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Course: When an OD Needs Legal Counsel
When an O.D. Needs Legal Counsel

LEARNING OBJECTIVES

Upon completion of this course, participants should be able to:

1) Know the definition of Medical Malpractice and the elements needed to prove thereof;

2) Have a general understanding of how to avoid a medical complaint and/or a medical lawsuit; and

3) Describe various alternative dispute resolutions, in lieu of trial.
Medical Malpractice: *Special Case of Negligence*

Professional malpractice is an action for negligence on the part of the healthcare professional.

The injured Plaintiff (aka: Patient) has the burden of proving the necessary elements of a professional malpractice action.
The 4 Elements that Must be Proved:

1. Duty—the existence of a duty owed to the Plaintiff (Patient);
2. Breach of the Duty;
3. Proximate Causation; and
4. Damages.
The Plaintiff (Patient) Must Prove:

That the Doctor failed to exercise the degree of skill, care and learning possessed in the same profession (Duty and Breach of Duty); and

That as a Proximate Result of such failure, the Plaintiff suffered Damages.
Burden of Proof in Medical Malpractice Case

**Preponderance of the Evidence**: evidence presented that provides more convincing than the pre-existing evidence presented in court.

Common Types of Malpractice Claims

--Actions taken or failure to act by Optometric Physician

--Failure to properly inform the Patient, prior to a medical procedure

--HIPAA and other Medical Record Violations
Most Common Cause of Medical Malpractice

The most common cause of Malpractice is *Misdiagnosis*: an error in diagnosis, lack of due diligence of care, or the ordering of improper course of treatment that injured the Patient.
Pearls To Avoid a Malpractice Claim

1. Establish a Strong Optometric Physician and Patient relationship;
2. Set Realistic Expectations in Patient Care; and
3. Avoid Adverse Events or Outcomes Related to Patient Care.
How To Reduce the Risk of Being Sued

Adhere to the Standard of Care of an Optometric Physician;

Maintain accurate medical records: Never change a patient’s chart (add or delete additional information);

Failure to document (a silent medical chart) is assumed that something was not performed.
Communicate, Communicate, Communicate

◦A. It is paramount to have a good rapport with the patient;

◦B. Defuse negative feelings even if a mistake occurred;

◦C. Informed Consent: Whether you are prescribing extended wear contacts or prescribing an ophthalmic medication.
You Receive a Letter/Correspondence From a Law Office

OR

A Claim Has Been Filed Against You

WHAT NOW?
Contact Your Medical Malpractice Carrier

1. Beware of provisions within your policy that may require that you notify your carrier within a certain period of time or your coverage may be waived;

2. If you are working for a multi-specialty clinic or corporation, contact your risk manager immediately;

3. Listen to your Advisor and follow their directions.
Review Your Med Mal Insurance Coverage

--Confirm that you have adequate Professional Liability Insurance

--Read the Policy—failure to talk to your insurance company first may place you in violation of your obligations under the policy

--Amount of Coverage is important: $2 million-$4 million

--Confirm coverage of Acts of Optometry performed anywhere (within or outside of office)
An Attorney Contacts You to Discuss Your Care—What do you do?

1. Always Ask the Attorney to Send Requests and/or all Correspondence in Writing;

2. Never, never discuss Patient care to an Attorney due to HIPPPA regulations;

3. If you receive written requests or correspondence from an Attorney, immediately contact your malpractice carrier before responding.
Malpractice Suit May Take Years to Resolve

--Malpractice Suits are Lengthy: Litigation takes years and is highly costly

--The Jury Usually Does Not Get the Whole Story due to various legal procedures/motions and requests to suppress evidence

--A Main Discovery Tool—Deposition—is the foundation for everything else to come.
Discovery—the following methods may be employed should a claim be filed:

1. Interrogatories;
2. Subpoenas;
3. Requests for Admissions;
4. Request for Production; and of course
5. DEPOSITIONS
Deposition—Most Common Discovery Tool

1. A deposition is taken before a court reporter who is a notary public;

2. A deposition may be taken by any one of the following:
   ○ a. Audiotape
   ○ b. Videotape
   ○ c. Stenographic

3. The party taking the deposition must state the method of recording in the Notice of Deposition and shall bear the cost of the recording.
The Purpose of Taking a Deposition

1. To Learn the Theories of the Case;
2. To Learn the Facts and how the events occurred;
3. To Learn what the other side knows; and
4. To Learn the weaknesses in your case and the flaws in the opponent’s case.
DEPOSITIONS—Who May be Deposed?

