

Legal Update 2023
Strategies for Success



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Chad taught trial practice at the University of Tulsa College of law as an adjunct professor. He also serves on the Board of Directors of the Indian Nations Council of the Boy Scouts of American and is a Board member of the Sigma Chi House Corporation at Oklahoma State University. Chad is licensed to practice in all state and federal courts in Oklahoma and Kansas and is a Fellow of the American College of Trial Lawyers.

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Gene is admitted to practice in the state of Oklahoma and the Western District of Oklahoma Federal Court. He was rated as a "Rising Star" by Superlawyers.com

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Why do we get sued?

- The outcome of the care provided is not what was expected
- Confusion regarding why the outcome was not what was expected
- Deviations from the standard of care
- Greed combined with a deep pocket



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How can we avoid lawsuits?

- The best way is to provide excellent care.
- Sometimes that is not enough (Why?)
 - Everyone in this room has had a bad outcome despite providing proper care.
 - Your patients and their families/friends need to have realistic expectations of the probabilities of outcomes. Especially when the outcome is uncertain.
 - This requires candor and time.
 - The time you spend with patients explaining the situations and the difficult choices ahead is far less than you will spend with me if you get sued.



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How can we avoid lawsuits?

- Recent studies have examined how attorneys/plaintiffs analyze charts.
- Medical documentation plays a role in 10-20% of medical malpractice lawsuits.
 - Inaccurate, incomplete or generic records undermine a physician's defense and make malpractice lawyers more likely to take a case
 - Of the malpractice claims involving documentation errors, 70% involved missing documentation and 22% involved inaccurate documentation while 18% involved a combination of transcription errors, illegible entries and delays in documentation
 - These errors are self inflicted



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Documentation

Your charting is not just for communication with each other or billing.

It is a legal record of the care you provided.

Malpractice lawyers often decide to take a case based only on your documentation.

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Missing documentation

- **Informed Consent**
 - Patients often do not understand or care what they are signing: they want surgery.
 - You are in a hurry.
 - The note you write about consent may prove to be more important than you think.
 - The preprinted form will not always contain all that you need to discuss.
 - Make your consent discussion appropriate for the specific patient or family member making decisions.
 - Then make a note that details your discussion. That extra few minutes memorializing your discussion could prove vital in the decision to sue you or in your defense.

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Missing documentation

- **Informed Consent**
 - Make the discussion personal and not rushed.
 - Discuss things that may occur in the surgery and those that could cause a change in plan.
 - Patients want to be helped and you are the people they have decided to rely upon.
 - When you encounter a scenario during your treatment of the patient that requires a change in plan, if you have discussed this possibility with the patient and documented that discussion you are in a much better position.
 - Example: a change from a central venous catheter to a swan-ganz catheter during a bypass procedure

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Missing documentation

• Leaving against medical advice

- The signed form is not always enough.
- These situations are frustrating.
- Have the discussion with the patient including the recommended course of treatment you feel is necessary.
- Include the possible results of refusing medical treatment and be specific and include the worst-case scenario even if remote: the worst-case scenario is condition that leads to the lawsuit.
- **Most important: Make a note in the chart that is detailed and includes all your advice and all the potential bad outcomes. Include in this note what you think the patient needs to do even knowing they are leaving your care and where they might go for that care since they do not want you to help them.**



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Missing documentation

• AMA

- The patient that seems confident in their decision to leave will magically have no idea what the potential pitfalls of this decision are after they meet and discuss their testimony with their attorney.
- When they have an attorney, truth is no longer the guiding force, it is money and money alone. Memories seem to be strangely altered when a pot of gold is perceived on the horizon.
- Your testimony is only strengthened by a detailed note in the chart.



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Missing documentation

• Consultations

- Scenario: Patient shows up in the ED with headache.
- After initial workup, you consult a neurologist who recommends against diagnostic studies.
- Patient later suffers a brainstem herniation from an undiagnosed subarachnoid hemorrhage and dies in the ED.
- When the patient sues, part of your defense includes the advice of the neurologist you requested.
- Not in chart.
- Neurologist does not recall encounter and also did not chart.
- Result: Jury thought someone was being dishonest (did not care who it was) and awarded patient's family \$44 million.



