record, when effective documentation is lacking, the focus shifts from the care of the patient to the provider's overall credibility.

A good chart lays out more than the physician's actions when used as part of the defense. A "good" chart is so complete that another physician could assume care for the patient at any point, easily understanding both the course of treatment and why it was chosen.



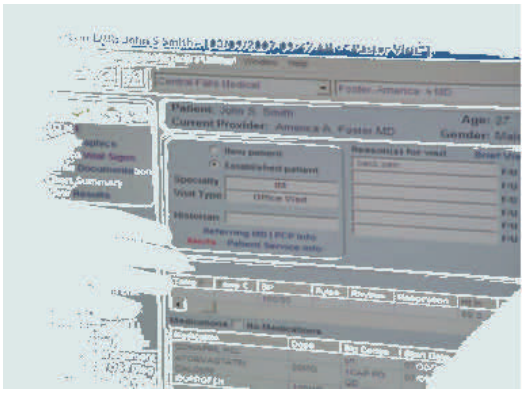
Behave: What's your bedside manner like? Do you sit down, display open and relaxed body language, maintain eye contact and remove physical barriers between you and the patient? Do you wait for patients to ask questions and complete what they're saying? Are you empathetic and offer assurance when needed? Are you honest and provide information in a way that the patient will understand? Is your demeanor non-judgmental and respectful? *Avoid patronizing, demeaning, or critical comments and be aware of voice tone.*

CLOSED CASE STUDY: *READ OTHER PROVIDER'S NOTES*

The purpose of this section is to share summaries of closed cases that have occurred in the New England area and represent real life issues that provide proactive risk management educational opportunities. The cases used may come from Lifespan affiliates, or other institutions or practices, or may be composites of several cases with very similar fact patterns. We present these cases because we believe they have some relevance to situations that you may encounter.

Ms. B., a 62 year old librarian, arrived at the Emergency Department with back pain after a fall. The ED Attending examined the patient and noted a positive Babinski and slight foot drop. The Orthopedic Resident examined the patient and failed to note those findings. After calling the Orthopedics Fellow and discussing the findings, the patient was discharged to home.

Ms. B. subsequently suffered permanent, disabling nerve damage and brought suit against the ED and orthopedic physicians.



LESSONS LEARNED

Ultimately, it was found that the Resident did not read the ED Attending's note, and had she done so, her verbal report to the Fellow would have included information that would have led to an admission rather than a discharge with follow up. The triage nurse's notes reflected statements by the patient that could have had an impact as well. Full liability fell on the Resident and the hospital that employed her.

Communication breakdowns occur in almost all cases involving allegations of medical negligence. *Talking with other members of the team caring for the patient and/or reading other's chart entries are critical components of safe patient care.*

2019 Loss Prevention Grant Fund: Our 16th Year Creating Change!

Did you know? Entering its 16th cycle in March, 2018, the Loss Prevention Grant Fund has awarded funding to over 60 recipients who have implemented projects related to loss prevention, patient safety and claims reduction. Beginning in March, watch the Lifespan Intranet front page for our updated Risk Management Grant notice and see our grant website at: https://www.lifespan.org/grant-award-program

Policy Year 2018 *@Risk Live Lecture Series*

Presented by Lifespan Risk Services, Inc. - Loss Prevention

Rhode Island Hospital - George Auditorium - 12—1pm

Dodging Professional Liability in Healthcare	Inside the Mind of a Juror	Physician Wellness Parts I & II	Opioid Dependence
03/22/2018	04/19/2018	02/15/2018 Part I	05/17/2018
		06/21/2018 Part II	

Please note: Presentations dates and times will not change; however, presentation topics may be substituted for one another depending on speaker availability.

Give GREAT Discharge Instructions (...or at least adequate instructions)

Patients hear a fraction of what you are telling them, so make it good

And they are likely not listening to what they don't want to hear, like "no driving, no drinking, no bathing." They might be anxious to leave, or angry that they are not being admitted.

Ask them to repeat back VERY IMPORTANT directions.

Of course, it is best if patients get this information in writing, in the language they can read and understand.

In a lawsuit, you will be asked who gave the discharge instructions, what information was communicated and what material was handed to the patient.

