

Why Medically Defensible Claims Get Settled

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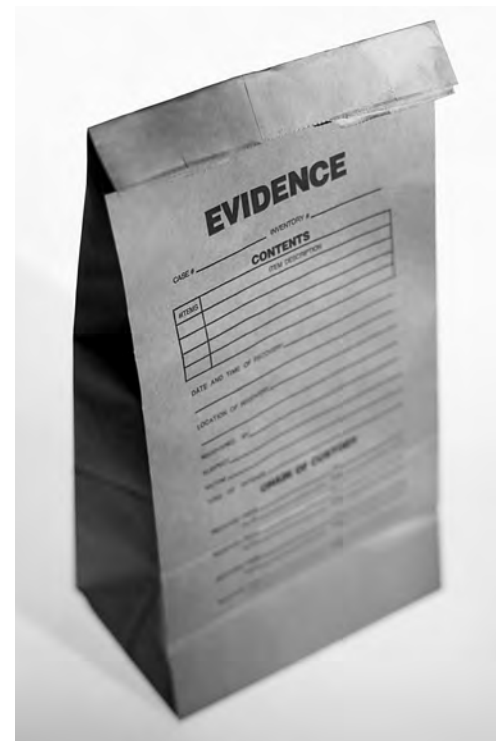
Frequently, physicians assume that when an otherwise medically defensible claim is settled, economy was the reason. Before making that assumption, consider that First Professionals Insurance Company (First Professionals) does not make economical settlements in non-meritorious cases merely to avoid the cost of a defense. Moreover, from a purely economic standpoint, the average malpractice settlement far exceeds the average cost of a defense. The fact of the matter is that there are a number of reasons why settlements are made, and sometimes necessitated, for claims in which the care and treatment are perfectly acceptable.

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Often the reason settlement is necessitated can be traced to inadequate risk management practices that facilitate claims and undermine defensibility. Other factors that explain why medically defensible claims get settled include:

- **Inadequate coverage.** This is best illustrated when damages exceed policy coverage limits. Can the physician afford the risk of personal financial exposure?
- **Factual discrepancies.** Issues of law are decided by the judge; however, issues of fact are determined by a jury. Consequently, the composition of the jury is tantamount to prevailing on questions of fact.
- **Documentation.** Does evidence in the form of medical records support the defense?
- **A defendant's witness potential.** Essentially, will the jury like the doctor?
- **A plaintiff's witness potential.** Is the non-physician jury more likely to identify with the patient than the doctor under the circumstances?
- **Supportive testimony.** Will prior and subsequent treating physicians support the defense or inure to the plaintiff?
- **Sympathy factors.** Will the nature and extent of the plaintiff's injury overwhelm the jury?
- **Case venue.** What is the bias of the county toward defendants and in particular, physicians?
- **Plaintiff attorney.** What is the caliber of opposing counsel? Has the attorney achieved good courtroom results in similar cases?
- **Applicable case law.** What influence will applicable case law or previous court rulings have upon the defenses raised?





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For comments, questions or to obtain additional copies contact the First Professionals Insurance Company Risk Management Department at 800-741-3742, ext. 3100.

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- **Punitive damages.** What is the likelihood of punitive damages being awarded?
- **Claim experience.** Does the physician have a history of claims? Can the history be used against the physician?
- **Unfavorable rulings.** Has the judge ruled unfavorably for the defense during discovery of the case? How likely will subsequent rulings during trial favor the plaintiff's case?
- **Publicity factors.** Will a trial result in detrimental publicity or media coverage?
- **Impact of an adverse verdict.** What impact will an adverse verdict have upon the doctor's future ability to practice medicine? ●



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News Alerts

FDA Requests Boxed Warning for Contrast Agents Used to Improve MRI Images

The U.S. Food and Drug Administration (FDA) has asked manufacturers to include a new boxed warning on the product labeling of all gadolinium-based contrast agents which are used to enhance the quality of magnetic resonance imaging (MRI).

