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MEDICAL MALPRACTICE NEWSLETTER

Fall 2016 Issue

Getting Back to the Basics: "Bedside Manner"

According to data recorded by the National Practitioner Data Bank, nearly \$4 billion was spent in the United States on medical malpractice payouts in 2015. The national rate of medical malpractice payouts has increased in recent years and in Tennessee, the costs of medical liability remains high. In 2014, malpractice claimants were paid damages totaling over \$100 million, according to Tennessee's 2015 Health Care Liability Claims Report. As of December 31, 2014, 3,495 malpractice claims remained pending in Tennessee; and according to the Annual Report of the Tennessee Judiciary, about 375 malpractice claims were newly filed in fiscal year 2013-2014. Another 356 malpractice claims were filed in fiscal year 2014-2015, and a single malpractice case tried this year in Shelby County, Tennessee resulted in an award of \$30 million to the plaintiff.

In recent years, Tennessee has taken some aggressive and proactive steps to combat the astronomical costs of medical liability with tort reforms intended to facilitate early resolution of malpractice claims and to weed out frivolous lawsuits. In 2008, the Tennessee General Assembly enacted T.C.A. § 29-26-121, which requires claimants to provide healthcare providers with presuit notice of potential malpractice actions, and T.C.A. § 29-26-122, which requires claimants to file with the trial court a separate pleading along with a complaint for malpractice certifying that a qualified expert has reviewed the records and believes there is a good faith basis to file suit. In 2011, Tennessee also enacted legislation capping recoverable non-economic damages in tort actions at \$750,000, with a maximum cap of \$1,000,000 for catastrophic claims or those involving minor survivors. These statutory reforms are a step in the right direction and have resulted in fewer malpractice claims filed in this State. But the progress needs to continue.

One way physicians, nurse practitioners, physician assistants, and dentists alike can continue to decrease malpractice risk is by continuing to exercise and improve upon good "bedside manner." In fact, decades of research has shown that malpractice risk is related in large part to factors such as patient satisfaction with interpersonal communications. A sampling of the reported studies illustrates the point:

- In a 1992 article published in *JAMA*, investigators reported on a survey of 127 families involved in obstetric cases regarding what prompted them to file malpractice claims and found in part that many of these families expressed dissatisfaction with physician-patient communication (e.g., physician would not listen or would not talk openly). Hickson, Gerald B., M.D. et al. Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries. *JAMA*. 1992; 267(10): 1359-1363.
- In a 1994 article published in *The Lancet*, investigators reported on a survey of 227 patients and relatives who were taking legal action through five law firms and concluded in part that the decision to take legal action was determined not only by the alleged injury but also by insensitive handling and poor communication after the incident. C. Vincent, Ph.D. et al. Why do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action. *The Lancet* 1994; 343(8913): 1609-1613.

(Continued on Page 2)



MEDICAL MALPRACTICE NEWSLETTER

Fall 2016 Issue

(Continued)

- In a 1997 article published in *JAMA*, investigators reported on a comparison of the communication behaviors of "claims" versus "no-claims" physicians and found that "no-claims" primary care physicians tended to educate patients more, solicited patient opinions more, encouraged patients to talk more, and spent longer in routine visits, among other things. Levinson, Wendy M.D. et al. Physician-Patient Communication: The Relationship with Malpractice Claims Among Primary Care Physicians and Surgeons. *JAMA*. 1997; 277(7): 553-559.
- In a 2002 article published in *JAMA*, researchers engaged in a study of 645 general and specialist physicians to examine the association between physicians' patient complaint records and their risk management experiences and found in part that risk "seems not to be predicted by patient characteristics, illness complexity, or even physicians' technical skills. Instead, risk appears related to patients' dissatisfaction with their physicians' ability to establish rapport, provide access, administer care and treatment consistent with expectations, and communicate effectively." Hickson, Gerald B., M.D. et al. Patient Complaints and Malpractice Risk. *JAMA*. 2002; 287(22): 2951-2957.
- In a 2005 article published in *The American Journal of Medicine*, investigators examined 353 physicians at a large US teaching hospital and concluded in part that those physicians with the lowest patient-satisfaction ratings had malpractice lawsuit rates that were 110% higher than those physicians with the top satisfaction survey ratings. Stelfox, Henry Thomas, M.D. Ph.D et al. The Relation of Patient Satisfaction with Complaints Against Physicians and Malpractice Lawsuits. *Am. J. Med.* 2005; 118(10): 1126-1133.
- In a 2007 article published in *JAMA*, researchers reported on a study of 3,424 physicians who took a clinical-skills examination between 1993 and 1996 and who were followed until 2005 and found that scores in patient-physician communication were strongly correlated with the number and risk of patient complaints; the physicians in the bottom communication score quartile had a significantly greater risk of patient complaints as compared to physicians in the top communication score quartile. Tamblyn, Robyn, Ph.D. et al. Physician Scores on a National Clinical Skills Examination as Predictors of Complaints to Medical Regulatory Authorities. *JAMA*. 2007; 298(9): 993-1001.

The foregoing data and research indicates that while poor "bedside manner" can generate enough patient dissatisfaction to provoke a malpractice claim even when a provider has done nothing technically wrong, good "bedside manner" can increase levels of patient satisfaction, lower rates of complaints, and ultimately decrease the risk of malpractice claims. Therefore, as the recent tort reforms act to decrease the number of malpractice claims by facilitating early resolution and weeding out frivolous lawsuits, simply getting back to the basics in the practice of healthcare--some of those basics, according to the studies, being good listening skills, managing patient expectations, confirming patient understanding, communicating clearly, friendliness, eliciting patient input and opinions, being attentive to patient concerns, taking time and not acting rushed, and being accessible--will certainly payoff when it comes to further decreasing malpractice risk in Tennessee.



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Fall 2016 Issue

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Marty Phillips and Ashley Cleek successfully defended a local cardiologist in the Circuit Court of Madison County, Tennessee. The Plaintiff's 55 year-old decedent had passed away less than a month after being started on a common anti-arrhythmic medication that had been prescribed by another provider. The Plaintiff sued the cardiologist, alleging that he should have stopped the medication when the decedent began demonstrating signs and symptoms of pulmonary toxicity. The physician countered that the patient's problems were due to his pre-existing congestive heart failure, and that it was this condition that ultimately caused his death rather than lung toxicity from the medication. In addition to the cardiologist and his co-defendants, the jury heard testimony from several treating physicians, two cardiology experts, a pharmacologist, and a forensic pathologist. After a trial that lasted almost two weeks, the jury deliberated for less than 30 minutes before returning a defense verdict.



Marty Phillips, Tim Wehner, and Brandon Stout successfully defended an orthopedic surgeon and her employer before the Tennessee Court of Appeals, Western Section. The case involved a patient who suffered a crush injury to her shoulder in an all-terrain vehicle accident. The Plaintiff alleged that she received negligent treatment in the emergency room and that the treatment resulted in the development of cellulitis. To support her claim, the Plaintiff disclosed one medical expert, an orthopedic surgeon from Atlanta, Georgia. Following the expert's deposition, the defendants moved for summary judgment, arguing that the expert's testimony was insufficient to demonstrate that the defendant deviated from the standard of care or that the Plaintiff suffered an injury which would not otherwise have occurred. The trial court granted the motion and dismissed the case. The Court of Appeals affirmed.



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