# Medical-Legal Considerations & Important Topics in Litigation

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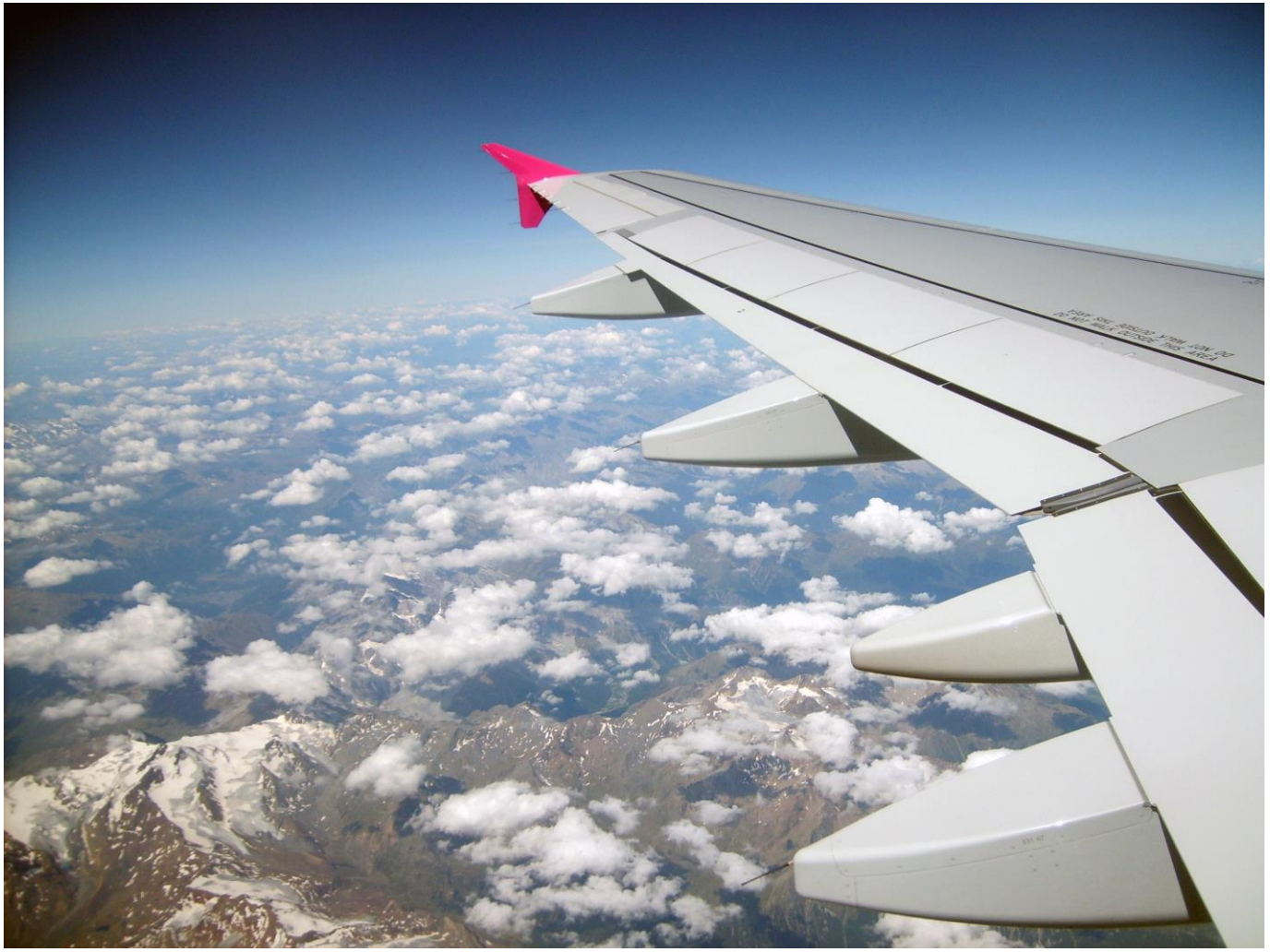
# A View from 30,000 feet



# Requirements for Filing

- Petition/Complaint.
- No Affidavit of Merit is required in Oklahoma.
- All tort reform regarding an Affidavit of Merit has been ruled unconstitutional because it is viewed as being included a “special statute" that is barred by the Oklahoma Constitution.
- The life of a lawsuit ranges typically anywhere from 1 1/2 years to 3 years in length.

# Statute of Limitations

- In a case of alleged medical malpractice resulting in a personal injury, the statute of limitations is 2 years from the date that the patient knew or should have known of the wrongfulness of their injury.
- In the case of the patient's death, it is a two-year statute of limitations from the date of death.
- In a case of alleged medical malpractice resulting in injury to a child, the statute of limitations does not run until the patient's 19th birthday.

