Top Risks of Office Practice
Arlene Luu, RN, JD, CPHRM

Today's Program
Oklahoma Osteopathic Association, August 15, 2015

Today's speaker is Arlene Luu, RN, BSN, JD, CPHRM, Senior Patient Safety & Risk Consultant, MedPro Group (Arlene.Luu@medpro.com)

Arlene provides comprehensive risk management services to policyholders in MedPro Group's Western Division. She has more than 20 years of experience as a registered nurse and has worked as a defense attorney representing doctors, nursing homes, nurses, and other healthcare providers in medical malpractice cases.

Arlene's experience in risk management and patient safety includes working in the hospital setting and providing risk consulting services to physicians in all specialties, dental providers, medical groups, and healthcare facilities. She has presented and published information on various patient safety topics, and she has provided risk management guidance and support related to healthcare law, quality improvement, and risk exposure.

Arlene earned her bachelor of science degree in nursing from San Diego State University, a certificate in public health nursing for the state of California, and her juris doctorate degree from California Western School of Law. She is a licensed attorney in California and a certified professional in healthcare risk management (CPHRM).
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Agenda

- Name the top medical practice risks
- Review of case studies involving the top risk issues
- Identify strategies to decrease risks that may lead to malpractice lawsuits
Why Patients Sue

• Dissatisfaction with care
• Lack of communication and rapport
• Feel they have been wronged
• Unrealistic expectations
• Anger

Why Patients Sue (continued)

(Hickson et al. Florida study of 127 claimants)

• 1/3 were advised to sue by someone outside the immediate family (usually a medical person)
• 1/5 to find out what really happened
• 1/5 because suspected a cover up
• 1/5 so this wouldn’t do this to anyone else
• 1/15 monetary gain
Top Risks of Office Practice

1. Communication
2. Communication after an adverse event
3. Documentation
4. Follow-up on tests and referrals
5. Follow-up on patients
6. HIPAA

Top Ten Specialty Practice Claims

<table>
<thead>
<tr>
<th>Specialty Practice</th>
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<tbody>
<tr>
<td>Internal Medicine</td>
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<tr>
<td>Obstetrics/Gynecologic Surgery</td>
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<tr>
<td>General and Family Practice</td>
</tr>
<tr>
<td>General Surgery</td>
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<tr>
<td>Orthopedic Surgery</td>
</tr>
<tr>
<td>Radiology</td>
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<tr>
<td>Anesthesiology</td>
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<tr>
<td>Emergency Medicine</td>
</tr>
<tr>
<td>Cardiovascular/Thoracic Surgery</td>
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<tr>
<td>Plastic Surgery</td>
</tr>
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</table>
**Frequency: Top Five Claims**

<table>
<thead>
<tr>
<th>Allegations</th>
<th></th>
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<tbody>
<tr>
<td>1. Error in diagnosis – cancer, MI, appendicitis</td>
<td></td>
</tr>
<tr>
<td>2. No medical misadventure – abandonment, consent, communication, education</td>
<td></td>
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<tr>
<td>3. Improper performance – pregnancy, back disorder</td>
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<tr>
<td>4. Medication error</td>
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<tr>
<td>5. Failure to supervise or monitor a case</td>
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PIAA Report 2013

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**Specialties with Highest Paid Claims**

- Obstetrics and gynecologic surgery
  - Improper performance brain damaged infant $596,516
- Internal medicine
  - Error in diagnosis lung cancer and chest pain
- General surgery
  - Improper performance calculus of gallbladder, bile duct
- General and family practice
  - Error in diagnosis acute myocardial infarction $205,138
- Orthopedic surgery
  - Improper performance, osteoarthrosis $201,196
## Average Indemnity Payments

