Avoiding Medical Malpractice: Is Apology the Answer?....

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Disclosure

I have no actual or potential conflicts of interest in relation to this program/presentation.
Learning Objectives:

• Discuss why patients sue their providers
• List steps you can take to minimize your risks for such an event
• Describe aspects of the Mass Disclosure, Apology and Offer (DA&O) Initiative
Medical mistakes happen

• The human body is complex
• Treatments are complex
• There are no guarantees in life. …
• Most patients don't sue their doctors when a bad outcome occurs
A Murder charge...

- Beverly Massachusetts
- Patient with Flu-like symptoms
  - Treated with a caffeine/aspirin preparation
  - Heating pads prescribed for aches
- Patient vomited frequently over next week
- Started seizing and died....
Specialty Risk of a Claim …

More than 10% Annually
- Neurosurgery
- CV surgery
- General surgery
- Orthopedics
- Plastics
- Gastroenterology
- OB/GYN
- Urology

5-10% Annually
- Pulmonology
- Oncology
- Cardiology
- Neurology
- General IM
- ER
- Anesthesiology
- Radiology
- Pathology
- Dermatology
- Family Practice

All Physicians 7% annually
# PIAA Registry 1985-2008

<table>
<thead>
<tr>
<th>Total Claims</th>
<th>Total Paid</th>
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</thead>
<tbody>
<tr>
<td>1. OB/GYN</td>
<td>1. 3.3 billion</td>
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<tr>
<td>2. Internal Medicine</td>
<td>2. 1.7 billion</td>
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<tr>
<td>3. General Surgery</td>
<td>3. 1.6 billion</td>
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<tr>
<td>4. Family Medicine</td>
<td>4. 1.4 billion</td>
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<tr>
<td>5. Orthopedics</td>
<td>5. 1.1 billion</td>
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<tr>
<td>6. Radiology</td>
<td>6. 0.8 billion</td>
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<tr>
<td>7. Anesthesiology</td>
<td>7. 0.7 billion</td>
</tr>
<tr>
<td>8. Plastic Surgery</td>
<td>8. 0.25 billion</td>
</tr>
<tr>
<td>9. CV Surgery</td>
<td>9. 0.4 billion</td>
</tr>
<tr>
<td>10. Pediatrics</td>
<td>10. 0.5 billion</td>
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Some Good News….

- 90% of MA 2009 medical-malpractice trials were decided in favor of the doctors
- Several plaintiff attorneys have stopped taking med-mal cases
More Good News…

### DATA WATCH

#### Malpractice Payments, Premiums on the Decline

(billions of actual dollars)

- **Sum of premiums written for physicians’ and hospitals’ liability insurance**
  - (2011 data NA)

- **Value of malpractice payments made on behalf of physicians**

Note: Based on data from the National Practitioner Data Bank and A.M. Best & Co.  
Source: Public Citizen

Why do patients sue?

• Long-term effects on work, social life, family relationships (70%)
• But also because of insensitive handling and poor communication after incident
  – *Intense emotions felt for a long time*
• Explanations often not given
  – *considered unsatisfactory when given* (85%)
Four main themes

1. To prevent similar incidents in the future
2. Wanted an explanation
3. Compensation for actual losses, pain and suffering or to provide care in the future
4. Punishment !!!

Lancet. 1994
Negligence – a Medical *Misadventure*…

• The failure to do something which a reasonably prudent person would do under like circumstances

• A departure from what an ordinary reasonable member of the community would do in the same situation
  – *not meeting the standard of care*
Malpractice in Primary Care

• Errors in Diagnosis (34% of cases filed)
  – Acute MI most common (24 % of cases)
  – Cancer next most common
    • Breast (21 %)
    • Lung (17 %)
    • Colon (17 %)
  – Appendicitis (19 %)
Rarely a cognitive error alone

- Failure to obtain a through H & P
- Failure to order appropriate diagnostic test
- Failure to create an appropriate F/U plan
Step 1 – Documentation….

• Documentation can make or break a case
• When problems with records accompany a negligence claim 2/3\(\text{rds}\) are paid
Dr. Smith is involved in a ‘failure to diagnose colon cancer case’

- He has cared for this 48 yo pt for 12+ years
- The initial intake H&P records a FH, that is negative for any cancers
- The treating oncologists records note that the patients father had been diagnosed with colon cancer 8 years previously …. 
Be thorough & accurate ....

