A Storm Is Brewing: Seeking Protection from Professional Liability Hazards

Daniel J. Briceland, MD
Paul Weber, JD
Disclosures

Daniel Briceland, MD and Paul Weber, JD have no financial disclosures.
Risk Management Discount

WAEPS members will receive a 10% risk management premium discount.

Complete the sign-in sheets.
Outline

• Issues related to refunding fees
• Steps to minimize establishing a patient-physician relationship when providing an informal curbside consult to a colleague
• Liability risks of “speaking off the record” with an attorney
• Risks of “enhancing” the medical record
OMIC insures over 4,600 ophthalmologists nationwide (76 WA)

Since 1987 over 4,100 closed claims and lawsuits in our database (45 WA)

- “claim” = demand for money (lawsuit, letter from patient or attorney)

Another 3,300+ incidents, etc. handled by Claims department (86 WA)
Overview of Claims and Lawsuits

- 20% of OMIC claims close with an indemnity payment to plaintiff (35% - WA)
- Average indemnity payment = $164,000 ($235,000 – WA)
- Highest indemnity payment = $3,375,000 ($850,000 – WA)
- About 4% of cases go to jury trial and defense wins about 90% (WA – 1 jury trial defense verdict)
<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
<th>Specialty</th>
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<tr>
<td>$3,375,000</td>
<td>Failure to <strong>diagnose</strong> ROP</td>
<td>Medical Retina</td>
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<td>Failure to <strong>diagnose</strong> bilateral glioma in 10 mo old baby</td>
<td>Pediatric</td>
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<td>Failure to <strong>diagnose</strong> glaucoma in 8 yr old</td>
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<td>Failure to treat corneal ulcer in 2yr old</td>
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<td>$1,000,000</td>
<td><strong>Misdiagnosis</strong> sarcoidosis/prednisone overdose</td>
<td>Oculofacial</td>
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<td>Failure to <strong>diagnose</strong> foreign body</td>
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<td>$1,000,000</td>
<td>Failure to <strong>diagnose</strong> Trigeminal Schwannoma</td>
<td>Pedi/Adult Strabismus.</td>
<td>2014</td>
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YOU WANT TO AVOID.....
Claims Department

“More than just lawsuits.”
Reports to Claims Department

Report Categories

• Lawsuit
• Claim (demand for money in writing)
• Miscellaneous
• Incident
  • Medical Board reports
  • Deposition Assistance
  • “Informal meeting”
  • Legal advice
  • Medical Records Request
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Case study

Annual exam for 59 year old diabetic
Patient expressed need for new glasses prescription
Wanted new frames
Phoropter stuck
Patient leaned forward to sit up in chair

..........  
BUMP!
A case study

BUMP! (cont.)

Nickel sized raised welt with small break in skin

Patient reclined in chair

Lesion iced, small Bandaid applied

Patient said she was fine and agreed to proceed with the complete eye exam

Refraction fee waived

Multiple times patient replied she was fine

Evening phone call, reassured no problems
TWO MONTHS LATER.....
Registered letter from attorney
Patient alleged she was struck in forehead
Dizzy for weeks
Went to ER night of occurrence
Diagnosed possible concussion
Out of work for 3 weeks
They indicated that they would contact the physician once her situation stabilized to discuss settlement
OMIC claims rep reviewed chart notes
Reassurance
Guidance
Discussed options
Answered questions
Medical expenses + Pain/Suffering = Mid 5 figures???
EXPENSES vs CHARGES (“Phantom Damages”)
COUNTER OFFER?
AMOUNT?
NEGOTIATIONS

Counter offer with 3 figures to cover out of pocket costs to patient

Weeks later, there was a counter with slight reduction, still in 5 figure range

OMIC claims rep advised and assigned local counsel to assume negotiations

Nuisance claim but still very concerning and can be expensive.
HARD QUESTIONS

Fight or settle?

What was it worth to make this go away?

Emotional cost of fighting?

RANSOMING REPUTATION?
Decision to make final offer at maximum that would be willing to settle

Common ground found

Paperwork completed to prevent further claims later
TAKE AWAY

CALL OMIC!!!

THIS IS WHAT WE PAY FOR

THEY WILL HELP GET YOU OFF THE ROLLER COASTER!
Claims/Litigation Handling Overview

- Insured Reports to OMIC:
  - Part of policy requires contact when aware of possible claims: triggers coverage and let the pros deal with the problem
  - Payments need assistance of counsel and are handled differently on a case-by-case and state-by-state basis
  - Confidential settlement agreement and release
  - Premises related claims: Contact General Liability/Premises Liability Carrier
Requests for Refunds and Fee Waivers: Common Questions
Requests for refunds. Common questions.

