Dodging the Malpractice Bullet

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Definition of Malpractice

- Presence of a Patient-Clinician relationship
- Practice below the “standard”
- Practice caused injury
- By definition the occurrence was unintentional
Why Malpractice?

• Ordinary negligence will occur with statistical certainty.
• Citizens have a legal right to be compensated for injury.
• There is an adversarial basis for personal injury compensation.
Harvard Medical Practice Study  NEJM 1991 325:245-251

- 31,429 randomly sampled charts
- 27,179 adverse events due to negligence
- 14,180 with “strong” evidence of malpractice
- 5,396 with disability lasting longer than six months
- 415 malpractice claims
Legal vs. Medical Thinking

- Lawyers are trained to rationalize from landmark cases; clinicians are trained to generalize and accept deviations.

<table>
<thead>
<tr>
<th>Fault</th>
<th>Injuries</th>
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<tbody>
<tr>
<td>Clinician’s view</td>
<td>Attorney’s view</td>
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Malpractice Progression

1. Anger
2. Find Attny
3. Review Case
4. Proceed With Process
Avoiding Malpractice

- Patient satisfaction
- Technical competence
- Documentation
- Informed Consent
- Consultation
Patient Satisfaction

- Customer vs. patient
- No smile, no satisfaction.
- Communication with family members.
- Informal remarks.
- Common courtesy.
Malpractice Progression

Anger → Find Attny → Review Case → Proceed With Process
Technical Competence

- Absolutely assumed by patients and third parties
- Maintain up-to-date skills
- Practice guidelines
- Knowing when you’ve exceeded your skills
- Preventive care
- Carelessness
Documentation

- Not documented, not done.
- 1/3 of suits involve inadequate records
- SOAP is standard of care
- Excellent records can prevent action
- No personal comments!
Informed Consent

- Duty to disclose ALL relevant information.
- Legalistic fiction that is not applicable to a large segment of the population, destroys good patient care, and paralyzes the conscientious clinician.
- Appropriate documentation and use of consent forms is always important.
Certainty v. Informed Consent

- We all desire certainty.
- Denying all certainty actually leads to wanting it all the more.
- Balance between total certainty and hope.
  - “I will stick with you.”
- If properly done, will lessen feelings of abandonment in the event of a negative outcome.
Consultation

- Duty to consult if something not proceeding as expected or out of the scope of practice.
- Consider appropriate consultation if situation is high malpractice risk.
- **Never** refuse a request for consultation!
- Risk management consultation.
Other Areas of Liability

- Non-clinical personnel.
- Employees under supervision.
- Telephone triage & communication.
- On-call coverage.
- Communication with consultants and on-call.
Malpractice Progression

1. Anger
2. Find Attorney
3. Review Case
4. Proceed With Process
If you are accused…

• **Never alter records!**
• **Talk to no one** outside of QI or Risk Management process.
  – Beware of “friendly” attorney conversations.
• **Work closely with assigned attorney.**
• **Take all hearings and depositions seriously.**
If you are accused…

• REMEMBER, THE TRIAL HAS NOTHING TO DO WITH JUSTICE OR GOOD CLINICAL PRACTICE, IT IS A THEATRICAL PERFORMANCE DESIGNED TO INFLUENCE THE THINKING OF NON-CLINICIAN JURORS.

There is no such thing as reality, only perceptions.