

When a Lawsuit Happens

While no physician wants to face a medical malpractice lawsuit, it is important to be prepared and familiar with the process. By becoming actively involved in the defense, learning to control tempers and to answer questions directly and clearly, physicians can play an important role in coming to settlement and even convincing a plaintiff to drop a case.

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To be awarded damages in a malpractice case, the plaintiff must prove that negligence occurred and that it was the cause of the injury. In an article in the *Cleveland Clinic Journal of Medicine*, Carl A. Culley, Jr., MD, and Leslie J. Spisak, JD,

explain: “Negligence is a physician’s failure to meet the standard of care as defined by the U.S. Supreme Court: ‘that which a reasonable physician would do under the same or similar circumstances.’ In many cases—but not all—the plaintiff must present an expert witness to testify that the defendant failed to comply with the standard of care.”

A lawsuit may begin with a notice letter or a summons served on the physician. A notice letter arrives by certified mail from the plaintiff’s attorney, explaining the intent to bring suit. These

legal documents require a formal response, which the defense attorney is responsible for filing within a specific time period. In California, plaintiffs must give at least 90 days' notice before starting a court action. Laws like this are designed to trim court congestion by giving a defendant the chance to look into the claim and resolve it without going to court.

Subpoenas are a demand for documentation or other information, or an appearance in court. In healthcare cases, a request for documentation generally refers to medical or billing records, or

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calls for an insured's deposition and/or appearance at trial. There may be a penalty for any failure to comply with legal requests such as subpoenas.

Once a subpoena or request for documentation has been received, most carriers ask that the patient's chart be placed in a secure location. The chart should remain in the same condition as before notice of the claim, with nothing changed or removed. If

the chart is altered, the physician is almost certain to lose the case. Furthermore, altering the chart can lead to cancellation of insurance coverage, criminal charges, and loss of medical license for professional misconduct. A separate file should be established for any legal documents related to the patient's complaint.

Appropriate members of the staff should be made aware of the legal situation. However, specifics of the case should be discussed only with the attorney and claims representative.

Preparing for Trial

Physicians should establish a good working relationship with their lawyers. Once the attorney is selected, the physician needs to feel comfortable with the choice. To help establish a solid relationship, immediately become active in your defense. For example, ask your lawyer what he or she expects to happen in the case. Your lawyer should tell you what he or she has learned concerning the allegations against you and the facts on which the

allegations are based.

Physicians are expected to be upfront and honest during conversations with their lawyers. Discussions between client and attorneys are privileged and not discoverable. Be ready to spend time and effort on your defense. Educate the attorney on specific healthcare issues involved in the case. If possible, research names of specialists or references to medical literature and research that may help the defense. The physician's cooperation is essential to a successful claim defense.

A trial may be scheduled within a year after the filing of a suit, but this can vary greatly depending on a number of factors such as the efficiency of the court involved and the enthusiasm of the lawyers to process the case. Some cases go on for many years.

Because a case can drag on for a long time, attorney and physician should stay in touch so that both are kept up to date on what is happening. Most physicians spend time working with their lawyers to gather information and to deal with issues that arise. Legal experts say that being actively involved in the defense increases the odds for a better outcome. Noninvolvement could end up costing dearly.

The lawyer is expected to coordinate the claim through all stages of the investigation and defense during a trial. The physician should be as prepared as possible for every stage, especially the deposition and the actual trial. For example, the physician should discuss with the attorney how best to answer questions from the plaintiff's attorney. Because a jury may equate the physician's knowledge of the medical record with his or her care and concern for the patient, the physician should take pains to achieve a detailed knowledge of the record. Determine whether there are any medical records of prior or subsequent care and treatment for the patient, and become familiar with those as well. Practice answering questions, using videotapes to review and evaluate responses.

The Discovery Phase

The first phase of the suit involves *discovery*, which takes place between the time the lawsuit is filed and when it is tried. During this phase, the defense and the plaintiff each have a chance to obtain relevant data and documents from the other par-

ties to the lawsuit. The aim is to allow each side to become familiar with the other side of the case.

Discovery can cover various forms, such as *interrogatories* (written questions served by one party on the other), *expert reports* (which contain expert opinions), and *depositions* (question-and-answer sessions in which witnesses provide sworn testimony).

