Good Communication Helps to Avert Lawsuits

Answer all your patients' questions, explain reasons for any poor results, and try never to appear rushed.

BY FRAN LOWRY
Orlando Bureau

ATLANTA — Being sued for medical malpractice is almost as inevitable as death and taxes. But taking the time to establish good communication with patients and their families may afford the best protection against a lawsuit, Dr. Robert A. Mendelson said at the annual meeting of the American Academy of Pediatrics.

"Try never to appear rushed, talk to your patients, answer all their questions, and explain to them the reasons for any poor results. If the family feels that you truly care about them and that you are sincerely interested in their child's well-being, the chances are good that they will forego a lawsuit, should something untoward happen," he said. "These are some of the most powerful things we can do to make our practices less vulnerable to successful lawsuits."

Dr. Mendelson, of a group practice in Portland, Ore., suggested informing patients about worst case scenarios before starting any therapy. "With any procedure or treatment, bad things can happen. If you explain this up- front to patients, and have written proof that you have done so, it can be very powerful in court."

Effective risk management starts with recognition of the risk exposures in your practice, Dr. Mendelson said. Among the biggest offenders are illegible handwriting and incomplete or sloppy documentation. "If it's not written in the record, it didn't happen. Write everything that you do in the chart or in the electronic medical record."

Failure to diagnose certain conditions—such as meningitis, neonatal problems, appendicitis, and congenital deafness and cataracts—is a leading cause of law suits. Medication errors also are common causes, he said.

Patients sue their doctors for many reasons, he continued. They include:

► Anger.
► Revenge, usually due to poor communication.
► True monetary needs, such as those that arise when a child is facing very expensive long-term care.
► Guilt or misplaced blame: "If I had just taken my child to the doctor earlier."
► Comments from relatives and other professionals: "Your doctor did *what*?"
► Greed, in a minority of cases.

Many physicians are sued, but few actually go to court. Most neonatal intensive care unit physicians will be sued if they practice long enough; 30% of American Academy of Pediatrics members, 10% of pediatric residents, and 80% of American College of Obstetricians and Gynecologists members will be sued at some time in their career. However, 60%-70% of all lawsuits are dropped or settled before they get to court, Dr. Mendelson said.

The average cost for defending a case is $34,000, but the highest costs are often emotional, he added. "There [are] the long time frame, the time lost from work due to worry, assisting your defense, dealing with lawyers—these are all draining. Be available as a support to your unfortunate colleagues (if necessary), even though you cannot discuss the medical aspects of their case with them. It's an intensely stressful process to go through." ■

Document to Minimize Your Legal Risk

► Every word on every chart should be legible. Typed is best.
► Consider using voice recognition software to speed up the process of documenting your actions.
► If you thought of a treatment strategy but did not use it, document why you made that decision.
► Never alter a medical record. If you do have to make a change, cross it out with a single line so that it is still legible; initial and date the change. Erasures can put the entire medical record in jeopardy.
► To change an electronic medical record (EMR), make an addendum on it.
► If there has been a bad outcome, dictate a detailed narrative as soon as possible. Date and time the dictation accurately, and consider notifying your insurance carrier if you feel vulnerable.
► Initial all lab and imaging studies and correspondence before placing them in the chart.

Source: Dr. Mendelson

Some Admire 'Health Courts' Idea, but the Jury Is Still Out

BY ALICIA AULT
Associate Editor, Practice Trends

WASHINGTON — The concept of using administrative law judges instead of civil jury trials to settle malpractice suits has gained some admirers in the U.S. Congress and generated interest among state legislatures. But it is uncertain whether such a system is the solution to skyrocketing malpractice premiums and jury awards, according to academics, attorneys, and consumer and legislative representatives who met at a meeting sponsored by Common Good and the Harvard School of Public Health, Boston.

Under the "health court" concept, fleshed out earlier this year by Michelle Mello and David Studdert of Harvard, specially trained judges would make compensation decisions according to whether an injury was "avoidable" or "preventable" (Milbank Quarterly 2006;3:459-92). The plaintiff would have to show that the injury would not have happened if best practices were followed. Impartial experts would help set compensation, based on scientific evidence and what is known about avoidability of errors. Decisions would be made quickly.