<table>
<thead>
<tr>
<th>Specialty</th>
<th>Amount</th>
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</thead>
<tbody>
<tr>
<td>Ob/gynecologic Surgery</td>
<td>$293,087</td>
</tr>
<tr>
<td>Neurology/Neurosurgery</td>
<td>$330,000</td>
</tr>
<tr>
<td>Cardiovascular disease</td>
<td>$264,941</td>
</tr>
<tr>
<td>Paraprofessional</td>
<td>$262,096</td>
</tr>
<tr>
<td>Internal medicine</td>
<td>$224,000</td>
</tr>
<tr>
<td>General Surgery</td>
<td>$198,026</td>
</tr>
<tr>
<td>Orthopedic surgery</td>
<td>$176,599</td>
</tr>
<tr>
<td>General and family practice</td>
<td>$173,000</td>
</tr>
<tr>
<td>Dermatology</td>
<td>$144,245</td>
</tr>
<tr>
<td>Plastic Surgery</td>
<td>$122,935</td>
</tr>
</tbody>
</table>

## Communication
Question

What do patients rate as most important when it comes to their physician or practice?

A. Whether the physician is board certified
B. Where the physician went to medical school
C. Rapport with physician
E. The physician’s years of experience in practice

Relating to the Patient

Perhaps the most powerful predictor of the likelihood of being sued is how well the doctor relates to patients. The more honest and empathetic a doctor is, the lower the likelihood of suit.

(Kaplan et al. studied general internists and family physicians as part of the Medical Outcomes Study (data from 1986))
Communication Breakdowns

- Provider to provider
  - Regarding patient’s condition
  - Failure to review the medical record
- Provider to patient
  - Inadequate informed consent
  - Poor rapport (unsympathetic responses)
  - Language barrier/limited communication
  - Inadequate discharge/follow up instructions
  - Education regarding risks of medications

Communication Barriers

- Patient anxiety
- Illness or change in health status
- Literacy
- Culture
- Multiple questions/instructions from physician
- Too much information at one time
Communicating with Patients

• Manage expectation and experience
• Show respect and concern
• Encourage collaboration
• Document conversations, understanding and education

Communicating with Patients (continued)

• Open and relaxed body language
• Sit down
• Explain and educate
• Empathize and validate the patient’s feelings
• Listen attentively
Communicating with Patients (continued)

- Stick to one topic at a time
- Simplify and write down your instructions
- Frequently summarize the most important points
- Give the patient a chance to ask questions

Patients Are Our Work

- Not an interruption to our work
- Personal attention is still a desired commodity
- Deserve our compassion and understanding
- May still be annoying
Question

• What percentage of medical malpractice claims involve some form of communication failure?

A. 25%
B. 40%
C. 60%
D. 75%

Communication Failures

A review of reports reveals that communication failures were implicated at the root of over 70 percent of sentinel events
Risk Reduction Strategy

Patient complaints are an opportunity:

• To evaluate your care
• Your communication skills
• Intervene before a claim is filed

Patient Complaint Management

• Listen
• Gather information
• Express empathy: “This must have been frustrating.”
• Explain actions that you will take
• Set date/time to get back to person
• Return call/send letter
• Document process
**Teamwork**

All team members participate in the collection and handoff of various “elements” of communication:

- Interactions with patients about their tests/consults/results/reports
- Interactions with labs, pharmacies, and nursing staff
- Doctors’ instructions for patients
- Doctors’ messages to/from other providers

**Staff’s Role in Partnering with Patients**

- Answers questions as necessary, within scope
- Share with physician all complaints/concerns expressed by patient
- Seek clarification from physician when orders are unclear
- Include family members in conversations where appropriate
- Refer clinical concerns back to the physician
- Encourage sharing of concerns
Case Study

• A 74-year-old male was advised, during a hospital stay, to see a pulmonologist for a specific opacity in his right upper lobe suspicious for carcinoma seen on a CT scan.

• The patient was seen shortly thereafter by his PCP, who made a referral to a pulmonologist. The PCP saw the patient for regular visits for the next four years, but was not aware of the pulmonologist’s recommendation for additional follow up regarding the lung concern. At age 78, the patient was diagnosed with stage IV lung cancer and died three months later.