The single most important instructions are what to look for, where to go or who to call if their condition worsens

DON'T ENDORSE WEB MEDICINE

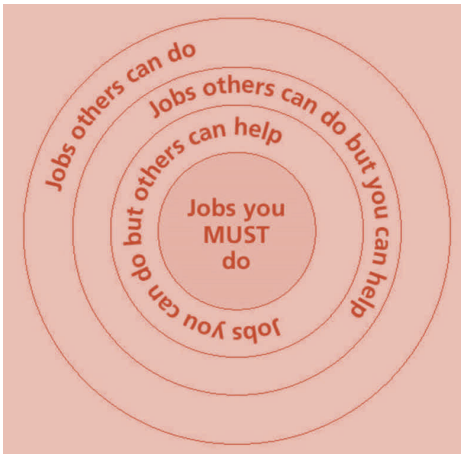
Sick people often become desperate people. They are likely to be vulnerable to misinformation and might be inclined to pursue courses of treatment that may actually harm them. Physicians can combat misinformation patients find on the web by providing *better* information, preferably from reliable sources.

In the courtroom, a patient may allege that a physician endorsed his/her course of treatment found on the web, resulting in a situation where the physicians must contradict him/herself. This opens the door for the plaintiff's attorney to bring the physician's overall credibility into question.

DELEGATE APPROPRIATELY

Know your trainee's and midlevel's scope of practice.

As their supervisor, you can and probably will be brought into a lawsuit under an allegation of negligent supervision, should any of those providers be sued for an activity you were meant to be supervising them for.



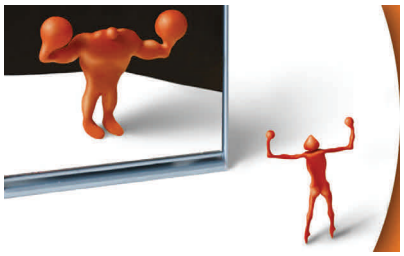
For example, under applicable RI regulations, a physician assistant (PA) may perform health care services when those services are rendered under the supervision of a licensed physician. Depending upon their level of professional training and experience as determined by a supervising physician, along with any limitations under the regulations, PA's may perform health care services consistent with their expertise and that of the supervising physician. The constant physical presence of the supervising physician or physician designee is not required in every circumstance. It is the responsibility of the supervising physician and PA to assure an appropriate level of supervision depending upon the services being rendered.

An agreement must be on file at the primary practice site between the PA and supervising physician outlining the level of supervision required, the requirements for communication between the PA and supervising physician, and the PA's job description, among other items. For additional information and a sample agreement, please refer to the RI DOH website @ **http://health.ri.gov/licenses/detail.php?id=237#three**

SET REALISTIC EXPECTATIONS

You may have seen a commercial for a medical procedure that promises an outstanding result: "Have our Lasik surgery; 20/20 vision or it's free!" A patient may be able to allege that this advertisement is a guarantee, and patients will try to do the same regarding statements you make to them.

- "I've performed this procedure hundreds of times."
- "She is the best nurse in this hospital."
- "This won't hurt a bit."



Providing patients with unrealistic expectations about their outcomes can lead to lawsuits, even if a physician has signed an informed consent detailing the risks involved.

The situation is even worse when the physician misrepresents his/her experience. One of the greatest assets available to physicians is their advanced training and professional experience, but that asset becomes worthless if a physician gives the jury a reason to doubt his/her credibility. Once the jury believes that a physician has misrepresented his/her experience, the ability to credibly explain the treatment decisions is lost.

THE IMPORTANCE OF WORDS

The first words said to a patient or family after an adverse event are often the statements that make the biggest impact.

Whether or not there is statutory protection for apology or disclosure after an adverse event, we caution providers not to "throw themselves on the sword" by making admissions of liability or speculating about the cause of the event.

In fact, sometimes physicians say things to patients that extend beyond the facts known at the time, and as the actual details become clear via an investigation, the physician may have to retract or contradict statements he or she made too soon. This inconsistency can look suspicious to a jury.

The initial response to patients or family members should be, "I'm sorry this happened. I don't know exactly what happened or exactly how or why, but I will find out promptly and let you know as soon as we figure this out."

Along with this conditional disclosure should come compassion, empathy and sympathy, conveyed credibly and sincerely.

DON'T CHANGE ALTER THE RECORD

The first step after receiving notice of a claim or suit is to secure the record. This can be difficult in the age of electronic records.

