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Ophthalmic Risk Management Digest
OMIC DIGEST

The Risks and Benefits of Malpractice Litigation

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The risks associated with a medical malpractice lawsuit are well known to most ophthalmologists. Not only is there the financial risk of a large monetary award to the plaintiff, but also the threat to the ophthalmologist's professional reputation. Additionally, a malpractice lawsuit can be a very demoralizing event. As observed by OMIC insured Gerhard W. Cibis, MD, "No amount of risk management articles or seminars can prepare a physician for the emotional devastation of being sued."[1] Regardless of whether they win or lose the lawsuit, physicians who are sued are at risk for severe emotional distress. The serious psychological effects of malpractice litigation have been addressed by psychiatrist Sara C. Charles, MD,[2] and best selling author Atul Gawande, MD.[3]

Given what is often a personally and professionally devastating event, it may be hard to believe that anything positive could emerge from malpractice litigation; however, the experiences of ophthalmologists who are sued can teach us valuable risk management lessons and may even help bolster the morale of others who are themselves in the middle of a claim or lawsuit.

In 1995, the OMIC Board of Directors requested that a closed claim questionnaire be sent to any insured involved in a claim at its conclusion. The Board's interest in surveying insureds was twofold. Directors wanted feedback from insureds regarding the performance of staff and defense counsel assigned to their case. This was important to ensure that OMIC was providing an efficient and supportive claims service. They also wanted to follow up with insureds regarding risk management issues that were brought to their attention during the course of the claim as well as loss prevention steps taken by these insureds to reduce the likelihood of future claims. They believed this information could benefit all insureds and help reduce overall frequency and severity of ophthalmic claims.

Over the past 15 years, OMIC's Claims Department has compiled responses from 1,241 questionnaires completed by insureds who have thoughtfully focused on ways to avoid future claims and frequently pointed out how they prevailed in their litigation because of good risk management practices they

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MESSAGE FROM THE CHAIRMAN

It is both an honor and a pleasure to follow Richard L. Abbott, MD, as your Chairman. During his 19 years on the OMIC Board of Directors, the last three as chair, Dr. Abbott guided the organization to unprecedented growth and financial strength. He did so with patience, gentle persuasion, and an unwavering passion for quality patient care and safety. Working with a board he helped shape, and with the support of a stable and professional staff headed by CEO Timothy J. Padovese, Dr. Abbott moved the organization forward in many important areas. As a member and chair of the Underwriting Committee, he drafted revisions to OMIC's underwriting guidelines and introduced policy enhancements to improve coverage of refractive procedures, oculofacial plastic surgery, retinopathy of prematurity, and ambulatory surgical facilities. He authored and presented numerous studies demonstrating the correlation between risk management education and improved quality of care. He was instrumental in driving OMIC to become the recognized leader in ophthalmic risk management. Ophthalmologists and patients worldwide have benefited from

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had already implemented. The two areas of concern that are consistently cited by insureds are problems with documentation and informed consent.

Documentation Issues

Documentation issues manifest in claims in different ways, sometimes serving as a shield to protect and defend the physician and other times used as a sword by the plaintiff if critical documentation is found lacking. About the importance of documentation, one insured wrote on his questionnaire, "I am much more aware of the need for careful documentation of my communications with other physicians, optometrists, and others involved in the patient's care." Another said simply, "Documentation cannot be overstated."

One particular area of concern frequently cited by insureds is the importance of documenting telephone calls. In several cases, the only connection the insured had with a patient was one phone call from the hospital ER. A bad outcome for the patient and different accounts of what the ER physician and the ophthalmologist said, and documentation of the phone conversation became a critical factor in the insured's defense.

One approach to documenting after hours or out of office phone calls is to use OMIC's "Patient Care Phone Call Record Pad." This is a 3 x 6 inch pad of 25 perforated, lined forms that prompt the ophthalmologist to document relevant information, such as patient history, prescribed medications, and follow-up. These pads have been very popular with insureds for many years as they can be placed in various places where calls are taken after hours or while on call (e.g., at home or in the car). The form can later be placed in the patient's chart. Phone pads are available free to OMIC insureds upon request. Contact the Risk Management Department at (800) 562-6642, ext. 652.

OMIC has also developed a detailed guide to help ophthalmologists and their staff effectively screen, manage, and document patient calls. "Telephone Screening of Ophthalmic Problems: Sample Contact Forms and Screening Guidelines" may be found on the OMIC web site at www.omic.com.

Informed Consent

Approximately half of the claims brought against OMIC insureds are related to surgical procedures. Allegations include improper performance of surgery, improper management of a surgical patient, unnecessary surgery, and wrong eye/wrong powered lens. Every surgical procedure an ophthalmologist performs involves the informed consent process. Lack of informed consent is a frequent allegation that plaintiff lawyers include in any medical malpractice lawsuit.

Although OMIC emphasizes that informed consent is a process and not simply a matter of the patient signing a document, we have addressed the documentation component of the process by developing more than 60 procedure-specific informed consent documents. They can be found on our web site at http://www.omic.com/resources/risk_man/forms.cfm.

These documents are specific to the procedure being performed (e.g., cataract, retina, oculoplastic) and are meant to memorialize that the patient had a discussion with the ophthalmologist and understood the risks, benefits, and alternatives to this procedure. One insured commented, "I now use my own specific informed consent document for my chart regardless of what is required at the facility where I operate."

Insureds who have had claims know from experience that informed consent is further complicated because patients may have difficulty understanding the medical information and complex procedure they are consenting to. Plaintiff attorneys highlight this complexity and try to show that the physician did not take the time necessary to help the patient adequately understand the risks. Every ophthalmologist and practice faces this challenge and needs to address the consent process differently depending on the procedures performed, the communication skills of support staff assisting in the process, the patient population, and the availability of patient education materials.

