

Malpractice Prevention: Everything the NP needs to know

Presented by:
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Disclosures

- **Speaker Bureau:**
 - Sanofi-Pasteur, Merck, Pfizer, Seqirus, Moderna: Vaccines
 - AbbVie and Biohaven: Migraines
 - Idorsia: Insomnia
 - AstraZeneca: Asthma
 - Exact Sciences: Colorectal cancer
- **Consultant:**
 - Sanofi-Pasteur, Merck, Pfizer, Moderna, and Seqirus: Vaccines
 - GlaxoSmithKline: OA and Pain
 - Bayer: Chronic Kidney Disease
 - Idorsia: Insomnia
 - Shield Therapeutics: Iron Deficiency Anemia
 - Exact Sciences: Colorectal cancer

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All relevant financial relationships have been mitigated.

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Learning Objectives

- Discuss components of a malpractice claim.
- Identify techniques to prevent malpractice claims.
- Discuss pros and cons of having one's own malpractice policy.

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References

Listed within the Presentation

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Medical Malpractice

- The failure of a healthcare professional to exercise such care as would a reasonably prudent healthcare professional under the same or similar circumstances

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How is this determined?

- Standards of care
- Expert witness
- National guidelines
- Consensus opinions

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Today's Medicine...

- Nurse practitioners are facing increasing demands to...
 - Interact with more patients
 - Return more calls
 - Review more charts

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Today's Medicine... (continued)

- Study conducted at a major teaching hospital
 - Over a 9-month period, an error was made on 50% of patients.
 - 18% suffered a serious consequence
 - 1% sued for malpractice

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Additional Statistics

- More than ¼ of U.S. adults have experienced a major medical error within the past 2 years
- Although not all litigate
 - 1–4% do file a claim

– <http://www.medscape.com/viewarticle/459856> ¹² _{www3}

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What about NPs

- Study conducted from January 2011 through December 2016
 - 67 claims against NPs (1358 MD)
 - Most common
 - Failure/delay/wrong diagnosis (48%)
 - Medication related (24%)
 - Medical treatment related (16%)

<https://www.thedoctors.com/the-doctors-advocate/first-quarter-2018/nurse-practitioner-closed-claims-study/> accessed 06-30-2020

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Slide 9

J2 this article was written in 2003, please provide newer source (within the past 5 years)
JK, 6/29/2020

WW3 Unable to find other newer information to make this point; I will address others
Wendy Wright, 7/5/2020

What about NPs

- Study conducted from January 2011 through December 2016 (cont.)
 - MI, lung/prostate/breast cancer, pneumonia, PE, sepsis (Most common)

<https://www.thedoctors.com/the-doctors-advocate/first-quarter-2018/nurse-practitioner-closed-claims-study/> accessed 06-30-2020

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This is very true for NPs...

- Nurse practitioners are frequently being named as defendants in cases.
 - Increasing responsibilities
 - Increasing numbers of NPs

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Quote from CLE Program for Attorneys

- “Midwives, nurse practitioners...are not always employees of hospitals or attendings and may actually be independent medical practitioners. Even when they are employees, you may consider naming them as defendants since they may have their own insurance policies.”

– Source: Seminar: May 2, 2003; Prosecuting and Defending Medical Malpractice Claims; NYSBA CLE; Uniondale, NY ¹³ WW1

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Statistics

- Approximately 50% of all claims are unfounded and have no basis.
 - Approximately 20% have some merit but will not reach a settlement or trial.
 - 30% will be resolved either out of court or in trial.

