LESSONS LEARNED FROM MALPRACTICE CLAIMS

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Financial Disclosure

Hans K Bruhn, MHS does not have any financial disclosures

Documentation Issues
From Actual Medical Records

The skin was moist and dry. Occasional, constant, infrequent headaches. The patient has been depressed since she began seeing me in 2003. The pelvic examination will be done later on the floor.
From An Actual Transcript

By Attorney: Doctor, as a result of your examination of the plaintiff, is the young lady pregnant?

Expert Witness: The young lady is pregnant -- but not as a result of my examination.

From An Actual Transcript

By Attorney: Now doctor, isn’t it true that when a person dies in his sleep, he doesn’t know about it until the next morning?

OMIC 2014
Closed Claim Statistics
It is not a matter of “if”, just “when”...

Probability of a Claim in 35 years

Assumes probability of a claim in a given year is 8%

Probability of a Paid Claim in 35 Years

Assumes probability of an indemnity payment in a given year is 2%

2014 Closed Claims by Treatment (246)
Overview of Claims and Lawsuits

OMIC insures over 4,600 ophthalmologists nationwide.

Since 1987 over 4,000 closed claims and lawsuits in our database.

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

Another 3,300+ incidents, etc. handled by Claims department.

Overview of Claims and Lawsuits

- Only 21% of OMIC claims close with an indemnity payment
- Average indemnity payment = $164,000
- Highest indemnity payment = $3,375,000 (ROP)
### OMIC Large Losses ($1 million+)

<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
<th>Specialty</th>
<th>Year Closed</th>
</tr>
</thead>
<tbody>
<tr>
<td>$3,375,000</td>
<td>Failure to diagnose ROP</td>
<td>Medical Retina</td>
<td>2007</td>
</tr>
<tr>
<td>$2,000,000</td>
<td>Failure to diagnose bilateral glioma in 10 mo old baby</td>
<td>Pediatric</td>
<td>2009</td>
</tr>
<tr>
<td>$1,800,000</td>
<td>Failure to diagnose glaucoma in 8 yr old</td>
<td>Pediatric</td>
<td>2001</td>
</tr>
<tr>
<td>$1,500,000</td>
<td>Failure to diagnose ROP</td>
<td>Pediatric</td>
<td>2012</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to treat corneal ulcer in 2yr old</td>
<td>Comprehensive</td>
<td>1999</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Misdiagnosis sarcoidosis/prednisone overdose</td>
<td>Oculofacial</td>
<td>2002</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to diagnose ROP</td>
<td>Pediatric</td>
<td>2009</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to diagnose ROP</td>
<td>Pediatric</td>
<td>2010</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Acute glaucoma post phakic implant</td>
<td>Comprehensive</td>
<td>2011</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to diagnose foreign body</td>
<td>Oculofacial</td>
<td>2012</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to diagnose Trigeminal Schwannoma</td>
<td>Ped/Adult Strabismus</td>
<td>2014</td>
</tr>
</tbody>
</table>

### Pre-Claim Assistance

“Call Early. Call Often.”

11/11/2015
Ophthalmologists face more than just litigation….

- Reports to OMIC “Confidential” Risk Management Hotline
  - General liability/risk question
  - Incidents
  - Difficult Patients
  - Document Review
  - Problems with other healthcare providers

### 2014 Reports to Risk Management (#1,960)

- 1,666 General Questions
- 1060 Difficult Patient Reports
- 116 Incident Reports
- 198 Document Reviews

Risk Management: *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.

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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.

CALL OMIC OR YOUR MALPRACTICE CARRIER

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Your staff’s stock response when attorneys want to talk:

“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 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 - 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

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
2014 Reports to Claims Department

2014 Reports to Claims Department

Lawsuits/Claims, 201
Miscellaneous, 107
Incident Reports, 308

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
A case study

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?

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.
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
*Physician pays out of pocket to avoid reporting to NPDB*
Paperwork completed to prevent further claims later

**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. 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
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

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

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.

Thank You