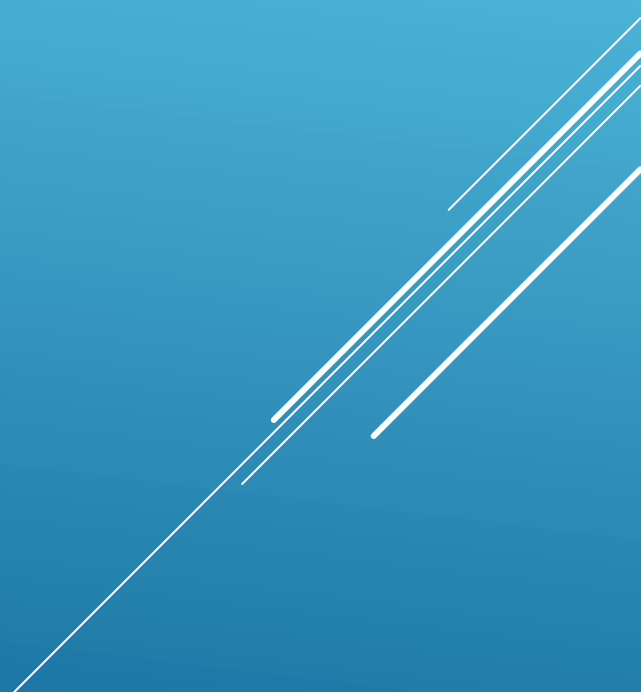


DEFENDING YOUR
MALPRACTICE CLAIM AND
AVOIDING THE NEXT ONE

A decorative graphic consisting of several parallel white lines of varying thicknesses, slanted diagonally from the bottom-left towards the top-right, located in the lower right quadrant of the slide.

▶ Chad Moody

▶ Rodolf and Todd



▶ What is medical malpractice?

- ▶ The State of Oklahoma defines malpractice or negligence by statute

▶ Negligence

- ▶ In order to prevail, the Plaintiff/patient must prove four things
 - ▶ Duty
 - ▶ Breach with injury
 - ▶ Causation
 - ▶ Damages

▶ Duty

- ▶ Healthcare providers have a duty to provide care that meets the standard of care


(What a reasonably prudent doctor would do in the same or similar circumstance)

▶ Breach


- ▶ The doctor has not met the standard of care by doing something they should not have done or by not doing something they should have done

▶ Causation

- ▶ The negligence is the direct cause of the injury sustained by the plaintiff/patient

- ▶ If you get served with a lawsuit:
 - ▶ Let your employer know immediately
 - ▶ If you are in private practice and have your own insurance policy, call your insurance representative immediately
- 
- A decorative graphic consisting of several parallel white lines of varying lengths, slanted upwards from left to right, located in the bottom right corner of the slide.


▶ If you get served (cont.)


- ▶ Don't freak out!
 - ▶ Your attorney will help you with responding and generally assuring you that the world is not ending
 - ▶ This will be a marathon and not a sprint
 - ▶ Let your attorney handle the law stuff, you be a doctor
- 
- A decorative graphic consisting of several parallel white lines of varying lengths, slanted upwards from left to right, located in the bottom right corner of the slide.

▶ The better question is why do you get sued?



Why?

- ▶ The care provided did not lead to the result expected
 - ▶ Confusion regarding why the outcome was not what was expected
 - ▶ Deviations from the standard of care
 - ▶ Greed combined with a deep pocket
- 
- A decorative graphic consisting of several parallel white lines of varying lengths, slanted upwards from left to right, located in the bottom right corner of the slide.


- ▶ Lets talk about electronic medical records (EMR)
 - ▶ The good: Legible, Efficient, Everything in one place
 - ▶ The bad: Too much clicking boxes; not enough narrative description of what is actually happening to the patient
- 

- ▶ The Ugly: Chat features (I hate these so much! Why?)
 - ▶ They are well intended. Meant to allow communication vital to patient care from one caregiver to another.
 - ▶ They are being used as EMR texting system.
 - ▶ I have seen some terrifying comments.
 - ▶ “I am so hungover this morning”
 - ▶ “The guy in 413 died last night. Should have started the antibiotic sooner. Oh well!”
 - ▶ “I called the doctor and he could have cared less about this patient”

▶ Chat Systems in EMR

- ▶ These messages are part of the medical record
- ▶ They are discoverable
- ▶ If they are erased the Court will make a finding that the hospital has destroyed evidence
- ▶ Do not put a message in a chat system that you would not be comfortable reading to a jury
- ▶ Or better yet, don't use it! Speak to each other in person. Have a telephone call.

▶ Consent

- Patients often do not understand or care what they are signing: they want surgery
 - You are in a hurry
 - The note you write about consent may prove to be more important than you think
 - The preprinted form will not always contain all that you need to discuss
 - Make your consent discussion appropriate for the specific patient or family member making decisions
 - Then make a note that details your discussion. That extra few minutes memorializing your discussion could prove vital in the decision to sue you or in your defense.
- 
- A decorative graphic consisting of several parallel white lines of varying lengths, slanted diagonally from the bottom right towards the top right, set against a blue background.

▶ Consent

- Make the discussion personal and not rushed
- Discuss things that may occur in the surgery and those that could cause a change in plan
- Patients want to be helped and you are the people they have decided to rely upon
- When you encounter a scenario during your treatment of the patient that requires a change in plan, if you have discussed this possibility with the patient and documented that discussion you are in a much better position
 - Example: a change from a central venous catheter to a swan-ganz catheter during a bypass procedure


▶ How can we avoid lawsuits?