Such a system would likely increase the number of people eligible for compensation, but decrease the size of awards, Ms. Mello said.

Unlike the current tort system, a health court system could also help deter medical errors by collecting data that would then be given back to hospitals and practitioners for root-cause analyses, she explained.

In 2005, Sen. Michael Enzi (R-Wyo.) and Sen. Max Baucus (D-Mont.) introduced the Fair and Reliable Medical Justice Act (S. 1337), which would provide money for demonstration projects on alternative methods to address malpractice, including health courts. The Senate Health, Education, Labor, and Pensions Committee held a hearing on the bill in June 2006, but there has been no further action.

At the symposium, Stephen Northrup, the health policy staff director for that committee, said it is not clear whether the newly Democratic-controlled Congress will consider alternatives such as health courts. Because Democrats are unlikely to approve of caps on damages as a tort reform, he said, it is incumbent on physicians to promote alternatives.

The National Committee for Quality Assurance supports the move toward an administrative court, said NCQA general counsel Sharon Donohue. But there is no evidence that rewards will decrease, and with an expanding number of claimants, malpractice premiums might still increase because they are based on the number of claims paid, she said.

Some consumer groups oppose the idea. Linda Kenney, president of the advocacy group Medically Induced Trauma Support Services, said that patients should not be required to start the claims process, as is proposed under the health court system. An audience member representing Consumers Union said that her group did not like the idea of taking away a patient's right to a jury trial.

Dr. Dennis O'Leary, president of the Joint Commission on Accreditation of Healthcare Organizations, also said he saw some basic impediments to using the courts to improve patient safety. Overall, 85% of errors are due to systems issues; only 15% are competency related, so solutions should focus on systems design, Dr. O'Leary said.

Despite JCAHO's voluntary reporting requirements of the last 10 years, there are few reports of adverse events—maybe 450-500 a year, he said. Most reports concern problems that are not easy to hide, such as patient suicides—the top category—and surgical misadventures, the number two category, Dr. O'Leary said. Surprisingly, at least eight cases a month of wrong-site surgery are reported, he added.

Several states have looked at or adopted "I'm sorry" statutes to address malpractice. Under the 2003 law, physicians can apologize, admit fault, and explain the cause of an error without such statements' being held against them in court. The law has reduced the number of cases going to trial in Colorado.

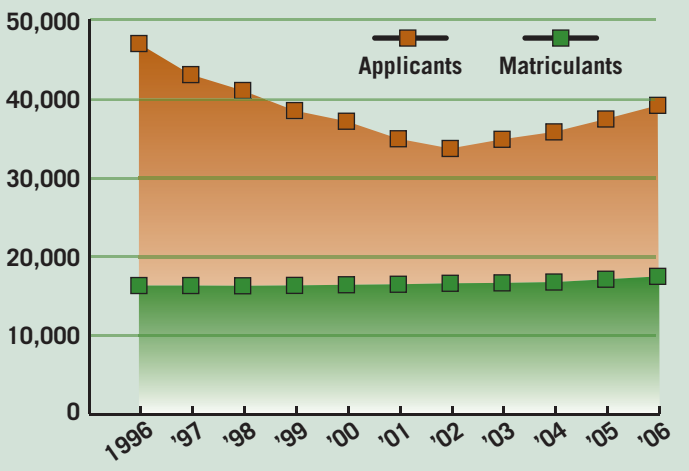
So far, 2,835 of the 6,000 physicians covered by the COPIC Insurance Co., a malpractice insurer, have participated in a program implementing the law, said George Dikeou, a legislative consultant to the company. Participating physicians have had at least 3,200 discussions with patients, and in about 2,000 cases, the discussion was all that was needed to close the case, he said.

The insurer is authorized to pay up to $30,000 per case; the average payout over 711 cases has been about $5,300, Mr. Dikeou said.

Of 116 cases that went to court, 54 cases were closed without payment and without attorney involvement. Six cases were closed with payment, 40 are still open, and 16 have gone to trial. ■

DATA WATCH

U.S. Medical School Applicants on the Rise



Source: Association of American Medical Colleges