Source: rmf.harvard.edu/Clinician-Resources/Case-Study/2014/Safer-Care-Unreconciled-Specialist-Opinion

Risk Issues

• Communication between pulmonologist and PCP

• Inadequate system for closed loop communication referral
  • 1) patients are referred to specialists in a consistent manner, 2) outstanding visits are followed up, and 3) reports are brought to the attention of the patient and the care team

• Communicate between the PCP and patient
  • Clinical reasons for referrals and their urgency
  • When all parties are involved in the transactions they reduce the opportunities for patients (or reports) to fall through the cracks

• Documentation of follow up
Decrease Communication Risks

- Consider health literacy
- Be aware of cultural issues
  - Translator may be needed
- Use teaching tools
  - Teach back
  - Ask Me 3
  - Models
- Document
  - What was given
  - Understanding

Visit Summary Form

VISIT SUMMARY
Key points we discussed today:
Your blood pressure is 150/90.
Your goal is less than 130/85.
Diet and exercise are key to controlling your hypertension.

New medications:
benazepril (Lotensin) 10 mg - one tablet per day

Instructions:
Take your new pill when you first get up in the morning.
Walk around the block every morning.
Walk around the block every afternoon.
Cut back on salt and alcohol.
Come back for a follow-up visit in 2 weeks.

Call our office if symptoms worsen or if you have any questions.

John Smith, MD 9 / 6 / 06
Physician

9 / 6 / 06
**Ask Me 3 Form**

1. What is my main problem?
2. What do I need to do?
3. Why is it important for me to do this?

Asking these questions can help me:
- Take care of my health
- Prepare for medical tests
- Take my medicines the right way

- I don’t need to feel rushed or embarrassed if I don’t understand something. I can ask my doctor again.
- When I Ask 3, I am prepared. I know what to do for my health.

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**Communicating Adverse Events**
AMA Ethical Opinion

“...the physician is ethically required to inform the patient of all facts necessary to ensure understanding of what has occurred.”

AMA Ethical Opinion 8.12 — Patient Information

“Liability concerns should NOT impede disclosure.”

Learn when it’s safe for doctors to say they’re sorry. American Medical News (2013, May 20)

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Barriers to Disclosure

<table>
<thead>
<tr>
<th>Barrier</th>
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<tbody>
<tr>
<td>Fear of malpractice litigation</td>
<td>77%</td>
</tr>
<tr>
<td>Staff opposition</td>
<td>52%</td>
</tr>
<tr>
<td>Concerns about scaring patients</td>
<td>26%</td>
</tr>
<tr>
<td>Separate malpractice insurers</td>
<td>21%</td>
</tr>
<tr>
<td>Concerns about cost</td>
<td>9%</td>
</tr>
</tbody>
</table>

Hospital disclosure practices: Results of a National Survey. Health Affairs (2003, Mar/Apr)
What to Address

1. Explicit statement that an error occurred (in a medical error situation)
2. What the error was and the clinical implications
3. Why the error happened
4. How recurrences will be prevented
5. An apology...Not acceptance of liability

Communication Checklist

When?
- As soon as practical following the event
- As soon as basic facts are known

Where?
- In a quiet room with limited interruptions
Communication Checklist

**What?**
- Simple, concise facts, in layman's terms
- Avoid speculations
- Do not point fingers
- Do not avoid the patient/family in hopes of avoiding questions
- Commit to further meetings with the patient/family

**Apology**
- **Unanticipated outcome:** “I am sorry. I did not expect this to happen.”
- **Medical error:** “I am sorry that this has happened.”
- It is okay to say “I am sorry.”
Disclosure Language

Positive

• “First, I want to say how sorry we are that this has happened.”
• “It appears you were given too much medicine, which caused your blood pressure to drop.”
• “I appreciate you coming in to allow us the opportunity to discuss what occurred, and for me to be able to answer any questions you have.”
• “One of the reasons you may have become so ill was because you received more than the recommended dose ordered.”

Negative

• “I know exactly how you must be feeling right now.”
• “Of course, if you took better care of yourself…”
• “Try and pull yourself together.”
• “Perhaps this is a blessing in disguise.”
• “It’s all my fault.”
When Disclosing, Remember . . .