It is imperative that no changes, alterations or deletions be made in the chart. If a lawsuit develops, even the appearance that an alteration has been made will have a devastating impact on the defensibility of the case. The chart must stay in the same condition it was in before the provider had notice of the claim, or before the event occurred.

YOU'VE BEEN SERVED...NOW WHAT?

What are the obligations once you are involved in a potentially compensable event, have been notified that a claim is being brought against you, or you've served in a malpractice lawsuit?

1. Try. To. Relax.

Your carrier has two duties: (1) the duty to defend you, which requires that your carrier retain an attorney to defend legal claims brought against you; and(2), the duty to indemnify you, which requires that your carrier pay an amount up to the policy limit for a settlement or judgment on any covered claim against you.

2. Report. Events. Quickly.

Typically your malpractice policy or indemnification agreement will require prompt notice of any significant event, potential or actual claim, or lawsuit against you. Early reporting brings certain benefits, including most or all of the following:

- ◊ Risk Management/Loss Prevention support
- ◊ Legal guidance
- ◊ Determination of liability
- ◊ Preserve: memory, records, device, equipment
- ◊ Access to all parties
- ◊ Possible earlier resolution and lower settlements
- ◊ Emotional/physical toll reduced
- ◊ Positive changes for patient safety

Don't Ask, Don't Tell – Ouch. *Who can you talk to??*

At times, a plaintiff/potential plaintiff's lawyer will contact a physician to obtain information because they are generally considering bringing a claim against a hospital, a provider, or even against the physician. Those who try on their own to convince the attorney that they don't belong in a lawsuit can unwittingly cause adverse consequences and guarantee their own involvement in the suit – even if only as a witness against their employer, the hospital or their own colleague(s).

While there are a few exceptions, you should not discuss the Summons and Complaint, the patient involved, or the allegation(s) with anyone. You'll be asked by the patient's attorney who you discussed the case with, and then that person can be called as a fact witness.

This includes colleagues, even (and especially) if they're also named in the suit. Individual accounts of events can become blurred, making it difficult to recall what you knew at the time of the event. If the patient elects to continue to be treated by you, never discuss the case with him/her. Nor should you ever discuss the matter in social settings, or text, e-mail, Facebook or Tweet about the lawsuit. *(See next page.)*

So who may you talk to? Your own attorney, your medical professional liability (medical malpractice) insurer, a religious leader, mental health counselor and your spouse.

WATCH YOUR OFF DUTY BEHAVIOR - INCLUDING USE OF SOCIAL MEDIA

Everything comes into question when you become a defendant in a malpractice lawsuit. What is permitted into evidence is largely up to the judge, and discretion of judges varies widely. Courts are viewing electronically stored information, such as Facebook profiles, no differently than a person's photo album at home or a journal that relates to the care in question, all of which are discoverable in litigation. Judges are treating electronically stored information in much the same way they treat tangible evidence. Once that information is out there in a public forum, it's fair game.

A social media search by attorneys is the norm now, opening you up to a character assassination if there is questionable material found on your profile. Social media posts can complicate the defense of your case. Even then, nothing is truly private. An attorney can get a warrant for your social media accounts.

For example, complaints posted by an exhausted resident after a stressful overnight in the ER can come back to haunt the writer should a patient seen during that time file a claim or suit. The same holds true with posts from a raucous party in which pictures of you raise questions as to your ability to use good judgement. Worse, they may be used to suggest you were impaired the night before you were to perform surgery on a patient that was harmed. Even late-night posts may suggest you had little sleep and were less than attentive during a patient's office visit.

A recent lawsuit alleged a patient was harmed because an on-call surgeon failed to return to the hospital to attend to a patient he performed a procedure on earlier that day. He contended that he never got the pages, the cell phone calls, or the text messages from the hospital. During litigation, a Facebook post was revealed showing the physician and his wife celebrating their anniversary on the night in question, with an open bottle of wine between them. Needless to say, this compromised the defense of his case.

If you have friends and family who often include you in their posts, ask them not to during your legal case.

Friends and family will ask you how your case is going. Don't answer them on social media. Don't post about the progress of your case. Your lawsuit is private. Anything on social media is public. Help your friends and family understand that information online could be used against you in court and if someone does tag you in a photo that could be misleading, remove the tag. It's up to you to control who can see your account. Hide your friends list from anyone who isn't your friend. Set your privacy and security settings as high as they can go. While this won't stop the courts from accessing your posts with a subpoena, it will lower suspicion of anything questionable lurking beneath the surface.

