

How to Mitigate the Risk of GI Lawsuits

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Getting Sued

- Most physicians will be sued at some point in their career
- Interventionalists are more likely to be sued
 - We are all interventionalists!!!!
 - More procedures
 - More potential for complications
 - Patients undergoing non-elective procedures tend to be more frail and thus have higher complication rates

Informed Consent

- **Not a paper, but a process**
- Should be delivered by one of the physicians performing the procedure
- Should include time for Q & A
- Should clearly and unapologetically review the risks, benefits, and limitations of the procedure.
- Do not rush (even if you are behind schedule)
- **This is your chance to ensure the patient understands what you plan to do and why you plan to do it**

Sample Consent: ERCP

- Risks:
 - Bleeding
 - Allergic reaction i.e. to sedation or dye
 - Cardiac difficulties
 - Respiratory difficulties
 - Perforation that may require surgery
 - Pancreatitis that may be mild to severe
 - May require new or extended hospitalization
 - Need for more than one procedure
 - Patient may need stent changes, repeat tissue sampling, etc

GI Lawsuits

- Perforation
- Post-ERCP pancreatitis
- Failure to diagnose
- Delay in diagnosis
- Poor follow up
- Abandonment

Perforation

- Most common cause of lawsuits in GI
- Usually recognized during procedure
 - May manifest later, sometimes >1 day after procedure!
- Should always be discussed during consent process
 - Pt will often state they did not understand...
- Recognition of the perforation is critical
 - Exam
 - KUB
 - CT if KUB does not clearly show free air
- Appropriate referral to surgery
- Appropriate follow up

Post-ERCP pancreatitis

- Usually for severe PEP
- The Trifecta:
 - Bad indication
 - Bad endoscopic technique
 - Bad outcome
- Very difficult to win
 - You cannot cause PEP if you do not do an ERCP
 - Utilize MRI/MRCP and EUS appropriately to help with patient selection

Failure to Diagnose

- Can be tricky...
- Colonoscopy → missed colon cancer
 - Photodocumentation
- Colonoscopy → colon cancer in near term future
 - Photodocumentation
- EUS → Missed pancreatic cancer
 - Limitations of procedure
- Barrett's esophagus → Failure to survey/biopsy
- Rectal exam

Delay in Diagnosis

- Usually symptom related
- Act on alarm symptoms
 - Bleeding
 - Dysphagia
 - Weight loss
 - Jaundice
 - Epigastric pain → back
 - Change in stools

Document, Document, Document!

- In general the best protection from a lawsuit is good documentation
- Clearly record your thoughts and observations about the case as it develops
 - OK to comment on emotional issues
 - “The patient is extremely angry and frustrated with his illness.”
 - “The patient is very resentful towards her prior physicians.”
- Document relevant telephone calls:
 - To patient
 - From patient
 - With another provider about the patient

Timeline

- The lawsuit usually begins before you realize it
 - Weeks or months may pass before you become aware of legal activity on part of plaintiff
- Patient contacts an attorney to represent them
- Patient/attorney/experts review records
- A claim of wrongdoing is made against the physician
 - Remember, bad outcomes are not malpractice
 - Everybody will perforate someone*
 - You are being held to the **standard of care**, not the **standard of perfection**

Notification and Discovery

- You will generally receive notification of a potential or real lawsuit against you
- Medical records will be obtained for evaluation
- Clinic notes, procedure notes, emails, telephone records, x-rays, etc will be obtained
- Everything you write down is discoverable

Discovery

- Expert witnesses
 - Called in by both sides to review the records
 - Written statements common
- Deposition: Pre-trial questioning
 - Physician
 - Patient
 - Expert witnesses
 - Other involved individuals (RN's, endo tech, etc)

Deposition

- Can be very taxing
 - May last for hours
 - May span more than one day
 - Lawyers are very sophisticated
- Plaintiff's attorney may:
 - Be hostile
 - Get you to answer a question you do not understand
 - Try to get you to admit errors on your part
 - Attempt to intentionally fluster or upset you
 - Ask the same question repeatedly to get a different answer
 - Everything you say is recorded and can be used against you
 - You may also be videotaped during deposition

Expert Witnesses

- Usually, but not always, academicians with published expertise in relevant areas
- They will review the chart in significant detail
- Should be objective
 - I.e. if plaintiff's expert finds no violation of the standard of care they will generally say so
 - Not just "hired guns"
- May supply written statements, depositions, or testify in court
- Expert's not there to save or hang you
 - There to evaluate the facts of the case

Outcome

- Most cases settle or are dismissed
 - If no clear violation of standard of care → dismissed
 - If clear violation of standard of care → settlement
 - Your insurance company may settle over your objections
- If you go to court...
 - Anything goes
 - Trial outcomes very difficult to predict
 - Can still settle or have case dismissed during trial