1. Any person including witnesses who are not parties to the action;
2. Any person to whom one believes may have knowledge of relevant information; and
3. Parties to the action, agents and employees of parties, former parties and the attorneys of the parties.
ALTERNATE DISPUTE RESOLUTION

In the State of Oregon, parties to a malpractice case must (mandatory) participate in some form of Alternate Dispute Resolution within 270 days after a cause of action has been filed.
WHAT DOES IT MEAN BY ALTERNATE DISPUTE RESOLUTION?

Alternate Dispute Resolution ("ADR"):  

1. Mediation; or  
2. Arbitration.
Mediation

1. Mediation is an informal way for parties to resolve their disputes;
2. The Mediator (trained/neutral) will assist the parties in resolving the dispute;
3. The Mediator does not rule on the case, decide on the merits of the case and does not make a determination who is right or wrong;
4. The Mediator does not issue a decision.
Benefits of Mediation

--Mediation is a fair process helping the parties avoid a lengthy discovery process and litigation;

--Mediation usually last no more than 1 day;

--Parties agree in advance of the cost of the Mediator.
Arbitration

Arbitration is another form of ADR

Arbitration is a method of resolving disputes between the Parties outside of Court.

Parties refer their dispute to an Arbitrator
The Arbitrator’s Role:

A neutral Arbitrator, or panel of Arbitrators, will listen to the Parties, review the evidence put forward and issue a decision.

An Arbitration is less formal than a Trial, but more formal than a Mediation.
Mandatory vs. Voluntary Arbitration

Mandatory: A Dispute that is subject to mandatory arbitration must go through arbitration.

Voluntary: Both sides agree to submit their disagreement to arbitration; this allows the Parties a choice, rather than a necessity.
Binding versus Nonbinding Arbitration

In a binding arbitration, the Arbitrator’s decision is final. It may not reviewed or overturned in Court.

In nonbinding arbitration, either Party may reject the arbitration decision (award) and demand that the case be set for trial. The Parties assess the strengths and weaknesses of the case, with the goal of reaching a resolution.
Statute of Limitations for Medical Malpractice in the State of Oregon

Statute of Limitations is a Defense to a Malpractice lawsuit;

Statute of Limitations places a limit on the amount of time a Plaintiff alleging malpractice has to file a lawsuit against an Optometric Physician
State of Oregon—Statute of Limitation Law

In OR, the statute of limitations for medical malpractice cases is two (2) years from the date of injury or its reasonable discovery, but not more than five (5) years from the date of the act or omission to act that is alleged to have been discovered and resulting in injury to the Plaintiff (Patient).

For Patients under the age of 18, the statute of limitations is tolled until the age of majority, but the statute of limitations period may not be extended more than 5 years or more than one (1) year past the age of majority, whichever occurs first.
Additional Rules with Medical Malpractice Cases:

Traditional Collateral Source Rule: Payments received by the Plaintiff (Patient) from third parties (i.e.: medical insurance companies) would not be considered in the calculation of damages.

The State of Oregon modified the traditional rule: Oregon allows the evidence of collateral source benefits that have not been paid for by the Plaintiff to be admitted as evidence.
Damage in Medical Malpractice Cases

Damages in medical malpractice cases are in the form of economic (wage loss, cost of medical care and other out of pocket expenses) and non-economic damages for pain and suffering resulting from the alleged injury.

The Oregon Supreme Court held that placing caps on non-economic damages (Pain and suffering and/or lost of consortium) in medical malpractice cases are unconstitutional.
Joint and Several Liability

More than one Defendant (Doctor) is Sued

Under Joint and Several Liability, each Defendant named in the lawsuit may be required to pay the full amount of the verdict.

The principle of Joint and Several Liability is that the Plaintiff (Patient) will be fully compensated even if one of the Doctors has insufficient funds or insurance.
Oregon Adopted Modified Rule of Joint and Several Liability

In Oregon, the Defendants (Doctors) are liable only in proportion to their degree of fault for any damages awarded.

*Caveat*: If within one year of the final judgment the damage award is uncollectable, the Court may step in and reallocate the liability for the uncollected portion of the damage award among the other Defendants (Doctors) based on their relative degrees of fault.
Pearl: Consult with an Experienced Medical Malpractice Lawyer

Never, never, never represent yourself!

You should consult with a competent and experienced medical malpractice attorney who has specific knowledge and understanding of the handling of medical negligence claims.
Hire a Medical Malpractice Attorney

1. Medical Malpractice cases are complex and very costly to litigate;

2. Malpractice Attorneys are aware of the ever changing laws

3. Malpractice Attorneys will guide you through the process and represent you from start to finish.