

Risk Management Update: Family Practice Medicine 2012

A Risk Management
Seminar

Presented by



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Course Objectives

Participation in this seminar will better enable participants to:

- ▶ Examine current & emerging litigation trends related to family practice medicine;**
- ▶ List at least three practical skills to use when talking with patients & families about an unexpected event; and**
- ▶ Identify & apply risk management strategies in the practice setting.**

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DISCLAIMER: Information in this presentation is neither an official statement of position, nor should it be considered as professional legal advice to individuals or organizations.

**ProAssurance's Approach
to
Risk Management
and the
Defense of Claims**

ProAssurance is committed to the improvement of the American Judicial System. Improvement is made possible when all participants have a thorough understanding of the system and its underlying premises and procedures. Improvement is also made possible when the participants receive regular instruction in the details of the operation of the dispute resolution mechanisms afforded by our society. Our system is an adversary system. Its effectiveness is dependent upon honest advocacy. Dishonest advocacy, frequently seen among too many lawyers today, will ultimately destroy the very fabric of our system.

Many plaintiffs' lawyers are honest, hard working, and ethical attorneys trying to do the best for their clients. However, like all professions, the legal profession has its share of bad apples, and these lawyers are willing to resort to devious means to obscure the truth from a jury and to erect barriers which will prevent a jury from understanding the truth of your position. Today's program and the following materials are offered to improve your effectiveness in communicating the care given to your patients and the decision-making about the care. Effective communication with patients enables them to have realistic expectations about care and to participate in maximizing their own care. Effective communication among health care providers optimizes patient outcomes.

Unfortunately, some lawyers seek to utilize devious means as a way that serves to prevent the system from treating you fairly. This is often demonstrated by their reference to bits and pieces of a medical record rather than the complete picture, or their reliance on half-truths or their propensity to take matters out of context. It is also apparent that certain of these lawyers seek to ignore and hide the many dilemmas and difficult clinical conditions which you face every day and which inevitably shape the life and death decisions that must be made without the benefit of hindsight. These tactics, employed all too often by some lawyers today, serve to distort the truth in professional liability actions. Your highest obligation in your practice – and in any judicial proceeding is to tell the truth. It is the highest moral, legal, and ethical obligation you have. You should always, in all circumstances, tell the truth in fulfilling that obligation.

Nothing about today's program or the following materials is designed to alter your basic obligations to your patients. You would not take that advice even if it were offered to you. However, we do hope these materials will help alleviate the natural feelings of frustration which you would feel if accused of injuring your patient. Plaintiffs' attorneys seek to utilize these feelings to avoid the truth. Hopefully, these materials will help to raise your awareness about the importance of what you do to give the highest quality of care to your patients. Also, these materials are designed to instill in you a respect for the system and an understanding of how it operates so that when you are unfairly accused of wrongdoing you will be in a position to defend yourself.

Malpractice Claims Update General & Family Medicine



About the Data . . .

- PIAA Data Sharing Project
- Frequency vs. severity
- Claims are always allegations
- The reality behind the data
- Judgment always applied
- Shared problem
- 55%



General/Family Practice

FP Physician's Ages represented in data:

< 35	10%
35 – 44	30%
45 – 54	27%
55 – 64	18%
≥ 65	15%

Source: 2010 PIAA Statistics; General & Family Practice 1985-2010



Physician Information, cont.

<u>Practice Type</u>		<u>Gender</u>	
Solo	49%	Female	10%
Group	48%	Male	90%
Institution	3%		

64% are Board Certified

Source: 2010 PIAA Statistics; General & Family Practice 1985-2010



General & Family Practice Claims

- Ranks 3rd in number of claims reported
- Ranks 4th in total indemnity dollars
- Ranks 8th in percentage of paid claims

Largest single indemnity payment for claims closed in 2010 = \$2,200,000

Source: 2010 PIAA Statistics; General & Family Practice 1985-2010



General & Family Practice Claims

Claims from 1985 – 2010:

- 32% Paid
- Average Indemnity - \$169,239

Claims closed in 2010 only:

- 29% Paid
- Average Indemnity - \$313,495

Source: 2010 PIAA Statistics; General & Family Practice



Associated Medical & Legal Issues

Associated Issue	% Paid	Average Indemnity
Problems with records	67%	\$184,068
Problem with Pt. Hx, exam or work-up	42%	\$334,883
Communication between providers	42%	\$262,578
Premature discharge from institution	48%	\$205,506
Failure to conform to Reg/Statute/Rule	50%	\$202,252
Telemedicine	50%	\$151,132

