

Understanding the Anatomy of a Lawsuit

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The Doctors Company
TDCGROUP

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Senior Patient Safety Risk Manager

Kathleen Stillwell earned Master's Degrees in Public Administration and Health Services Administration. She is a registered nurse and Certified Professional Health Care Risk Manager (CPHRM). Ms. Stillwell is a nationally recognized expert in healthcare risk management with over 38 years of experience in clinical risk management, professional liability claims management, compliance, and high-risk underwriting. Her expertise includes hospitals, medical practices, and integrated healthcare organizations. She is a frequent speaker for conferences, and authors articles for TDC articles and health care publications.

Ms. Stillwell serves on Chapman University, Leadership Council for Crean College of Health and Behavioral Sciences in Irvine, CA. She also serves on the University of California Riverside Advisory Board for Women in Leadership Program. Kathleen is a member of Brandman University Nurse Advisory Board, and a volunteer coach for physicians and nurses for the California Medical Association Care 4 Caregivers program. She has served as faculty for the American Society for Healthcare Risk Management and is published in the American Hospital Society Risk Management Handbook for Healthcare Organizations.

Kathleen has held numerous leadership positions with national and state risk management and quality organizations, including past Board Member for the American Society for Quality (ASQ), Healthcare Division, President of the CA State Patient Care Assessment Council, Board member for the California League of Nursing, adjunct faculty for Woodbury University and the University of San Francisco. She served on the Advisory Board of King International, Inc., and is a Charter Member of the Business Renaissance Institute.



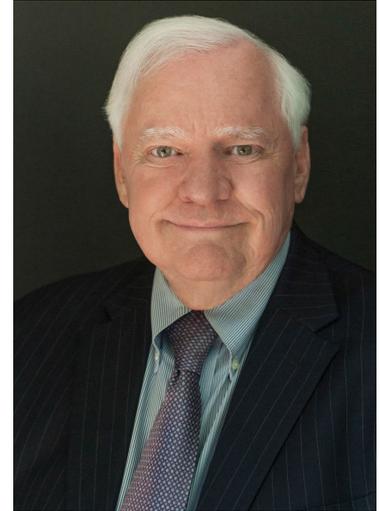
Richard Cahill, Esq.

Vice President and Associate General Counsel

Richard Cahill received his undergraduate degree (*summa cum laude*) from UCLA in 1975 and his Juris Doctorate from Notre Dame Law School in 1978. He served as a deputy district attorney in California at the outset of his career and was subsequently appointed as counsel on the Central Legal Staff of the Nevada Supreme Court before entering private practice in southern California.

Mr. Cahill has specialized in various facets of health care litigation for more than 40 years, including the defense of hospital and physician professional liability claims, managed care contract disputes, network privileges issues and related business torts. His principal clients included Cigna Health Plans, Kaiser-Permanente and Tenet HealthCare. He has completed in excess of 185 trials and binding arbitrations during his career with a combined win-rate of 92% and has been appointed as an arbitrator in more than 350 cases involving complex healthcare issues.

Mr. Cahill is currently Vice President and Associate General Counsel with The Doctors Company and provides legal support to the Claims and Patient Safety Departments, oversees company appellate litigation, researches and submits original content for publication and also lectures frequently around the country on topics related to the health care community. He has a preeminent rating with Martindale-Hubbell, the premiere peer-reviewed attorney rating service in the United States.



Objectives

After this CME activity, you will be able to:

- Explain the process of a medical malpractice legal action in California
- Identify what steps to take if I receive a legal communication naming me as a defendant
- Identify three areas of an office practice that I can focus on to decrease my malpractice liability potential

Ignorance of the law is no excuse.

Thomas Jefferson 1743-1826
Third President of the United States

A California Medical Negligence Action Begins Like This

**Do not ignore the mail:
90-day Notice
of Intent**

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Attorney for Patty Patient
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Santa Monica, CA 90402
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Pantsoff@gmail.com

April 4, 2025

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Dr. John ~~Doogood~~ M.D. / ~~Doogood~~ Family Practice
47392 Pacific Ave.
Los Angeles, CA 90201

Re: Notice of Intent to Initiate Legal Action for Medical Malpractice
Patient: Patty Patient
Date(s) of Treatment: December 16, 2024

Dear Dr. Doogood,

Pursuant to California Code of Civil Procedure § 364, this letter serves as formal notice of my intention to initiate a legal action against you for medical malpractice. This notice is being provided at least ninety (90) days prior to the filing of a legal complaint, as required by law.