Despite these differences, all insureds who have been sued agree that the experience makes them more focused on having meaningful discussions with patients and efficiently documenting the consent process.

"I now ask patients what they expect from planned surgery to see if they have realistic expectations."

"I am more open with patients about possible complications and have longer pre-op discussions."

Some ophthalmologists find that using a checklist helps them address specific issues with a particular patient (e.g., language barriers, use of herbal medicines) and document the process. This approach won't work in all practices or situations, but a checklist can take some of the complexity out of the informed consent process. A sample checklist, "Consent to Treatment Certification Document,"[4] is available on the OMIC web site at http://www.omic.com/resources/risk_man/recommend.cfm#obtaining.

The Defense Team

OMIC insureds who have been through litigation comment on the importance of becoming a team member with defense counsel and OMIC staff. Staff is integral to the defense team and is the first point of contact when insureds find out they are going to be sued. Each insured is assigned a litigation analyst, who manages the claim until it is resolved. The analyst explains the litigation process and makes sure the ophthalmologist is informed about each step in the process and able to participate fully in his or her own case.

"OMIC staff worked closely with me and my defense attorney. She kept me in the loop and kept my confidence up that we had a good team and defense."

The "quarterback" of the team is the defense attorney who is retained to represent the insured. OMIC appoints attorneys who have significant expertise in medical malpractice litigation, knowledge of ophthalmology, and proven effectiveness in jury trial cases. OMIC insureds prevail in almost 90% of the cases taken to trial and having an attorney who is skilled in trial tactics and strategy is fundamental to success in the courtroom.

"He was a very experienced attorney with excellent knowledge of the clinical issues involved in the case. He was always available and went out of his way to become informed and do the necessary 'leg-work' to offer our side every advantage at trial."

But no matter how exemplary the skills and experience of the attorney and OMIC staff, a successful defense requires the full participation of the ophthalmologist whose knowledge, insight, and experience are essential elements in preparing the defense's case. Litigation is often a long and tortuous process that can play out over many years. Understandably, attending depositions, reviewing documents, and meeting with defense counsel can be frustrating for busy physicians. However, OMIC insureds have learned that making the commitment to become an active member of the defense team is an important element in bringing about the best possible resolution to their case. Dr. Cibis advises insureds:

"Go over the facts of the case, especially the medical records, again and again. Each time you do, new angles and facets will appear. Do not begrudge the time you spend with your defense attorney. Do not cancel or cut short meetings with your attorney. Thoroughness in preparation comes to the fore during the deposition and especially during the trial."

Other Lessons Learned from Litigation

In addition to risk management issues, insureds who have been sued provide insights and perspectives on the overall litigation process. Over three-quarters of claims against OMIC insureds are dismissed without any payment to the patient. A large percentage of these claims have no legal merit and arguably should never have been filed. Consequently, many comments from insureds center on the arbitrary or unfair nature of the tort (justice) system in this country and its negative impact on practicing medicine.

"It is a travesty that this case proceeded as far as it did. What a splendid reason for tort reform."

"The patient would have sued regardless of any steps I, or anyone, could have taken."

Insureds who are sued because of unrealistic patient expectations report that the experience makes them better at identifying a patient's motives for surgery.

"I now listen more to my 'gut' and take this into consideration as far as patient selection."

"I try to be more aware of patients' personality and character."

Fatalistic and sometimes angry comments about a particular patient or patient population are not an uncommon reaction to feeling attacked both professionally and personally. The Physician Litigation Stress Resource Center says anger is a repercussion of litigation.

"Sued physicians, for example, often feel that the suit is not only unfair but totally unjustified. These feelings can translate into intense anger that can result either in outbursts toward others or simmering inward rage that can contribute to the development of guilty feelings and/or significant stress-related symptoms, such as headache, hypertension, coronary artery or gastrointestinal disturbances."[5]

Resources to deal with the anger and other difficult emotions that might arise during and after litigation may be found on the Physicians Legal Resource Center web site at http://www.physicianlitigationstress.org/index.html.

Fortunately, most OMIC insureds are able to work through their anger and their comments are particularly instructive for others who are facing or might face litigation in the future.

"I was able to get through this horrific ordeal relatively unscathed, but a bit stronger from my scars. The phone call I received informing me that my case had been dismissed ranks, in terms of emotional impact, just below that of my children being born."

"I had often thought I would not survive a lawsuit. I did. I am even more committed to my job as an ophthalmologist than before."

"I am humbled at the experience I have gone through during this four-year process. I am grateful (to OMIC) to have the representation that I had to help resolve the case prior to trial. I hope to be able to share my experience with others in the future so they understand that while frustrating, the process works."

"It was a very stressful experience but I am a wiser doctor for having gone through it."

There is an eloquence, poignancy, and hopefulness to these comments. The willingness of these insureds to share their sentiments about litigation and their insight into risk management is of benefit to all OMIC insureds. We owe them a debt of gratitude.

1. Cibis GW, MD. "How to Survive a Malpractice Lawsuit and Emerge Stronger." *OMIC Digest*, Fall 1993.

2. Charles SC, Frisch PR. "Adverse Events, Stress, and Litigation: A Physician's Guide." Oxford University Press, 2005.

3. Gawande A. "Complications: A Surgeon's Notes on an Imperfect Science." Picador, Henry Holt and Company, 2002.

4. Rozovsky FA. "Consent to Treatment: A Practical Guide," 4th Edition. Aspen Publishers, 2011 (with annual supplements).

5. Physicians Litigation Stress Resource Center, http://www.physicianlitigationstress.org/physician_support.html.