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Missing documentation

• Consultations

- Record the consultant's name in the chart along with the recommendation of the consultant and your intention to follow the specialist's advice (that is why you sought the consult after all)
- Best practice is to have the consultant also make a note.
- Even if your decisions lead to a bad outcome, your discussion with specialists, documented in real time will have enormous impact and at a minimum affect a jury's perception of what actually happened.



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Missing documentation

• Communicating with patients at and after discharge

- Patients are often not clear about or don't remember what they were told to do after discharge.
- You or your mid-level or nurse need to spend time with all patients before they leave: they are not all the same, some will take considerably more time.
- All of your hard work may be for naught if the patient does not care for themselves as needed after they leave.
- Write down for them exactly what they need to do for themselves, what they need to be watching for and what to do if their condition is not improving or is getting worse.



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Missing documentation

• The pre-printed hospital forms are great until they are not

- No form will apply to every patient and your detailed/tailored plan for your patient is important.
- Make a discharge plan that is specific for your patient. Add it to the preprinted form and put paper copies in the patient's hand. Nothing makes a defense attorney happier than a patient who brings the detailed discharge instruction they were given by you to the deposition, and we can prove they did not follow them.
- All jurors will relate to a Plaintiff who says "we were not sure what to do when we got home".
- When your instruction is specific you are not only helping your patient but you are also helping yourself.



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Missing documentation

- After discharge, call your patients and check their status, especially those you suspect may need checking on.
- Document exactly what you said to them and what they said to you and also document that you tried to call, left a message and did not hear back.
- No patient on Earth will complain that a doctor or nurse called to check on them after discharge.



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Inaccurate documentation

- **Electronic medical records**
 - Auto population is not your friend (trust me).
 - No one has the same vital signs for 3-4 shifts in a row. No one is buying that.
 - Update the problem lists: if pain is less, write it down; if it increases write it down.
 - When you populate in review of systems "moves all four extremities" and the patient has an amputated limb... **(yes, I have seen this)** you will have a hard time explaining.
 - These errors may have no impact on the care but blow the door wide open for an attorney to paint you as careless, rushed or oblivious.
 - Narrative notes following your examination of your patient will always be your friend. Be accurate and provide context including statements of the patient in quotes. Help them recall what they said after they sue you and their memory is being clouded by the attorney and the pot of gold.



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Inaccurate documentation

- **EMR have dozens of spots for you to click and provide information**
 - Read the notes made in the chart prior to your arrival to care for the patient.
 - Documenting a change in condition is not possible without knowing the prior condition!
 - Be accurate regarding location: if pain is documented as being in the right lower quadrant previously and you discover pain in the left lower quadrant, figure out what is going on. Correcting a chart is better than having an attorney show you the error at your deposition.



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Inaccurate documentation

- **Transcription**

- Read it and fix it!
- When an operative report or discharge summary makes it in the chart with blanks or errors, you will be asked why you did not proofread the document.
 - "I was too busy" is not a good response.



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Inaccurate documentation

- **Editing the chart**

- The goal is for the chart to be a tool for those who care for the patient after you.
- If you find errors, identify them and make it accurate.
- Explaining why you fixed an error when the patient was still in your care is far easier than explaining why you did not notice or didn't bother to correct.



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Beyond documentation

- My friends who are physicians ask me repeatedly, "how do I keep from being sued?" These are my answers:
 - Provide good care.
 - Talk to your patients, ask them if they have questions and answer all of them.
 - After surgeries, sit down next to their family in the waiting room and don't seem like you are anxious to get to your next case.
 - If something happened that was different than what was planned, tell them, explain what happened and tell them what you did and why. They can handle it.
 - Be compassionate: This is likely one of the most stressful times in their life.



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Closing remarks

- You cannot prevent all lawsuits.
- I have defended more physicians and hospitals than I can remember who did nothing wrong.
- I have also defended cases where the standard of care was not met.
- After every single case my advice to my clients is the same:
 - Continue to focus on care of the patient: we need you!
 - Take this experience and grow from it: it will make you stronger and smarter.
 - Remember how your charting was analyzed and used against you and do better in the future.
 - Don't let this make you jaded. The vast majority of your patients appreciate that you are here for them. That includes me!