This claim arises out of negligent medical care and treatment provided by you and/or your staff on or about [insert treatment dates] at [insert hospital or clinic name]. Specifically, the care provided fell below the accepted standard of practice and has resulted in significant injury, pain and suffering, and damages.

Please consider this letter as my good-faith effort to resolve this matter prior to litigation. If you or your

Notice of Intent to Sue- California Code of Civil Procedure §364

- Also called a “364 letter”
- Required to be sent before a medical negligence action is filed in California
- A 90-day notice to a defendant
 - Contains the legal basis of claim including the injuries suffered
- Don’t wait for more “official” paperwork to arrive
- Call your malpractice carrier right away
- A Notice of Intent tolls the statute of limitations (puts it on hold)

Statute of Limitations- California Code of Civil Procedure §340.5

The statute of limitations on a medical malpractice action in California is one year from the date the injury was discovered or should have been discovered but no more than three years from the date of the injury.

- Exception for minor patients:
 - A patient under the age of 18 has three years from the injury to bring a claim.
 - Except that, a patient under the age of 6 has until age 8, even if more than three years have passed since the injury.
- Even if you think the Statute of Limitations has passed on an issue that you've received a Notice of Intent for, you still need to call your malpractice insurance company right away.

Statute of Limitations- California Code of Civil Procedure §340.5

“...discovers, or through the use of reasonable diligence should have discovered, the injury...”

- Plaintiffs can, and often do, make factual allegations of delayed discovery to try to avoid statute of limitations.
- Physician cover-up of injury is grounds for relief from statute of limitations.
- Statute of limitations may be shorter in Government settings.

Tips on Dealing with Legal Matters

- Physicians often receive phone calls from attorneys just to “ask a few questions”
 - You are not obligated to speak to an attorney on the phone
 - If you receive a subpoena for a deposition or appearance, call your insurer
- The first sign that a patient may be seeking legal action is that they request a copy of their medical records
 - You must provide a patient with a full copy of their records within 15 days of their written request
 - Family members who want to obtain a copy of records for a deceased patient must meet certain criteria under HIPAA (involved in care, estate executor, personal representative, etc.)

Tips on Dealing with Legal Matters

- Have an affirmative process in place so YOU are alerted when records requested by patient/attorney.
- Recommend YOU review records before produced.
- What to do if the patient is still your patient



When a Patient Threatens to Sue, Remember:

A Malpractice Lawsuit needs 4 things:

Duty

- You had a duty to do something for the patient

Breach

- You did not do that thing or did it incorrectly or did it in a careless way

Causation

- Your breach caused the patient some type of harm

Damages

- The patient's harm can be measured in dollars

What Are “Damages”?

Damages are the injuries suffered as a result of the negligence.

Law recognizes two categories of damages:

- Economic Damages; and
 - (Not Capped by MICRA) Past incl. Medical Expenses, Lost Wages Future incl. Future Medical Expenses, Lost Earning Capacity
- Non-Economic Damages
 - (Capped by MICRA) Past, Present and Future Pain & Suffering Loss of Consortium/Companionship



But Let's Back-up a Bit

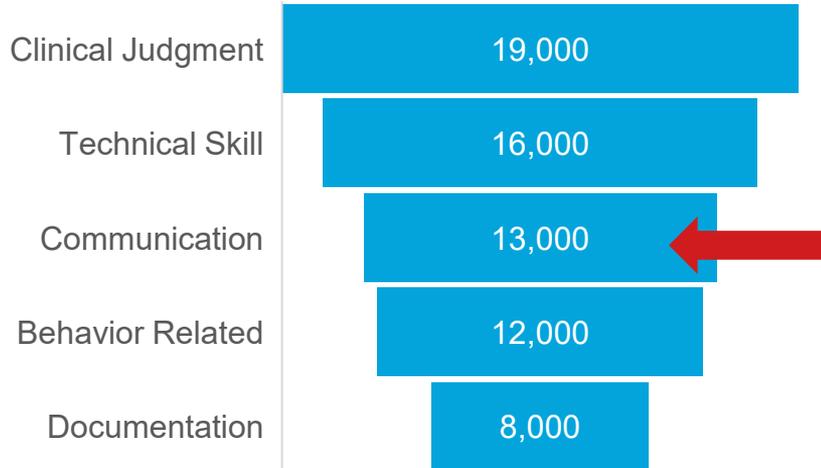
Reasons why patients file lawsuits...



