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Physician CONNECTION

Remaining Current: Helping Your Patient and Yourself

By Thomas Joensen

The goal of *Physician Connection* is to feature articles by leaders in the medical, legal and risk management professions, and we believe you'll enjoy the in-depth perspectives shared by our authors. We realize the practice of medicine can involve both science and art. A patient's medical history and treatment plan should be based on the patient's condition, appropriate guidelines and procedures, and the physician's clinical opinion. Therefore, the views and opinions expressed are those of the authors and do not reflect the policy or position of PSIC.

Your responsibility to remain current—to improve patient care and patient safety—has become more important as information explodes to the point of being unmanageable. By understanding what everyday activities help you remain current, you may be able to prevent a lawsuit or be able to better defend your clinical actions should a patient decide to sue.

This article also offers a refresher on how the law treats malpractice allegations and how to handle situations in which there are very few practitioners engaged in a particular medical field or treatment.

The Information Age

Medical malpractice lawsuits can be a mystifying experience to the defendant practitioner. To some, malpractice lawsuits are intellectually insulting. Why? Because the practitioner knows that bad outcomes and even human error are part of medicine. Plus, outcome bias and hindsight bias cause witnesses and jurors to greatly overstate the possibility of a complication or bad outcome being predicted or prevented. The task of retroactively judging a physician's treatment fails to appreciate the difficulty of the decisions made with the information available at the time.

Adding to the challenge of practicing medicine, the dissemination of information concerning patient disease management has greatly changed in recent years. *PubMed* and *UpToDate* are reportedly the most widely used sources of information for current standards of practice. Medical journals are now sent electronically. Continuing education is conducted on computers. Courses at academic institutions provide materials on flash drives. Telemedicine is much more prevalent. Patients themselves are utilizing the Internet to gain information previously unavailable to "laypersons."

The exponential growth of medical knowledge in the last 30 years surpasses all prior knowledge of medicine.[1]

Consider the implications of the following scenario: A primary care physician treats a patient for hypertension in late January 2010. Unknown to the physician is that the guidelines for management of hypertension were changed just a few weeks before his treatment.

Two years later, the physician is sued for medical malpractice. Two years after that, the jury learns from the plaintiff/patient's expert that the new management guidelines were available two weeks prior to the time

of treatment through multiple resources. In treating the patient, the defendant physician did not follow all of the new management guidelines.

Can the practitioner be expected to keep up with journals, newsletters, new case studies, specialty board literature, and the vast electronic repositories of medical information?

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And, if the practitioner no longer subscribes to paper journals and newsletters, can they be expected to bring up digital publications without prompting? Should the practitioner review every email advertising a new study or finding? Or, does the email alerting the practitioner of the new article or publication get put in the virtual trash can with all of the other junk mail? These are the challenges facing providers today.

The Framework

It is known that every doctor will likely be sued; with some specialties averaging multiple suits in a career.

A 2011 *New England Journal of Medicine* study found that the proportion of physicians facing a claim each year ranged from 19.1 percent in neurosurgery, 18.9 percent in thoracic-cardiovascular surgery, and 15.3 percent in general surgery to 5.2 percent in family medicine, 3.1 percent in pediatrics, and 2.6 percent in psychiatry.[2] The mean indemnity payment was $274,887, and the median was $111,749. Mean payments ranged from $117,832 for dermatology to $520,923 for pediatrics.[3] It was estimated that by the age of 65 years, 75 percent of physicians in low-risk specialties had faced a malpractice claim, as compared with 99 percent of physicians in high-risk specialties.[4]

A report from the American Medical Association (AMA) paints a bleak picture of physicians' experiences with medical liability claims and bolsters the case for national and state level reform. A key finding from the report is that, among physicians surveyed by the AMA, there was an average of 95 medical liability claims filed for every 100 physicians, almost one per physician.[5]

A bad outcome or medical error, however, does not equal medical malpractice. In most jurisdictions, a legally submissible medical malpractice claim requires a plaintiff to establish through admissible evidence[6]:

- A physician-patient relationship and the attendant duty of the practitioner to the patient
- The standard of care to which the physician is held (usually established through expert testimony)
- Breach of the established standard of care
- Injury caused by the breach
- Damage sustained by the patient

In a non-malpractice negligence lawsuit, a plaintiff must prove the elements of negligence based upon the reasonable person standard. In medical malpractice actions, however, the law adopts a framework where specialized skill and learning is evaluated.[7] The framework incorporates "reasonableness," and allows the jury to evaluate the provider's conduct, i.e., the increased skill

and knowledge, in terms of what is being done within medicine.

The "standard of care" requires that the practitioner must exercise the degree of skill and learning ordinarily possessed and exercised under the same or similar circumstances by other members of the profession.[8] Jurisdictions require medical experts to establish this standard of care, as well as causation. An expert must testify that within a "reasonable degree of medical certainty" that the standard of care exists and the practitioner's conduct either met or fell below the standard of care.

> How can physicians keep up with the overwhelming number of journals, newsletters, case studies, specialty board literature and electronic repositories of medical information?

Courts are allowing the use of a variety of alternative forms of written proof to establish the standard of care, including the physician desk reference, medical texts and journals, statutes and regulations, standards or accrediting bodies or regulations, and clinical practice guidelines.[9] Defense attorneys, however, argue that these sources do not establish the standard of care without accompanying expert testimony to establish the written source as authoritative and place the material into context. Written documents do not alone establish the standard of care; practitioners establish the standard of care.

