

Best Practices and Prevention Basics: Physicians' Guide to Professional Negligence Claims, Part 2

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Although some in the medical profession want to avoid scrutiny by the legal profession, such avoidance is neither possible nor desirable. As responsible professionals, physicians are accountable to the public, and malpractice lawsuits are one avenue of that accountability. This does not mean that all, or even most, suits have merit. But it is often left to the fact-finding process of the legal system to determine whether a physician's actions were negligent in a particular situation. Because involvement in the legal system can be expensive, time-consuming, and stressful for the physician, we must examine ways that can enable physicians to avoid lawsuits.

"What is to give light must endure burning."

—Viktor E. Frankl, MD, PhD, neurologist, psychiatrist, Holocaust survivor

PRACTICE POINTS

- All physicians are subject to scrutiny by the legal system, and they may one day be asked to defend their actions in a courtroom.
- To reduce the likelihood of a lawsuit, practice good medicine, which includes listening to the patient and answering questions, coordinating specialist care, and keeping meticulous records.
- Your relationship with a patient is a legal contract that can be terminated only after informing the patient of your wish to do so.
- To obtain a patient's informed consent, you must clearly explain the potential risks and benefits, as well as alternative options, for a specific surgical or medical procedure.

In a previous article published in this journal (July/August 2007), we discussed the basic principles underlying medical professional liability.¹ In this companion article, we provide physicians with strategies for avoiding liability and minimizing the chances of being named in a malpractice lawsuit.

Although practicing good medicine does not guarantee that a physician will not be sued, it does make it less likely. Moreover, if a lawsuit is filed, good medical practice makes the physician's actions far easier to defend. Many of the costs, both financial and emotional, of medical negligence cases can be avoided with some simple preventive strategies. These strategies have the added advantage of being the forward-looking features of good care. Quite often, a few simple steps taken in advance may mean a lawsuit will never get filed.

Practicing good care is the most critical deterrent to avoiding malpractice lawsuits, but most risk management experts agree that effective communication with the patient, good record-keeping, and common sense are almost as important. In keeping with these principles, physicians can take 8 specific steps (Table).

Special areas of concern for physicians are the physician-patient relationship, discontinuing that relationship, informed consent, prescription medications, penmanship and medical records, and wrong-site surgery.

The Physician-Patient Relationship

Once established, the physician-patient relationship creates the potential for liability. Physicians are accustomed to thinking of the relationship from the standpoint of delivering care. But for legal, as opposed to medical, purposes, the physician-patient relationship resembles the formation of a legal contract.

Contracts can be thought of as expressed or implied. An expressed contract is an easily understandable concept. There is an actual written agreement among the parties, in which terms are openly declared and agreed upon. An implied con-

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Table The 8 steps to avoiding malpractice lawsuit

1. Involve patients in their medical history

Give patients the opportunity to ask questions about their diagnosis, prognosis, and therapy (including medications they are taking or proposed surgical procedures). In the outpatient setting, encourage patients to bring in written questions that can be addressed in the course of the visit.

2. Hone your listening skills/bedside manner

The first minutes of the physician–patient encounter are the most critical and demand uninterrupted listening. Avoid any distractions, especially during this phase of the interaction.

3. When you cannot answer the questions, provide alternative avenue to address the patient's concerns

Patients today have unprecedented access to medical information via the Internet, television, and direct-to-consumer advertising. Some of that information is good, and some is not. Patients often have questions that the physician cannot answer. In such cases, reassure the patient, and let him or her know that you will make an effort to find out the answer to the questions, or that you will direct the patient to the appropriate resource.

4. Stay within your area of competence

Obtain referrals and consults where indicated. You will be held to the standard of a specialist if you undertake care ordinarily rendered by a specialist.

5. Coordinate care with specialists

After referring patients to other specialists, or for other specialty diagnostic tests, find out the results and communicate them to the patient. It is a good idea, whenever possible, to discuss the results with the specialist to ensure that the patient receives consistent information.

6. Avoid criticizing other doctors in public or in the medical chart

Criticism generally serves no useful purpose and may come back to haunt you.

7. Document meticulously; don't alter medical records

Handle medical records with meticulous care. An improperly altered medical record suggests impropriety, even when none occurred. Be especially careful with computerized medical records, because experience with computerized medical records is limited in most settings.

8. Share responsibility for outcomes with the patient, family, other providers

Provide time- and action-specific discharge instructions, including the expected time frame for follow-up or recovery. Avoid guarantees, and let the patient know that predictions always carry an element of uncertainty.

tract is an entirely different legal entity, which requires no written agreement. The physician–patient contract is not a creation of the physician or the patient, but is inferred by the law as a matter of reason and justice by the conduct of the physician. Liability can arise under both expressed and implied contracts.