Written responses to interrogatories are legally admissible in court and should be reviewed carefully with the defense attorney. While certain questions may seem repetitious, physicians are advised to take every question seriously.

The deposition is one of the most important phases of a lawsuit. Legal experts stress the importance of being prepared for this phase by carefully studying the medical record and reviewing relevant literature. Taking time to research the medicine involved in the case and passing this on to the attorney may help put an end to the plaintiff's claim.

The physician can expect to answer questions about background, training, and experience. Attorney James W. Saxton, author of *The Satisfied Patient: A Guide to Preventing Malpractice Claims by Providing Excellent Customer Service*, advises

physicians to carefully review their responses to the discovery request, especially the interrogatories. This is an opportunity to clear up anything that may be erroneous.

The Deposition Phase

The deposition is one of the most important phases of a lawsuit. Legal experts stress the importance of being prepared for this phase by carefully studying the medical record and reviewing authoritative literature relevant to the medical issue at the center of the case. Taking time to research the medicine involved in the case and passing this on to the attorney may help put an end to the plaintiff's claim.

"Preparation means knowing the facts, knowing the medicine, knowing the opponent's strategy, and knowing what types of questions to expect," explains Eugene Cooney, Esq., in the Spring 2005 issue of *Connection*, the newsletter of the Connecticut Medical Insurance Company.

Notice of deposition will provide the name of the case, the

time and place of the deposition, and the identity of the court reporter. It may also specify a list of documents and records that must be brought to the deposition. If the time of the deposition is inconvenient for work or personal reasons, the physician should try to reschedule.

Before the deposition, key issues in the case should be reviewed. The attorney may be able to describe the plaintiff's attorney and offer some examples of likely questions. Going through a mock deposition can be very helpful, says Mr. Saxton.

Documents for the deposition should be properly organized. Generally these include a copy of the complaint, the physician's answer to the complaint, answers to interrogatories, and a recent

Pretrial Screening Laws

According to a study published in the June 2006 issue of the *New England Journal of Medicine*, about one-third of medical malpractice cases do not involve practitioner error. Although most of these cases do not end in an award to the plaintiff, they do cost dearly in terms of legal and administrative fees. In an attempt to reduce the number of non-meritorious cases that go to trial, many states set up pretrial screening panels for medical malpractice cases.

The purpose of these screening panels is to review cases at an early stage and give an opinion about whether there is enough merit to go to trial. Each state has different rules and regulations concerning pretrial screenings. Some require that only physicians sit on the panels; some require only attorneys; and others choose a combination of physicians, attorneys, and laypeople. In some states a pretrial panel is a voluntary measure, in others it is required before going to trial. Although the decisions of the panel are non-binding, some states allow the decisions to be used as evidence if the case goes to trial.

New Hampshire enacted a pretrial screening panel law in 2005 that includes three fundamental provisions:

- Pretrial panels are mandatory.
- An appropriate standard of proof must be met by the plaintiff.
- Unanimous panel findings are admissible in the trial.

Under this law, parties to a malpractice claim must go before a panel consisting of a judge, an attorney, and a physician. The panel conducts a hearing and decides on the merits of the case. Cases proceed to trial by jury if parties are unable to settle.

copy of the physician's curriculum vitae.

During the deposition the physician is under oath and liable for perjury if not truthful. Generally a court reporter records the testimony, prepares a transcript of the recording, and certifies its accuracy. Today depositions are recorded by both a stenographer and videotape.

Testimony provided during a deposition is a key event of the pretrial process. The plaintiff's attorney will use these sessions to determine how a jury might react to the physician's testimony. If the physician handles the questions well during the deposition, the plaintiff's attorney may recommend the plaintiff drop the case.

Responses during this phase are very important because the defense attorney will probably refer to the answers during the actual trial. Therefore, any individual who is deposed should be represented by a lawyer during this phase. "If your receptionist and office nurse are deposed, your attorney can and should represent their interests," says Mr. Saxton.

All lawyers and parties to a case are usually present at the deposition. This lets the defendant hear how the plaintiff's attorney intends to present the case. It is essential to be as polite as possible to the patient and his or her attorney, but to avoid informal chatter with them.