# Life of a Lawsuit

- Filing of Pleadings.
- Written Discovery.
- Depositions of the Patient/Family and Treating Providers
- Expert Witness Depositions

# What Does Plaintiff Have to Prove?

- A *prima facie* case of medical malpractice requires:
  1. Duty of care owed by the physician/provider to the patient.
  2. A breach of the duty of care.
  3. Medical causation. (The breach of the duty caused the injury.)
  4. Injury

# Negligence– Defined
## (OUJI 3d – Instruction 9.2)

- Since this lawsuit is based on the theory of negligence, you must understand what the terms "negligence" and "ordinary care" mean in the law with reference to this case.
- "Negligence" is the failure to exercise ordinary care to avoid injury to another's person or property. "Ordinary care" is the care which a reasonably careful person would use under the same or similar circumstances. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide. Thus, under the facts in evidence in this case, if a party failed to do something which a reasonably careful person would do, or did something which a reasonably careful person would not do, such party would be negligent.

# The Definition of Standard of Care

- The standard of care is a reasonableness standard.
- Evidence required to prove a prima facie case of medical negligence.
- Plaintiff typically has to present qualified expert medical testimony to prove the prima facie elements of a case of alleged medical negligence.

# Standard of Care – Non-Specialist
## (OUJI 3d – Instruction 14.1)

- In [(diagnosing the condition of)/treating/(operating upon)] a patient, a physician must use [his/her] best judgment and apply with ordinary care and diligence the knowledge and skill that is possessed and used by members of [his/her] profession in good standing engaged in the same field of practice at that time. A physician's standard of care is measured by national standards. A physician does not guarantee a cure and is not responsible for the lack of success, unless that lack results from [his/her] failure to exercise ordinary care or from [his/her] lack of that degree of knowledge and skill possessed by physicians in the same field of practice.

# Standard of Care – Specialist
## (OUJI 3d – Instruction 14.2)

- In [(diagnosing the condition of)/treating/(operating upon)] a patient, a specialist must use [his/her] best judgment and apply with ordinary care and diligence the knowledge and skill that is possessed and used by other specialists in good standing engaged in the same special field of practice at that time. This is a higher degree of knowledge and skill than that of a general practitioner. A specialist does not guarantee a cure and is not responsible for the lack of success unless that lack results from [his/her] failure to exercise ordinary care or from [his/her] lack of knowledge and skill possessed by other specialists in good standing in the same field.

# Standard of Care

- Exceptions to need for an expert witness
  - Where the injury is so obviously due to substandard care that no expert witness is required.
- Informed Consent

# Damages

- Compensatory Damages Include:
  - In general, Pain and Suffering (non-economic damages) and Economic Damages
  - Economic Damages could include past, present and future medical expenses, lost wages, loss of earning capacity, loss of contribution of household services, and any sort of future medical needs.
  - Wrongful Death Damages

# Tort Reform and Cap on Damages

- A cap on damages has been ruled unconstitutional by the Oklahoma Supreme Court.
- Previously there was a $350,000 cap on non-economic damages.
- There has never been a cap on economic damages.

# Several Liability

- One area of tort reform measures that has survived is the concept of several liability.
- Several liability allows for apportionment of fault by a jury when there is more than one provider whose care is at issue.
- Under several liability a provider should only be liable for the amount of fault you are apportioned.

# Trials

- If there is an genuine issue or disputed fact, then the law requires a fact finder to decide which side is correct.
- The fact finder, whether it be a judge or jury, decides the issue of fact, *i.e.* whether there was medical negligence/malpractice.
- In state courts a jury is made up of twelve jurors.
- A unanimous verdict is not required.
- 9 out of 12 jurors must agree on a verdict.
- Accordingly, three jurors may find against the defendant healthcare provider, but the defendant healthcare provider can still prevail at trial. Alternatively, three jurors may find for the defendant healthcare provider, and the plaintiff could still prevail.

# Trials

- A hung jury is where 9 out of 12 cannot agree on a verdict.
- Burden of Proof:
  - A burden in a civil case is what is more probably true than not true (preponderance of the evidence).
  - A burden of proof is lower for plaintiffs in a civil case in comparison to a prosecutor in a criminal case which requires a burden of proof of "beyond a reasonable doubt."
  - Accordingly, if the jury finds that plaintiff has proven their case by a preponderance of the evidence, then plaintiff will prevail.

# Frequent Areas of Questioning

- Differential diagnosis.
- Use of the term “Rule Out.”
- Use of the terms “safety” and “danger.”
- Discussion of policies and procedures in an effort to equate them to “rules” or the standard of care.
- Use of the term “consistent with ….” in questioning the physician.
- Sepsis and any accompanying guidelines.

# Informed Consent

- What is the law of informed consent in Oklahoma?

- Many practicing physicians do not have a good understanding of informed consent.