Source: 2010 PIAA Statistics; General & Family Practice 1985-2010

Claims Frequency

Specialty	2010	Total
1. Internal Medicine	1,241	34,993
2. Ob/Gyn Surgery	1,133	34,649
3. General Surgery	920	26,549
4. GP & Family Practice	799	29,031
5. Orthopedic Surgery	673	23,786
6. Radiology	662	14,770
7. Anesthesiology	370	9,906
8. Other Nonsurgical Specialties	355	2,939
9. Emergency Medicine	284	4,926
10. Ophthalmology	257	7,378

Source: 2010 PIAA Statistics; General & Family Practice 1985-2010

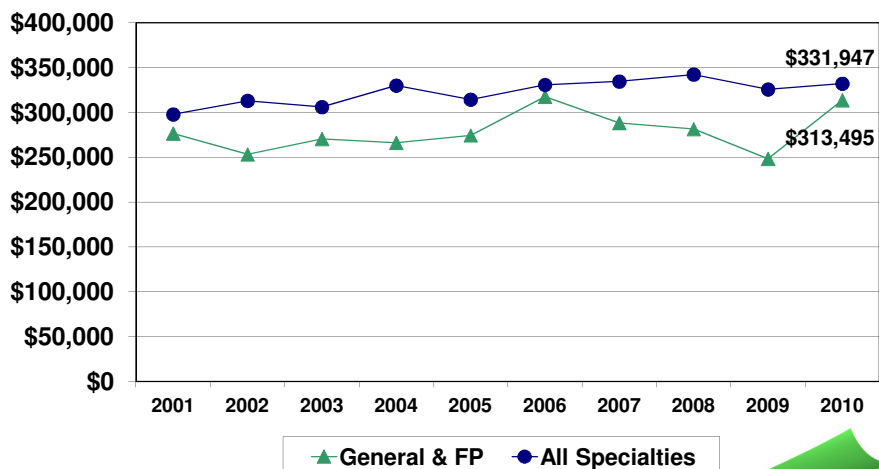
Claims Severity

Specialty	2010 Average Indemnity
1. Radiation Therapy	\$479,783
2. Neurology–Nonsurgical	\$473,987
3. Anesthesiology	\$458,167
4. Ob/Gyn Surgery	\$421,262
5. Cardiovascular Diseases–Nonsurgical	\$417,790
6. Pediatrics	\$412,584
7. Neurosurgery	\$399,564
8. Paraprofessional	\$398,875
9. Emergency Medicine	\$392,042
10. Other Nonsurgical Specialties	\$374,165

Source: 2010 PIAA Statistics; General & Family Practice 2010

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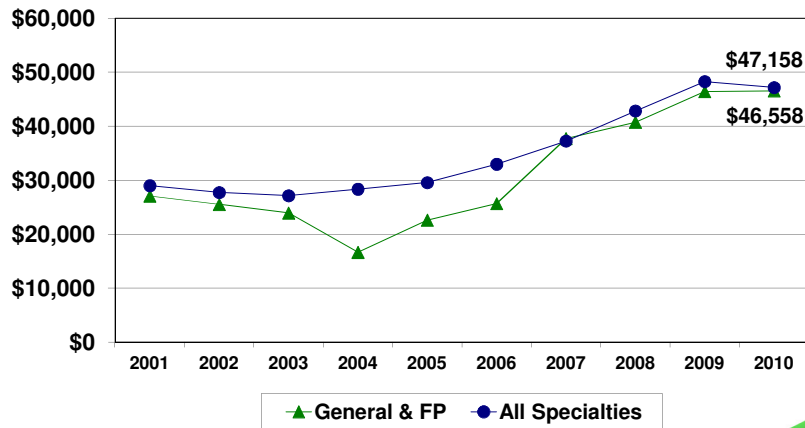
Average Paid Indemnity