The plaintiff's attorney will try to discover weaknesses and to uncover information that is helpful to the plaintiff's case. It is best to simply answer the questions without adding extraneous information. Whenever a question refers to a document, the physician should ask to review the document.

There may be questions about the physician's education, training, certification, hospital associations and positions, prior lawsuits, and any disciplinary issues with state or federal agencies. The aim of the plaintiff's attorney is to establish the standard of care and to try to show that the physician did not meet that standard in one or more of the ways alleged in the complaint.

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Legal experts agree that a professional demeanor impresses jurors and improves chances of a favorable outcome. Physicians should be calm, compassionate, and knowledgeable about the case. Southern California Physicians Insurance Exchange (SCPIE) points out that a weak claim against the insured can be made even weaker by a physician's poise and professionalism at the deposition. Arrogance or hot tempers will not help.

Attorney Saxton stresses that maintaining credibility is extremely important during the deposition. One way to establish credibility is to respond confidently to questions. "For example, responding with a confident 'yes' or 'no' is more powerful than 'usually I would not,' or 'I think so,'" he explains. Further, he reminds physicians that "depositions are inherently adversarial." In other words, never let your guard down.

It is wise to pause and think before answering tough or lead-

Resources for Dealing with the Stress of a Lawsuit

In today's litigious society, medical malpractice suits are an occupational hazard that can cause great stress and may have repercussions far beyond the courtroom or the medical practice. They can affect work relationships, self-esteem, and family life. Physicians are advised to get the support they need both during and after a medical malpractice lawsuit.

Resources are available to provide support and counseling. One resource available on the Web is the nonprofit Physician Litigation Stress Resource Center (www.physicianlitigationstress.org). The center was founded by physicians and insurance and legal personnel with experience in helping physicians cope with the emotional dimensions of medical malpractice. The site points out that those most at risk are those who try to navigate the waters of a malpractice suit without support.

Individual insurance carriers may also offer assistance. For example, ISMIE Mutual Insurance Company in Chicago offers a semiannual seminar, called "Taking Control: Managing Your Malpractice Lawsuit," for its policyholders and their spouses. Designed for defendants in medical malpractice litigation, the seminar discusses the various phases of a lawsuit, explains ISMIE's claims management process and defense policy, and answers participants' questions. The program is

ing questions. Doing so gives the defense attorney a chance to object to the phrasing of the question or to the question itself. The attorney's objection will alert you to possible legal quagmires. Respondents can always ask the plaintiff's lawyer to repeat a question if it has been asked too quickly or if the question was not clear. The lawyer may instruct his or her client not to answer a question that may solicit information that is not legally discoverable.

A plaintiff's attorney will employ various types of questions to cause difficulty for the physician during the deposition. In some situations, the questions may seem unfair. For example, lawyers will ask the same question in several different ways to try to get a conflicting response. If your attorney does not jump in to object when this occurs, simply respond by saying, "As I stated before...."

The plaintiff's attorney will probably lodge some hostile ques-

presented by a physician, a defense attorney, and a claims professional. (For more information, go to www.ismie.com/risk.html.)

Another resource from ISMIE is The Litigation Support Network, which was established to give physicians facing legal action the opportunity to talk with others who have had similar experiences. Physician volunteers provide support to doctors currently involved in litigation. The members of the network do not give legal, insurance, or medical advice. Instead, they provide collegial support, sharing advice on how they survived litigation and suggesting additional resources. For more information, go to www.ismie.com/claims/litigation.html.

Medical Mutual Liability Insurance Society of Maryland has an online stress management program on their Website for the Professionals Advocate Insurance Company, the division of the company that offers insurance to physicians in Maryland, Virginia, and the District of Columbia. To access the materials, go to www.professionalsadvocate.com, then click on risk management and choose stress management. The site offers reference materials on stress, tips and techniques for stress management, and links to other resources.

