

## An Ounce of Prevention Is Worth a Pound of Malpractice

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**M**edical malpractice is defined as a deviation from the standard of care by a medical professional that is a proximate cause of injury to a patient. In most cases, a plaintiff must establish negligence by presenting testimony of a physician who practices in the same field as the defendant healthcare provider. The testimony must state that the defendant did not treat the patient in accordance with the standard of care.

Malpractice is a concern for all providers. A lawsuit costs money and time and can result in increased insurance premiums. Moreover, a suit can provoke anxiety and lead a physician to question the level of care that he provides. Despite these negative consequences, practitioners often fail to consider reasonable preventative measures that could help to avoid malpractice suits. Fortunately, many providers have learned that a little prevention can go a long way toward improving care and reducing malpractice claims.

### Reasons Why Patients Sue

The basic ingredients in medical malpractice suits are surprise, disappointment, and anger. These emotions can be in response to a real or perceived error, malfunction, or miscommunication between the physician and a patient. Suits are also brought when a patient or family cannot accept the natural chain of events or the unpredictable course of disease. In response to these issues, there is a vast amount of literature that examines methods of re-

ducing medication errors, lack of proper supervision, or overall systems flaws. However, little is written about malpractice suits that stem from errors in communication. Physicians are often viewed by patients as dispensers of advice that they must follow to improve or maintain their health. Consequently, the credit or burden for clinical outcomes goes to the physician. In reality, physicians cannot guarantee particular outcomes. Therefore, it is necessary to correlate a patient's expectations with likely clinical outcomes and to enroll patients in the decision-making process as early as possible. If physicians can take steps to involve their patients early, they may be able to prevent some malpractice allegations in the event of an unfortunate result. To go one step further, by documenting this communication, physicians are also providing necessary backup in the event of litigation.<sup>1</sup>

### Communication and Documentation

An unfortunate reality is that malpractice suits can be filed even when the medical provider adhered to the standard of care. In fact, a negative outcome or even a settlement does not necessarily mean that malpractice has occurred. In other words, lawsuits can be caused by a simple failure in communication and a failure to delicately but definitively define the expectations and limitations of a treatment plan. A poor result does not necessarily equate with a failure in care. It is critical to note that in geriatric care, the physician or facility are communicating not only with the patient, but with the patient's family as well, some of whom may be suspicious of the care to be provided.

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### Setting and Documenting Expectations

Physicians can better serve their patients and their families by devoting time to communication. By discussing expectations regarding a patient's medical condition, comorbidities, and the

limitations of treatment, and then documenting these communications, a malpractice claim may be prevented. However, this is not a cure-all and it requires that documentation be completed in a timely manner—ideally, contemporaneously with the communication. Fully documenting a patient's condition allows for better coordination of care with other healthcare providers and accurately reflects the discussions with the family about reasonable expectations.

As an example, oncologists have developed a tool for delivering bad news to patients diagnosed with cancer called the "SPIKES" Method.<sup>2</sup>

SPIKES stands for:

- **S**—Setting (Pick a private location.)
- **P**—Perception (Find out how the patient views the medical situation.)
- **I**—Invitation (Ask whether the patient wants to know.)
- **K**—Knowledge (Warn the patient before dropping bad news.)
- **E**—Empathy (Respond to the patient's emotions.)
- **S**—Strategy/Summary (Once patients know, include them in treatment decisions.)

### **The Legislative Environment: States of Reform**

Many states have implemented tort reform to reduce frivolous malpractice suits. For example, Pennsylvania implemented reform in 2002 and has seen a significant decrease in the number of suits.