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Slide 13

J3 this article was written in 2003, please provide newer source (within the past 5 years)
JK, 6/29/2020

WW1 This was a specific event that happened to me while teaching and I don't want to change this
Wendy Wright, 6/30/2020

National Practitioner Data Bank

- Reporting database designed to prevent negligent health care professionals from moving across state lines for practice
 - Administered by the Dept. of Health and Human Services

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National Practitioner Data Bank (continued)

- Information contained
 - Licensure
 - Malpractice payments
 - Professional memberships
 - Clinical privileges
- Additional information
 - Drug enforcement action
 - Medicare and Medicaid exclusions

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National Practitioner Data Bank (continued)

- How does it work?
 - When applying for a job, the prospective employer queries the data bank.
 - You can query your own record to make sure it is accurate
(<https://www.npdb.hrsa.gov/>).

WW2

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National Practitioner Data Bank (continued)

- How does it work? (cont.)
 - Hospitals are required to query the data bank every two years for any health care professional employed or on staff.
 - JCAHO:2003 mandates same for long-term care facilities and subacute facilities.

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Slide 17

J4 URL not found...please provide an alternative.
JK, 6/29/2020

WW2 changed
Wendy Wright, 6/30/2020

Malpractice Statistics on Behalf of Nurse Practitioners

- 2012 – 2016: 287 claims involving NPs, NP practices, or NP students which paid \$10,000 or more
- 2007 – 2011: 200 claims which paid \$10,000 or more

<https://www.medpagetoday.com/publichealthpolicy/by-the-numbers/69392>
accessed 07-03-2020

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Legal Terminology

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Tort

- Derived from the Latin word torquere, to twist
 - Wrong or injury that results from the breach of a duty (negligence)

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Intentional Tort

- Nurse practitioner commits the act with the intent to bring about the result.
 - Assault and battery
 - Forcing a person to take a medication when the person is competent to refuse the medication
 - This has been a big issue in long-term care facilities, as well as hospitals.

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Intentional Tort (continued)

- Nurse practitioner commits the act with the intent to bring about the result.
(cont.)
 - Invasion of privacy
 - Divulging information to others without a patient's consent to do so
 - Giving a progress report on a patient without permission

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Hobbs vs. Lopez, Ohio

- College student had pregnancy test performed by MD.
 - Told MD she wanted a 1st trimester abortion if positive. Test was positive.
 - Physician instructed RN to call and give information to patient.
 - RN called and reached Mrs. Hobb's (patient's mother).

<https://www.legale.com/decision/199476696ohioapp3d6701676> accessed 07-1-2020

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Hobbs vs. Lopez, Ohio (continued)

- RN gave patient's mother the results and information on locations of abortion sites.
 - Patient sued for medical malpractice.
 - Breach of privilege
 - Negligent infliction of emotional distress

<https://www.leagle.com/decision/199476696ohioapp3d6701676> accessed 07-1-2020

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Components of a Malpractice Claim

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Components of a Malpractice Claim (continued)

- Plaintiff must prove the following...
 - Duty
 - Relationship with plaintiff was established
 - Visit, phone call, casual conversation
 - Duty can occur in any setting.
 - Social event
 - Giving samples
 - Giving advice to family and friends

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Example Case

- Husband and wife were driving in Texas.
 - Husband began having chest pain and numbness in his left arm.
 - Couple stopped at the closest hospital.
 - Spoke to a physician and a nurse.
 - The nurse observed the man complaining of cardiac symptoms.
 - The physician told the nurse to send him to another hospital 24-miles away.

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Example Case (continued)

- On the way to the other facility, the husband died.
- Court ruled
 - Nurse failed to evaluate the patient and initiate proper care. License suspended.
 - Nurse claimed there was no relationship.
 - Court declared there was a relationship by virtue of her license and job.

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Components of a Malpractice Claim

- Plaintiff must prove the following...
 - Breach of standard of care
 - Will be held to standard of care of a NP with the same level of education and practice
 - For NPs – May or may not be the same standards of care for a physician

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Breach of Standard of Care

- Can result in a malpractice case in which compensatory damages are sought for negligence
 - Can also result in the loss of the nurse practitioner's license

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Components of a Malpractice Claim

- Plaintiff must prove the following...
 - Proximate cause
 - Compromised in standard of care caused the client's injury

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Proximate Cause

- Often difficult to prove
- Foreseeability – One issue that the court considers when trying to establish causation
 - Should the nurse have foreseen the situation in order to have prevented it?