Another insurer, Medical Mutual Insurance Company of Maine (www.medicalmutual.com), claims to offer one-on-one interaction between defendant physicians and physician members of the claims committee through its litigation support system.

tions. While such questions are designed to surprise, one should not be intimidated; simply answer confidently. The attorney may also ask leading questions. These are ones in which the questioner is not really asking questions, but rather giving answers, explains attorney Eugene Cooney in the Connecticut Medical Insurance Company's newsletter *Connection*. For example, questioning the witness by saying, "Dr. Smith, when a patient presents to the ER with a history of sudden, sharp chest pain radiating to the back, one of the possible explanations is an aortic dissection, is that right?" is a leading question because the questioner has already provided the answer. "In the hands of an experienced trial attorney, the leading question can be used with devastating effect and leave the witness feeling helpless," Mr. Cooney explains.

Expert witnesses will also be deposed. The expert witness for the defense cannot be a friend, relative, or person with whom the physician has regular contact. He or she must be independent and must have quality credentials. In some situations, it may be difficult to evaluate the strengths and weaknesses of a case until these witnesses have answered questions during the deposition.

A copy of the completed deposition is sent to the physician, who can then suggest changes or corrections to make sure that the transcript is accurate. Legal experts say that this is a chance to review what was said and confirm that it is accurate.

Going to Trial

Most malpractice lawsuits never actually go to trial. Statistics indicate that 61 percent of these suits are either dropped by the plaintiff or dismissed by a judge. More remarkable is that only 1 percent of patients injured by negligence are compensated by the system, Michelle M. Mello, J.D., Ph.D., associate professor of health policy and law at Harvard School of Public Health, recently told the House Committee on Energy and Commerce's subcommittee on health.

It often takes several years after a lawsuit is filed before the trial begins. In addition, statistics indicate that the average suit may take four years to resolve—with some cases taking much longer. This means that if your case goes to trial, you must be

prepared to go the distance if the case drags on.

It is the attorney's job to let the physician know what to expect from the trial. For the most part, the major questions to be addressed are these:

- Did the physician breach the standard of care?
- Was the physician's breach a substantial factor in causing harm to the patient?
- What damages should be awarded because of that breach of care?

In preparation for trial, the attorney should explain the type of questions that the plaintiff's attorney will likely ask. The deposition may serve as fodder for some of these questions. Since many months may have passed since the deposition, it would be wise to thoroughly review all the

information again. Physicians should carefully review the patient's medical record, their own depositions, and the depositions of experts and plaintiffs.

When a case goes to trial, the physician should be present in the courtroom with counsel for most of it. If the doctor is not present, the jurors may believe that he or she is not interested and feels indifferent toward the patient. Depending on the complexity of the case, a physician should block out as much as three weeks or even more for this. The trial can be a difficult time, especially since physicians must sit in the courtroom and listen to testimony that is likely to criticize their performance and qualifications as a physician.

The first step in the trial involves selection of jurors. A jury is generally made up of twelve individuals. They are questioned during the initial phase, called *voir dire*, a phrase that derives from Middle French and means "speak the truth." The defense attorney and the plaintiff's attorney usually have an opportunity to question potential jurors; but in some jurisdictions, the judge may take on the questioning of jurors. Both sides may reject a certain number of jurors without cause. The judge may also

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excuse jurors for reasons such as bias, previous knowledge of the case, or acquaintance with the parties or attorneys involved in the case. The aim, says Mr. Saxton, is to end up with a group of jurors who are going to be fair to both sides.

The trial itself begins with opening statements from both sides. Since the plaintiff has the burden of proof, the plaintiff's attorney will be the first to present his or her statement. While it will be a difficult and emotional time for physicians to hear how the plaintiff's attorney describes the case and the doctor, the information presented indicates how the plaintiff's attorney intends to handle the case.

After the defendant's attorney presents his or her opening statement, generally the plaintiff's attorney starts presenting the case with testimony from the patient, who explains the medical problems that he or she suffered as a result of the doctor's care. Expert witnesses will be called to provide testimony concerning the standard of care, and they may also provide testimony concerning causation and damages. Attorney Saxton says that the expert witness must explain how the standard of care was breached and that this breach was a substantial factor in causing the harm.

The experts are furnished with medical records, depositions, and other relevant information needed to arrive at their opinions. In some situations, they may be able to examine the plaintiff to determine what happened and what damages, if any, are apparent. Depending on the case, there may be a number of expert witnesses. The defense is then given the opportunity to cross-examine all the witnesses called by the plaintiff.

