Speaker Disclosure

Karen Wilkinson certifies that, to the best of her knowledge, no affiliation or relationship of a financial nature with a commercial interest organization has significantly affected her views on the subject on which she is presenting.

Learning Objectives

• Identify how malpractice cases are litigated and settled pre-trial.
• Recognize areas of risk for malpractice claims in nurse practitioner practice.
• Identify common fact patterns in pediatric-related litigation and apply knowledge to case examples to transfer learning to daily practice.
Adverse Outcomes and Patient Harm

• Even when excellent NP care is provided, patient comorbidities or system failures can result in an inadequate patient outcome.
• Understanding the conditions that lead to a litigation claim helps NP providers develop techniques to mitigate risk and minimize the potential for litigation.

Headline-Grabbing Study Brings Attention back to Medical Errors

• Medical Malpractice is now the third leading cause of death in the United States.
• Common types of cases in the field of medical malpractice include birth injuries, emergency room errors, failure to diagnose, misdiagnosis, anesthesia errors, medication errors, surgery errors, and improper treatment.
• Analyzing the death rate from preventable medical errors over an eight-year period of time, Johns Hopkins researchers demonstrated that more than 250,000 people per year die in the United States as a result of medical malpractice. That means that 9.5-10% of all deaths in America are due to preventable medical malpractice. And those are just the deaths. Even more people are injured by medical malpractice and prescription drug side effects every year.

One Example from Washington

NPDB Data 2016-2018
One Example:

**Washington OIC Report 2014-2018**

Information about medical malpractice claims

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Why Do Patients Sue?

- Money?
- Information?
- A bad patient relationship?
- To teach the doctor a lesson?

“So that this won’t happen to someone else.”

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Some Basics of Litigation

- Medical Malpractice: *deviates from SOC*
  - 4 elements:
    - Duty of care
    - Duty was breached
    - Breach was proximate cause of the injury (causation)
    - Damages flowed from the injury

- Medical Negligence: *failure to exercise SOC*

- Standard of Care
  - Most often established by the testimony of medical experts conversant with standards of practice in a particular medical specialty
- Settlement: defendant agrees to some or all of plaintiff’s claims
- Vicarious liability: assigns responsibility not solely to NP but also to employer or supervisor
Adverse Outcome/Patient Harm Litigation

- Service of the Complaint
- Complaint, Answer, and other Preliminaries
- Discovery stage
- Experts disclosed
- Pre-trial motions
- Actual trial OR Settlement
  - Forced settlements, verdicts
  - National Practitioner Data Bank

What Happens “backstage”

**Behind the curtain:**  
**Pre-trial settlement:**
- Settled
- Case not disclosed, nature of error and damages to plaintiff hidden, concealed, and embargoed
- Public or medical community don’t know error, lawsuits filed, of outcome

The Good News….. And the Bad…..

- Medical Providers DO win about 90% of cases that go to TRIAL.

- Reality is that about 95% of med mal lawsuits (that result in a payout) are settled WITHOUT trial.
  - Why? It’s either
    - case is indefensible or
    - risk of a jury trial is too great

- Pre-trial settlements almost always include a non-disclosure clause.
Closed Claims - still have a cost

- **Closed Claims with Expense Payments but no Indemnity Payout**
  - Successfully defended on behalf of the NP, resulting in a favorable jury verdict
  - Withdrawn by the plaintiff during the investigation or discovery process
  - Dismissed in favor of the defendant NP by the court prior to trial

Cost still incurred:
- Expense payment of attorney fees, expert witness fees and costs involved investigating the claim
- Average of 27 months to resolve cases with indemnity

National Practitioner Data Bank

- Collects information about health care professionals who have
  - Paid judgments
  - Entered into settlements
  - Had adverse action on their license or privileges to practice
- Requirement for all hospitals and health care facilities, professional health care societies, state licensure boards, insurance companies, (Federal agencies)
- Who has access:
  - State licensing boards, hospitals, professional societies, health care facilities for peer review, attorneys in special circumstances, individual
- What is reported:
  - Full name, home address, DOB, schools attended and graduation dates, place of employment, SS#, license number and state
  - Name, title, phone number of official submitting report and relationship to practitioner
  - Dates of judgment or settlement or amount paid
  - Description of judgment, settlement, or action

What is Current Data Telling us?
We Can't Fix the Human Part....