Source: 2010 PIAA Statistics; General & Family Practice 1985-2010

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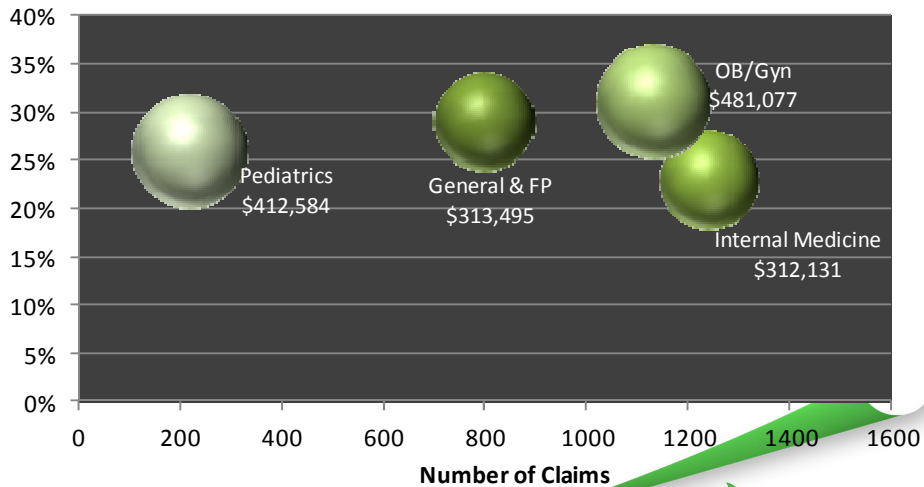
Average Legal Expenses



Source: 2010 PIAA Statistics; General & Family Practice 1985-2010

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Comparison of Average Indemnity, Frequency and % Claims Paid



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Top 10 Medical Misadventures

Medical Misadventure	Total Claims	2010 Claims
1. Errors in diagnosis	9,171	262
2. No medical misadventure	4,770	91
3. Improper performance	4,124	124
4. Failure to supervise/monitor case	2,686	59
5. Medication error	2,674	92
6. Failure/delay in referral or consultation	945	25
7. Failure to recognize treatment complication	826	33
8. Not performed	823	20
9. Failure to instruct or communicate with pt	616	20
10. Improper supervision of residents/staff	NA	19

Source: 2010 PIAA Statistics; General & Family Practice 1985-2010

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Most Prevalent Patient Conditions

1985 – 2010

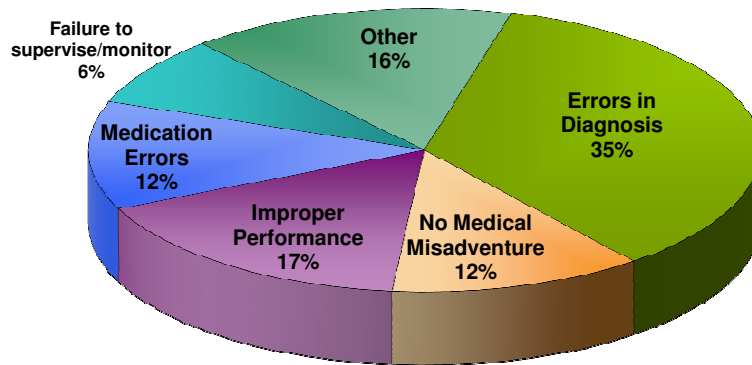
1. Obesity
2. Myocardial infarction, acute
3. Diabetes
4. Malignant neoplasms of female breast
5. Symptoms of abdomen/pelvis
6. Back disorders, including lumbago & sciatica
7. Appendicitis
8. Malignant neoplasms of bronchus/lungs
9. Malignant neoplasms of colon/rectal region
10. Chest pain, not further defined

2010 Only

1. Decubitus ulcer
2. Back disorders, including lumbago & sciatica
3. Symptoms of abdomen/pelvis
4. Chest pain, not further defined
5. Myocardial infarction, acute
6. Malignant neoplasms of bronchus/lungs
7. Malignant neoplasms of colon/rectal region
8. Pneumonia
9. Diabetes
10. Appendicitis

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Most Frequent Medical Misadventures



Source: 2010 PIAA Statistics; General & Family Practice 2010

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No Medical Misadventure

- Abandonment
- False imprisonment
- Breach of confidentiality
- Failure to conform with regulation, statute or rule
- Consent issues, breach of contract or warranty
- Vicarious liability
- Punitive damages
- Religious issues
- Assault & battery
- Res ipsa loquitor – self evident
- Problems with records
- Billing & collection problems
- Communication between providers
- Managed care referral problem

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Apology & Disclosure



Disclosure of Unanticipated Outcomes

- Lack of formal disclosure training
- No disclosure may be detrimental
- Disclosure ≠ admitting liability
- Apology may/may not be included in disclosure discussion



Topics of Discussion

Disclosure = facts that are known

Expression of empathy = “I’m sorry this happened”

Apology = empathy + admission of error

Our Experience

Jurors tend to forgive physician errors in judgment even with significant complications or death as long as the physician comes across as kind, competent, & caring

Tips for Disclosure Discussion

- Step back from situation
 - What is known & unknown?
 - Effect on physician
 - Pt/family point of view
- Seek assistance
 - Professional liability carrier
 - Hospital risk management
- Know disclosure process