- Practice what to say and use a communication checklist to prepare yourself
- Consult your insurance carrier and risk manager
- Offer support counseling to involved staff
- Be prepared for anger
- Anticipate questions

Documentation

- Clinical documentation is completed as soon as possible after the error or unanticipated outcome and includes:
  - Date and time
  - Objective statement of the facts of the event
  - Care or treatment implemented
  - Outcome
Question

Which of the following information should be included in the medical record?

A. Statement that the patient is noncompliant and attention seeking
B. Communications with other clinicians regarding patient care
C. Criticism of another provider’s care
Purpose of Documentation

- Provides evidence of care
- For billing and reimbursements
- To communicate with other providers
- Promotes continuity of care

Documentation

- Document objectively, completely and timely
- Do not point fingers at other staff or providers
- Do not impeach integrity of medical record by altering the record
- Use only approved abbreviations
- Use EMR appropriately
  - Templates
  - Cut and paste
  - Cookie cutter
To Document or Not Document

• Missing documentation is the most common obstacle for building a defense for acceptable care
• What would be easier to defend?
  • Dr. Smith tells the jury that she advised the patient to see a specialist for a biopsy and the patient swears this never happened
  • Documentation in the record by Dr. Smith: “Warned Mr. Jones once again that he should have this skin lesion biopsied.”
• For EHR: defense attorneys warn that failure to review vital pieces of information exposes doctors to the potential for dangerous oversights of patient care

Common Documentation Issues

• Updated allergy status and medication lists
• Staff documentation
• After hours conversations
• Consent
• Follow up on no-shows
• Pattern of patient noncompliance
• Education provided
• Communication with other providers regarding care plan
Case Study: Documentation

• 39 y/o woman went to a thoracic surgeon after swallowing a dental crown
• Thorax CT confirmed the foreign object and a incidental finding of a 1cm x 6mm nodule in RUL; a 3 months follow up CT was recommended
• There is no documentation of any communication
• A bronchoscopy was performed, the dental cap was on the upper lobe bronchus. The surgeon and radiologist discussed the CT scan in OR
• The patient did not return to the surgeon for recommended follow-up. The surgeon did not contact the patient

source: ww.rmf.harvard.edu

Case Study: Documentation (continued)

• Three years later, a chest x-ray prompted by persistent shoulder pain showed a right apical mass, patient was diagnosed with lung cancer
• After two years of treatment, patient experienced metastatic disease and given a grim prognosis
• The radiologists recalled telling someone in the surgeon’s office about the incidental finding of a nodule, but did not know whom she spoke with
• The patient was mad at the surgeon for not returning two phone calls from her after the bronchoscopy
## Risk Issues

- No documentation of communication between the radiologists and surgeon
- No communication with the patient regarding the results
- No follow up after the patient failed to return to see the surgeon
- The patient was upset about the surgeon’s communication

## Referrals and Results
Question

A good system for ensuring laboratory test result are reviewed by the office is to set up a follow up appointment with the patient?

A. True
B. False

Lab Tests, Procedures and Referrals

- Evaluate current system for tracking tests ordered, and provider referrals
- Use paper or electronic log
- Review and initial all test results prior to filing
- Advise patient of abnormal test results
- Design plan for communicating normal and abnormal test results
**Lab, Procedure and Referrals** (continued)

- Ensure system accounts for all results from outside sources (paper or electronic)
- Re-evaluate practice procedures on a regular basis

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**Case Study: Follow-Up**

- Patient complained of severe headaches. He was experiencing a variety of personal issues.
- The physician referred him for an MRI. The test was done; results indicated patient had brain lesion. Report recommended immediate further testing
- The office did not get the results
Case Study: Follow-Up (continued)

- Patient came in eight months later complaining his headaches were worse.
- By this time it was too late. Caught early enough the lesion was operable.
- The patient assumed no news was good news.
- There was no reliable follow-up system.

