Malpractice Issues for the Gastroenterologist

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Speakers’ Disclaimer

- Richard E. Moses, DO, JD does not have any financial conflicts to disclose.
- This presentation is not meant to offer medical, legal, accounting, regulatory compliance or reimbursement advice and is not intended to establish a standard of care. Please consult professionals in these areas if you have related concerns.
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Presentation Goals

- Understand the changing malpractice risks under PPACA
- Review the expanding role and risks faced with non-physician clinicians (NPCs) under PPACA
- Discuss the evolving malpractice risks associated with Clinical Practice Guidelines (CPGs)
- Discuss the evolving risks of Electronic Healthcare Records (EHR)
- Review the quality demands and reporting requirements of PPACA and their potential role in medical malpractice cases

BACKGROUND
Health Care Reform

President Obama Signs PPACA
March 23, 2010

Health Care Reform

- Health Care Reform Goals
  - Improve Access
  - Universal Coverage
  - Increase quality reporting to include outcomes
  - Increase integration of care through partnerships of physician networks and hospitals
  - Cost control and cost reduction
Physician Workforce Issue

- Association of American Medical Colleges (AAMC) Center for Workforce Study on Physician Shortage:
  - 2015 → 63,000 physicians
  - 2020 → 91,500 physicians
  - 2025 → 130,600 physicians
- Primary care faces greatest physician shortage
- Gastroenterology shortage → Lewin Group Study
  - 2020 → 1,050 Gastroenterologists
  - www.internalmedicinenews.com (2/15/09)

www.aamc.org/data/workforce/reports
https://obpmedical.com/gastroenterologist-shortage-being-forecasted

Non-Physician Clinicians
Nomenclature

- **Nonphysician Clinician (NPC) = Physician Extender = Midlevel Provider**
- **Number & Use of NPCs → Increasing**
  - Nurse Practitioner (CRNP)
  - Physician Assistant (PA)
  - Others
    - CRNA → Certified Registered Nurse Anesthetist
    - CRNM → Nurse Midwives

Physician Liability for NPCs

**Physician Liability (Vicarious)**
- Lack of adequate supervision
- Untimely consultant referral
- Failure to properly diagnose
- Inadequate examination
- Negligent misrepresentation
- Violation of health care fraud laws

**Legal Theories**
- Vicarious liability
- Negligent supervision
- Negligent hiring/negligent selection

Nurse Practitioner Supervision Environment

AVOID LIABILITY

- Hire qualified NPC
- Know state rules
- Properly train NPC
- Check all credentials
- Check all references
- Properly supervise
- Follow state supervision requirements
- Review work regularly
- Encourage interaction
- Proper NPC patient intro
- Set high standards of care for NPC
- Make sure procedures are followed
- Stress documentation

Clinical Practice Guidelines

- Institute of Medicine (IOM)
- CPGs Defined:
  - “Systematically developed statements to assist the practitioner with patient decisions about appropriate health care for specific clinical circumstances.”

Institute of Medicine, TO ERR IS HUMAN: BUILDING A SAFER HEALTH CARE SYSTEM (1999)
Barry Furrow, et al., HEALTH LAW 267 (2nd ed. 2000)
GUIDELINES:
Quality & Malpractice

- Government Accountability Office (GAO)
  - “...beneficiaries...who receive health care from providers who adhere to PPACA...may receive higher quality of care...Conversely, those who receive care from providers who fail to do so may receive lower quality of care.”
  - “...it is possible that, if these (PPACA) standards and guidelines become accepted medical practice, they could impact the standard of care against which provider conduct is assessed in medical malpractice litigation.”

www.gao.gov/products/P00407

GUIDELINES:
Medical Malpractice Cases

- Already affecting settlement patterns according to survey of malpractice lawyers
- Plaintiffs have used guidelines to their advantage
- ACOG Guidelines used the most
- EXPERT TESTIMONY STILL NEEDED

CPGs Can Be Our Friends...

Defending an Allegation of Missed Cancer
The Plaintiff's Burden

The plaintiff must prove that the performance of the colonoscopy was below the standard of care.

