Heads Up!

A risk management expert talks about some "hot" issues in medical malpractice

by Janine Fiesta, JD, BSN

ILLUSTRATION/ ROB COLVIN

Most malpractice cases come from the inpatient hospital setting; however, the number of cases that come from physician offices and outpatient clinics is on the rise. Today's cancer care professional needs to be aware of a number of risk management issues that are on the healthcare radar screen.

Medical errors. The healthcare community should get away from what risk management calls "tombstone regulations," which means reacting to a situation and piecemealing a solution/approach *after* a problem has occurred. Experience has taught us that complex systems with multiple checks and balances do not always alleviate medical errors. In fact, in some instances, we've actually seen the opposite effect—when multiple providers are accountable instead of one person, everyone may assume that the other individuals have performed the safety check. A proactive approach to risk management emphasizes the evaluation of "near misses" *prior* to an injury occurring, which is a more productive method of protecting patients from medical errors.

Inadequate pain management. In 2002 a California patient successfully sued a physician for failure to provide adequate pain medication. The $1.5 million award against the physician was at least partly based on information in the patient's medical record, which documented that the patient had communicated the severity of the pain to the physician.

In 1999 the Oregon state medical board disciplined a doctor for failing to relieve the pain of his sick patients. While he was using acetaminophen for terminal cancer patients, he was refusing to prescribe any pain medication for others.

Currently, a number of other state medical boards around the country are reviewing physicians and disciplining for failure to provide adequate pain medication.

Failure to follow advance directives. A few years back, an interesting case occurred outside of Philadelphia in which a physician (who was a patient) sued his physician colleague for failing to follow the patient's advance directive. The patient was in his early 70s and had suffered a stroke and knew what the next stroke might mean in terms of his quality of life. He wrote a very detailed advance directive, a living will, and a durable power of attorney for healthcare that clearly stated his wishes. He communicated those wishes to his physician, who did not follow them when the next stroke occurred. Instead, the physician resuscitated him, put him on life support, and was very aggressive in his treatment. The patient physician survived the stroke, but with very severe complications. He pursued litigation against his own physician and the jury found liability.

There are several similar cases around the country where physicians are being sued for failing to follow specific, expressed wishes of competent patients.

Failure to diagnose or delay in diagnosis. In 2002 a Florida healthcare entity was sued when it failed to follow-up on a mammogram report. The patient never received a card from the hospital about the results of her mammogram, although the physician said he tried to reach her and initialed that he had read the report. Ten months later, the patient felt the lump, but by that time she had metastatic disease and died shortly thereafter. However, the $7 million verdict that was awarded was shared in thirds between the patient, the physician, and the hospital. The patient's liability was related to family testimony that the patient had always received a card from the hospital previously, wondered why she had not received any information about her last mammogram, but chose not to pursue the matter. So, the patient was found to have one-third liability for failing to contact her physician for the results of her mammogram. One-third of the accountability was assigned to the physician for failing to make sure he contacted the patient and for not documenting that he had attempted to get in touch with the patient. The hospital also shared one-third of the liability because the hospital could not prove that it had sent a letter indicating that the patient had a problem and should call or return to the hospital.

In other legal cases, patients have also shared in the legal accountability because of their own non-compliance with their responsibilities as patients.

SO, WHAT CAN YOU DO?

Keep in mind the importance of standards of care. In any malpractice suit, it is the failure to follow a reasonable standard of care that determines whether you're going to be held liable. While a number of physicians view such standards as "cookbook" medicine, the use of standard procedures have actually been helpful from the standpoint of consistency and defending malpractice cases. Today, standards and protocols can be admitted as evidence and understood by judges and juries.

In the end, sound legal advice is to always practice safe and good patient care. From a malpractice and risk management point of view, a practitioner can be defended if his or her decision was based on the safety of the patient and the quality of care given to the patient. Always err on the side of the patient when making any healthcare decisions.

Janine Fiesta, JD, BSN, is vice president of legal services and risk management at Lehigh Valley Hospital and Health Network in Allentown, Pa.

ILLUSTRATION/ROB COLVIN