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Proximate Cause (continued)

- 2 nurses, helping a man into a chair.
 - One nurse let go of the patient to locate a chair.
 - The man fell and broke his hip.
- Court ruled
 - The nurse was responsible because she should have foreseen the patient would need a chair and therefore, should have placed the chair before moving the patient.

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Components of a Malpractice Claim

- Plaintiff must prove the following...
 - Injury
 - Actual injury must have occurred.

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Damages

- Must prove that actual physical or emotional harm (injury) occurred
 - For instance, cases where a nurse is negligent, but no damage or harm occurred as a result

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Damages (continued)

- If the malpractice case is successful, damages will be paid.
 - Damages
 - Monetary compensation paid for loss or injury which resulted from an act of omission or negligence committed by another.

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Punitive Damages

- Punish defendants
 - Some states do not allow these.
 - Other states allow them in situations where the defendant acted with reckless disregard for the plaintiff's safety.
 - Huge awards
 - Because the actions involved malice, malpractice policies often do not cover the award.

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Starkey vs. St Rita's Medical Center

- 36-year-old male began experiencing chest pain and pressure, fatigue, diaphoresis at work.
 - Came home and went to bed
 - Wife gave him an antacid with no improvement
 - He went to bed and his wife called a general triage number at the local hospital.

<https://www.courtlistener.com/opinion/3944741/starkey-v-st-ritas-med-ctr/>
accessed 07-01-2020

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Starkey vs. St Rita's Medical Center (continued)

- Nurse advised the wife that it sounded like her husband may be having a heart attack but not to wake him.
 - "Let him rest and see how he was when he awoke."
 - When he awoke, symptoms continued.
- Suffered an MI and is now unable to work

<https://www.courtlistener.com/opinion/3944741/starkey-v-st-ritas-med-ctr/>
accessed 07-01-2020

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Example of Punitive Damage

- Nurse moved a terminal “no code” patient with less than 24-hours to live to a new room.
 - Patient was on supplemental oxygen.
 - Nurse chose to move the patient without the oxygen despite the family’s request.
 - Patient cardiac arrested on the way to the new room and died.

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Example of Punitive Damage (continued)

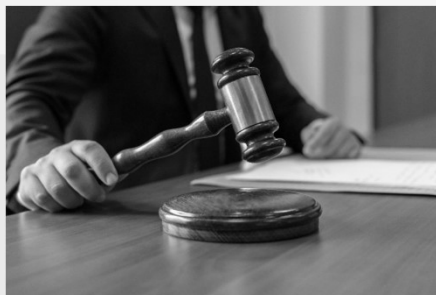
Court found that the nurse’s action was a gross deviation from the standard of care and awarded punitive damages

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Examples of Payouts

- Punitive damages
 - Few punitive damage cases have been successful against NPs
 - Oklahoma NP case: asked for 129 million from jury



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Many states have imposed caps...

- ...to reduce amounts paid to plaintiffs
 - 50% of states have imposed caps
 - Reduces premiums
- Some states have shared fault.
 - Award is reduced by percentage that plaintiff was found to contribute to outcome

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Significant Decrease in the Number of Insurers

- Many companies are no longer providing medical malpractice insurance.
 - Limiting states in which they will insure
 - Only writing claims-made policies

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Other Important Information

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Board of Registration in Nursing

- Board of registration in nursing that determines scope of practice
 - Job is to ensure public safety by making sure that all individuals, licensed to practice in that state, meet minimum qualifications
 - Each state has its own set of qualifications.

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Nurse Practice Act (Scope of Practice)

- State law that regulates the practice of nursing
 - Each state has a different scope of practice.
- Provides general guidelines regarding those duties which can be performed and those which can not be performed by the nurse or nurse practitioner.