# A Refresher on the law of informed consent

- Established in 1979 by the Oklahoma Supreme Court case Scott v. Bradford
- “Consent to medical treatment, to be effective, should stem from an understanding decision based on adequate information about the treatment, the available alternatives, and the collateral risks. This requirement, labeled "informed consent," is…as essential as a physician's care and skill in the performance of the therapy. The doctrine imposes a duty on a physician or surgeon to inform a patient of his options and their attendant risks. If a physician breaches this duty, patient's consent is defective, and physician is responsible for the consequences”

# Informed consent– physician's duty (OUJI 3d – Instruction 14.11)

- It is the duty of the physician to disclose to [his/her] [patient] all relevant information to enable that [patient] to make an informed decision on whether to consent to or reject the physician's proposed treatment or surgery.
- This duty of disclosure includes advising a [patient], when a proposed treatment or surgery involves a known risk of death or serious bodily harm, of the possibility of such outcome and explaining in understandable terms the complications that might occur. The disclosure shall include any alternatives to the proposed treatment or surgery and the risks of each, including the risk in foregoing all treatment or surgery.

# Informed Consent

- Risks
- Benefits
- Alternatives/Options

# Informed Consent

- It is a subjective standard, not an objective standard.
- A physician must determine in talking with each individual patient what risks, benefits, and alternatives that particular patient needs to be advised of before beginning the proposed treatment.
- Adequate informed consent for one patient may be inadequate for another patient.

# Informed Consent

- "What is reasonable disclosure in one instance may not be reasonable in another. We decline to adopt a standard based on the professional standard. We, therefore, hold the scope of a physician's communications must be measured by his patient's need to know enough to enable him to make an intelligent choice. In other words, full disclosure of all material risks incident to treatment must be made. There is no bright line separating the material from the immaterial…. A risk is material if it would be likely to affect patient's decision…." *Scott v. Bradford*

# Informed Consent

- With increasing frequency plaintiffs are claiming lack of informed consent in medical malpractice cases.

# Informed consent– Exceptions to duty (OUJI 3d – Instruction 14.12)

- 1. A physician has no duty to disclose risks that are already known to the patient, or which are commonly understood by the average person to be involved in the proposed treatment or operation.
- 2. A physician has no duty of disclosure when [he/she] relies upon facts which would demonstrate that full disclosure would be detrimental to a patient's total care and best interest, or where such disclosure would alarm an emotionally upset or apprehensive patient so that the patient would not be able to weigh rationally the risks of refusing to undergo the recommended treatment or operation.
- 3. A physician has no duty to inform a patient of the risks of a medical procedure when an emergency exists and the patient is unconscious or otherwise incapable of determining for [himself/herself] whether treatment should be administered.

# Informed Consent

- Exceptions:
  - There is no need to disclose risks that either ought to be known by everyone or are already known to the patient.
  - Where full disclosure would be detrimental to a patient's total care and best interests a physician may withhold such disclosure, for example, where disclosure would alarm an emotionally upset or apprehensive patient.
  - Where there is an emergency and the patient is in no condition to determine for himself whether treatment should be administered, the privilege may be invoked

# Informed Consent

- Takeaways:
- Document that you discussed the risks, benefits, alternatives, and options to the proposed treatment whether it be a procedure, specialty consultation, admission, or discharge.
- Take a few moments to explain your decision making to the patient and document that the patient understood the plan of care.
- If you feel uncomfortable or feel a patient may be uncomfortable with a proposed treatment, make an effort to discuss your thought process to the patient.

# Mid-Level Supervision Lawsuits

# You are the Supervising Physician

- Was the P.A. sued?
- What role did the P.A. play in the care?
- What was your role in the care at issue?
- Were other physicians “supervising”?
- Who employs the P.A.?

# Oklahoma Statutes

- 59 O.S. Sect. 519.2(7)
  - Defines “supervision” for P.A.s
  - Repealed the statute that stated “reasonably available for consultation.”

# Duties of the Supervising Physician

- Oversee activities of the P.A.
- "Accepts responsibility for the medical services rendered by the P.A."
- There is no requirement of constant presence.
- Must be easily in contact by telecommunication to the P.A.

# Vicarious Liability?

# Physician Supervision

- Increased use of mid-level providers including physician's assistants and nurse practitioners.
- Physician responsibility is to provide reasonable supervision.
- Unless you personally employ the mid-level provider, we contend does not mean you are personally liable for the mid-levels actions.
- Note that some hospital polices say that you are personally responsible for a mid-level's actions.
- However, you are responsible to reasonably supervise the mid-level when they decide to consult you and you must be available for consultation.
- Provide guidance regarding what type of patients the mid-level sees on your shift. Higher risk patients should be seen by you. Know your hospital policies and procedures on this issue.
- Same applies for resident physicians.