Initially, a physician has no duty to render medical care unless he or she has agreed to do so. However, once a physician accepts a patient, he or she forms a legal relationship, one that is no different from actually signing a contract with that patient. Unless the law allows physicians to break that contract by withdrawing from the physician–patient relationship, they are obligated to provide appropriate treatment. Therefore, once either the physician or the patient decides to terminate the relationship, specific, appropriate measures must be taken to ensure proper closure of the relationship and to minimize the chances for liability.

The law recognizes the establishment of a physician–patient relationship even when the relationship is based only on a telephone conversation in which the physician has discussed symptoms with the patient or with anyone speaking for patients who may be too sick or too young

to speak for themselves. Even without direct contact (ie, the physician has not seen or examined the patient), the physician is considered to have taken on the case and to have established a physician–patient relationship on the basis of a detailed discussion of the symptoms.

► The physician is considered to have taken on the case and to have established a physician–patient relationship on the basis of a detailed discussion of the symptoms. ◀

The physician now has some obligation to the patient. If some serious complication or death occurs, and that outcome is judged to occur in any way because the physician did not follow through on the earlier conversation, the physician may be liable. Obviously, this is not always true. Simple conversations, in which only a very casual mention of a problem is followed by the physician's refusal to see the patient, usually do not signify that a relationship has been established. The physician is not then deemed to have abandoned the sick person.²

Discontinuing the Relationship

One of the best methods for discontinuing a patient–physician relationship is to inform the patient, via certified mail, that he or she no longer desires to be responsible for the patient’s medical care. The physician should suggest that the patient seek the care of another physician. If the patient requires continued care, it is incumbent on the physician to advise the patient in the letter that he or she will remain available to the patient for a reasonable and specified period of time before the patient finds another physician. Remember that the “reasonableness” of the length of time will vary according to the nature of the illness.

When the relationship between a physician and a patient is terminated, the exact circumstances of the termination must be documented. The patient’s condition should be summarized in the same manner as a discharge note in a hospital record. For each ongoing medical problem that is identified, there should be evidence that the patient was notified of the problem and of the need for future care. If the physician knows the patient’s new physician, this should be recorded in the termination note.

A physician who terminates the physician–patient relationship must document that the patient was properly notified. The physician should write the termination note in the patient’s chart, and the patient should be contacted and told of the physician’s decision, its medical implications, and where the patient can obtain further care, if needed. This should be put in a letter that repeats the information in the medical record.

- ▶ The failure to obtain informed consent can be a form of medical negligence or may give rise to a cause of action for medical battery. ◀

If possible, the patient should sign a copy of this letter during a visit with the physician. The physician should give the patient the original letter, keeping the signed copy on file. If this is not possible, the letter should be sent by certified mail, with a return receipt requested. The certified mail number should be noted in the letter, and a copy of the letter and the return receipt should be put in the patient’s medical record. If the letter is returned and efforts to find a correct address fail, the unopened letter in the patient’s record will document that a diligent effort was made to contact the patient.

Patient-initiated terminations must be carefully documented. Although the patient always has the right to terminate the physician–patient relationship, this is usually done not by confronting the physician but simply by not returning for care. The physician may be responsible for following up with patients who disappear, if they have

conditions that require continuing medical care. (It is also prudent from a business standpoint to keep track of patients and their reasons for seeking care elsewhere.)

Following up on missing patients requires that medical records be kept so that the physician is aware a patient has been “lost to follow-up.” Tickler files serve as reminders that a patient is due to return for care. These may be computerized, or simply noted as an extra entry on the office calendar. When a patient misses an appointment, the physician, or a designee, should call to find out what has happened to the patient. If the patient cannot be located, refuses to come back, or has found care elsewhere, the physician should document this information in the medical record. If there is uncertainty about follow-up, and lack of follow-up could create a serious situation, the physician should send the patient a certified letter explaining why the patient should return or find alternate care. Common conditions for which it is especially important to guarantee follow-up include orthopedic patients who fail to return to have casts removed, and patients with chronic illnesses that require precise management, such as diabetes.

Informed Consent

In many medical situations, the patient’s informed consent must be obtained before providing care or treatment. Informed consent essentially means the physician (or other medical provider) must tell a patient the potential benefits, risks, and alternatives involved in any surgical or medical procedure, or other course of treatment. Generally, caregivers must obtain the patient’s written consent to proceed. If this duty is breached and injuries result, the patient may have a legal claim for damages. The concept of informed consent is based on the principle that a patient has the right to prevent unauthorized contact by the physician. At the same time, a physician has a duty to disclose information so the patient can make a reasoned decision regarding treatment, based on an understanding of what the physician proposes.