Learn from your mistakes...and from the mistakes of others.

Embrace your mistakes and learn from them rather than deny them or dwell on them.

No one is immune to mistakes, do not cast the first stone.

Dr. Sanjay Gupta wrote in a New York Times *Opinion* article that American doctors perform a staggering number of tests and procedures, far more than in other industrialized nations, and far more than we used to. Since 1996, the percentage of doctor visits leading to at least five drugs' being prescribed has nearly tripled, and the number of M.R.I. scans quadrupled. Many procedures, tests and prescriptions are based on legitimate need. But many are not.

In an anonymous survey, orthopedic surgeons said 24% of the tests they ordered were medically *unnecessary*. This kind of treatment is a form of defensive medicine, meant less to protect the patient than to protect the doctor or hospital against potential lawsuits. Dr. Gupta advises:

- Don't change your practice so much that you spend time doing unnecessary or burdensome things that take your focus off of the patient.
- Don't over test to avoid a lawsuit: Over-testing to avoid lawsuits puts your patients at risk – potentially decreasing the quality of care they receive – and increases healthcare costs. It's critical to manage your malpractice risk effectively, but how do you do it without placing your patients in danger?

On the next two pages are the final words of advice – and are the things that lawyers truly want to see.

Found @ http://www.nytimes.com/2012/08/01/opinion/more-treatment-more-mistakes.html, 12/4/2017

WHAT (DEFENSE) LAWYERS WANT TO SEE*

Do Your Homework

Physicians are pressed for time, but it's vitally important to take time to review charts prior — not during — the appointment. Know about the patient's previous visits and the reason for the current one. Keep notes on family members, pets, hobbies, or other areas of interest so you can build a relationship that will help both you and the patient create a partnership toward better health.

Think Like a Patient

Patients want to believe they are the most important person you will see that day and that you are 100 percent focused on them. While this isn't feasible, taking time to think like a patient, and understand the condition from their perspective, can help you become a more empathetic physician. Use your common sense here: anything that would irritate you will most likely irritate them. Reply to calls and emails in a timely fashion, don't rush them, and make them feel that you are truly devoted to their health. Obviously, your patients are going to be very concerned with their own health, but when they are meeting with you, they want to believe that you are sincerely committed to them as well. Considering things from your patient's point of view will make you a more empathetic doctor, and will go a long way towards establishing and maintaining a beneficial doctor-patient relationship.

Be Informed

Sometimes the procedures a doctor conducts most often or considers the simplest are the ones that go awry towards a malpractice situation. That's because the physician, knowledgeable as he or she is about the course of action being taken, doesn't know the latest information on it, having failed to stay current with new studies and medical literature.

Devour as much up-to-date information about your specialty as possible to be fully informed and protect yourself from problem incidents. Increasing advances in healthcare make it important to know what's happening in the world of medical news, which is often reported in consumer publications and the Internet, and may be provided to your patients via other sources. Even if you don't perform specific procedures, your ability to discuss them with your patients will reinforce their confidence in you.

Communicate

The answer to that question "why?" is important for your patient to know, too, as are the risks inherent to any procedure being performed. A patient who's informed and aware—and feels their doctor cares—is less likely to become litigious.

Communicate clearly and effectively, ensuring your patients understand their diagnosis, treatment and medication plans. Check their understanding by asking them to explain it back. Not only does this help to ensure instructions are properly followed—it shows patients that you care.

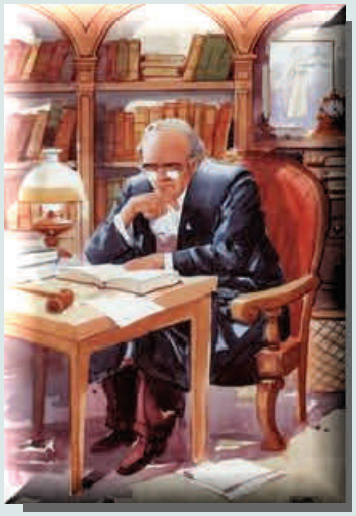
This is true even when things go wrong, which is why directness and honesty are critical in the event of medical error. Take the time to make an honest disclosure. Healthcare lawyers agree that timely, clear communication is critical to avoiding lawsuits.

