Case

- Male patient diagnosed with vessel blockage
- Testing and decision for bypass graft surgery
- Surgery not successful
- Damage required eventual amputation
- No discussion with patient of possible consequences…..possible surgery failure
- Litigation followed >

Case

- Female patient consulted dermatologist for skin treatment
- Procedure was completed as planned
- Patient was unhappy with treatment results including a claimed facial deformity
- Using an Internet site the patient “excoriated” the practice and physician
- And……the physician responded

Paulson, K. When Web Reviews Lead to Lawsuits, USA Today. 3/19/13
Adverse Events

- 9 year study: A root cause analysis of 2,966 hospital “Sentinel Events”
- Identified “communication” problems as a primary root cause

Conclusion of MDs/RNs

- Open-ended query to MDs/RNs
- What is most needed to improve safety and efficiency
- MD’s and RN’s cited better communications
Dangerous Communications

• Communications that lead to bad endings, e.g. malpractice claims & other litigations
  – Communications that failed to occur
  – Poor MD/provider to patient on treatment
  – Poor MD to MD treatment communications
  – MD communications to patients about MD/providers
  – MD communications to MDs about MDs..

Why Bad Communications?

• Different specialty backgrounds
• Different communication styles of providers
• Uncertain of roles and responsibilities
• Chain of command and information handling
• Too busy to pay attention to detail
• Failure to "communicate" with the other physician
• Rush to poor conclusions, judgments and very questionable actions!
He Said What??

• Patient care over several years with medical problem
• Treatment by two primary care physicians and consultants with later post treatment problem
• Malpractice action against all with panel findings against one primary physician
• Physician call to plaintiff attorney
• Outlined reasons that other primary physician was at fault
• Defense attorney aware later..

Medical Jousting
Medical Jousting

- The unnecessary, inappropriate, unwarranted, and uninformed actions or statements toward another healthcare provider
- Injudicious, uninformed criticism
- “Another valuable gift the medical profession donates to lawyers”
- Clearly “the deadly professional sin”

Velasco C. Jousting – Lighting the Malpractice Fuse. 2007.
Karp D. The Misdirected Search for Malpractice Solutions, Medical Economics. 1997.

Ask Those Who Sue...20 Years Ago

- Large group of plaintiffs questioned
- Asked “Did a health professional suggest maloccurrence?”

Beckman et al. The doctor-patient relationship and malpractice.
And Today....

- May 29, 2013
- Study of cancer patients in referral situations
- Physician comments about prior physician care
- Critical comments including lack of trust and criticism of the other involved specialties


Critical Comments About Who?

- Physician toward physician
- Physician toward staff
- Staff toward physician
- Staff toward staff
- All combinations…
The Nature of “Jousting”

• Can affect any healthcare provider directly or indirectly
  • Intentional
  • Unintentional
  • Documented
  • Verbal
  • Neither documented nor verbal…

Intentional Verbal

• Earlier case – physician to plaintiff attorney
• Planned action
• Example of “righteous retaliation”
• No improvement of personal position
• More difficulty for everyone including defense

• The most common verbal mistake……
She Said What?

- 22 y/o patient had a difficult delivery by a physician unknown to her
- Healthy child, but complication of perineal tears
- Post partum checks by regular OB physician
- In questioning who delivered the child the response of "What on earth did she do to you".
- Patient immediately consulted attorney and filed action citing her physician as “expert willing to testify” that the first physician was “negligent”.

Velasco C. Jousting Revisited: Don’t Fall into this Liability Trap. SDJ Med. 1996.

Unintentional Verbal

- Characteristics
  - Most frequent type
  - Not planned
  - Usually offhand comment
  - Involves all type of providers
  - No intention of harm
- Problems no matter what the intent…
A Good Reason to Sue?

- Study of families involved in malpractice lawsuits
- Family members had received “information” from other medical professionals

54% “Information” was reason to sue


The Unfortunate Result

- In one study 25% of medical malpractice suits were traced to critical remarks made by one doctor about another.
- Over a period of years has ranged from 20% to 55%....

Velasco C. Jousting – Lighting the Malpractice Fuse. 2007.
Causal Remark Advice

• Think before you make the “that’s not how I would have done it” type statement. Really? Maybe you would have done it that way had you been there at that time.
• Think before the “Who did this to you?” type question. Directed toward the identity of the prior physician clearly bad inference
• Who can hear what you say to another provider about a provider? To a resident, a nurse, etc.
• If it might be misunderstood, don’t say it!...

What Did That Look Mean?