• Medications & allergies
• Problem list
• Include accurate/updated
  – Past Medical History
  – Family History
  – Social History
• Health Maintenance Section
Acute visits

• Incorporate direct patient statements
• Be clear, concise, precise
  e.g. always note the location of a breast lump
Don’t forget the vitals….

• Every encounter should include vitals
• Include weight
  – Note discrepancies, trends
• Acute visits need temperatures
Document Recommended/Ordered Tests

• Claims that a test was never recommended or ordered are common
  – Record diagnostic and treatment plan
• If unsure about diagnosis
  – record a list of possibilities and note your thinking
  – It’s worse to have nothing in an assessment

“Likely GERD, as atypical CP and no cardiac risk factors”..
Partner with your patients……

• Don’t settle for uncertainty….
• Present options and ask your patients to help you decide on course
• Ask the patient to schedule a re-check in a week or two if you are uncertain about a tentative diagnosis
• Document when and why the patient was advised to return
Document Non-Compliance

• Explain risks of non-compliance
  – document the specific advice/patient response

  “Informed patient that he should have a colonoscopy to screen for colon cancer to detect such a cancer early”

• If refusing a recommended diagnostic or treatment plan and you believe that a bad outcome could possibly result, have patient sign a statement of refusal
Consider patient dismissals

• Considerations for dismissal
  – Noncompliance,
  – Missed appointments
  – Long-overdue balances
  – Difficult patients that you have trouble dealing with

• Discuss with patient
  – Rather than mailing a certified dismissal letter, hand them the letter at their next office visit

• Document in the chart that It was delivered
Don’t alter entries

Plaintiffs’ attorneys always hope that doctors have altered their records because if they can show deliberate cheating changes in the record the case is over.
Don’t Be Judgmental

• Use direct quotes when possible
• If the patient smells like alcohol, don’t write that the patient is drunk.
  – Describe the smell and the patient’s behavior
• Don’t use exclamation points!!!!!
• Charted emotional responses indicate that the note is probably not as objective as it should be
Document phone calls

• Calls of any significance should be carefully noted by staff, reviewed and included in record
• After-hours calls need to be recorded, noting advice given
  – Establish a system to ensure these get recorded
  – As much as possible, the patient’s own words should be included in the documentation
Follow-up

- *Failure-to-diagnose* cases not only focus on uncertain diagnoses but frequently on lab results or referrals that weren’t followed up properly
"I wish I had seen this test result earlier!"

- 262 Internist surveyed
- 60% expressed dissatisfaction with their method for handling test results…..
- Wanted a system to track orders for tests to completion…..
  coupled with generation of patient letters
If you ordered a test, you own it, even if you’re not responsible for the patient’s ongoing care…

- Close the loop on test results
- Tell patients when & how they will hear results
- Tell patients to call if they don’t hear
- Document that you ordered the test
- Track to ensure that test results are received
- Role for a patient ‘portal’?
- When the results arrive, review, compare with any previous, sign and file in record
Make referrals happen

• In *high-risk situations*, it’s not enough to refer the patient to a specialist and note that you’ve done so in the chart
• Have your staff make the initial call to the specialist’s office to make the appointment
• Document date of the specialty visit
Records review

- Review chart before the exam
- Note if labs or referrals were ordered and if so the results or lack thereof
- Review information from other physicians carefully and record pertinent findings
Negligent drug treatment

......another common malpractice claim

• Allergies and sensitivities should be noted when a new medication is prescribed

• F/U protocols for chronic conditions
  – Hypertensives & diabetics every 3-4 months
  – Those on statins every 6 months
  – Those on NSAIDs, antidepressants, chronic analgesics, cardiac agents, warfarin or any chronic medication should be seen regularly
EHR to the rescue???