The failure to obtain informed consent can be a form of medical negligence or may give rise to a cause of action for medical battery. Some states distinguish between medical malpractice cases alleging no informed consent and those claiming a total lack of consent to the medical procedure in question.³

Informed consent cases concern the duty of a physician who has obtained the patient’s consent to perform a medical procedure to disclose fully the risks associated with that procedure. The failure to obtain an informed consent could give rise to an action for medical malpractice.

Cases alleging a total lack of consent involve a physician who undertakes to treat a patient without the patient’s consent; without consent, it is meaningless to require the

disclosure of risks necessary for an “informed” decision. A total lack of consent case is treated as a medical battery, because it involves an intentional unauthorized touching of the person of another. Furthermore, a physician’s treatment is limited to acts substantially similar to those to which the plaintiffs consented. If physicians go beyond the consent given and perform substantially different acts, they will be liable under a theory of medical battery.

Who should speak to a patient about informed consent? The physician is the optimal person to discuss the matter with the patient. However, a representative, a nurse, or another related healthcare professional is certainly qualified to obtain the informed consent. The physician should cover the following topics:

- The patient’s diagnosis
- The nature and purpose of the proposed treatment or procedure and its likelihood of success
- The risks and benefits of the proposed treatment or procedure
- Any alternatives to the proposed treatment or procedure, regardless of their cost and whether they will likely be covered by the patient’s health insurance
- The risks and benefits of an alternative treatment or procedure
- The risks and benefits of not receiving or undergoing any treatment or procedure.

► One novel development in the area of consent, especially for experimental procedures and major surgery, is videotaping the consultation and consent. ◀

The physician should further confirm the patient’s understanding of what is being said. Ideally, the patient, or the patient’s legally authorized representative, should sign and date the “expressed” informed consent document(s) and be given a copy of the fully executed consent documents. The consent document should include:

- The name of the healthcare professional who discussed the proposed treatment with the patient
- The name of the healthcare provider performing the procedure
- The date, time, and location where the consent form was signed.

A copy of the executed informed consent should be placed in the patient’s file. One novel development in the area of consent, especially for experimental procedures and major surgery, is videotaping the consultation and consent.

Sometimes “expressed” consent is not possible and, therefore, “implied” consent is applicable. In emergency situations, there is not always time to obtain a patient’s informed consent. Or the patient may be unconscious

and unable to communicate. If an emergency situation involves risk to the patient’s life or the patient is unable to communicate, consent may be implied under the rationale that the patient would have consented to emergency treatment.

When a competent adult seeks medical treatment, the process of obtaining informed consent is usually relatively easy. However, in situations in which mentally disabled individuals or children need treatment, informed consent becomes more difficult. In these situations, serious questions arise concerning who is authorized to give informed consent. A mentally disabled person generally has an appointed guardian authorized to make medical decisions and give informed consent. Physicians should ensure they have obtained informed consent from the correct person or persons acting as designee.

In most situations, parents can give informed consent for treatment for their minor children. Some states allow young adults under the age of 18 years to play a more active role in their medical care and treatment, including the process of informed consent. Not every teenager is capable of making informed-consent decisions under these laws. Instead, most states focus on “mature minors” who are deemed sufficiently ready to understand the nature and consequences of treatment. In those states, such young adults may provide consent without consulting with their parents. Some states have passed specific laws that allow minors to consent, without parental knowledge or approval, to healthcare treatments related to substance abuse, mental health, and sexual activity.

Although a physician is required to inform a patient about benefits, risks, and alternative treatments, patients must also play a part in the informed-consent process. Patients must listen to the physician and ask questions if they do not understand or if they would like more detailed information. Often plaintiffs in litigation do not understand the role of providing consent to a physician. Even when consent is not the issue of a lawsuit, many patients simply do not comprehend the purpose of the preceding consultation and the implication of their signatures to a document of consent.

In summary, make sure the informed consent procedure is handled appropriately. Create realistic expectations; don’t promise too much or too little. Informed consent is a process involving the art of good communication. The signed consent form is not the goal of informed consent, it is merely the receipt ensuring that the process has been carried out.

Prescription Medications

Prescription medications have enabled us to overcome or cure illnesses that, until recently, were often fatal. But they can also be confusing and dangerous when errors

occur. Every prescription is characterized by 4 parts:

- The *superscription*—the heading where the symbol “R” or “Rx” is located
- The *inscription*—the area of the prescription that contains the names and quantities of the ingredients or drugs
- The *subscription*—the directions for compounding or mixing the drug
- The *signature*—often preceded by the sign “s,” which is the portion of the prescription that gives the directions to be marked on the container.