Before the defense attorney presents the physician's side, he or she may file a motion with the court to dismiss part of the claim because the attorney feels that there is not sufficient evidence. However, in most cases, the judge will say that it is up to

the jury to decide, and the judge will allow the jury to hear the rest of the case.

The defense

Do your patients have questions about Medicare Part D? We've got the answers in Your Guide to Medicare Part D from *Patient's Digest*. Go to www.doctorsdigest.net to download an executive summary that gives patients quick tips and instructions on how to get the free publication.

attorney then has an opportunity to present the other side of the case. The physician will be called to the stand and will be asked a series of questions about the case. The first questions come from the physician's own defense team.

The more difficult questions come during cross-examination by the plaintiff's attorney. "The types of questions are not as open-ended as those that were asked during the deposition," explains Mr. Saxton.

Nevertheless, it is the job of the doctor to explain to the jury in a credible way what actually happened. To do this, the physician must answer honestly, confidently, and with concern for the patient. The physician should look at the jurors directly and avoid the use of medical terminology when testifying. If members of the jury do not understand the physician's answers, they may well conclude that the patient also had trouble understanding the physician.

The expert witness or witnesses for the physician will have an opportunity to answer questions regarding the standard of care. Expert witnesses are selected on the bases of many criteria, including knowledge, education, training, expertise in a given discipline, credibility, and demeanor. Generally witnesses who testify on the standard of care in a given discipline must also

Re-evaluating Jury Trials

While jury trials are a mainstay of the U.S. justice system, their role in malpractice cases may need to be re-evaluated, say some experts. "Exorbitant amounts of money are spent to get compensation to the few patients who receive it," Michelle M. Mello, J.D., Ph.D., associate professor of health policy and law at Harvard School of Public Health, recently told the House Committee on Energy and Commerce's subcommittee on health. "On average, about 55 cents on the dollar in malpractice system costs is spent on administrative expenses," she told lawmakers.

Dr. Mello said that it may be necessary to rethink the country's historical attachment to juries as a means of resolving malpractice disputes. This rethinking, she said, is necessary if the country is committed to the goal of getting compensation to more injured patients. (For more on alternatives to jury trials, see chapter 5.)

have practiced medicine in that discipline for a long enough time to develop solid expertise.

Once all the evidence is presented, lawyers for both sides will summarize their cases for the jury in closing arguments. At this time the lawyers can tie everything together and convince the jury to render the verdict in favor of the plaintiff or the defendant. “The job of the jurors is to determine what the facts really are, listen to the judge’s explanation of the law to be applied, apply the law and the facts to come up with a verdict,” explains Mr. Saxton. If the jury decides that the care fell below the standard, the jury must decide whether the physician caused an injury, and

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the amount of monetary damages that will be paid as a result of the injury. Obviously the jury could also decide that the standard of care was met and that the physician was in no way negligent.

Dealing with the Stress of a Lawsuit

For physicians who experience the threat of a malpractice claim or an actual lawsuit, the stress surrounding these events can take a heavy emotional toll. Experts say that physicians who face a trial or actually go through one are likely to experience a series of emotions, similar to those that accompany any catastrophic life event. These feelings may include panic, shock, humiliation, guilt, embarrassment, depression, and inadequacy.

There are many ways to help reduce stress levels. It can help to talk to family as well as counselors about these feelings. These important support systems can provide assistance before, during, and after trial.

Even after the case is resolved, it is possible to experience continued stress and self-doubt. Many insurers and state medical societies provide referrals to stress reduction programs. Some insurers provide sessions with a consultant or phone consultations with professionals specifically trained to assist doctors who

face the anxiety and worry associated with a lawsuit. (See sidebar on stress-reduction resources earlier in this chapter.)

It can help to talk to other physicians who have been sued about the process and how they handled the event. While physicians facing a trial should not talk about the details of the case, it is acceptable to discuss the experience of being sued and the feelings it arouses.

If an error was actually made, a physician should take time to find out what went wrong and take steps to insure that a similar mishap does not occur in the future. Since many malpractice cases are related to poor communication, experts recommend taking advantage of knowledge gained in order to improve communication skills.