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Nurse Practice Act (Scope of Practice) (continued)

- Provides general guidelines...(cont.)
 - Your employer has the right to restrict you to a narrower scope of practice BUT can not expand your scope beyond the Nurse Practice Act.

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Make sure that...

- When you are performing a function or job, you ask yourself the following...
 - Am I educationally qualified and experientially to be performing this task?
 - Could I defend my education regarding this task/job in court and would the jury believe that I am qualified?

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NP Case, Oklahoma

- Family NP
 - 1st year after graduation
 - Working alone in ED (rural hospital)
 - Delay in diagnosis (pulmonary embolism)
 - 19-year-old patient died
 - Issues:
 - Can you defend your education?
 - Can you defend your experience?
 - Are you in your scope?

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Keep Up with the Latest Treatment Options

- Review textbooks and journals
- Discuss cases with colleagues
- Continuing education programs
- Agency for Health Care Policy and Research (AHCPR) Guidelines

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Always Assume the Worst

- Consider the most serious diagnoses first
 - I.E., myocardial infarction, ectopic pregnancy, testicular torsion, breast cancer, appendicitis, aneurysm

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Always Assume the Worst (continued)

- NP evaluated a middle-aged man with chest pain
 - Examined him, discussed case with MD
 - Diagnosed muscle spasm and sent home
 - Patient suffered a myocardial infarction and sued for loss of wages, failure to diagnose
 - Physician and nurse practitioner paid claim.

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Follow-up on High "Ticket" Items

- It is the nurse practitioner's and MD's responsibility to follow-up on potentially serious problems
 - This is true even if the patient does not complain of continued symptoms.
 - Duty to follow-up with the patient is yours until the issue has been resolved.
 - I.E., mammogram, pap smear, breast lump

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When a patient asks...

- Strongly consider getting the test
 - Particularly when some providers may consider the test standard of care
 - 1 million settlement paid in NH
 - 52-year-old male patient asked a family physician for a PSA test.
 - Physician told patient that the test had a lot of false positives and was often an inaccurate test.
 - Patient had prostate cancer.

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Breach of Confidentiality

- May result in a malpractice claim
 - Examples
 - Discussing a patient where others can hear
 - Releasing information without permission
 - Leaving a message on an answering machine
 - Discussing a patient's condition with family members
 - Leaving record in view of others
 - Not shredding documents

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Avoid the Risk of Negligent Nondisclosure

- If you examine a patient and find an abnormality, you must inform the patient of that abnormality.
 - All facts to assist the patient with making decisions regarding the problem need to be provided.
 - I.E., Colon cancer screening recommendations

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Always Obtain Informed Consent

- Document that establishes proof that the procedure was discussed with the patient
 - Including the risks and benefits
- Allows patient or proxy to ask and have all questions answered
- No coercion
- Person performing the procedure must be involved in the informed consent process

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Warn Patient of Adverse Effects

- Psychiatrist prescribed a medication which called for a “warning” to avoid driving or operating heavy machinery.
 - Failed to provide the “warning” to the patient

– Source: Buppert, C. Nurse Practitioner’s Business Practice and Legal Guide 2018 ¹² WW4

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Slide 60

J7 update to newest edition please
JK, 6/29/2020

WW4 done
Wendy Wright, 7/5/2020

Warn Patient of Adverse Effects (continued)

- Patient took the medication, drove and caused an accident which injured a third party.
- Third party sued the psychiatrist for malpractice and won.

– Source: Buppert, C. Nurse Practitioner's Business Practice and Legal Guide 2018

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Discontinue a Medication when it Causes a Cautioned Adverse Effect

- Physician prescribed OCPs for a patient.
 - She developed migraines.
 - Called physician who advised her that she could continue the pills
 - She suffered a stroke.