Be Nice

Don't just communicate professionally; communicate courteously. Your patients are in a vulnerable position when seeking your care. The more kindness they feel from you, the more likely they are to see you as a trusted partner in their health, rather than a future legal adversary. Quite frankly, it doesn't matter how talented, educated, or experienced you are if your bedside manner is always creating friction between you and your patients. Be courteous. Ask your patient questions. Listen and learn from what they say, and give genuine feedback.

The credo to be kind falls on your entire care team and staff, as it's the overall perception of your practice and experience at your office, not just your interaction, the patient will judge.

(Continued on next page)



Every profession has its stresses, but doctors' are unique. Overwhelmed patients share their innermost thoughts and concerns. Faced with difficult decisions—sometimes life-and-death—they trust our expertise and rely on us to always take the right action. Added to that is the stress of delivering bad news, or the need to tell patients that their lifestyle decisions are harming them, a message not always well received. You may need to tell some that cancer will ultimately take their life, even if their outcome is positive in the short term. Depending on your personality, these interactions can be incredibly draining.

To these everyday professional stresses, add the stress of fighting a lawsuit to defend your reputation. More than ever, it becomes imperative that you take care of yourself. Don't hesitate to make yourself your first priority. Do whatever you need to do to unwind. This might be physical exercise like running or biking, or it might simply involve becoming more engaged in other personal interests. If you're not blocking out time to decompress, you're doing a disservice to yourself, your case, and your patients.

David P. Michelin, MD, MPH
Gynecological Oncologist
Traverse City, MI

Follow up

Physicians who have protocols in place to ensure there is follow up regarding missed appointments and tests are less likely to be sued. The protocols should be written, a system created for tracking, and documented in each patient's chart.

Always Obtain Informed Consent

Operating on a patient without informed consent from the patient or guardian is just asking for a malpractice lawsuit. It is essential to discuss all elements of a procedure – risks, costs, etc. – *before* the procedure takes place. Tracking back to the first two tips, good communication skills are necessary to discuss the circumstances with your patient, and good documentation skills are necessary to catalog all details of the situation. While this may seem like Malpractice 101, it continues to be a common issue.

Document It All

When recording a patient visit into a chart or EHR, physicians often leave a lot out. It's a given that you can't document an encounter in its entirety, but don't skip details that could help cover you down the road in the event of a poor outcome. Always be sure to answer the question "why?"

With available data and a broad range of treatment choices available, make the record more understandable by including information about why you selected a particular course of treatment.

Listen and Learn

Patients are generally not shy about providing feedback. Implement a suggestion box, e-mail box, and/or satisfaction survey and then share the results with your team. Have a designated person who is responsible for following up on patient feedback and be sure to take actions to show patients you listened to their concerns and suggestions.

Embrace & Use Feedback

Have multiple patients informed you that a specific procedure hurts more than they thought it would? Incorporate that into your consultative discussion with the next patient you'll render it to.

To earn 1.0 CME credit for reading information on Dodging Professional Liability in Healthcare in this issue, go to:
https://www.surveymonkey.com/r/9DWMR6J

Please note: the link will expire two (2) years from the time this newsletter was issued.

Be Consistent

The same level of care should be administered to each and every patient. When procedures are performed, that rule becomes especially critical. Failing to follow protocol by missing just a few steps of your normal process, cutting corners or rushing can result in an error or variation of usual outcome. A few seconds can make the difference between getting a patient out the door healthy and getting hit with a malpractice suit.

Use checklists to ensure that you and your team execute each care episode properly. Consistently delivering on the items above can significantly lower your risk of being sued. Utilize your tools (CME, EHR, and your innate ability to care) and remember each patient believes he or she has a personal relationship with you. Creating systems, guidelines and accountability for communication will reduce your chances of a medical liability suit, while also enhancing your reputation as a quality physician to payers and your community.

Know It Can Still Happen

Despite good intentions and good care, you may still get served with a suit at some point in your career, so keep that in mind even when you're focused on staying malpractice-free. Protect yourself properly with insurance and have good counsel available to lessen the impact a lawsuit could have on your practice.

* Found at http://www.carecloud.com/continuum/avoid-lawsuits-how-to-be-a-malpractice-free-practice/

Insights is published by Lifespan's Department of Risk Management Loss Prevention division.
Submissions and ideas are welcome and may be submitted to the department or faxed to **401-444-8963.**