• The Problem: We need to learn how to avoid preventable harm.
• The Solution: Most of our mistakes get ironed out in peer review, credentials or quality committees.
• Our most egregious mistakes go not to a conference room but to a courtroom.
• If lawsuits represent our most egregious mistakes, learning from them is the lowest hanging fruit in the patient safety.
Why Haven't We Improved?

- The lack of knowledge about mortality from medical mistakes is the tip of the iceberg.
- All errors that result in injury, regardless of their severity, violate the basic promise in medicine to do no harm.
- No comprehensive, nationwide system for reporting or capturing all types of medical errors that happen not just in hospitals, but also in primary care offices, nursing homes, and many other settings where patients receive care.
- No reliable, up-to-date estimate of the total number of medical errors that take place across all areas of the health care system. (In 1999, the IOM estimated that as many as a million people were injured annually by medical errors.)

Culture of Safety

- Every year, more than 12 million patients experience a diagnostic error during an outpatient visit. It is estimated that half of these could cause harm.*
- Progress in patient safety is happening:
  - April 2011, the Department of Health and Human Services launched the Partnership for Patients initiative to reduce preventable hospital-acquired conditions and hospital readmissions. The federal partners include the Centers for Medicare & Medicaid Services, AHRQ, and CDC.
  - AHRQ's interim estimates for 2014 indicate a 17% drop in hospital-acquired conditions such as adverse drug events, catheter-associated urinary tract infections, central line–associated bloodstream infections, pressure ulcers, and surgical site infections since 2010, resulting in approximately 87,000 fewer deaths.
- Still a tremendous amount of work to be done in the realm of patient safety. For example, diagnostic errors are an area that hasn’t improved much.*


Analyzing Medical Malpractice

- The 2016 National Academies of Sciences report, Improving Diagnosis in Health Care, recommended that health care providers work directly with their malpractice insurers to learn about diagnostic failure.
  - Essential to bringing about change necessary to prevent similar injuries
  - Turns data into credible evidence for what failed, why, and changes in vulnerabilities
    - Cricio 2018 CBS Benchmarking Report: Medical Malpractice in America A 10-Year Assessment with Insights
    - NSO/CAN Nurse Practitioner Claim Report
The analysis of frequency and severity by specialty shows that the three specialties with the highest frequency of closed claims are:

- **Pediatrics**
- **Emergency Medicine**
- **Women's Health (Obstetrics)**

The three locations with the highest frequency of closed claims are:

- **Physician Office Practice**
- **NP Office Practice**
- **Aging Services Facility**, skilled nursing

The average paid indemnity for closed claims by specialty is as follows:

- **Pediatrics**: $10,000,000
- **Emergency Medicine**: $9,900,000
- **Women's Health (Obstetrics)**: $9,800,000

The national average paid indemnity for closed claims is $9,000,000.
Severity of Allegations

<table>
<thead>
<tr>
<th>Allegation Category</th>
<th>Percentage of Closed Claims</th>
<th>Total Paid Indemnity</th>
<th>Average Paid Indemnity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diagnosis</td>
<td>20.9%</td>
<td>$24,906,735</td>
<td>$2,482,522</td>
</tr>
<tr>
<td>Assessment</td>
<td>6.3%</td>
<td>$4,456,275</td>
<td>$241,571</td>
</tr>
<tr>
<td>Medication</td>
<td>29.4%</td>
<td>$19,603,274</td>
<td>$670,709</td>
</tr>
<tr>
<td>Treatment and care management</td>
<td>22.2%</td>
<td>$11,017,457</td>
<td>$695,303</td>
</tr>
<tr>
<td>Communication</td>
<td>0.8%</td>
<td>$500,000</td>
<td>$500,000</td>
</tr>
<tr>
<td>Scope of practice</td>
<td>4.2%</td>
<td>$1,755,000</td>
<td>$144,250</td>
</tr>
<tr>
<td>Abuse/patient rights/professional conduct</td>
<td>1.9%</td>
<td>$405,000</td>
<td>$110,000</td>
</tr>
<tr>
<td>Equipment</td>
<td>0.3%</td>
<td>$71,000</td>
<td>$71,000</td>
</tr>
<tr>
<td>Documentation</td>
<td>0.3%</td>
<td>$30,000</td>
<td>$30,000</td>
</tr>
<tr>
<td>Supervision of others</td>
<td>0.3%</td>
<td>$40,000</td>
<td>$40,000</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>0.3%</td>
<td>$10,000</td>
<td>$10,000</td>
</tr>
<tr>
<td>Overall</td>
<td>100%</td>
<td>$68,015,261</td>
<td>$438,471</td>
</tr>
</tbody>
</table>