Before prescribing any medication, a physician should be aware of all medications the patient is taking, including over-the-counter drugs and alternative medicines. Physicians should reinforce the importance of taking the medications only as prescribed. Patients should be advised that if they feel any medication is not having its intended effect, they should immediately contact their physician. An important way to prevent inadvertent drug interactions is by working in concert with hospital pharmacists.

Penmanship and Medical Records

Although medical records are becoming increasingly computerized, penmanship is still an issue that can create legal problems. Good penmanship aids in the care and treatment of a patient; bad penmanship can lead to fatal errors.⁴ It is important that a physician’s notes in a patient’s medical chart are legible. It is equally important that a pharmacist is able to read a patient’s prescription. In fact, in an attempt to address problems with legibility, some hospitals have begun sending doctors to remedial penmanship classes.⁴ The following case illustrates how important penmanship can be in a malpractice trial. We have seen a doctor asked at her deposition whether she reviewed and relied upon the medical records of a previous treating colleague. After she answered in the affirmative, the plaintiff’s attorney asked her to read into the record the previous healthcare provider’s note. The doctor’s confidence on the stand ebbed quickly when she realized she was unable to read her colleague’s handwriting, despite professing the reverse.

Wrong-Site Surgery

A number of organizations have developed steps to avoid wrong-site surgery. In a recent study of 2.8 million operations during a 20-year period, the rate of wrong-site surgery involving areas other than the spine was 1 in every 112,994 operations.⁵ Virtually all guidelines on wrong-site surgery recommend marking the correct operative site. Use a marking pen that remains visible after skin preparation, and do not mark any nonoperative site. The mark should be unambiguous; the surgeon should use her initials or the word “yes,” since an “x” may be ambiguous. The mark should be visible after the patient is prepped

and draped. Ideally, the patient should participate in the operative-site marking or, alternatively, a family member or friend should oversee the marking. Immediately before starting the procedure, the surgical team should take a “time-out,” wherein each member of the team verbally confirms the patient’s identity, correct side and site, procedure to be performed, and any special requirements.

- ▶ Practicing medicine in good faith means every decision and action the physician takes is always done with the patient’s best interests in mind. ◀

Conclusion

Obviously, the facts of any specific situation will dictate the best approach to patient care. The generic steps outlined in this article are meant simply as a preventive strategy, focusing on the practice of good medical care and minimizing liability. Besides practicing good medicine, one essential step every physician can take to avoid malpractice lawsuits is to practice in good faith at all times. Practicing medicine in good faith means every decision and action the physician takes is always done with the patient’s best interests in mind. This cannot be overstated. The right course to adopt in a particular situation may not be obvious, complications may arise, and outcomes may not always be optimal, but physicians who practice good care in good faith have a small likelihood of being sued and can be comfortable in the knowledge that they have done their best. ■

SELF-ASSESSMENT TEST

1. Practicing good medicine, which helps to avoid litigation, includes all the following elements, except:
 - A. Involve patients in the creation of their medical history
 - B. Do not alter a medical record
 - C. If you believe another physician has provided suboptimal care, make a note of it in the patient’s record
 - D. Obtain referrals and consultations for areas that may be outside your expertise
2. Which of these functions is not considered to be as important as practicing good care for minimizing the risk of a malpractice lawsuit?
 - A. Familiarity with state malpractice legislation
 - B. Effective communication with the patient
 - C. Good record-keeping
 - D. Using common sense
3. Which of these statements about the physician–patient relationship is not true?

Continued

85% and 67%, respectively (2% and 4%), than reported by at least 25% of patients treated with Lexapro are reported, except for the following adverse effects: an increase in placebo (Lexapro) headache, upper respiratory tract infection, back pain, paresthesia, inflated labial, anxiety. ...

- A. The physician-patient contract is inferred by law
B. A physician must see a patient face-to-face before a physician-patient relationship can be established
C. Both expressed and implied contracts can result in liability
D. A physician is not obligated to provide treatment until he has agreed to do so
4. Which of these activities is not appropriate when terminating a physician-patient relationship?
A. The patient a certified letter indicating that you will no longer be responsible for that patient's care
B. If a certified letter notifying a patient that you are discontinuing his treatment is returned unopened, open it and put it in the patient's file
C. Notify the patient of the need for future care of an ongoing medical problem
D. Document the reasons for the termination in the patient's record
5. Which of these statements about minimizing the chances of a malpractice suit is true?
A. Never treat a patient without obtaining his or her expressed consent
B. A social worker should speak to a patient about informed consent whenever possible
C. In nonemergency situations, inform the patient about alternative treatments before performing a procedure
D. To avoid confusion, do not involve the patient when marking an operative site

(Answers at end of references list)

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Answers: 1. C; 2. A; 3. B; 4. B; 5. C.

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