# Medical Records

# Documentation

- Your physical exam documentation should never be just a standard template exam findings.
- A focused exam is appropriate in certain circumstances.
- Be able to show through your documentation that a hands on physical exam was performed.
- Document that you performed frequent reassessments.
- Discuss your decision making process.
- Discuss your plan at time of hand off to oncoming physician.
- Confirm that you discussed discharge instructions and plan for follow-up.
- Be specific about what your discussions were with consulting specialists.

# Documentation

- You were exercising reasonable judgment.  Just show it!

# The Pitfalls of Electronic Communication

- Communication outside what is in the medical record can be problematic.
- In the age of social media, some of your office staff may be friends with the patient or patient's family.
- Any communication by you or clinic staff outside of the medical record can be problematic including texts, emails, social media posting and messaging.
- Remember that any phone calls or text messages are not privileged and are potentially discoverable.

# Electronic Fingerprints

- With electronic medical records there are ways to access times that records were reviewed.
- Audit trails can say exactly when you were in the chart and how long you were in the chart.
- For Radiologists there are ways to determine how long you looked at a set of images before producing a radiology report.
- If you are accessing medical records, long after your care, it will only lead to more questions in a lawsuit about what you were doing in the chart.

# Electronic Medical Records

- A good attorney can find almost always problems / inconsistencies / omissions in the electronic medical records.
- A Solid H&P, physician progress notes, operative reports, procedure reports, and a timely discharge summary are your best friend in the world of electronic medical records.
- Time of dictation matters.

# What makes up a Medical Record

- 63 Okla Stat Sec 7001.3
- Progress Notes
- Labs/Radiology
- MAR
- Any record generated during the care/treatment and/or administration of a patient.
- Medical records do not have to be in written form.

# Retention of Medical Records

- Oklahoma State Law
  - Adult: must be retained for a minimum of 5 years.
  - Minor: must be retained for a minimum of 10 years AFTER the date of last treatment OR at after the patient turns 21, whichever is longer.
  - Deceased Patient: must be retained for a minimum of 6 years past the date of death.

# Privileged and Confidential Information

## State and Federal Laws

# State Statutes

- General Privilege: 12 Okla. Stat. Sec. 2503
- Specific to Mental Health/Drug and Alcohol Counseling: 43A Okla. Stat. Sec. 1-109
- Oklahoma Alcohol and Drug Abuse Services Act: 43A Okla. Stat. Sec. 2-108©
- Juvenile Records: 10A Okla. Stat. Sec. 1-6-102
- Dental Records: 53 Okla. Stat. Sec. 328.32
- Healthcare Information Systems Act: 63 Okla. Stat. Secs 1-11 and 1-120

# Federal Statutes

- HIPAA
- HIPAA Regulations: 45 CFR sec. 164.102, et. Seq
- Requirements for Medicare/Medicaid Participation: 42 CFR sec. 482.24(b)(3)

# Who Can Authorize the Release: Adult Patients

- Patient
- Law Enforcement?
- If a Patient is unable to consent:
  - Spouse
  - Court Order
  - Implied Consent
  - Emergent Threat
  - Multiple more Exclusions under Statute

# Who Can Authorize the Release: Minor Patients

- Parents
- Legal Guardian or Personal Representative
- Court
- Proper Authorities with Suspected Abuse (limited)
- Proper Authorities to Assist Locating Child's Parents (limited)
- Prevent Injury or Death (limited)
- Emergency (limited)
- Law Enforcement?

# Who Can Authorize the Release: Deceased Patients

- Coroner/Funeral Services (limited)
- Spouse
- Estate Executor, Administrator and/or Personal Representative
- Next of Kin (limited)
- Law Enforcement?

# Qualified Release and Authorizations

- General Rule for Release of PHI
  - www.ok.gov/health/Organization/HIPAA_Privacy_Rules/Oklahoma_Standard_Authorization_Forms
- Requirements for Qualified Authorization:
  - Complete Patient Name, DOB, Social Security Number
  - Name of Person or Organization Disclosing PHI
  - Name and Address of Recipient of PHI
  - Specific Information to be Shared
  - Identify Purpose of Sharing PHI
  - Expiration Date
  - Signed and Dated

# PHI Requests by Attorneys: Practice Policies

- Secure the record.
- Is there a retention letter/spoliation letter?
- Assure the record is complete.
- Assure authorization/release form or Court Order is proper (scope of order).
- 63 Okla. Stat. Sec. 19B – Only Medical Malpractice
- HIPAA notification/proper Subpoena

# Preparing Records for Release

- Assure the record is complete.
- EMR hardcopy.
- Have a way of verifying what records were sent and when.
- Consider a letter explaining limitations – Electronic Medical Records.

# No Qualified Release?

- DO NOT RELEASE THE PROTECTED HEALTH INFORMATION

# Questions ????