• Patient with illness received care including medication Rx
• Patient left the original MD and sought care elsewhere and was examined by 2nd MD
• Problems followed with suit and testimony,

“I knew something was wrong with the medicine Dr. Miller prescribed because of the way Dr. Moore looked when I told her about it. She looked surprised, like she couldn’t believe it. She shook her head and frowned. She didn’t say anything, but I knew she thought he’d made a mistake.”

Velasco C. Jousting – Lighting the Malpractice Fuse.
Not Spoken, Not Written

- **Definition:** The statements (written or oral) by a healthcare provider indicating or implying unprofessional or negligent actions of another healthcare provider or actions (including body language)
- Communication without speech or writing
- Conscious / unconscious gestures and facial expressions…body language
- Nonverbal communication represents two-thirds of all communication


Body Language & Advice

- Easy indication of being negative or critical
- Among things first noticed by patients
- Especially when seeing patients in consultation or for “second opinions”
- Be aware of the importance of eye contact
- Careful of body gestures, i.e. frowning, head shaking
- Remembered as much as actual statements…

I Told Her Not to Do It!

• Female patient evaluated for surgery
• Specialist examined patient and advised surgery
• Referring physician disagreed
• Surgery done with post op complications & death
• Note by referring MD:

“Although I strongly disagreed with Dr. Green’s proposed surgery, he convinced the patient to proceed. Her many post-op complications and finally her death have proved my advice correct.”

Velasco C. Jousting – Lighting the Malpractice Fuse. 2007

Documented for Better or Worse

• **Definition:** The “…unfortunate practice of one health professional making critical comments about another provider’s care, directly or indirectly, either to the patient or in the medical record”.
• Just as damaging as bad verbal comments
• Longer life in record form
• Much longer in the age of EMR….
Intentional Documentation

- A documented statement that was deliberate!
- Did the physician feel better?
- Did this assist the situation in any way?
- Written comments may be intentional
- Or maybe really unintentional…..

Small Notes of Irritation

- The unintentional is not unusual….
- Appearing in medical records
  - A consultant should have been called.
  - As usual, no nurses available to help.
  - The nurse did not check on this patient.
  - The catheter should have been checked more often.
- Be careful of the wording…. in any format
- It may well be read by many !....
When the Patient Reads the Notes

- Critical record notes…more than embarrassment
- Leading to malpractice claim
- Difficult defense
- Will the patient ever see derogatory documentation?
- History of seeing records on occasion, record copies
- A new age of EMR and MU
- Much more patient access to records…

Advice When Writing

- Be careful in the phrasing of information
- Document only in an objectively manner
- Stay on point with exact facts and what plans and treatment is being provided
- If concerned about whether something could be misunderstood, reverse the situation to comments on your care
- Consider that everything written might be read in court to a judge or jury…
Jousting Effects Summary

- Provides no benefits especially to the patient
- Provides assistance (“gift of the highest order”) to plaintiff attorneys
- Reduces the cooperation of other providers
- Fuels a negative patient attitude of concern and distrust
- Increases the risk to all involved healthcare providers
- “When one provider criticizes another, both are at increased risk for a malpractice claim” i.e. “ALL”……

Crumpton H. Criticizing prior care: are you chumming the water in which you swim? 2003.

This is What Really Happened

- 45 y/o man seen in ED for “popcorn hull” lodged in throat
- Treatment provided by three physicians including family MD, Staff MD, and resident
- Coughing & respiratory arrest attempted intubation
- Discussion of treatment and possible cricothyrotomy…

Velasco C. Jousting – Lighting the Malpractice Fuse. 2007.
This is What Really Happened

- Family MD insisted on transfer to another hospital
- Patient died in route
- Litigation with 3 MD critical notes
- Resident note on failing to do the procedure which “could have saved the man’s life”.
- Everyone was sued…

Velasco C. Jousting – Lighting the Malpractice Fuse. 2007.

Poor Judgment

- Example of extreme poor judgment
- Could not withstand the temptation to respond
- Should have been discussion between physicians
- Was no other evidence of malpractice
- Added to problems for everyone involved…i.e.
  everyone was sued and had the malpractice defense experience!