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Dobbs v. Jackson Women’s Health Organization

- Landmark Supreme Court case effectively overruling *Roe v. Wade*, decided in June of 2022.
- *Dobbs* does not make abortion illegal per se, rather, it gives the power back to the individual states to determine and enforce their own abortion laws.

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Dobbs v. Jackson Women’s Health Organization

- Effectively determined that the Fourteenth Amendment to the United States Constitution does not protect the right to an abortion.
- Resulted in many states enforcing restrictive abortion laws, Oklahoma being among the states with the strictest abortion laws in place.

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Current Oklahoma Law Following Dobbs

When the Supreme Court gave the power back to the states to determine individual abortion laws, Oklahoma reverted to its 1910 law which states:

- Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life shall be guilty of a felony punishable in the State Penitentiary for not less than two (2) years nor more than five (5) years.

Current Oklahoma Law Following Dobbs

- Current Oklahoma makes it illegal for anyone to perform an abortion or to assist a woman in procuring an abortion unless the abortion is necessary to save the mother's life. Violating the statute is a felony punishable for up to five years in prison.
- Additionally, in August of 2022, Oklahoma passed SB 612, which makes performing an abortion a felony punishable by up to 10 years in prison and/or fines of \$100,000.

OK Supreme Court Strikes Down HB 4327 and SB 1503

- May of 2023 the Oklahoma Supreme Court struck down two pieces legislation that only allowed Oklahoma women to obtain abortions in the case of a "medical emergency".
- Oklahoma's high court has ruled that women have a right under the state Constitution to obtain an abortion when a pregnancy risks their health, not just in a "medical emergency".
- The Oklahoma Supreme court ruled that a woman has a constitutional right to have an abortion to save her life if her doctor determines that continuing the pregnancy puts the woman's life at risk due to a preexisting condition, or a condition that the woman is likely to develop over the course of her pregnancy.
- Oklahoma law does not require a physician to be absolutely certain that the pregnancy at issue will endanger the mother's life, but mere speculation that the pregnancy will do so is insufficient to determine that abortion is necessary.

Attorney General's Guidance Letter:

Previous Oklahoma Attorney General, John O'Connor issued guidance to Oklahoma law enforcement on how to prosecute abortions in the state, and focused on five points of clarification:



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AG's Guidance Letter:

ONE: prosecution should focus on "elective abortions" and that other situations are either not in violation of the state's abortion laws or should be handled with "careful discretion" and in consultation with the state's Attorney General's office. The AG's guidance memo specified that "elective" abortions also encompass "on-demand" abortions such as those obtained via the abortion pill.

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AG's Guidance Letter:

TWO: Oklahoma laws prohibiting abortion **do not permit the prosecution or punishment of the woman seeking an abortion.** Additionally, the Oklahoma abortion prohibitions do not pertain to "unintentional miscarriages, miscarriage management (removal of a dead child from the uterus), ectopic pregnancies, IVF (or other fertility treatments), or uses or prescription of contraception, including Plan B.

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AG's Guidance Letter:

THREE: Abortion is only authorized under Oklahoma criminal law in situations where abortion is necessary to save the mother's life.

O'Connor stated that physicians "should be given substantial leeway to treat pregnant women experiencing life-threatening or emergency physical conditions...so long as they are not unnecessarily terminating the life of the unborn child or abusing their position intentionally to facilitate elective abortions."

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AG's Guidance Letter:

FOUR: Under Oklahoma law, no independent exception to the state's abortion prohibition exists for pregnancies resulting from rape, sexual assault, or incest. An abortion in any of those three circumstances is only permitted under Oklahoma law if the resulting pregnancy endangers the life of the mother.

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AG's Guidance Letter:

FIVE: Oklahoma prohibits "aiding and abetting the commission of an unlawful abortion" including "advising a pregnant woman to obtain an unlawful abortion."

This prohibition does not extend to abortion activism so as not to infringe on constitutionally provided rights to free speech. However, district attorneys and law enforcement have been encouraged to pursue cases where "a person has advised or encouraged a woman to obtain an unlawful abortion in some imminent way" such as by taking an "overt or tangible action toward" the procurement of the abortion.

[Link to guidance memo](#)

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Questions?



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