Another Case

- Physician saw a patient for follow-up visit after lab results demonstrated elevated PSA.
- In reviewing record, physician noted PSA from last year was elevated. He noticed the report had been filed without his initials, so he probably did not see the report before it was filed.
- The patient’s treatment was delayed one year as a result of the report that was missed.
Patient Follow Up

Follow-Up on Missed Appointments

• Establish formal tracking system for missed appointments
• Follow-up with patient to reschedule
• Document missed appointment in patient record
• Document attempts to contact the patient
• Send letter to patients who repeatedly miss appointments
Follow-Up on Missed Appointments (continued)

- Explain importance of follow-up care
- Consider termination of patient, if necessary
- Follow termination process:
  - Do not assume patient has terminated first
  - Consider care needs
  - Give proper notice
  - Send termination letter

HIPAA
Staff slipups on patient privacy can get doctors sued

Medical offices must train employees adequately about confidentiality rules to avoid legal risks, experts say.

By ALICIA GALLEGOS — Posted April 22, 2013.

Should a medical clinic be liable for the intentional disclosure of private health information by a staff member? The New York Court of Appeals will weigh this question in *Doe v. Guthrie Clinic*, a case in which a nurse texted a relative about a patient’s sexually transmitted disease.

Legal experts say the case is a reminder to physician practices and medical offices to educate employees properly about privacy regulations and ensure that they know the consequences of such breaches.

HIPAA Violations

- Unauthorized release of protected health information (PHI)
- Lost or stolen PHI: laptops, drives
- Violations of EMR
- Failure to train staff
- Failure to follow federal/state requirements
  - Notice of Privacy practices and acknowledgement
  - Training of staff
  - Breach notification
Question

Mr. Johnson comes to the office and requests to review his wife’s medical records. What should you do?

a. Let him see it
b. Delay him by saying there is nothing in there of interest
c. Tell him “no” and explain that the chart belongs to his wife
d. Refer him to the privacy personnel

And HIPAA More News...

A licensed practical nurse pled guilty to disclosing a patient’s health information for personal gain faces a maximum penalty of 10 years imprisonment, a $250,000 fine or both.

Andrea Smith, 25, of Trumann, Arkansas, and her husband, Justin Smith, were indicted on charges of conspiracy to violate and violations of the Health Insurance Portability and Accountability Act (HIPAA). Smith worked at a multispecialty clinic in Jonesboro, Arkansas.

Smith accessed a patient’s private medical information. She then shared that information with her husband, who on that same day, called the patient. J. Smith reportedly told the patient he intended to use the information against the patient in an upcoming legal proceeding.

Northeast Arkansas Clinic has terminated Smith’s employment. The Arkansas Board of Nursing has opened a complaint and is gathering information.
### Patient Rights

- Notice of privacy practices
- Privacy protection
- Confidential communication
- Access to information
- Personal privacy
  - Exam rooms
  - Waiting room
  - Nursing station
  - Hallways

### Disclosure of PHI

- Disclosure permitted without consent
  - Treatment
  - Payment
  - Operations
- Consent also not required for
  - Abuse
  - Coroner
  - Public health
  - Valid warrant
**Risk areas**

- Improper internet use
- Disclosing protected health information
- Loss of portable media such as PDA, laptops
- Mistakes
- Curiosity

**HIPAA Basics**

- Protect all PHI from those who should not have access to it
  - staff, patients, guests, any unauthorized person, even a family member
- Position computer screens away from public view
- Have written privacy and security policies
- Automatic log outs on computers
- Keep private conversations PRIVATE
HIPAA Basics (continued)

- Get patients’ preference for office to patient contact including authorization to give messages with people who answer the phone
- Remind one another about the need to terminate a conversation and resume in a private area
- Develop and have all team members sign a privacy statement acknowledging that failure to abide could result in termination

Social Media Risks

- Breach in identifiable patient information
- Breach in professional boundaries
- Public domain
- May tarnishing the practice’s reputation
- Can become a permanent record
AMA: Professionalism and Social Media

- Be cognizant of standards of patient privacy and confidentiality
- Use privacy settings to safeguard personal information and content
- If interacting with patients on the internet, maintain boundaries in accordance with professional guidelines
- Consider separating professional and personal content online
- If you see unprofessional content posted by a colleague, you have a responsibility to bring it to his/her attention
- Postings may negatively affect your reputation

ARRA Breach Notification

Implements the Health Information Technology for Economic and Clinical Health (HITECH) Act

- CEs must provide notice of breach
  - In writing by first-class mail or email (if individual agrees)
- Notifications without unreasonable delay
  - No later than 60 days following discovery
- Notify the Secretary at the HHS web site
  - Annually for less than 500 residents affected
- BAs must notify CEs of breach and identify individuals

(HITECH section 13402)
**Question**

A lab employee wants to ask a patient out on date. The employee looks up the patient’s number in the electronic medical record and calls the patient.

