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GOOD MEDICINE.

WHAT DOCTORS SHOULD KNOW ABOUT GETTING SUED

A Guide to Overcoming the Emotional Impact of a Lawsuit and Succeeding in Court

YOU ARE AT RISK FOR A LAWSUIT

As a physician, it's not a matter of if you will get sued, but when.

Thirty-six percent of physicians in low-risk specialties and 88 percent of physicians in high-risk specialties are projected to face their first claims by the age of 45. By the age of 65, more than 75 percent of physicians in low-risk specialties and 99 percent of physicians in high-risk specialties have experienced a claim.¹

Because claims are becoming an inevitable part of the medical business, it's important that physicians know what to expect when they are sued and how to navigate the legal process to ensure success.

MALPRACTICE SUITS COULD CONSUME YOUR CAREER

Physicians spend significant time in court defending themselves against medical malpractice claims, a majority of which are found to be fruitless and frivolous. The average physician spends 50.7 months, or over 4 years, of a typical 40-year career fighting malpractice claims—the majority of which end with no indemnity payment. High-risk specialists such as neurosurgeons and cardiovascular surgeons spend nearly a quarter of their careers defending themselves against litigation.²

Malpractice lawsuits have a huge impact on physicians' practices. Consider the following facts:

- ▶ Seventy percent of the time physicians spend on claims is spent defending claims that end in no payment to the plaintiff.
- ▶ Physicians experience additional stress, work, and reputational damage from the time spent defending claims.
- ▶ Fighting claims takes time away from the physician practicing medicine and can delay the physician's ability to implement or improve quality- or safety-related procedures.
- ▶ The lengthy time required to resolve claims also negatively impacts patients and their families.³

What It Feels Like to Be Sued: A Physician's Perspective

"I was concerned going into trial. I did have emotional ups and downs. I couldn't sleep nights. It was very difficult."

—*Malkeet Gupta, MD, MS, Emergency Medicine, California*

"It was very, very difficult for me to hold my head up and feel good about myself."

—*Elizabeth Nye, MD, FACOG, Obstetrics & Gynecology, Illinois*

"It takes a long time to get back into the routine—back to not thinking of a patient as a litigant—and going back to your regular job like you did before."

—*Thomas K. Wuest, MD, MMM, Orthopedic Trauma Surgery, Oregon*

WHEN YOU ARE SUED—WHAT TO EXPECT

The litigation process can be long and drawn out. The process typically lasts two to five years, with claims being filed a year to two years after a negative event or the date of discovery of an injury—depending on state laws.

STAGES OF LITIGATION

1. Notification: You will typically be notified of a claim by a process server in person or by mail. It is critical that you report any claim—or potential claim—to your medical malpractice insurance carrier immediately to begin working with a claims representative and building your defense.
2. Discovery: During this period, your defense attorney will work with you and your claims specialist to build your case—this includes selecting expert witnesses to testify on your behalf, reviewing the medical record, and conducting depositions. During this period, the plaintiff’s attorney will also build a case against you.
3. Trial: Your case will be tried in court in front of a judge and jury and a verdict will be reached.

At any point during litigation, the plaintiff’s attorney may make a demand to settle. Work with your attorney and insurance carrier to determine what is best—where permitted by law, carriers should obtain a physician’s written consent to settle a claim.

COPING WITH THE EMOTIONAL IMPACT

Case Study: A Family Medicine–Related Claim

A family physician in Texas saw a new patient, an 18-year-old man, who was seeking treatment for pain after being assaulted. The patient had blunt force trauma and defensive wounds consistent with his history. He also had a laceration to his scalp that had been repaired in the emergency room with metal sutures. During the office visit, the patient also requested a refill of his Xanax prescription.

The physician provided a prescription for hydrocodone and a gap prescription for Xanax, each with appropriate dosage instructions. The patient took fatal doses of each medication and died. The patient’s parents filed a malpractice claim against the doctor. The doctor, defense counsel, and the claims specialist worked as a team to evaluate and review the case throughout its progression.

Ultimately, the doctor was fully exonerated, with the jury agreeing the standard of care had been met.

