Liability Issues in a Pediatric Practice

Managing Risk on a Continuing Basis

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Legal Disclaimer

I am not an attorney. The information provided during this session is general in scope and educational in content. It should not be construed as legal advice. Different facts and circumstances may dictate that a different rule or law may apply. Much of the information in this presentation is based on personal opinion and experience. As always, physicians should consult their personal attorneys about legal requirements in their jurisdictions to obtain legal advice on particular matters.

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What is RISK MANAGEMENT?

- Assess areas of risk
- Assess vulnerabilities
- PROACTIVE steps to reduce areas of risk
- Post event management of incidents
- Corrective steps once new vulnerabilities are apparent

This is an ongoing process and an opportunity for CQI

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General Liability Issues

- Employment
- Slip and Fall
- Cybersecurity
- HIPAA

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The First Step in Risk Management--Identifying areas of risk

- Initial patient contact with the office
- Documentation
- Telephone care
- Telehealth
- Test management and follow up
- Referral management and follow up
- Follow up in general
- Subjective issues

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Initial patient contact with the office

- Answering the telephone—live vs. phone tree
  - Are instructions to "call 911 if this is an emergency" actually useful?
- Staff—education and training
  - Every person does some amount of triage
- Hold time
- Assessment of patient needs and appropriate call routing
- Responsiveness to degree of urgency

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Telephone interactions

- Answer calls promptly and be accessible
- "Red flag list" for initial answering person
- Access and review patient record
- Honor requests to be seen or offer appointments
- Non-clinical staff cannot do triage—can only direct calls
- Provide information according to PEDIATRIC-SPECIFIC protocols
- Confirm caller understands advice, medication use, anticipated course of events, instructions for when to call back
- Have a process for documenting calls needing follow up
- DOCUMENT ALL CALLS AND ADVICE GIVEN ON A TIMELY BASIS

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Documentation

- Record all contacts – office, phone, consultative, coverage for others
- Document your thinking and decision making (also very important under 2021 coding rules)
- Templates may be useful but use with caution
- Document follow up done after the patient contact as well

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Liability Issues in Telehealth Care

- 1 in 5 pediatricians will be sued at some point in their career
- Indemnity dollar amounts have been constant
- In 2015 Survey of Fellows, 55% of suits arose from hospital care, 35% from office care, but only 5% from telephone care
- However, in 2020, pandemic-related increases in telehealth care have shifted the numbers of visits, and will likely result in a shift in these numbers as well

As telehealth comes to represent an increasing proportion of pediatric visits, there will likely be an increase in telehealth-related malpractice claims

https://www.aap.org/en-us/professional-resources/practice-transformation/managing-practice/Pages/Protecting-the-Practice-from-Medical-Liability.aspx

https://pediatrics.aappublications.org/content/145/4/e20190711

https://www.aappublications.org/news/2020/05/21/law052120

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Issues Involved in a Medical Liability Case

- Duty to provide care/breach of duty
- Deviation from the standard of care
- Proximate cause of an injury
- Damages
- Failure to warn/informed consent

These apply to all instances of the doctor-patient relationship
Telehealth encounters are subject to the same standards as in-person care

BUT…

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...telehealth encounters hold additional risks

- Lack of face-to-face interaction
- Possible incomplete history
- Definite incomplete physical examination
- Technical limitations

Liability Issues in Telehealth

Technical limitations

- Video quality and resolution
- Lighting
- Relying on untrained parent to demonstrate issues of concern

Lack of face-to-face interaction

- Poor eye contact
- Limited engagement of patient with physician
- Inability to read body language

Liability Issues in Telehealth

Possible incomplete history

- Poor engagement
- Missed triggers for further inquiry

Definite incomplete physical examination

- Much can be done by observation
- But clearly there are elements of the examination which require the laying on of hands
- Use of physician-guided remote examination tools by caretaker

It is critically important to know what you don't know at the time of the evaluation

Liability Issues in Telehealth

Proactively Address the Risks

- What conditions are clearly appropriate for telehealth (in most circumstances)
- What conditions are clearly NOT appropriate for telehealth
- The "gray zone"
- Be alert to the signs, sometimes subtle, which indicate that the specific patient encounter cannot be adequately completed via telehealth

Do not hesitate to convert a telehealth visit into an in-person visit, either in the office or the ED

Liability Issues in Telehealth

Documentation

- All the usual elements of a note
- Particular attention to differential diagnosis and MDM
- Expected course, and how the caretaker should respond if the course deviates from expected
- When to reassess the patient if symptoms persist
- Virtual visit consent: Patient/parent understands the differences between in-person and virtual visits
- Virtual visit disclaimer: "This visit was performed virtually/remotely using the XYZ platform. As such, elements of the history and physical examination may be limited, and the diagnosis and plan formulated may be impacted by these limitations. The patient/parent has been instructed about the expected course of the illness, and about the steps to be taken should the patient worsen or fail to improve. An in-person visit may be required to provide a more complete assessment."