– Source: Buppert, C. Nurse Practitioner's Business Practice and Legal Guide 2018 ¹⁸ WW5

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J8 update to newest edition please
JK, 6/29/2020

WW5 done
Wendy Wright, 7/5/2020

Don't Contribute to Substance Abuse

- Patients have sued providers for contributing to a substance use disorder.
- Consult with other specialists regarding long-term controlled substances.

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Documentation

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Slide 63

MF5 Correct term is "controlled substances".
Margaret Fitzgerald, 6/29/2020

WW6 changed
Wendy Wright, 7/5/2020

Documentation (continued)

- Documentation is crucial at a malpractice trial.
 - It provides a record of the quality of care you provided.
 - Lack of documentation can make you vulnerable to a malpractice claim.

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Poor documentation is dangerous.

- Notes and prescriptions must be legible.
 - Cardiologist wrote prescription for isosorbide dinitrate (Isordil®).
 - Pharmacist read it as felodipine (Plendil®) and filled the prescription.
 - Patient died as a result.
 - Settlement
 - \$225,000 from cardiologist and \$225,000 from pharmacist

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Document All

- No shows
- Canceled appointments
- Telephone calls made to a patient to check on him/her
- Letters sent and calls made reminding patient of a particular test that needed to be completed
 - Keep copies in chart of these letters.

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Nonadherence

- Always document discussions trying to get the patient to improve adherence.
- Document the patient's verbal responses.

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Examples of Things **NOT** to Write in the Chart

- COM
 - Crotchety old man
- FLK
 - Funny looking kid
- FLK from FLP
 - Funny looking kid from funny looking parents
- Two hands stamped on the chart
 - Treat with kid gloves
- FFC
 - Fit for coffin
- 29-year-old well-endowed beautiful young woman
- T/T=2/3

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Document a Patient's Refusal of Care

- Document that you have explained the risks, benefits and alternatives of treatment.
- Also discuss and document the risks of refusing treatment.

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Why do people file malpractice claims?

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Reasons for Malpractice Claims

- **Expectation**
 - Expect better outcome
- **Investigation**
 - Want to see if anyone is at fault
- **Blame**
 - Someone else's fault
- **Retribution**
 - Punish nurse
- **Remuneration**
 - Money
- **Institutionalization**
 - Punish the system

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The research is clear.

- The relationship with a patient is the biggest risk and the biggest protection.
 - Effective communication is an important way to prevent a claim.

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Customer Service:
Little things can make a big difference

This is your biggest protection.

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Example

- Beckman and colleagues studied 45-depositions and focused on why plaintiffs decided to bring malpractice actions.
 - Determined – It was the process of care, rather than the bad outcomes which determined the decision to file a claim.
 - 71% of depositions revealed problems with MD-patient communication.

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Claims Against Surgeons Focused on Four Issues

1. Perceived unavailability
 - No one returned our calls, no one came when I rang
2. Devaluing the patient's or family's views (cultural insensitivity)

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4409730/> accessed 07-05-2020

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J12 page not found, please update source
JK, 6/29/2020

Claims Against Surgeons Focused on Four Issues (continued)

3. Poor delivery of medical information
 - Failure to explain why a complication happened
4. Failure to understand the patient's perspective

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4409730/> accessed 07-05-2020

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Compare this with...


- Primary care clinicians who have never had a claim tended to...
 - Educate patients about what to expect
 - Used humor more
 - Employed better communication techniques to make sure patients understood and communicated with them
 - Spent an average of 3.3 minutes longer with the patient

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4409730/> accessed 07-05-2020

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Remember
Happy Patients Do **NOT** Sue



Angry Ones Do!