- Should one contact the malpractice carrier and if so at what point. (Yes and ASAP.)
- Would it be better to simply speak with the patient. (Often physician/staff can negotiate with some OMIC guidance.)
- Should one obtain a release. (Yes, especially if "large" amount of money. Often small amount and physician not concerned.)
- Some general guidelines especially with the problems with premium IOL’s and refractive surgery would be of help. (See slides that follow re steps and issues to consider.)
Refunds, waivers, etc.

• Waiving/refunding fees and paying for additional care is **not** admission of “guilt”

• Waiving/refunding fees and paying for additional care **may or may not** dissuade the patient from filing suit

• **CALL OMIC!!!**
Steps to take when making refunds, waivers, etc.

- Check state law regarding reporting
- Contact OMIC Risk Management to review any letter you write to the patient
- Contact OMIC’s Claims Department if you want the patient to sign release in exchange for a fee waiver, refund, or payment

- **CALL OMIC!!!**
Caution re: refunds and waivers

• Contracts with third-party payers (including Medicare) may limit ability to waive co-pays or refund fees
  – Violating contracts/regulations may subject physician to allegations of insurance fraud and abuse

CALL OMIC!!!
Refunding fees – National Practitioner Data Bank issues

- Two conditions must be met before a report to the NPDB
  1. A written complaint or claim demanding payment
  2. A malpractice payment made by a business or corporate entity (includes business entity comprised of solo practitioner)
Refunding fees – NPDB issues, cont.

• A refund, even if in response to a written demand, if paid out of personal funds, is NOT reportable

• Individuals are NOT required to report payments they make for their own benefit

• A waiver of debt (the patient hasn’t paid yet: no money has changed hands) is NOT considered a payment and should NOT be reported

CALL OMIC!!!
Risk Management:
*Can I Speak With You Off the Record?*
“Can I speak with you off the record?”

Various Scenarios

- **Patient’s attorney**
  - wants to discuss care *you* provided
  - wants to discuss care provided by another physician or healthcare provider (e.g. optometrist) to your patient

May be related to malpractice claim or other legal matter

- **Another physician may request a curbside consult.**
Risk management issues when talking to patient’s attorney

- Confidentiality obligations: patient must authorize.
- No duty/obligation even if patient authorizes.
- No privilege in communications with patient’s attorney. Nothing is “off the record”.
- Attorney may become hostile and threaten deposition.
- Be especially careful commenting on other providers care.

"Can I speak with you off the record?"

CALL OMIC
“Can I speak with you off the record?”

After discussing with you, staff’s stock response to attorney might be:

“Dr. XXXX has a *longstanding* policy of not getting involved in the legal matters of any of his patients. This policy allows him to devote *all* his time and attention to providing quality patient care.”
Curbside Consults

- Called “curbside,” “hallway,” or “sidewalk”
- **Usually**: presentation of the patient’s history, recitation of the diagnostic test results obtained to date and discussion of potential avenues of treatment for this patient and others with similar symptoms
- **Usually**: specialist does not know the patient’s identity; patient is unaware of the consultation; the specialist does not bill for his or her advice.
Curbside Consults

• Where a physician provides an evaluation of a patient for the benefit of a third party, or as a professional courtesy for a colleague, *a patient-physician relationship is typically not established.*

• However, some courts are allowing medical malpractice suits to proceed against specialists consulted informally by a patient’s primary doctor.
Curbside Consults - Documentation

- If the treating physician is sued, the consultant may be *impleaded - reasonably foreseeable*.

- Physician seeking informal consult most likely documented that they sought and followed the advice of an “expert” regarding treatment.

- **Consultant should**: document any such consultations with the date of the inquiry, the inquiring physician’s name, the nature of the inquiry, and any advice given.

