RAINEY • KIZER
REVIERE & BELL PLC

Jackson Offices
105 S. Highland Avenue
Jackson, TN 38301
and
209 E. Main Street
Jackson, TN 38301
P 731.423.2414

Memphis Office
Raymond James Tower
50 N. Front Street, Ste. 610
Memphis, TN 38103
P 901.333.8101

MALPRACTICE ATTORNEYS

Thomas H. Rainey
Jerry D. Kizer, Jr.
Marty R. Phillips
Timothy G. Wehner
Patrick W. Rogers
Michelle Greenway Sellers
Amanda C. Waddell
Craig P. Sanders
Ashley D. Cleek
John O. Alexander, IV
J. Caleb Meriwether

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MEDICAL MALPRACTICE NEWSLETTER

Spring 2013 Issue

"Doctoring" Patient Records: Resist the Temptation

Upon hearing of a bad outcome, receiving notice of a potential malpractice claim or, even worse, being served with a lawsuit, the first thing that many physicians do is conduct a tedious review of the patient's chart. While doing so, the physician may recall additional conversations, instructions, or other information pertinent to the patient's care and treatment that somehow did not find its way into the medical record. In such cases, it may be tempting to simply make some quick notations in the chart in an effort to bolster one's defense. To those who choose to do so, however, a word of advice: Beware.

While it is not improper to add a late entry progress note that is clearly documented as such, altering a patient's records after the fact can have serious consequences in the context of a lawsuit. First, it may void the provider's insurance coverage depending upon the language in the policy. Moreover, the liability cap on non-economic damages, which applies to actions that accrued on or after October 1, 2011, is removed "if the defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue." See Tenn. Code Ann. § 29-39-102(h)(2).

Not only is there no limit to the amount of non-economic damages that can be awarded in such a scenario, but also a defendant who is proven to have engaged in such conduct may subject himself or herself to a claim of fraud and possibly punitive damages as well. The Tennessee Civil Justice Act, which recently codified prior appellate case law, provides that punitive damages may be awarded in cases where the claimant proves by clear and convincing evidence that the defendant acted maliciously, intentionally, fraudulently, or recklessly. See Tenn. Code Ann. § 29-39-104. Certainly, one could at least argue that falsification of patient records falls into this category of conduct.

In addition to increasing the type and amount of damages that may be awarded in a lawsuit, a physician who chooses to alter or falsify patient records after a poor outcome should also consider the impact that such conduct, if discovered, will have on his or her credibility as a witness. In virtually all medical malpractice cases, both the plaintiff and defendant will call expert witnesses to testify regarding the pertinent issues in the case (standard of care, causation, etc.). While the experts may have impeccable credentials and make outstanding witnesses, their credibility is always questioned due to the fact that they are paid for their time and efforts in the case. Consequently, the defendant physician may be the only non-paid expert from whom the judge and jury hear testimony. If the plaintiff is able to demonstrate that the defendant altered medical records in an effort to avoid liability, then it may severely impugn the doctor's credibility and cause the jury to discount or even disregard his or her testimony on key issues such as what the standard of care required, whether he or she complied with such standard, and whether the patient suffered any harm that would not otherwise have occurred from the alleged negligence.

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Lastly, physicians should also be aware that alteration or falsification of a patient's records may prompt action by the Tennessee Board of Medical Examiners. See Tenn. Code Ann. section 63-6-214(b)(1) (providing that the Board may take action against a physician's license for unprofessional, dishonorable, or unethical conduct). Physicians should bear in mind that any additions or alterations made to a patient's chart after a request for records is received will be looked upon with great suspicion, even if the new information is entirely accurate and conspicuously identified as a late entry. In many instances, it may be much easier to explain during a deposition (or from the witness stand) why certain information was left out than it is to explain why information was only added or changed after the medical provider was alerted to the possibility of litigation. The best practice is, of course, to chart thoroughly and accurately at the time of treatment, negating the need for any "late entries." The practice to avoid is charting late without any indication that or trying to make it appear as though late entries were not in fact late. Incomplete charting can often be explained; attempted deception cannot.

Many hospitals and large medical groups have a practice of placing a patient's medical chart under "lock and key" with a risk manager or other administrator upon receiving notice of a potential malpractice claim. Even before receiving notice of a potential claim, however, physicians should ensure that their offices have a procedure in place for responding to requests for records from patients and/or their attorneys. It is important to document the date on which such a request is received, the date the records are sent out, and specifically which portions of the chart are included (this may be accomplished by sending a cover letter on the provider's letterhead specifically listing for the requesting party what is being sent pursuant to the request).

MEDICAL MALPRACTICE NEWS AT RAINEY ▪ KIZER ▪ REVIERE & BELL PLC

We are pleased to announce that **Amanda C. Waddell**, a member of the firm's medical malpractice group, and her husband, Alex, recently celebrated the birth of their first child, Miriam Elizabeth Waddell. Miriam was born on April 22, 2013 and weighed 8 lbs. 13 oz. Congratulations to Amanda and Alex!