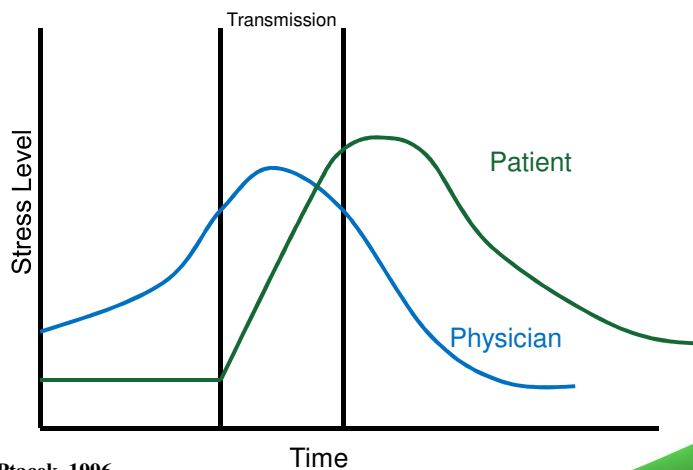
Disclosure Tips (cont'd)

- Prepare
 - Consider questions pt will ask
 - Practice answers
 - Suitable location
- Talk with patient ASAP
- Be open, honest, & respectful
- Express empathy, consider apology
- Witnesses

Disclosure Discussion (cont'd)

- What to say
 - What happened in layman's terms
 - Express empathy, apologize if appropriate
 - Changes in pt's care plan & areas of concern to pt/family
 - What will happen next
 - Availability to pt
 - Offer support services
 - Steps taken to prevent reoccurrence

A Word About Timing on Disclosure



Source: Ptacek, 1996.

Disclosure Discussion (cont'd)

- What NOT to say
 - Subjective information
 - Conjecture
 - Speculation
 - Blame others or point fingers
 - Apology *before* knowing all the facts

Ineffective Disclosure

- Hastily executed discussion
- Anxious, ill-prepared staff
- Veering from script
- Unable to establish pt's/family's level of understanding
- Inappropriate desire to compensate immediately

Expressions of Empathy

- In person
- Letter
- Sympathy card
- Send flowers
- Attend funeral

Disclosure Documentation

- Date, time, location
- Parties present
- Relationships of parties
- Questions asked
- Commitment to continued assistance

Apology Laws

- Designed to reduce liability risks associated with disclosing mistakes (1990's)
- Currently 36 states
 - Majority permit expressions of sympathy, not admissions of fault
 - Data still sparse

Source: <http://www.sorryworks.net/laws.html>.

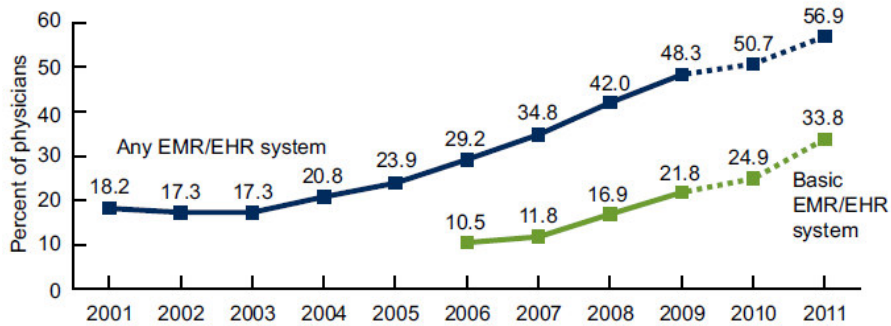
Case Study – Missing CT Result

- 46 YOWM – visit to PCP 8 months ago
 - Complaint of SOB
 - Chest x-ray & CT ordered
 - Results never provided to pt
- Patient presents for annual physical
 - Physician reviews chart
 - CT report missing
 - Tumor – high probability of malignancy

Electronic Health Records



Status of EHR Adoption



Hsiao, C. et al. "Electronic Health Record Systems and Intent to Apply for Meaningful Use Incentives Among Office-based Physician Practices: United States, 2001–2011" Centers for Disease Control and Prevention National Center for Health Statistics (December 2011), <http://www.cdc.gov/nchs/data/databriefs/DB79.pdf> (accessed January 7, 2012).



Patient Portals & e-Mail



Patient Portals

- Typically furnished by EHR vendor
- Assist in meeting MU requirements
- Physician determines portal's features
 - Clinical treatment information
 - Scheduling appointments
 - Medication refills
 - Communicate with physician & office staff



Patient Portals – Liability Risks

- Certified EHRs \neq HIPAA compliance
- Embedded practice guidelines & clinical requirements
- Not a substitute for hands-on exam
- Know thy patient!