Your relationship and communication with a patient is a factor in all these reasons!

Contributing Factors

The Doctors Company 20,000 Claims



Communication issues are third most common contributing factor

Communication:

- Between provider and patient or patient's family 20%
- Among providers 13%
- Electronic tools 2%
- Tele transmissions, virtual visits, other 2%

Top Risks in the Medical Office Practice



**Over thirty years
of medical office
risk assessments**



Documentation



**Lab and test
tracking**



**Medication
Management**



Informed Consent



**Appointment
Management**

Documentation

Documentation and Risk



- Medical malpractice claims can be won or lost based on the quality and content of the medical record.
- Poor documentation or a vague, incomplete, or altered record, can severely compromise your credibility.
- Since claims are often filed years after an event occurs, physicians may need to refresh their own recollection with the record.
- Expert witnesses will need to follow the care you gave and testify that it was appropriate.

Documentation

- Common insufficiencies include:
 - Gaps in “the story” or inability to follow a chain of events well
 - Differential diagnosis not documented
 - Lack of documentation on the outcome of a treatment, procedure or medication
 - Overuse of EHR “copy/paste” or auto-populate functions
 - Incomplete fields in medical record templates



When Should Something Be Documented

- Out of the ordinary situations
- Patient non-adherence to plan of care
- Failure to follow advice of a consult
- Consent discussions
- Patient has a preoccupation with something
- When responsibility/care is transferred
- Perplexing symptoms or outcomes



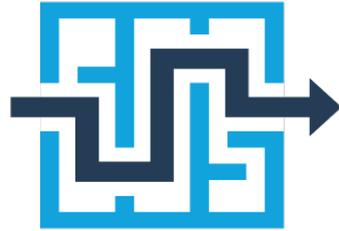
Case examples of poor documentation

- Documentation never/rarely perfect go to countless examples of where lost a case (inadequate identification of risks for informed consent/patient care instructions; late entry; etc.)
- Good Documentation – Exam Note before catastrophic spinal infection

Laboratory, Diagnostic Test and Consult Tracking

Why Tracking is Critical

**Referral made for consult
or order for test.**



Results received, reviewed,
filed, and communicated to
the patient. Follow-up
if necessary.

- Result tracking is one of most basic, yet critical functions of the medical office.
- 70% of patient diagnosis depends on lab results.
- Consequences of lost, delayed, or overlooked results can be devastating in some cases and quite difficult to defend.

Establish a System of Active Tracking

Do not have a system that:

- Relies only on alerts and reports sent to the physician's inbox.
- Postpones review of test or consult results until the patient's next visit.
- Lacks a master list of test/consults outside individual patient records.
- Relies too heavily on memc



Notifying Patients of Results

INSTEAD:

- Inform patients of ALL results. Tell them when and how they can expect to receive results:
- **Normal Results:** A phone call, letter, or patient portal.
- **Abnormal Results:** Depending on the severity or urgency, by a phone call or setting up in-person office visit.
- Define contingency steps when patient can't be reached by phone.
- Have a system for critical value reporting or urgent consult findings.

Notifying Patients of Results

NEVER say to a patient :



No news is good news. We only call you when something is wrong.

Encourage patients to always call if they have not heard back from the office or received results from a test or referral.

Missed lab test results, increased potential liability

- My first case as a lawyer involved missed sarcoidosis diagnosis; patient had to have lung transplant.
 - Skin lesions – pathology missed diagnosis from biopsy
 - Chest X-rays – early ones recommended follow-up monitoring; not done
- PSA/Colon Cancer follow-up

Informed Consent

Informed Consent is More than a Form

Document more than “r/b/a discussed”
Sign here....



Complete Disclosure of Risks

If risks are not discussed thoroughly, patients may feel betrayed or angry if a complication occurs

- Teach patients the difference between a known risk and medical error.
- Discuss common, serious risks even when the likelihood is relatively low.
 - If a complication occurs, the patient and family are less likely to view it as a result of medical error or negligence if they were warned about it ahead of time.
- Avoid exaggerated reassurances:
 - “Don't worry about a thing. I'm sure you won't have any problems.”
 - “I have to tell you of the risk of _____ but I've never seen that happen in 20 years of practice.”