In 2005, Congress proposed House Resolution 534, which would have preempted many existing state laws governing medical malpractice lawsuits with a federal

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statute.<sup>3</sup> This proposed statute would have placed a limit of \$250,000 on noneconomic damages (pain and suffering) in most medical malpractice suits in states that had not previously enacted a cap. Additionally, new limits with regard to the statute of limitations and the awarding of attorneys' fees and punitive damages have been proposed. To date, Congress has been unable to pass a federal tort reform law for medical malpractice cases. Specifically, in 2006, Congress voted against two proposed laws that would have significantly reformed awards in medical malpractice cases. However, states have enacted laws that mirror the proposed federal legislation. For example, in 2003, the state legislature in Texas enacted reform that caps noneconomic damages at \$250,000 per occurrence for all physicians or healthcare institutions, and a second \$250,000 per occurrence for any other completely separate institution.<sup>4</sup> The law also provides that future medical expenses be compensated through periodic payments. Other reforms were enacted with regard to expert witness reports and pretrial depositions.

### **Barriers to Change: The IMPACS Study**

A Robert Wood Johnson Foundation study of the malpractice environment (Improving Malpractice Prevention and Compensation Systems or IMPACS) identified many issues concerning tort reform.<sup>5</sup> The program director and deputy program director concluded that the political and economic interests invested in the current tort system make meaningful reform difficult to achieve. If reform were to come about, it would require a compelling policy rationale in league with an active public relations campaign to convince the constituency that its passage is necessary. For example, the most effective way to promote malpractice reform may be as a patient-safety mechanism, which will prevent more medical errors than the current tort system has allowed.

IMPACS has also shown that, except for the small number of policy and health researchers working in the field, there is not a strong constituency invested in

### **Mediation Rather Than Suit**

Following an alleged medical error, the parties may choose to engage in a process known as *mediation*, in which the physician and patient or family present their cases, with or without the benefit of counsel, before an impartial mediator in an effort to settle the matter. This process may occur before or after a lawsuit is initiated and allows the parties to discuss their points of view, complaints, and even explanations in a confidential setting. One benefit of this course is that any information gathered during a confidential mediation cannot be used against either party in a subsequent trial.

malpractice reform. Certainly there are advocates for reform, but the issue does not rank as a top priority for those not directly impacted by it, even though they may be impacted in the future. However, many opponents of reform are vehement in their resolve. Further complicating the reform process is the fact that many reformers focus only on limiting monetary awards. While monetary caps are a valuable part of the solution, the controversy surrounding them may serve to frustrate the legislative process and complicate opportunities for fundamental reform.

### Conclusion: Malpractice Reduction Through Better Communication

Proper care and better communication can help prevent malpractice cases. This communication should begin with the patient's first visit with a physician. From the outset, a physician can take a proactive position by explaining the planned treatment, with its attendant risks, limitations, and reasonable expectations. The next step is to document everything that is said and ask the patient or the family questions to ensure that they understand what was discussed. For patients and families, learning of a life-threatening illness or a risky procedure can be a stressful, confusing, and potentially upsetting experience. However, by properly communicating a care plan, that stress can be alleviated while relationships are built with patients. Of course, this plan and the specifics of these discussions should be completely documented to avoid later confusion.

Many states have implemented preventative measures to decrease frivolous medical malpractice suits. Howev-

er, without the benefit of these laws, measures can be taken by physicians to improve quality of care and prevent malpractice cases. Communicating difficult issues can be improved by using the SPIKES method. As a result, expectations can be better managed, reducing the risk of perceived problems in care. **MPM**

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### Some Hospitals Try New Policies Aimed at Improving Communication

Several hospitals are adopting new policies aimed at improving communication that they hope may reduce malpractice suits. The tactics that follow are not endorsed by the authors of this article because the jury is still out on how these may impact litigation. Nevertheless, in the interest of presenting other opinions, the editors of *Medicare Patient Management* list them here:

- **Disclosure:** full accounting of what went wrong and why; medical staff and administrators available to answer questions
- **Documentation:** medical records and charts quickly provided to patients, families, and attorneys
- **Apology:** responsible doctors, nurses, and clinical staff admit fault and apologize to patients and family members
- **Solution:** explanation of how hospital will avoid making the same error in future
- **Compensation:** quick and fair financial offer if unreasonable care causes medical injuries

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