When a claim is filed against a physician, it is deeply personal—over 95 percent of physicians experience emotional distress during some or all of the litigation process.⁴ Medical malpractice stress syndrome (MMSS), stress related to malpractice litigation, can negatively impact your health, your personal and professional relationships, and your practice.

Ellen J. Plumb, MD, a family medicine specialist in Philadelphia, shared the profound emotional impact of a lawsuit. Dr. Plumb was sued by a patient's family during her third year of residency after the patient died following discharge. In the following excerpt from an essay she wrote, Dr. Plumb shares the feelings of powerlessness and uncertainty that overcame her during the litigation process.

Every decision that I had to make in those first few weeks was threatening, fraught with feelings of failure, fear, and anxiety. I was forced into a silence of shame, alone and vulnerable. With each letter that I received from the lawyer, my heart ached, the accusation of neglect repeatedly reconstituting as a tangible knot of resentment, anger, insecurity, and profound sadness. I spent thousands of hours during my last 2 years of residency reconciling the privilege and responsibility associated with caring for patients with the overwhelming fear of making a mistake. ... I was feeling: decay, smothered, overwhelmed, angry, insecure, exposed, eviscerated, cowardly.⁵

Case Study: A Gynecological Oncology–Related Claim

A gynecological oncologist in Michigan saw a 66-year-old female with an abnormal pap smear suggestive of uterine cancer. After confirming uterine cancer, the doctor determined the patient needed a hysterectomy and appropriate surgical staging. The patient had multiple medical conditions, including atrial fibrillation, coronary artery disease, factor V Leiden requiring anticoagulation, and poorly controlled diabetes.

The patient had an open surgery due to multiple prior surgeries. She had a hysterectomy and staging, but there were significant adhesions that took almost two hours to remove. On the third day after surgery, the patient developed extreme nausea, vomiting, and pain. The doctor performed another surgery where a 2.5-centimeter opening in her bowel was discovered.

The patient filed a malpractice claim against the doctor, alleging the doctor injured her during surgery. Experts from around the country were brought in to support the doctor's case.

In the end, the jury exonerated the physician.

3 TIPS FOR ALLEVIATING LITIGATION STRESS

Take these steps to alleviate your stress during a malpractice lawsuit, allowing you to continue to serve your patients and maintain healthy relationships with those around you.⁶

1. Prepare: Approach the litigation as another necessary part of your career, taking the same approach you would for any other hurdle, like a board exam.
2. Reach out: While you can't divulge clinical details of litigation to family members, you should talk to them about how the claim is affecting you.
3. Make yourself a priority: Take time to care for yourself, engage in your personal interests, and decompress.

PHYSICIANS MUST BE A PART OF THE DEFENSE TEAM

Physicians should be active members of their defense teams, working with their attorneys to prepare for litigation. Ken Broda-Bahm, PhD, a senior litigation consultant at Persuasion Strategies, says the most effective doctors are engaged in the process, asking their attorneys, "What can I do to help?" These doctors, Dr. Broda-Bahm says, are comfortable and confident with their role, understanding that being sued doesn't mean they did something wrong—rather, being sued is an inevitable part of medicine.

Thorough preparation for your case will help you be ready not only in a technical sense, but also emotionally, so you know what to expect during the litigation process.

The Impact a Suit Has on a Physician's Relationships

While physicians in litigation may discuss the case with their spouse, they cannot discuss the case with family, friends, or peers because those conversations could be discoverable. As a result, other family members and friends may feel shut out by a physician during the legal process.⁷

Many physicians also report changes in the way they practice medicine during and after a lawsuit, often practicing more defensive medicine and viewing patients as potential plaintiffs.⁸

For physicians facing a claim, one of the best sources of support is a spouse or a confidant who can listen to the physician's innermost feelings about the case. It is best to avoid discussing specifics of the case with anyone but a claims representative or defense attorney. Sharing feelings with spouses and confidants can help both the physician and those closest to them navigate their own emotions and bewilderment associated with the case.⁹

5 KEYS TO LITIGATION SUCCESS

1. Acknowledge the uniqueness of the legal process: You could feel like you are outside your element. While you will be talking about medicine, you will be doing it in a very legal way. It's important to partner with your attorney, and allow him or her to be an expert in the law while you are an expert in medicine.
2. Understand the other side's strategy: Be sensitive to the plaintiff's strategy so that you can prepare an effective defense.
3. Know the medical record: Review the medical record with your attorney.
4. Be at peace: Believe in the care you provided.
5. Practice: Role-play with your attorney, and in some cases a litigation consultant, to provide the best testimony and prepare for the types of questions you will be asked at deposition and at trial.