Comparison of 2012 and 2017 Claim Distribution by Allegation Category

Analysis of Frequency and Severity by Allegation Category

- Diagnosis
- Monitoring
- Assessment
- Treatment and care management
- Scope of practice
- Medication
- Communication
- Abuse/patient rights/professional conduct
- Equipment
- Documentation
- Supervision of others
- Confidentiality

- Monitoring: infrequent, but highest severity
- Diagnosis, medication, treatment/care management 84.5%
Analysis of Frequency and Severity by Allegation Category

- Monitoring - infrequent but have the highest severity
- Diagnosis
- Assessment
- Medication
- Treatment and Care Management
- Communication
- Scope of practice
- Abuse/patient rights/professional conduct
- Equipment
- Documentation
- Supervision of others
- Confidentiality

Severity of Allegations

<table>
<thead>
<tr>
<th>Allegation category</th>
<th>Percentage of total claims</th>
<th>Verdict paid indemnity</th>
<th>Average paid indemnity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monitoring</td>
<td>6.4%</td>
<td>$4,350,702</td>
<td>$43,927</td>
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<tr>
<td>Medicalized</td>
<td>2.6%</td>
<td>$15,820,425</td>
<td>$329,260</td>
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<tr>
<td>Treatment and care management</td>
<td>2.6%</td>
<td>$4,553,099</td>
<td>$183,000</td>
</tr>
<tr>
<td>Communication</td>
<td>9.3%</td>
<td>$19,039,817</td>
<td>$2,180,152</td>
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<tr>
<td>Scope of practice</td>
<td>2.2%</td>
<td>$4,750,000</td>
<td>$180,250</td>
</tr>
<tr>
<td>Abuse/patient rights/professional conduct</td>
<td>1.6%</td>
<td>$650,000</td>
<td>$10,000</td>
</tr>
<tr>
<td>Equipment</td>
<td>9.3%</td>
<td>$19,039,817</td>
<td>$20,000</td>
</tr>
<tr>
<td>Documentation</td>
<td>9.3%</td>
<td>$15,050,000</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>Supervision of others</td>
<td>2.2%</td>
<td>$450,000</td>
<td>$40,000</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>9.3%</td>
<td>$19,039,817</td>
<td>$12,000</td>
</tr>
<tr>
<td>Overall</td>
<td>100%</td>
<td>$69,875,001</td>
<td>$248,317</td>
</tr>
</tbody>
</table>

Most common settings are physician and nurse practitioner offices.
Diagnosis Related Allegations (32.8%)

- Subcategories
  - Most common settings are physician and NP offices
  - Subcategories: Failure to Diagnose (20.7%)
  - Common thread is lack or sound documentation supporting the decision-making process of NP
    - Common missing or incomplete documentation
      - History and physical assessment
      - Current medication list and problem list
      - Orders for ordered diagnostic test and/or neglecting to take prior ordered medications
      - Records of patient missing appts, failing to complete ordered diagnostic test and/or
        neglecting to take prior ordered medications
    - Notification of diagnostic test results and further treatment or testing needed
    - Reminders to patients to seek emergency treatment if a condition worsens
  - Patient education efforts and materials

Illness/Injuries Related to Failure to Diagnose

- Failure to diagnose infection/abscess/sepsis
  - Appendicitis, sepsis, osteomyelitis