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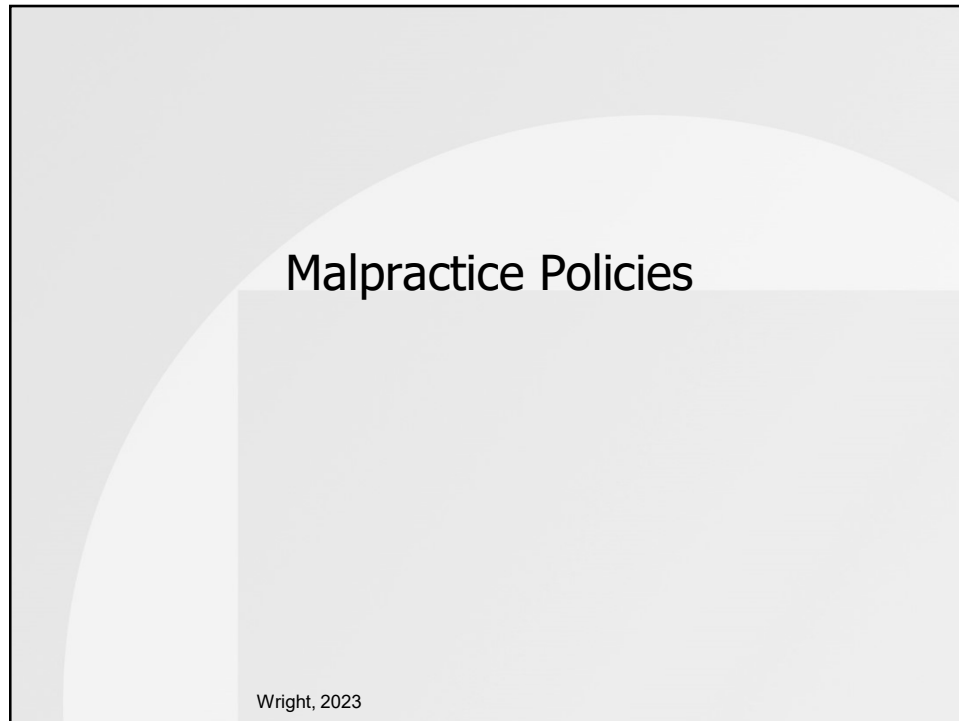
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In Summary...

- How do you protect yourself?
 - 4 Cs
 - Caring
 - Communication
 - Competence
 - Charting

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What type of policy is best?

- Occurrence vs. claims-made
- Best – Occurrence policy
 - This covers the nurse for any incident that occurred while the nurse was insured.
- Claims – Only covers the nurse while the policy is in effect
 - If you purchase a claims policy, make sure you purchase a “tail.”

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Recommendation Have Your Own Policy

- Institutional plans
 - Coverage may be denied for private duty activities.
 - You may have no coverage for off duty incidents.
 - Your coverage may be canceled following a job change.
 - Limits of coverage may be shared by others

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Example of Malpractice Coverage

- Liability coverage
 - 1 million per claim
 - 9 million policy aggregate
 - 16 million of umbrella coverage

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Drawbacks of an Individual Policy

- Some experts propose that you may be more likely to be sued if you have your own policy.
 - A lot of controversy regarding that premise