The requested warning would state that patients with severe kidney insufficiency who receive gadolinium-based agents are at risk for developing a debilitating, and a potentially fatal disease known as nephrogenic systemic fibrosis (NSF). In addition, it would state that patients just before or just after liver transplantation, or those with chronic liver disease, are also at risk for developing NSF if they are experiencing kidney insufficiency of any severity.

Patients with NSF develop thickening of the skin and connective tissues that inhibits their ability to move and may result in broken bones. Other organs are at risk of thickening as well. The cause of NSF is not known and there is no consistently effective treatment of this condition.

FDA first notified health care professionals and the public about the gadolinium-related risks for NSF in June 2006. Information on the risks was updated in December.

Gadolinium-based contrast agents are commonly used to improve the visibility of internal structures when patients undergo an MRI. Five gadolinium-based contrast agents have been approved for use in the United States: Magnevist (gadopentetate dimeglumine), Ominiscan (gadodiamide); OptiMARK (gadoversetamide); MultiHance; (gadobenate dimeglumine); and Prohance (gadoteridol).

Reports have identified the development of NSF following single and multiple administrations of the gadolinium-based contrast agents. Because reports incompletely describe exposure to gadolinium-based contrast agents, it is not possible to know if the extent of risks for developing NSF is the same for all agents.

Patients should be screened for kidney problems prior to receiving one of these imaging agents. The recommended dose should not be exceeded and enough time should elapse

to ensure that a dose has been eliminated from the body before the agent is used again.

There have been no reports of NSF among patients with normal kidney function or those with mild-to-moderate kidney insufficiency.

For more information see www.fda.gov/cder/drug/infopage/gcca/default.htm.

Adapted from: FDA News Release. May 23, 2007. Release No. P07-90. ●

New Survey Addresses Relationship of EMRs to Malpractice Risk

A joint survey by the Medical Records Institute, Inc. and Professional Risk Associates has gathered new information regarding the adoption of electronic medical records (EMRs) in physician practices, and the impact of EMR usage on patient safety and malpractice risk. Respondents from 115 practices in 27 specialties, representing 36 states, completed the Internet-based survey conducted from March 21 to June 30, 2007. Of the 62 percent of respondents with EMR systems, over two-thirds have had the systems for more than a year. Approximately one-quarter of those who had the systems complained that the system does not have the functions they need, and a similar percentage stated they did not receive adequate training. Nearly 20 percent of respondents stated their medical professional liability insurer offers a discount for having an EMR system, and close to half believe EMRs will make them less vulnerable to malpractice cases. Among the almost one-fifth who have had a malpractice case in which documentation was based on the EMR, over half said the EMR was helpful.

“These survey results are a great tool for medical malpractice insurance carriers to begin researching the impact of EMR functions on malpractice claims,” advised Bob Meadows, executive vice president, Professional Risk Associates. “We are excited to be at the forefront of this initiative and intend to continue working with our physicians and carriers to help reduce medical errors that lead to malpractice litigation and to encourage our carriers to develop discounting programs for physicians who properly use EMR technology.”

Source: MRI and PRA. Aug. 7, 2007. ●

Risk Management Products & Services

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Preventive Action & Loss Reduction Plan



“House calls” are no longer associated exclusively with a bygone era of medicine. According to an American Medical Association (AMA) survey of family physicians and internists, the provision of home care services has grown at an annual rate of 20 percent per year, for more than 10 years. Home care, which is broadly defined as that professional care which is provided to an established patient in the patient’s home or residence for the treatment of chronic or long-term conditions, or for patients who have specific needs requiring in-home services, is the fastest growing service industry in the United States. Home care services are being delivered to more than 7 million individuals of all ages with acute illnesses, long-term health conditions, permanent disabilities, or terminal illnesses.