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Percentage of Dismissals</th>
<th>Total Paid Payer</th>
<th>Average Paid Payer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tonsillitis</td>
<td>3.2%</td>
<td>$869.00</td>
<td>$620.00</td>
</tr>
<tr>
<td>Asthma attack</td>
<td>2.7%</td>
<td>$1,499.00</td>
<td>$1,100.00</td>
</tr>
<tr>
<td>Asthma attack</td>
<td>2.3%</td>
<td>$2,159.00</td>
<td>$1,100.00</td>
</tr>
<tr>
<td>Appendicitis and sepsis</td>
<td>1.1%</td>
<td>$1,499.00</td>
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</tbody>
</table>

Centroid Outcome includes Incurred Medical:

<table>
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<td>1.1%</td>
<td>$1,499.00</td>
<td>$1,100.00</td>
</tr>
<tr>
<td>Overall</td>
<td>10.7%</td>
<td>$7,484,875.00</td>
<td>$865.00</td>
</tr>
</tbody>
</table>

Septic hip case

- History:
  - 12 year-old with left leg pain
- Case facts:
Failure to Diagnose

Failure to consider/assess a patient's complaints

- Highest severity, as the plaintiff may suffer permanent total or partial disability
  - Case of the missed tibia fracture

Pediatric MVC

- History:
  - 5-year-old, developmental delay
  - Struck by a pick-up truck
- Case Facts:
  - Diffuse abrasions and mild burns
  - X-rays ordered
  - Discharged
  - Days later right leg pain
  - Distal tibia fracture
  - Casted and resolved with no long-term disability
- Complaint: ED failed to respond to concerns about right leg pain
- Case Outcome: settled or dismissed
- Learnings: communication with parents, discharge and return precautions
Severity of Allegations

<table>
<thead>
<tr>
<th>Allegation category</th>
<th>Percentage of closed claims</th>
<th>Total paid indemnity</th>
<th>Average paid indemnity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monitoring</td>
<td>1.1%</td>
<td>$2,247,500</td>
<td>$499,360</td>
</tr>
<tr>
<td>Diagnosis</td>
<td>22.9%</td>
<td>$24,510,750</td>
<td>$551,560</td>
</tr>
<tr>
<td>Assessment</td>
<td>4.6%</td>
<td>$4,406,275</td>
<td>$391,571</td>
</tr>
<tr>
<td>Medication</td>
<td>29.2%</td>
<td>$14,692,274</td>
<td>$453,340</td>
</tr>
<tr>
<td>Treatment and care management</td>
<td>22.9%</td>
<td>$11,019,450</td>
<td>$269,550</td>
</tr>
<tr>
<td>Communication</td>
<td>0.3%</td>
<td>$500,000</td>
<td>$500,000</td>
</tr>
<tr>
<td>Scope of practice</td>
<td>4.6%</td>
<td>$1,755,000</td>
<td>$164,230</td>
</tr>
<tr>
<td>Misdiagnosis/negligence/professional</td>
<td>1.9%</td>
<td>$402,500</td>
<td>$111,000</td>
</tr>
<tr>
<td>Medication</td>
<td>0.3%</td>
<td>$73,000</td>
<td>$73,000</td>
</tr>
<tr>
<td>Documentation</td>
<td>0.3%</td>
<td>$50,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>Supervision of staff</td>
<td>0.3%</td>
<td>$40,000</td>
<td>$40,000</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>0.3%</td>
<td>$50,000</td>
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<td>$69,075,261</td>
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Medication Prescribing Frequency

- Improper prescribing/managing most frequent

Medication Claims by Illness/Injury

- Costliest: ear injury/hearing loss
- Death/addiction: 19.6%
Practice Tips for Medication Prescribing

- Review current allergy information
- Learn about medication allergies, side effects, and interactions
- Discuss the patient’s condition, medications, and care needs with the collaborating or supervising physician as needed, and document these discussions
- Use caution when prescribing anticoagulants, antibiotics, and psychoactive medications, as well as other known toxicity-prone drugs
- Order and follow-up with all indicated monitoring tests and emphasize importance of keeping follow-up appointments
- Avoid verbal orders except in emergency situations
- Consult with a pharmacist as needed, documenting all communications
- Remain current regarding physical practice, medications, biologics, and equipment related to the diagnosis and treatment of illness and conditions encountered in one’s specialty
- Be cautious about treatment or providing care to family, friends, or co-workers
- Politely decline suggestions or recommendations from patients that could jeopardize their safety
- Refrain from initiating personal relationships outside of the care setting with patients and their family members

