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Proper documentation key for reducing risk in negligence lawsuits

By Cheryl Guttman Krader | August 1, 2011

- Meticulous documentation of actions and communications with patients may serve as basis for strong defense against lawsuits
- In medical negligence case, plaintiff must establish causation between physician's act and unfavorable outcome

Chicago - Keeping up to date with evolving standards of care, conducting thorough patient counseling that explains all reasonable evaluation and treatment options, and ensuring careful follow-up are important risk-management strategies for helping dermatologists avoid the mayhem accompanying a malpractice suit for a missed or delayed diagnosis of malignant melanoma.

However, proper charting with meticulous documentation of one's actions and communications may be more critical than anything else, because it can be the basis for a strong defense and stop a lawsuit from being filed in the first place, according to Mark M. Burden, Esq., and Stetson F. Atwood, Esq.

Mr. Burden and Mr. Atwood are attorneys at the Chicago law firm of Donohue, Brown, Mathewson and Smyth, where they specialize in defending physicians involved in medical-negligence lawsuits. They note that in a case of professional negligence, the information in a patient's chart often represents the best evidence of the facts of the case. Therefore, it is in a physician's best interest to chart carefully in order to create a record that will support their defense in a malpractice suit, should one arise.

"Careful charting is among the many things a physician can do to support a potential malpractice defense and help avoid a costly malpractice verdict. The better your documentation, the easier it becomes to defend you," Mr. Atwood says.

Adds Mr. Burden, "A well-documented chart that helps establish the physician met the standard of care may also prevent a malpractice case from even getting filed. A chart is often the first thing a plaintiff's attorney will review in deciding whether or not to pursue a case, and remember, plaintiffs' attorneys are only paid if their clients win."

Case in point

To further explore issues that often prove critical in malpractice lawsuits involving the care of a dermatologist, Mr. Burden and Mr. Atwood present hypothetical cases and assume the roles of opposing attorneys in these cases. One case involves a patient who was advised by a dermatologist that a melanocytic mole was benign and required no additional treatment based on findings of examination with optical diagnostic technology (MelaFind). Another dermatologist who saw the patient a few years later performed a biopsy that identified melanoma, but the report was lost. The patient, who was never notified of the diagnosis, had a seizure one year later, was found on evaluation to have brain and visceral metastases, and eventually died.

Two possible negligence claims can be made against the first physician: 1) The optical diagnostic technology is not standard of care for identifying melanoma and that its use resulted in a delayed diagnosis, and 2) the physician failed to properly instruct the patient to return for regular follow-up, resulting in delayed diagnosis. Since standard-of-care issues relating to chosen methods of diagnosis and treatment often come down to a battle of experts hired by the opposing sides, the decision about the first claim as well as for the second will more likely depend on what documentation exists in the medical record, the presenters say.

Playing the role of the plaintiff's attorney in this hypothetical case, Mr. Burden says, "It is important to know the limits of new and emerging technology and to use such modalities in connection with sound clinical judgment integrating other test results and clinical findings. However, irrespective of what the physician in this case may claim in testimony about the care he administered, the strength of the defense ultimately depends on whether the defendant's arguments are supported by the information contained in the chart."

Mr. Atwood echoes these thoughts. "Even if the defendant physician makes a good witness, it is difficult to convince jurors of specific facts in the absence of sufficient documentation. Merely stating that one performed an appropriate clinical exam or, in the case of the second negligence claim, that it is custom and practice to instruct patients to follow-up, renders the defendant vulnerable on cross-examination by the plaintiff's attorney," he says.

The negligence of the second physician relates to the failure to communicate the biopsy results to the patient, and the plaintiff has a strong case on these grounds.

"A plaintiff's attorney will tell a jury that once a physician orders a test, they own the result and are obligated to ensure that it is communicated to the patient," Mr. Burden says. "The lesson here is the importance of putting in place an office procedure for receiving, reviewing and reporting test results to ensure that they do not fall through the cracks. Failing to have such a procedure in place may be a violation of the standard of care."

Causation

For a plaintiff to win a case of medical negligence, it is also necessary to establish causation between the physician's act and the unfavorable outcome. Scientifically establishing a link between a delay in diagnosis and the patient's death from metastatic melanoma presents a more difficult challenge for the plaintiff's attorney in this case. Nevertheless, once jurors are convinced a medical mistake has been made, they are unlikely to think the patient's outcome would have been unchanged had he or she received a more timely diagnosis. Therefore, the ability of the defendant to win this case based on lack of causation is also unlikely, the attorneys say.

"In medical malpractice cases, the science on causation often favors defendants. However, in our experience, the jury will frequently gloss over that information where the standard of care was clearly breached and the plaintiff's attorney highlights sympathetic circumstances, such as a grieving family," Mr. Burden says.

Mr. Atwood agrees that jurors' sympathy for the plaintiff presents an obstacle to establishing a defense based on lack of causation.

"More often than not, the jury wants to believe that the defendant physician provided appropriate care," he says. "However, jurors often feel more sympathy for a critically ill or deceased plaintiff, which makes it difficult for the defendant physician to prevail."

Further discussion

The second hypothetical case presented by Mr. Burden and Mr. Atwood relates to standard of care issues in discussing and offering management options. It describes a woman who presented for consultation regarding treatment of an intermediate thickness melanoma. The dermatologist does not believe sentinel node biopsy (SNB) has been established to improve outcomes and does not mention it as an option. Wide local excision is performed, and six months later the patient returns with a regional nodal metastasis.

In this case, the main argument of the plaintiff's attorney would be that standard of care required that the dermatologist discuss SNB as a possible diagnostic option, and failure to do so resulted in a "lost chance" for his client (i.e., increased the risk of an unfavorable outcome). Here again, both sides are likely to produce expert witnesses with evidence supporting their respective positions on the value of SNB, and so a more salient standard-of-care issue relates to whether or not the physician has an obligation to provide the patient with information about all testing options in order to allow the individual to make an informed decision.

"The fact that some physicians elect to offer SNB does not make it the standard of care, and failing to offer it does not make the physician unreasonable if, based on his knowledge of the state of the art, his experience and the pertinent literature, SNB has not been proven to improve outcomes," Mr. Burden says.

Even if the jury accepts that SNB should have been discussed with the patient, however, the plaintiff's attorney still would have to prove that given all of the facts, a reasonable person would have elected to undergo the procedure SNB.

Here, the defendant's attorney would underscore through elicited testimony that the patient may have refused the procedure after learning from the dermatologist that SNB may not improve outcomes and may not be necessary. Furthermore, there is no way for the plaintiff's attorney to prove that if SNB had been done, it would have yielded a positive result.