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EHRs--Interference With the Doctor Patient Relationship

- Poor Eye Contact
- Being a Data Entry Clerk, Not a Physician (Let the Patient Know You are Still There!)
- Have a Conversation, Don't Just Enter Data
- Share What You are Typing/Assure Understanding and Agreement
- Reliance on pre-populated templates--Not Wanting to Write Narrative Due to Extra Work

The EHR makes it easier to review past notes, labs, consultations—DO IT, and review with the patient that you are doing it

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EHR-specific documentation issues

- Poor training
- Poor Understanding of How the Program Works (audit)
- Reliance on Templates Instead of Narrative
- Reliance on Auto-Population (MAJOR PROBLEM)
- Reliance on Copy/Paste for History
- Unexpected/Unsolicited Data From Other Providers
- Lab/Referral Follow Up (Patient Compliance) (MAJOR PROBLEM)
- Alert Fatigue
- Meds That Last Forever
- The Problem with the Problem List--Diagnoses That are Forgotten or Last Forever

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Over-reliance on templates

- Text is defaulted to normal
- Cutting and pasting
- A template is seldom the standard of care for a specific situation
- Box Checking without documentation of specifics
- Not documenting thinking in the form of a DIFFERENTIAL Diagnosis for anything but the totally ordinary
- Not documenting expected outcome, and what to do when course deviates from it
- Not documenting a follow up plan other than a check box of when to return

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Inconsistent records (A lawyer's dream!)

- Staff fill out some parts (e.g. ROS, CC) and doctors fill out others
- Doctors fail to review/act on the information others have documented
- Hybrid Charts: What is on paper fails to match the EMR

If chart entries do not match, the doctor appears…

A. NEGLIGENT

B. CARELESS

C. STUPID

D. ALL OF THE ABOVE

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The Case of the Ignored Intake Note

- 16 month old with CC: Vomiting
- MA documented "vomiting six times in past 12 hours. Green vomitus"
- MD noted soft abdomen, normal hydration based on capillary refill < 2 seconds
- No mention of frequency or quality of vomiting
- Diagnosis: viral syndrome
- Plan: push fluids

12 hours later infant admitted *in extremis* and died from total small bowel necrosis due to mesenteric hernia with obstruction

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It is not only about what you did, but what you **DID NOT DO!!**

"Doctor, when you ordered…You wanted the results?"

"Doctor, didn't you care enough to pay attention to….?"

"Doctor, did you have access to the previous visits?"

"Doctor, was there any reason you did not look at the old record?"

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Following upon orders/labs/referrals

- There is a reason a test/referral was ordered, so an answer must be obtained
- Lab results
- Consultation notes/recommendations
- Document review and actions taken based on review/recommendations
- No results = why not?
  - Results not obtained
  - Consultant did not send note
  - PATIENT DID NOT GO TO LAB/CONSULTANT
- Establish a PROCESS to follow up and DOCUMENT
- It is acceptable to cancel the order, but document why it is no longer needed

IF YOU ORDER IT, YOU OWN IT

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The AUDIT TRAIL—Under the hood of every EHR

- Every EHR documents every chart access and keystroke
- All entries are time stamped
- Under the hood and not readily seen
- Actions in the chart are discoverable

ONCE A CHART NOTE IS SIGNED, DO NOT GO BACK AND CHANGE ANYTHING

- Prima facie evidence of something to hide
- If chart alterations shown, every note ever written can be called into question
- An error/omission can be fixed/added, but only as a signed and dated addendum

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PROCESSES are critical

- What and how you enter chart data
- How you record phone calls
- How you transfer information
- How you track labs and other orders
- How you track and act on referrals
- How you follow up—plans and actualization
- How you document your thoughts—you can be WRONG but you cannot be NEGLIGENT

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ATTITUDE is just as critical

- Know your medicine
- Know the guidelines and standard of care
- Understand when and how you can deviate from guidelines and standard of care
- Don't get lazy—in care and in documentation
- Don't be complacent—sometimes there really are zebras
- Follow and record a differential diagnosis
- Follow through on your orders and plan
- Know your EHR and beware the audit trail
- Auto-populating the chart can save you time (a little) but cost you money (a lot!)

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No one can guarantee that you'll never be sued

There are things you can do to reduce the risk

There are things you can do to help assure a successful defense if you are sued

They require some thought and some work

But, hey, you made it through medical school….