HOW TO PROVIDE SUCCESSFUL TESTIMONY

A physician's goal while working with an attorney is to become the most effective truth teller possible. It is critical that physicians follow the legal advice of their attorneys.

Physicians experiencing a lawsuit should recognize that effective defense requires a team approach. The key to building a strong defense is collaboration among the physician, insurance carrier, defense attorney, and medical experts, explains defense attorney Steven P. Jones of Keating Jones Hughes, PC, in Portland, Oregon. This team should work together to make a presentation to a jury that is comprehensible and compelling to the physician's case, he adds.

On the stand, a physician's composure will be tested. Thomas K. Wuest, MD, MMM, an orthopedic trauma surgeon in Eugene, Oregon, was sued after a complication during surgery resulted in patient injury. Dr. Wuest recounts tactics used by the plaintiff's attorney to belittle and unnerve him when he took the stand.

The plaintiff's attorney will be merciless. They will say things about you that are disparaging about your skills, career—your morals.¹⁰

But physicians facing a lawsuit can maintain some sense of control during litigation through their testimony. Dr. Wuest worked with Keating Jones Hughes and a claims specialist to create effective testimony that allowed him to connect with the jury and show that he was a conscientious and competent surgeon who cared about this patient. In the end, the jury exonerated him.

You control your testimony through your answers and how you characterize the incident. With your attorney's instruction and practice, you can feel more prepared.

4 TESTIMONY TIPS

1. Beware of techniques used by the plaintiff's attorney, including tricks that prevent you from providing effective testimony.
2. Talk in your own terms—don't be led by the plaintiff's attorney.
3. Don't do any medical research on the case unless advised by your attorney—otherwise it could be used against you in court.
4. Carefully listen and respond to each question to the best of your availability.

Case Study: A Cardiology-Related Claim

A cardiologist in Florida saw a patient who came to the emergency room with chest pain. He was admitted by a hospitalist and the hospitalist consulted with the cardiologists.

A workup revealed an abnormal stress test and the cardiologist performed a heart catheterization.

After the patient was discharged, he experienced difficulty walking and he presented to his primary care physician with an occlusion to the femoral artery, which required surgery. The patient filed a malpractice claim.

The cardiologist worked with her defense counsel and a claims specialist to prepare for trial and advise on medical details throughout the process. The defense counsel felt the cardiologist had a solid case because she was a strong witness and the hospital chart reflected a detailed and thorough evaluation of the patient's pain.

In the end, the cardiologist was exonerated.

TIRELESSLY DEFENDING THE PRACTICE OF GOOD MEDICINE IS JUST ONE WAY WE'RE TAKING THE MAL OUT OF MALPRACTICE INSURANCE

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With the industry's best legal defense team and superior claims specialists, The Doctors Company fiercely defends doctors. In the event of a claim, a claims specialist will immediately go into action to protect you. And we never settle a claim without your written consent, where permitted by law.

The Doctors Company offers regional seminars and litigation education retreats that help doctors understand the medical legal process and discover how to be effective in court. Doctors also learn constructive ways to handle the stress of malpractice litigation. CME credits may be available.

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²Seabury SA, Chandra A, Lakdawalla DN, Jena AB. On average, physicians spend nearly 11 percent of their 40-year careers with an open, unresolved malpractice claim. *Health Affairs*. 2013;32(1):1-9.

³Ibid.

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⁷Relationships during malpractice litigation: With our spouse or significant other. Physician Litigation Stress Resource Center website. <http://physicianlitigationstress.org/spouse-support-during-malpractice-litigation>. Accessed January 11, 2016.

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