Analysis of Frequency and Severity by Allegation Category

- Monitoring – infrequent but have the highest severity
- Diagnosis – most frequent and have the second-highest average severity
- Assessment
- Medication
- Treatment and Care Management – decreased slightly in terms of both frequency and severity since the 2012 report from 29.5% versus 22.3%
- Communication
- Scope of practice
- Abuse/patient rights/professional conduct
- Equipment
- Documentation
- Supervision of others
- Confidentiality

Treatment and Care Management Allegations (22.3%)

<table>
<thead>
<tr>
<th>Allegation sub-category</th>
<th>% closed claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Premature or improper discontinuation or change in treatment</td>
<td>11.0%</td>
</tr>
<tr>
<td>Failure to properly address change in medical condition due to incorrect documentation</td>
<td>11.0%</td>
</tr>
<tr>
<td>Improper management of medical condition due to incorrect documentation</td>
<td>11.0%</td>
</tr>
<tr>
<td>Improper management of medical condition due to incorrect diagnostic testing</td>
<td>11.0%</td>
</tr>
<tr>
<td>Improper management of medical condition due to incorrect treatment</td>
<td>11.0%</td>
</tr>
<tr>
<td>Improper management of medical condition due to incorrect management of patient</td>
<td>11.0%</td>
</tr>
<tr>
<td>Improper management of medical condition due to incorrect management of medical patient</td>
<td>11.0%</td>
</tr>
<tr>
<td>Improper management of medical condition due to incorrect management of equipment</td>
<td>11.0%</td>
</tr>
<tr>
<td>Improper management of medical condition due to incorrect management of resources</td>
<td>11.0%</td>
</tr>
<tr>
<td>Improper management of medical condition due to incorrect management of regulatory requirements</td>
<td>11.0%</td>
</tr>
</tbody>
</table>
What could have been done better?

- Reassess patient when indicated
- Document key clinical information after reassessing
- Document with clinical encounters and communication with care
- Avoid repetitive copy and paste
- Be mindful of gender-related perceptions/display name and credentials

Frequency and Severity by NP Office Practice Claims

<table>
<thead>
<tr>
<th>NP Office Practice Claims by Allegation</th>
<th>Allegations</th>
<th>Frequency</th>
<th>Total Paid</th>
<th>Average Paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treatment and care management</td>
<td>1.5%</td>
<td>122,688</td>
<td>$81,260</td>
<td></td>
</tr>
<tr>
<td>Medication</td>
<td>0.7%</td>
<td>63,553</td>
<td>$100,687</td>
<td></td>
</tr>
<tr>
<td>Overdose</td>
<td>0.5%</td>
<td>30,234</td>
<td>$60,468</td>
<td></td>
</tr>
<tr>
<td>Dosage/ unaware of interaction</td>
<td>0.5%</td>
<td>29,000</td>
<td>$41,629</td>
<td></td>
</tr>
<tr>
<td>Infection/abscess/sepsis</td>
<td>0.5%</td>
<td>14,108</td>
<td>$100,000</td>
<td></td>
</tr>
<tr>
<td>Abuse</td>
<td>0.4%</td>
<td>14,108</td>
<td>$100,000</td>
<td></td>
</tr>
<tr>
<td>Overall</td>
<td>0.3%</td>
<td>148,368</td>
<td>$94,671</td>
<td></td>
</tr>
</tbody>
</table>

- Most common office related claims involve medication
  - Majority related to prescribing/management of controlled drugs
  - Costliest claims relate to diagnosis

Frequency and Severity by NP Office Practice Claims

<table>
<thead>
<tr>
<th>NP Office Practice Claims by Injury</th>
<th>Allegations</th>
<th>Frequency</th>
<th>Total Paid</th>
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<td>148,368</td>
<td>$94,671</td>
<td></td>
</tr>
</tbody>
</table>

- Most common office related claims involve addiction
  - Majority related to prescribing/management of controlled drugs
  - Death was second most frequent injury
    - Majority involved NPs who overprescribed controlled medications leading to unintentional overdose
  - Costliest claims relate to infection/abscess/sepsis
Questions?

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wilkinsonlegalnurseconsulting@gmail.com