- Without a record of advice given, the consultant will be defenseless.
Curbside Consults

It is all about your risk tolerance based on your personal judgment on a case-by-case basis regarding colleague requesting advice.
Curbside Consults - Recommendations

• Frame responses in general terms

• Suggest several answers; include disclaimer statements to emphasize no formal consulting relationship

• Keep conversations short and number few

• If pressed for specific guidance suggest a comprehensive evaluation appropriate
Patient Care Phone Call Record Pad

PHONE CALL RECORD
DATE ____________ FOR DR. ______________
CALLER ____________________ PATIENT ______________
PHONE ____________________ TIME RECEIVED ____________ AM
HISTORY ___________________________________________
ALLERGIES? ______________________________________
REGULAR RX? _____________________________________
RX & FU __________________________________________
PHARMACY ____________________ PHONE _______________ INITIALS _______________
Claims Department
“More than just lawsuits, but also lawsuits”
Altered or changed medical records are 

Fatal to Defense
November 2000 -

67 y.o. female pt with c/o blurriness and distortion OD – referred to insured by patient’s cataract surgeon

– VA 20/30-, 20/25

– Macular pucker OD>OS confirmed by FA and fundus photography.
November 2000 (cont.) –
Informed patient’s husband by phone of the results of the FA, surgery only option to remove the pucker.

Note *in records* states that risks and benefits of vitrectomy OD had been discussed with the patient.

Patient has uneventful pars plana vitrectomy
Case Study

January 2001 - Pt c/o of horizontal bar obstructing her vision OD and that vision not improved - ? cause.

March 2001 – 20/400 OD with mild temporal atrophy of ON.

May 2001 - 20/400 OD with temporal atrophy. Diagnosis: small vascular accident that occurred peri-operatively.
Case Study

Patient never returned to insured

July 2001

– Patient requests records sent to another neuro-ophthalmologist and retinal specialist.
Claim is Filed

April 2002
Insured hears lawsuit may be filed, contacts OMIC and sends records for review

November 2002 lawsuit is filed
Patient sues insured and his entity
Patient is home maker
  – No claim for loss wages
  – $6,000 in medical specials
  – $350,000 pain and suffering

Husband of pt. is a lawyer
OMIC Claim Review

Strong expert support (retina and neuro-ophthalmology)

– Diagnosis and treatment met the standard of care and
– Care did not cause the damage to the optic nerve
Litigation

Plaintiff’s *only* criticism is lack of informed consent

– Should use procedure specific consent form reviewing specific risks

– Patient and husband of patient testify that insured said surgery was the only option and “routine”
Insured’s Deposition

TESTIFIES

Discussed RBAs with pt. and later with husband of pt.

On day of surgery note made in chart that all RBAs discussed

Discussed RBAs patient and patient’s husband on day of surgery at hospital

Wrote note in hospital informed consent document about RBAs
Plaintiff Expert’s Deposition

- Plaintiff expert stated that did not find note about discussion of RBAs in the office record he was given to review

- *This statement alerts defense attorney that there are different sets of medical records!!!!!
A change in the liability equation

After deposition of plaintiff expert,

– Insured recalls making the notation in pt.’s chart about RBAs after he received his initial claim letter and demand from the Plaintiff.
RECORDS TIMELINE

May 2001 last sees pt. in office

May and August 2001 records copied and sent to patient’s subsequent treaters

April 2002 insured hears about possible claim and makes change to record and sends these to OMIC
Claims Analysis

Who will the jury believe?

– The medicine was defensible but
– How do you prove properly obtained consent if
  • no note and
  • no procedure-specific consent form
  • *Altered records*
– Defense attorney estimates if insured loses
  jury verdict value of case at $350,000
Final Outcome

Insured wishes to settle case rather than go through trial

$50,000 settlement to plaintiff
CONCLUSIONS

Jurors will sit through hours of testimony which they may not remember or understand.

The medical records (evidence) become exhibits which can be taken into the jury room during deliberations.
Specific Consents

- Consents should be procedure specific.
- List the risks and complications- will separate the adverse events.
- Florida Cataract and IOL specific consent form as an example.
“Correcting” the Medical Record
Procedure to Correct “Paper” Record

Paper: well-accepted procedure for correcting a record:

– scratch through the erroneous material (taking care to leave it legible)
– make your correction in a way that’s obvious
– sign and date the amendment so everyone can tell exactly what you did

Impossible for many EHRs

Designate person or team to address – need transparency
EHR

Unique documentation issues:

- Copy forward
- Copy and Paste
- Use of defaults
- Use of templates - prepopulated
- Inserting outdated data – labs, previous tests
- Check off boxes.
Prepopulated Information

- The information may not reflect the current findings.
- Propagated information may be false.
- Internal inconsistency within a note.
- Redundant information.
- Unnecessarily lengthy notes.
EHR Audit Trail

- Altering the medical record is easy to follow.
- Changes and the original record are stored and can be retrieved.
Thank you!