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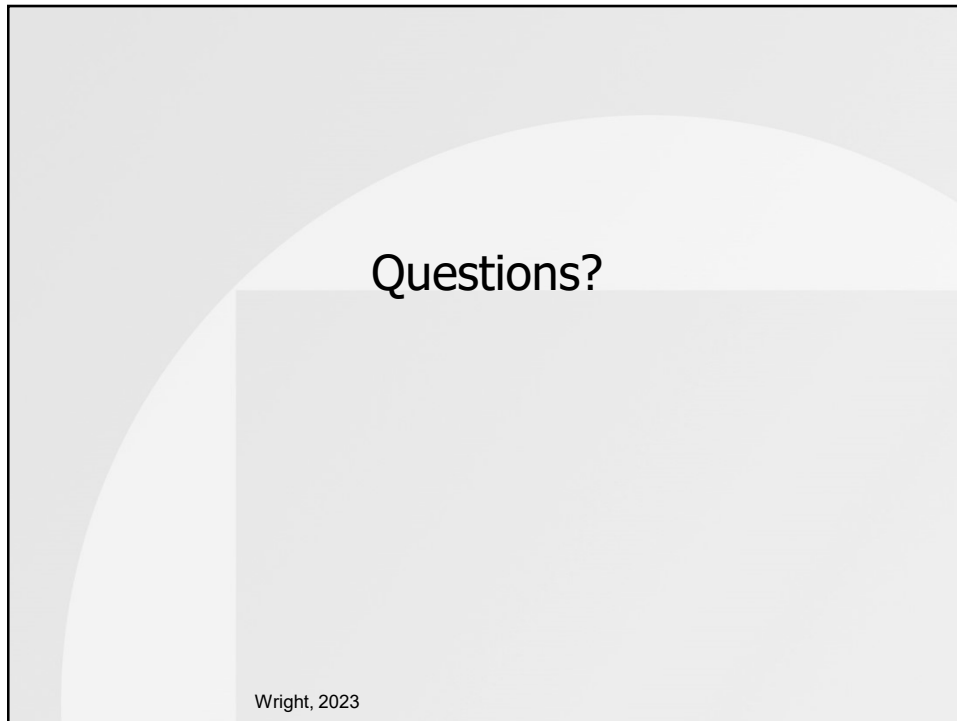
85

Conclusions

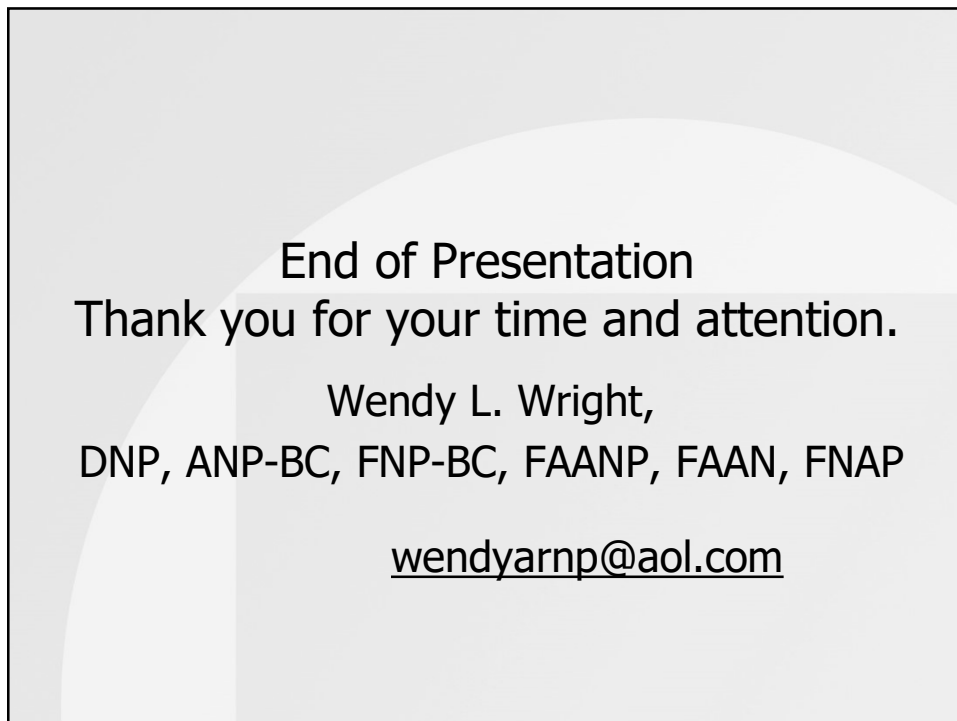
- In an era of increasing demands on the nurse practitioner, it is essential that steps be implemented to decrease the nurse practitioner's liability.
- Concrete steps can significantly decrease the risk of having a claim filed against the nurse practitioner.

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