Communication Techniques



Communication techniques to achieve a patient-centered informed consent:

- Consider the patient's culture, education, lifestyle, health literacy, and personal preferences
- Use lay terminology that the patient can easily understand
- Use visual aids, such as brochures, anatomical models, and videos
- **Ask the patient what he/she wants from the treatment (expectations)**
- Allow the patient to express concerns

Informed Consent is Not Just a Form: But the form is a useful tool!

- A well-drafted consent document is evidence that you try to give patients sufficient information to make their decisions.
- This document, supported by notes in the patient's medical record, is often the key to demonstrating proper consent.
- Be aware that consent forms given upon check-in to a facility are drafted for the facility's protection, not the physician's.



Legal Perspective

Patient specific risks

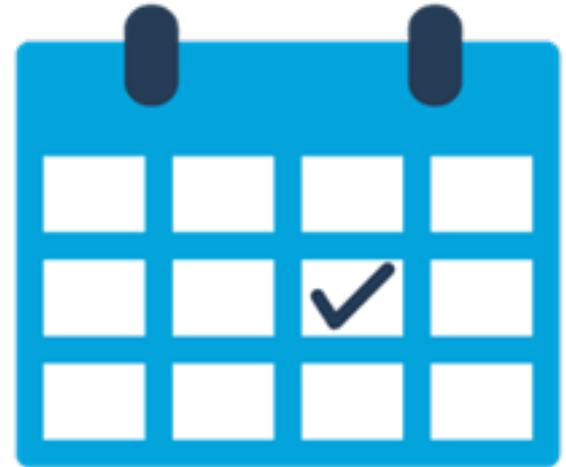
Pay special attention particular risks that a particular patient may be more likely to experience – discuss with patient and document discussion



Appointment Management

Appointment Management

- A good appointment management system will:
 - Decrease incidents of patients being “lost to follow-up”
 - Document attempts to reschedule patients in need of care
 - Provide a reminder to contact patient if previous attempt was unsuccessful
 - Explain in notes what conversations have taken place with the patient regarding no shows/missed visits



Appointment Management

No one should be relying on memory anymore.

- Electronic task reminders
- Automatic letter if phone attempts fail
- Physician review of no-show patients
- Automated process for preventative care tests and appointments (e.g. colonoscopy, annual exam)



Legal Perspective

Can't overestimate the importance of a **warm touch** with scheduling. You do not want patients to not show up because they did not want to answer/return a **cold call**.



Medication Management

Medications

- Medication management is always a challenge in office practices.
- Prescribing errors and drug interactions are often not caught until the record is scrutinized during litigation
 - Frequently found issues were:
 - Not updating medication list properly
 - Discontinued medications remain on list creating confusion
 - Lack of OTC medications or supplements noted in record
 - No check in with patient to assess whether medications are being taken correctly
 - Is patient still suffering from HTN or is patient not taking medication?



Establish a System



Ensure an accurate and current medication list

- **DO NOT ASK “Any new medications?”**
 - Instead:
 - Have patients bring all medications to the visit
 - Have patients review a list of their medications while they wait
 - Tell patients to keep a photo of their medication labels on their phone
- Prominently display an updated medication list in the medical record for all to view

CURES requirements for Controlled Substance prescribing

- To avoid contraindicated medications
- duplicative medications
- “doctor shopping”



Communication and Documentation are Key



...the best physician is the
most ingenious inspirer of
hope.

Samuel Coleridge
1772-1834
Poet, critic, philosopher

TDC Resources

7 Mistakes to Avoid If You Get Sued

Avoid the Common Pitfalls in Medical Documentation

What US Health Care Will Look Like in 2035: Key Takeaways from The Doctors Company

Risk Management Tips for What U.S. Healthcare Will Look Like in 2035

Telehealth Informed Consent

Resources for Practice Managers

Telehealth Clinical Documentation Strategies

Ambient Listening—Legal and Ethical Issues

Our Mission is to Advance, Protect, and
Reward the Practice of Good Medicine.

Best Practice: Office Manager Forum

Thank you!

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