• Potential drug interactions and allergic cross sensitivities are flagged, but…..
• One poll – 45% override these flags

“The system gives so many red flags that I routinely ignore them … kind of like the little boy who cried wolf”!
Communicate with your coverage

- Especially for patients with high-risk conditions or with uncertain diagnoses
- Let your patients know who is covering
Informed Consent

• Most common reason other than diagnostic error
• A signature on an informed consent form is not adequate communication.
• The statement should note the:
  – Procedure
  – Risks
  – potential Complications (infection, scarring)
  – Alternatives have been Explained
  – That the patient Understood the discussion
Relationships

• Relationship is the most important prevention for lawsuits
  …*but don’t ignore documentation*

• The common belief that nice doctors get sued less has been documented
Angry patients

• Plaintiff attorneys report the majority of their calls come from patients who had poor rapport with their physicians

• Keep your ‘antennae up’ for encounters that aren’t going well and make time for that patient to ensure that he/she doesn’t leave angry…….
## PIIAA claims data

<table>
<thead>
<tr>
<th>Injury type</th>
<th>Percent of claims paid</th>
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<tbody>
<tr>
<td>Grave injury</td>
<td>45%</td>
</tr>
<tr>
<td>Death</td>
<td>37%</td>
</tr>
<tr>
<td>Emotional Injury only</td>
<td>13%</td>
</tr>
<tr>
<td>Insignificant injury</td>
<td>16%</td>
</tr>
<tr>
<td>Temporary minor injury</td>
<td>26%</td>
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National Association of Insurance Commissioners Severity Index
Follow up with angry patients

• If a patient leaves angry and/or threatens to switch doctors, have a trusted staff member call and try to find out why the patient is upset

       …or call the patient yourself


What works in a medical error?

• Show empathy
  “This must be difficult for you”
  “I’m sorry that things turned out this way”
  “How are you coping with things?”

• However, empathy is not an apology…
Disclosure, Apology, & Offer (DA&O)

• Modeled after U. of Michigan Health Care
  – program has saved $2 million a year in litigation costs

• Stanford University’s hospitals and clinics have saved $3.2 million in annual premiums
D, A &O.....

• Healthcare professionals, institutions and their insurers disclose to patients when *unanticipated adverse outcome occurs from a mistake*...

• Hospitals provide provider education and have trained peer mentors available
  – Culture of tolerance

• Establish systems to improve patient safety and prevent recurrence
A 6-month ‘cooling-off’ period

• Investigate and explain what happened
  – Full disclosure by provider
• The patient must share all pertinent medical records
• Where appropriate, apologize and offer fair financial compensation
No more lawyers? 😞

• Patients retain the right to consult an attorney to advise them of their rights and to evaluate the fairness of any offer or to bring legal action if they so choose

• Statements of apology by providers is inadmissible in court, unless...
  – When later questioned under oath during litigation a contradictory or inconsistent statement is made…
Outcomes?

• Resolve negligence accusations quickly
• Improve patient safety

“Provide supportive assistance to physicians and patients instead of isolating them and enable physicians to practice evidence-based medicine rather than defensive medicine.”
A NICE DOCTOR?
Show your patients that you care

• If you have to keep them waiting, tell them what to expect
• Have your staff explain the reason for the delay and how long they’ll be waiting
• Let patients see your humanity
  – Mention your family or hobbies
  – Use humor appropriately
Give patients your full attention

- Don’t interrupt. Listen carefully, especially when you’re in a hurry
- Sit, don’t stand
- Taking phone calls during the exam shows a lack of respect
Respect patients’ privacy

- Don’t have your patients wait in a gown before you see them.
- If you have to leave the exam room and the patient is undressed, don’t leave the door open or invite others into the room without warning.
Avoid criticizing others

- Criticizing other doctors can give rise to lawsuits
  - Listen to what the patient says and don’t make a judgment (you weren’t there)

- You may be asked to testify against that physician as an uncompensated fact witness
Lousy Service

- Staff service is a part of your doctor-patient relationship.
- Bad service, dirty rooms, not returning phone calls are signs of a lack of respect.
- Staff members must show the same consideration that you do.
  - Your staff represents you to your patients.
Test your practice

• Ask patients what they think of your practice
  – Use a suggestion box or an informal survey

• Have a family member or trusted friend
  – Call to make an appointment
  – Complete a simulated visit

• Feed back to the staff what needs to be done in a supportive manner…..
The end.....