Email – Benefits & Risks

- Benefits
 - Enhanced communication
 - Documentation
 - Patient education
 - Communicate when convenient
 - Manage patients outside office
 - Patient comfort

Email - Risks & Benefits (cont'd)

- Risks
 - Privacy
 - Delays
 - Limited patient information

Email & Risk Management

- No urgent messages
- Footer with contact information
- Expected response time
- Specify appropriate transactions
- Conditions not to discuss

Email & Risk Management (cont'd)

- Subject titles
- Include patient name & number
- Concise
- Automatic responses
- Change message when unavailable
- Require replies to medical advice
- Communicate personally?

Email & Risk Management (cont'd)

- Send message when request completed
- Confidentiality notice
- Include in medical record
- Use blind copy for lists
- Watch email tone
- Obtain informed consent?

Additional Privacy Considerations

- Emailing off-site
- Encryption

- AMA's Guidelines for Physician-Patient Electronic Communications

e-Discovery

Stages of a Lawsuit

- Pleadings
- Discovery
- Trial
- Judgment
- Appeal

FRCP Impact on States

- 2006 Fed. Rules Civil Procedure were amended to include e-discovery
- Since then, over 30 states have adopted some form of e-Discovery rules*

* Connecticut Law Tribune, Feb. 7, 2011 Vol.37, No. 6

e-Discovery & ESI

- ESI – electronically stored information
 - EMRs
 - Clinical equipment
 - Databases
 - Computer files, storage, clouds
 - Email, instant messaging, voice mails
 - Laptops, personal portable devices, thumb drives, home computers
 - Social media sites

e-Discovery (cont'd)

- What is discoverable?
 - EHR
 - Other electronic office systems
 - Billing, scheduling
 - Email
 - Instant messaging
 - Personal portable devices (clouds)
 - 3rd party service providers (labs, radiology)
 - Social media sites
 - Metadata
 - ESI / PHI anywhere

e-Discovery - Changing Rules

- Paper records – “Go Fish”
- e-Discovery
 - preserve & protect
 - search & identify
 - produce

“Before anything else,
preparation is the
key to success.”

Alexander Graham Bell

Risk Management Suggestions

- IT support
- Records management policy
- Data mapping
- Litigation hold

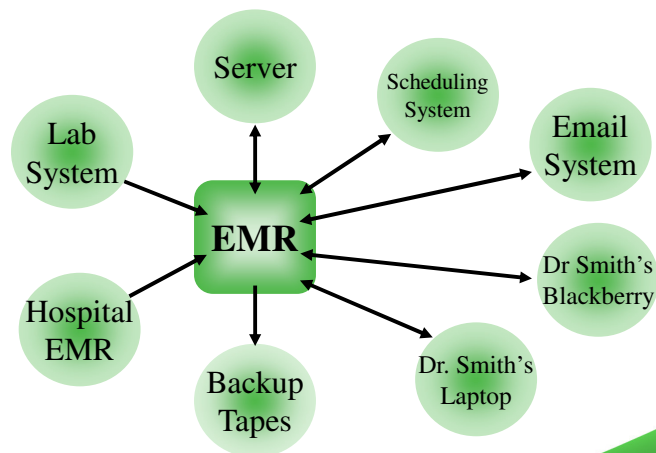
Preparing for e-Discovery

- Records management policy
 - Transition from paper to electronic records
 - Personal portable devices
 - Records retention/destruction
 - Litigation hold/release

Preparing for e-Discovery (cont'd)

- Data mapping
 - Map network systems, hardware & software
 - Personal portable devices & users
 - Map at EHR transition
 - Existing EHR mapped by vendor
 - Saves time, cost & disruption

Sample Data Mapping



Litigation Hold - What Do You Need?

- Purpose – preservation, protection, production
- Search all ESI for relevant information
- List systems, devices, metadata
- Authorized individual to "Hold"
- Key staff identified to preserve
- Notify personal, portable owners & satellites
- Notify professional liability carrier
- Compliance/follow-up

Searching ESI for Relevant Data

- Litigation counsel will argue matters of privilege & produce records for discovery
- Plaintiff will also be going through same exercise to identify relevant information from their ESI

e-Discovery

- Spoliation of evidence
 - “[T]he destruction or material alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation” (*Silvestri v. General Motors Corp.*)
- Fines & sanctions (negative inference)

**Thank you for participating in this
Risk Management Seminar
Please complete your evaluation**