Oftentimes, trials become battles over guidelines and whether guidelines impact the standard of care. Everyone usually agrees that guidelines do not establish the standard of care. But, the patient's attorneys will argue that treatment and practices do not become part of guidelines until they have been already incorporated into standard practice. Defense attorneys argue that there is a lag time from the development of new initiatives to adoption of information into everyday practice. It still takes time before practitioners use updated guidelines across a subspecialty.

If a physician is sued, it certainly helps to bolster the credibility of a practitioner at trial when evidence may be presented concerning the techniques the practitioner has adopted to remain current. Indeed, staying current also improves patient care in the moment.

What If There Is No Standard of Care?

How does a practitioner remain current on the standard of care in cases where relatively few practitioners have expertise in a particular subspecialty or the condition being treated is extremely rare? Many jurisdictions recognize that there are some circumstances where the standard of care is simply not established. In this case, be prepared to discuss your medical decisions or lack of consensus. For example, Iowa allows the "alternative-method-of-treatment doctrine," which provides: "Where there are several methods of approved diagnosis or treatment, which could be made available to a patient, it is for the doctor to use his best judgment to pick the proper one."

This instruction enables the jury to evaluate the practitioner's choices when there is no consensus or there is disagreement. Nonetheless, it would be beneficial for practitioners to adopt the tips below to remain current.

Practitioner Habits to Remain Current

It is important for you to develop habits that allow you to remain apprised of the standard of care. Good habits improve patient care and help you to better support conduct and medical decision making if and when it is evaluated in the courtroom.

There does exist a responsibility to remain current. While there was and is a time lag existing between the development of new methods and the method's incorporation into general use across all practitioners, this implementation period is speeding up.

The Internet also allows patients to learn about the new methods, thus forcing you to be apprised of developments, as well. While practitioners have historically warned patients about not using the Internet, that recommendation is not only unenforceable but passé.

Thus, it is valuable to simply develop strategies to maximize learning and advancement. To meet the responsibility to remain current, you should consider the following:

1. **Meet Continuing Medical Education requirements.** Obviously, this is required for continuing licensure. Determine which courses you feel are reputable and join the email notification list for the course. Volunteer to speak at continuing education courses. There are few opportunities that encourage becoming familiar with recent developments more than having to present on a topic of medicine.
2. **Subscribe to and receive medical journals in electronic format.** Receiving materials online ultimately allows the attorneys in a lawsuit to identify when a particular text came into the practitioner's possession if it becomes relevant. It is a good practice to avoid deleting the publication or journals emails without, at least, first skimming subject overviews. Spend an appropriate amount of time reviewing these emails and journals every week. In other words, make Saturday morning your journal review day. Then, if asked during litigation, you can discuss usual and customary practices about reviewing the journals. If the journal does not already do so, write and encourage the publisher to send the email announcement to include an "In this issue" synopsis.
3. **Subscribe to and visit *PubMed* and *UpToDate*.** As stated, these resources are quickly becoming the most used and respected sources of medical developments. You should not hesitate to conduct Internet research via electronic resources even when the patient is in the office. But, you should not use a patient occurrence as the sole trigger to update education. Similar to continuing education it is also worthwhile to become involved in drafting articles for online resources. It encourages learning about recent developments.
4. **Maintain good professional relationships and communication with colleagues.** Schedule lunches and breakfast meetings to discuss new developments. Start organizing team meetings and offer continuing education requirements for staff or others. These meetings can address both current patients being treated and allow for discussion of trends and practices.
5. **Develop a workable system to meet with salespersons**. Many practitioners find meetings with pharmaceutical, medical device, and capital equipment salespersons to be tedious, time-consuming, and annoying. Many

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facilities have prohibited account representatives from entering the building premises. Under strict supervision and proper perspective, these persons can be a valuable resource of new information.

6. **Be open to new technologies.** Many times, new technologies are inexpensive and adopted quickly in today's medical practice. Technologies, however, should be thoroughly evaluated on the impact of care in meaningful ways, both medically and legally.[10] As practices across the nation are consolidated, there may be more buying power to keep technologies cutting edge.
7. **Contact the practitioner's insurance company's risk manager to learn of available resources.** Not only are risk managers aware of current trends in medicine, their responsibilities regularly bring them in contact with many other professionals and resources. At the very least, the risk manager can offer suggestions on means to keep updated.
8. **Listen to patients and find out their expectations.** You should encourage patients to research their health problems and embrace your patients' efforts. Develop gentle techniques to put the findings into context. Patients research cars, restaurants, jobs, relationship candidates, etc., on the Internet. It is naïve to tell the patient that he or she cannot research his or her own health and expect them to follow that directive.

One of the most significant risks involved in the standard of care is the evolution of new developments in medicine. The suggestions above may help alleviate risk when your medical care is challenged in a courtroom.

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1 The Changing Standard of Care in Medicine, 23 J. Legal Med. 449, 478 (2002).
2 N Engl J Med. 2011 Aug 18;365(7): 629-36. doi:10.1056/NEJMsa1012370.
3 Id
4 Id
5 "Medical Liability Claim Frequency: A 2007-2008 Snapshot of Physicians," AMA Policy Research Perspectives, August 2010
6 The Changing Standard of Care in Medicine, 23 J. Legal Med. 449, 470 (2002).
7 Id., at 471.
8 Id., at 471.
9 Id. at 478.
10 Id. at 487.

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