Is this a privacy breach?

**Question**

Dr. Hannah a consulting physician calls to request some information regarding your patient, Mr. Edwards. Can you release information to her?

a. No, she needs to come in to be identified
b. Her request should be forwarded to the privacy personnel
c. No, she should be advised to first obtain a written authorization from the patient
d. After obtaining sufficient details to know it is Dr. Hannah, you can share the requested information
Protecting Patients PHI

- Take all reasonable steps to ensure only individuals with the “need to know” have access to PHI
- If patient posts negative information, resist the urge to respond
- Provide continual staff education
- Keep volume down
- Get consent for email communication

Implications

- Civil liability
- Licensing investigation
- Centers for Medicare and Medicaid (CMS)
  - Office of Civil Rights (OCR)
    - HIPAA Privacy and Security
    - Failure to follow breach protocol
- State Attorney General’s Office
  - HIPAA complaints
  - State rules and regulations
  - Consumer complaints
- Federal Trade Commission
  - Red Flag Rules
  - Advertising/marketing
Consent

Communicating Consent

• A process not just a signature
• Non-delegable duty
• Discuss risks and benefits, alternatives and risks of refusal of proposed procedure
• If affects the quality or length of patient’s life, get informed refusal
• Document discussion
A Well-Designed Informed Consent Process

- Description of procedure.
- Indications for the proposed treatment.
- Risks and benefits.
- Alternatives, including risks and benefits.
- Consequences of refusing treatment.

Physician’s Role in Informed Consent

- “It is a process of communication between a patient and physician that results...”
- “In the communications process, you, as the physician providing or performing the treatment and/or procedure (not a delegated representative), should disclose and discuss with your patient...”
Staff’s Role in Informed Consent

- Identify patient concerns and ensure that they are addressed by the physician
- Document and report:
  - Any/all questions, concerns, or requests for updates
  - Any/all signs of non-compliance
  - Any/all indications of dissatisfaction
- Keep patients informed about the current status of their treatment plans

Staff’s Role in Informed Consent

- Assist with supplying patient education provided that:
  - Staff training has taken place and has been documented
  - Education does not involve any component of patient decision-making – that educational discussion is the sole duty of the physician
### Cases of Informed Consent Error

- Staff failed to initiate process that would obtain informed consent for pediatric orthopedic surgery. Child sustained nerve damage. Permanent limp. Lawsuit against surgeon was settled before trial.

- Ophthalmologist promised patient self-adjusting lens. Written in consent. Staff discovered that lens was not available in the patient’s size; substituted non-regulating lens, without telling surgeon. Patient sued. Settled before trial.

### More Cases of Informed Consent Error

- Informed consent was in patient’s record but it was a consent for a completely different procedure. Patient had a complication that had not been listed on the incorrect form. Patient given full refund.

- Informed consent was in patient’s chart but had never been signed. Staffer forged patient’s signature. Patient already had a copy of form. Doctor was sued.
Effective Consent Crucial

“There are two things that you never want to hear from a patient:"
  • “Had I known this would occur I would not have chosen to do this.”
  • “I wish that I had known about ‘plan B.’”

James Gottesman, MD, practicing urologist (Seattle, WA), founder of Dialog Medical, and a Medical Protective Insured for 14 years.

Strategies for a Successful Practice

• Careful informed consent
• Objective documentation
• Good communication techniques
• Follow-up procedures for test results, missed appointments, and no-shows
• Manage patient expectations
• Comply with HIPAA
What questions do you have?

Thank You!