- The best way is to provide excellent care
- Sometimes that is not enough (Why?)
 - Everyone in this room has had a bad outcome despite providing proper care
 - Your patients and their families/friends need to have realistic expectations of the probabilities of outcomes. Especially when the outcome is uncertain
 - This requires candor and time
 - The time you spend with patients explaining the situations and the difficult choices ahead is far less than you will spend with me if you get sued

Recent studies have examined how attorneys/plaintiffs analyze charts

- Medical documentation plays a role in 10-20% of medical malpractice lawsuits
 - Inaccurate, incomplete or generic records undermine a physician's defense and make malpractice lawyers more likely to take a case
 - Of the malpractice claims involving documentation errors, 70% involved missing documentation and 22% involved inaccurate documentation while 18% involved a combination of transcription errors, illegible entries and delays in documentation
 - These errors are self inflicted

▶ Documentation


- Your charting is not just for communication with each other or billing
 - It is a legal record of the care you provided
 - Malpractice lawyers often decide to take a case based only on your documentation
- 
- A decorative graphic consisting of several parallel white lines of varying lengths, slanted upwards from left to right, located in the bottom right corner of the slide.


- Leaving against medical advice

- The signed form is not always enough
- These situations are frustrating
- Have the discussion with the patient including the recommended course of treatment you feel is necessary
- Include the possible results of refusing medical treatment and be specific and include the worst-case scenario even if remote: the worst-case scenario is condition that leads to the lawsuit
- ***Most important: Make a note in the chart that is detailed and includes all your advice and all the potential bad outcomes. Include in this note what you think the patient needs to do even knowing they are leaving your care and where they might go for that care since they do not want you to help them.***


▶ Missing documentation

- AMA

- The patient that seems confident in their decision to leave will magically have no idea what the potential pitfalls of this decision are after they meet and discuss their testimony with their attorney.
 - When they have an attorney, truth is no longer the guiding force, it is money and money alone. Memories seem to be strangely altered when a pot of gold is perceived on the horizon
 - Your testimony is only strengthened by a detailed note in the chart.
- 
- Decorative white lines consisting of several parallel diagonal strokes in the bottom right corner of the slide.

- The pre-printed hospital forms are great until they are not
 - No form will apply to every patient and your detailed/tailored plan for your patient is important.
 - Make a discharge plan that is specific for your patient. Add it to the preprinted form and put paper copies in the patient's hand. Nothing makes a defense attorney happier than a patient who brings the detailed discharge instruction they were given by you to the deposition, and we can prove they did not follow them.
 - All jurors will relate to a Plaintiff who says “we were not sure what to do when we got home”
 - When your instruction is specific you are not only helping your patient but you are also helping yourself
- 

▶ Missing documentation

- After discharge, call your patients and check their status, especially those you suspect may need checking on
 - Document exactly what you said to them and what they said to you and also document that you tried to call, left a message and did not hear back.
 - No patient on Earth will complain that a doctor or nurse called to check on them after discharge
- 
- Three white diagonal lines of varying lengths and thicknesses are positioned in the bottom right corner of the slide, extending from the right edge towards the center.

• Inaccurate documentation

• Electronic medical records

- Auto population is not your friend (trust me)
- No one has the same vital signs for 3-4 shifts in a row. No one is buying that.
- Update the problem lists: if pain is less, write it down; if it increases write it down
- When you populate in review of systems “moves all four extremities” and the patient has an amputated limb... (yes, I have seen this) you will have a hard time explaining.
- These errors may have no impact on the care but blow the door wide open for an attorney to paint you as careless, rushed or oblivious
- Narrative notes following your examination of your patient will always be your friend. Be accurate and provide context including statements of the patient in quotes. Help them recall what they said after they sue you and their memory is being clouded by the attorney and the pot of gold

▶ Inaccurate documentation

- EMR have dozens of spots for you to click and provide information.
 - Read the notes made in the chart prior to your arrival to care for the patient
 - Documenting a change in condition is not possible without knowing the prior condition!
 - Be accurate regarding location: if pain is documented as being in the right lower quadrant previously and you discover pain in the left lower quadrant, figure out what is going on. Correcting a chart is better than having an attorney show you the error at your deposition

▶ Beyond documentation

- My friends who are physicians ask me repeatedly, “how do I keep from being sued?” These are my answers:
 - Provide good care
 - Talk to your patients, ask them if they have questions and answer all of them
 - After surgeries, sit down next to their family in the waiting room and don’t seem like you are anxious to get to your next case
 - If something happened that was different than what was planned, tell them, explain why it happened and tell them what you did and why. They can handle it.
 - Be compassionate: This is likely one of the most stressful times in their life

▶ Closing remarks

- You cannot prevent all lawsuits
- I have defended more physicians and hospitals than I can remember who did nothing wrong.
- I have also defended cases where the standard of care was not met
- After every single case my advice to my clients is the same:
 - Continue to focus on care of the patient: we need you!
 - Take this experience and grow from it: it will make you stronger and smarter
 - Remember how your charting was analyzed and used against you and do better in the future.
 - Don't let this make you jaded. The vast majority of your patients appreciate that you are here for them. That includes me!