Implementing effective risk management measures will help ensure that the benefits of providing house calls and home care are not at the expense of increased liability exposure and malpractice claim development. Our latest product, *Physician*

Home Care Practice Liability: Preventive Action & Loss Reduction Plan, is an easy-to-read guide to establishing a home care practice and minimizing the related risk exposure—complimentary to our policyholders.

To request this or any of the risk management products and services First Professionals offers to its policyholders, please contact the Risk Management department.

Phone: (800) 741-3742, ext. 3100

Fax: (904) 354-6132

On the Web at www.firstprofessionals.com under Risk Management. ●

First Professionals has available a number of highly effective and comprehensive risk management products and services, designed to avoid claims and disciplinary actions, and encourage physician participation. These products and services are available at no cost to our policyholders.

Case Study: Inappropriate documentation constitutes fraudulent record

Editor's Note: This case study analysis reflects an actual First Professionals' case.

Case Analysis

During surgery this patient experienced cardiac arrest without successful recovery. Timing factors in the anesthesia record were inconsistent with the Code Blue documentation. According to the times recorded in the nurse's record on the Code sheet, anesthesia monitoring would have stopped 10 minutes before resuscitation began. The anesthesiologist, being certain that there was no time lapse in the monitoring of the patient, assumed his time documentation in the anesthesia record was wrong—and adjusted the record to coordinate the times with the Code sheet in an effort for clarification.

At trial it was discovered that the anesthesiologist had altered the record. Consequently the medical record was deemed fraudulent and the case rendered indefensible. During the criminal investigation that was initiated against the anesthesiologist for the record alteration, it was determined that there was indeed a 10-minute time difference—between the anesthesiologist's wristwatch and that of the clock on the operating room wall.

Risk Management Discussion

- Document with specificity.
- Never alter the medical record.
- Corrections to records should be dated contemporaneously with the correction and initialed.
- Never use "White Out" or otherwise attempt to cover original record entries – line through an erroneous entry, and initial and date the change made.
- Provide an explanation for inconsistencies in the record.
- Document your medical rationale.
- Ensure the same integrity of documentation made on paper is made electronically.
- Entries should be legible, and contain sufficient detail to clearly demonstrate why the course of treatment was or was not undertaken.
- Documentation should support the diagnosis, justify the treatment, and be accurately dated and timed.
- Ascertain if timing inconsistencies exist and determine the etiology.
- All OR staff should synchronize timing devices prior to every procedure. ●



Legal FAQs



What is a 'tort'?

A civil wrong or injury for which the court will provide a remedy in the form of an action for damages.

What are 'compensatory damages'?

Generally, damages designed to compensate the injured party. Compensatory damages include past, present and future medical bills, lost wages, and other expenses attributed to the negligent act or injury.

What is meant by 'discovery'?

Pre-trial devices that are used by one party to obtain information about the case. Forms of discovery include depositions, written interrogatories, production of documents or things including medical records and personal records. Discovery could also include physical and mental examinations, requests for admission and information necessary to support a claim for damages.

What is meant by the term 'negligence'?

Generally, the failure to use such care as a reasonably prudent and careful person would use under similar circumstances, or the doing of some act which a person of ordinary prudence would not have done under similar circumstances.

Must a physician sign all progress notes made?

Although state law does not specifically require a signature, Medicare, Medicaid and most HMOs require such documentation.

What is arbitration and what benefit does it provide?

Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision. Through arbitration, patients and physicians both benefit because they are able to more promptly resolve malpractice claims and for less cost to each party. It is also believed that arbitration panels will help to avoid unreasonable jury awards, thereby further lowering costs. These cost savings would positively impact professional liability rates and the cost and availability of health care services.

May a Physician Assistant (PA) sign the Baker Act forms to involuntarily admit a patient for psychiatric evaluation?

Yes, providing that such authority is within the scope of practice of the PA's supervising physician per Florida Statute 394.451(21). —