Velasco C. Jousting – Lighting the Malpractice Fuse. 2007.
Forever Written....Seen by Many

• Historically notes written in the medical chart/record
• Read by other concerned physicians and staff
• Confined to whoever read the paper chart
• No longer confined to paper
• The EMR/EHR
• Applies to an SMS type message
• Applies to E-mail
• Applies to Internet and Social Media…

Internet Social Media

• Social Media
• First started as a term 2004
• “Forms of electronic communication (as Web sites for social networking and micro-blogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)”

Internet Social Media

- Estimated more than 200 social networking websites
- As of February 14, 2013, adult Internet users using social networking sites…

67%
ALL ADULT INTERNET USERS


Internet Social Media

- Federation of State Medical Boards
- High percentages of physicians using social media

67% professional use social media
87% personal use social media

FSMB. Model Policy Guidelines for the Appropriate Use of Social Media and Social Networking in Medical Practice. 2012.
This is What I Think of That !!

- Urologist known as a good and respected clinician
- Began use of Twitter for commentary and opinion
- US Preventative Services Task Force recommendation on PSA screening
- Posted tweet disagreement in very disrespectful language to panel recommendations
- Picked up in wide (viral) distribution to patients and other physicians

FSMB. Model Policy Guidelines for the Appropriate Use of Social Media and Social Networking in Medical Practice. 2012.
Results

• Clear disrespectful action toward other medical professionals
• Wide distribution to more than the medical community
• Possible misinterpretation of information comment
• Did no good for furtherance of medical care related to the subject
• Not helpful in professional relations
• Representative of poor judgment in comments…

Tweeting

• The largest Facebook and Twitter
• As of 11/12/2012, Facebook members at 1,200,000,000!
• Twitter (micro-blogging) a social messaging platform using 140 character posts
• Twitter averaged 190 Million “tweets” per day 2011
• March 2013 averaging 400 million per day…

Physician Inappropriate Use?

- Inappropriate Internet Social Media use
- Physicians in online professionalism violations
- Survey state board medical directors

92% online violations

FSMB. Model Policy Guidelines for the Appropriate Use of Social Media and Social Networking in Medical Practice. 2012.

Social Media Concerns!

- State medical boards not just doing surveys
- Option to discipline physicians for inappropriate or unprofessional conduct while using social media or social networking
- Actions can range from a letter of reprimand to the revocation of license
- 71% have instituted disciplinary actions
- 29% resulted in suspension of license and 21% in loss of license…

FSMB. Model Policy Guidelines for the Appropriate Use of Social Media and Social Networking in Medical Practice. 2012.
Just a Small Comment

- Physician treating a hospitalized patient
- Has a problem with a consultant seeing the patient in timely manner
- Smartphone text to nurse about problem
- Nurse text to hospital nurse friend on physician comment
- Information reached patient and consulting physician...

Use of SMS Channels

- Standard SMS not secure
- Banned (not acceptable) by Joint Commission
- Not to be used for any communication of PHI
- Never use texting or messaging systems for critical comments same as in EMR or other written forms
- Should be considered as other written communications
- Other expanded communication possibilities......
Not Just Other Healthcare Providers

- A patient noted disrespectful language on a physician’s blog relating to someone described as a patient.
- The physician had expressed frustration towards the patient for multiple ED visits caused by failing to monitor her sugar levels.
- On his blog the physician referred to the patient as “lazy” and “ignorant.”
- Privacy and security of PHI?

FSMB. Model Policy Guidelines for the Appropriate Use of Social Media and Social Networking in Medical Practice. 2012.

Social Media Guidance

- Recommended guidelines for methods of use.
- Recommendations apply to all forms of Internet use.
- Chat Rooms
- Blogging
- Tweeting
- All types of social media…

FSMB. Model Policy Guidelines for the Appropriate Use of Social Media and Social Networking in Medical Practice. 2012.
Social Media Advice

- Consider like other written medical comments….same jousting potential for claims
  - Additional problems of PHI privacy and security
- Avoid requests for online medical advice
- No interaction with current or past patients on a personal social networking site, e.g. Facebook
- Be aware that information posted online may be available to anyone, and could be misconstrued

FSMB. Model Policy Guidelines for the Appropriate Use of Social Media and Social Networking in Medical Practice. 2012.

The Internet as a Weapon
The Question

If a patient or family member posts offensive criticism of you or your care on the Internet, your best recourse is:

1. Consult an attorney and sue the patient /family
2. Respond online and defend yourself
3. Ask someone else to go online and defend you
4. Ask the patient if he or she was responsible for posting it and request they remove it
The 10 Minute Visit

- Elderly man suffered a hemorrhagic stroke
- Hospitalized in ICU for 2 days
- Transferred to hospital room with family visiting
- Neurologist visited patient for 1st time 10 -15 minutes
- Advised no therapy, left, and did not speak to family
- Son was told by RN that MD was “a real tool”
- Son made extensive comments on Internet sites about MD being “insensitive” to father’s needs
- MD had an Rx: a libel suit


The 10 Minute Visit

- Initial court finding against MD and was appealed to appellate court who reversed decision
- Was appealed to the state Supreme Court who vacated decision of appellate court
- Critical comments about the MD were protected because they were an “opinion” and “mere vituperation”
- Cannot be considered a “statement of fact” to be proven True or False.