Table 1. Ideal Circumstances for Defense of a Medical-Legal Case Alleging Negligent Colonoscopy Resulting in Missed Cancer

<table>
<thead>
<tr>
<th>Condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bowel preparation is excellent, good, or adequate or the equivalent</td>
</tr>
<tr>
<td>Bowel preparation quality supported by photography</td>
</tr>
<tr>
<td>Digital rectal examination and results are recorded</td>
</tr>
<tr>
<td>Cecal intubation is documented by landmark notation and photography</td>
</tr>
<tr>
<td>Withdrawal time is noted and exceeds 6 minutes</td>
</tr>
<tr>
<td>Any retroflexion performed is photographed</td>
</tr>
<tr>
<td>Physician participates in a quality-improvement program, measures ADR, and ADR exceeds recommended thresholds</td>
</tr>
</tbody>
</table>


Finding CPGs

- www.gi.org
  - American College of Gastroenterology
- www.gastro.org
  - American Gastroenterological Association
- www.aasld.org
  - American Association for the Study of liver Disease
- www.guidelines.gov
  - U.S. Department of Health and Human Services
- www.google.com

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EHR Liability Issues

- Cloning/Cut & Paste
- Did/did not perform
  - Dropdowns, templates, defaults, macros
- Pre-populated templates
- Voice recognition issues

EHR Liability Issues

- Failure to check all areas of program for results
  - Scanned data v. direct drop
- Improper scanning by support staff
- Failure to check “paper chart” or “scanned chart”
- Changing the note
- Locking the note

EHR Liability Issues

- Chart inconsistencies
  - History
  - Exam
- Failure to read office visit notes created
- Automatic acceptance of coding engine recommendation
- Automatic acceptance of modifier recommendation
Paper Days
If it’s not documented, you didn’t do it!

EHR Days
You documented it...did you do it?
Where’s the HPI?

Reason for Appointment
1. Prior cold

Vital signs
BP 120/80, HR 72 bpm, RR 18, SBP 85, DBP 45

Physical Examination

Head, neck, & chest:
- Symmetry: symmetric
- Neurological:
  - Motor function:
  - Sensation:
  - Reflexes: normal, equal, symmetrical

Cardiovascular:
- BP: 120/80
- Heart rate: 72 bpm
- Blood pressure: 85/45
- Heart sounds: normal
- Auscultation: clear

Abdomen:
- Soft, nontender, normal bowel sounds
- Liver, spleen: not felt

Musculoskeletal:
- Range of motion: full
- Spine:
  - Alignment: normal
  - Mobility: full

Lymphatic:
- Nodes: not enlarged

Skin:
- Temperature: normal
- Rash:
- Lesions:

Assessments
1. Chronic disease: yes (Peripheral)
2. Diabetic: no
3. History of cardiac disease:
4. History of liver disease:
5. History of cancer:
6. History of peptic ulcer disease:
7. History of renal disease:

Where’s the appropriate exam?


Post-COVID BLEEDING
- Mantoux test: 5U, skin test:
- Endoscopy:
- Follow-up:

Pelvic pain
- Suprapubic pain intermittently

Discharge Plan
- Follow-up
- Anti-inflammatory:
- Pain management:
- Consultation:
- Physical therapy:
- Reevaluation:

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To Tattoo or Not to Tattoo

Voice Recognition Error

4. Chronic constipation
Police will continue with habits he’s a fiber and stool softeners as needed. Her constipation symptoms for the most part are well controlled at this time.

5. Weight Loss
Elise has lost a few more pounds in the last 2 months. I’ve encouraged her to eat smaller meals throughout the day and use some nutritional supplements. Her BMI is acceptable, but I would not like her to lose any more weight. She did an endoscopic ultrasound on the pancreas. We’ll continue to follow her weight.

Follow Up
4 Months
Risk Management Strategies

- Develop a process to use EHRs to evaluate patients
- Be careful → Take your time
- Check all dates on chart documents
  - Compare with date of last office visit or procedure
- Read what you typed, dictated &/or clicked
- DO NOT FORGET THE PATIENT


QUALITY REPORTING MEASURES UNDER PPACA
Physician Compare Website

- Website required by Affordable Care Act
  - § 10331(a)(1)
- Provides information regarding
  - Physicians enrolled in Medicare Program
  - Other eligible professionals participating in PQRS
- Assessment of:
  - Patient outcomes, continuity & coordination of care; efficiency & cost; patient experience; safety, effectiveness, & timeliness of care
- Information is publically displayed

Physician Compare Website

- CMS must allow physicians & other professionals to have reasonable opportunity to review their results before posting
  - 30 day preview period for all measurement data
- CMS will provide details of review process
  - www.cms.gov
- So...Review the data/info associated with yourself regularly that is in the public domain

http://www.medicare.gov/physiciancompare
CONCLUSIONS & SUMMARY

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Thank You

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