Fighting Back

- Impulsive “tweets” and other online statements of criticism are common
- Concern about rating organizations, e.g. Yelp and Angie’s List
- Related libel suits are increasing
- Organizations protected by legislation since Communications Decency Act (1996)
- Protected if “passive host” of 3rd party content…

Paulson K. When Web Reviews Lead to Lawsuits. USA Today. 3/19/13.

The Winning Case

- Plastic surgeon specializing in cosmetic surgery
- Patient had a rhinoplasty and skin resurfacing
- Patient not pleased
- Opened a specific website criticizing physician and practice
- MD obtained court order to stop site, but patient continued at public meetings
- Suit followed with judgment to physician, but…
- Bad public comment can occur

Alltucker K. Scottsdale doctors awarded $12 million in defamation case. Arizona Republic. 12/16/11.
The Winning Case

- Arizona Republic, response Internet post

- “Work for what they earned? HA! $50,000 for 30 minutes of labor? Complete crap. They get the money they get because they have established a choke hold on the American people that now doesn't even allow us to criticize them. They can charge whatever they want and no one can even say they did a bad job. Face the facts, Doctors are modern day extortionists, liars, crooks and thieves.”


Doctors seek gag orders to stop patients' online reviews

USA Today
Planning for Internet Attack

- Internet use increasing… and for attack related to MDs
- Use over several years: advance patient discussion and written waivers
- Bars patient from posting negative comments on line
- Directed at both sites and patients
- Question of violation of 1st Amendment rights
- AMA has no position on such waivers

Tanner L. Doctors seek gag orders to stop patients’ online reviews. 2009.

Internet Patient Comments

- Review of online physician criticisms
- Loss of patient confidence
- No coordination of care
- No or poor discussion of adverse events
- Failure to communicate!!

Kowalczyk L. Doctors firing back at patients’ online critiques, Boston Globe. 3/31/13.
Internet Patient Comments

- Review of on line physician criticisms
- Loss of patient confidence
- No coordination of care
- No or poor discussion of adverse events
- Failure to communicate!!

- Same problems….just a different medium!

Kowalczyk L. Doctors firing back at patients’ online critiques, Boston Globe. 3/31/13.

To Retaliate? Suggestions

- In considering retaliation, remember the concern of “opinion” vs. actually misrepresenting “facts”
- Consider the wide reach of any Internet response
- Avoid Internet methods of “poor person’s revenge” via Internet accusations
- Internet “self help” can be worse than nothing
- Consult an attorney as opposed to Internet responses

Will You Use Social Media?

- A factor in medicine that is not going to disappear
- Considerations of use
- Ignore or use as a defense and promotion?
- Consider goals, resources, and time
- Outsource or do “in house”?
- Who is responsible for compliance and your values?
- Someone that can “interact on social platforms” consistent with your practice values?

The Big Factor

- Largest factor for Medical Malpractice Claims?
  - Patient insurance status?
  - Physician specialty?
  - Breach in the standard of care rendered?
  - Judicial climate and density of attorneys?
  - Inadequate or bad communications!
Conclusions

• Large percentages of medical problems are clearly due to lack of MD and healthcare provider communication
• Patient discussions done in an insensitive manner, poorly, or not at all will result in deterioration of relationships..... an environment for claims
• Adverse events and bad outcomes are directly related to poor communications...and litigation
• Same potential outcome when criticizing other providers!

Summary Advice

• Avoid the impression that a situation will be difficult to manage because the other physician handled earlier care
• Hold conclusions until you have all the facts...not necessarily just what the patient tells you....the advantage of waiting
• Don’t cover up problems or alter records, but don’t elaborate unnecessarily....the right to remain silent!
• Patients should be told the truth after the facts are known.....speculation may not be the truth!
Summary Advice

• Use extreme caution communicating with physicians or patients using electronic methods, e.g. Internet, Social Media
• Be careful of what is written realizing it is permanent
• Do not use the Internet, E-mail, or other electronic media for anything other than objective information
• Teach medical staff the dangers of adverse remarks and documentation in any form
• Good communication not adverse comments improves patient safely, reduces possibility of errors, and reduces malpractice litigation.