Introduction

With completion of residency and the realities of being an attending staring me in the face, I endeavored to learn more about the malpractice crisis and the implications it had on my practice as a physician. I was disappointed to discover that there was not a succinct resource where I could learn about the key issues regarding this topic. In this time, I realized that having a basic understanding of medical malpractice was akin to being able to perform a cricothyroidotomy – hopefully you will never have to use the knowledge, and though the occasion to use it is rare, when called upon, it is imperative that you be have the appropriate skills. Similar to learning a rare procedure, education and preparedness will minimize the anxiety and improve your likelihood of success when that time comes. As a result, after utilizing various resources to learn about the topic myself, I have compiled a series of brief chapters by authors with varying expertise. These chapters represent what many would consider the fundamentals of issues related to medical malpractice including practical tips on prevention, basics on the litigation process, and defending your personal assets.

The practice of Emergency Medicine can be a field of landmines these days – these brief chapters are meant to provide a basic roadmap for the new attending.

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The Graduating Emergency Medicine Resident's Guide to Medical Malpractice

Edited by David C. Wong, MD

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An Introduction to the Medical Malpractice Crisis: How Did We Get Here?

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Background

Before getting to the practical portion of this resource, it would be useful to have an understanding of the current medical malpractice crisis – its evolution, probable causes and suggested solutions. The American Medical Association has identified 18 states in which health care providers are having grave difficulties in obtaining affordable professional liability insurance. Another 26 states have been declared on "orange alert" with indicators suggesting a serious and worsening situation. [1] Although grabbing the attention of media, this is not the first malpractice crisis to strike our nation. In the early to mid 1970s there was a crisis of insurance availability where major insurers left the market leaving many physicians unable to obtain insurance at any price. Following this, many physician-owned and operated insurance companies were formed as well as state-sponsored joint underwriting associations. Then, in the mid-1980s there was a crisis of affordability where premiums were so high that physicians could not afford to pay. The current crisis appears to be a mixture of both availability and affordability. Although different interest groups have opposing views on how much each of the following factors contribute, virtually all can agree that the crisis is a result of some combination of the following: increased malpractice awards, poor return on investment for insurance companies, a rise in reinsurance rates, and an exit of insurance companies from providing professional liability insurance.[2]

The General Accounting Office (GAO), in June 2003, analyzed seven states to attempt to determine the cause of rising insurance premiums. It was found that since 1998, insurers' losses on medical malpractice haven risen dramatically in some states. Specifically, the report cited an increase of insurers' payments of 142 percent in Mississippi from 1998 to 2001. The national average annual paid loss between 1988 to 1997 was 3.0 percent, but rose to 8.2 percent between 1998 through 2001. The increase in paid losses affects premiums several-fold. Higher paid losses will increase insurers' estimates of what they expect to pay out on future claims. Likewise, higher losses will raise plaintiffs' expectations for damages and raise payouts for cases that are settled. While the GAO report concluded that this was the largest contributor to rising malpractice premiums, the details contained within the report show inconsistency between various states, regions within states, and specialties. For example, in Harrisburg, Pennsylvania, premiums increased between 1999 to 2002 by as much as 165 percent. Meanwhile, rates in the same time period for similar specialists in California and Minnesota rose only by five to 21 percent. In Florida, obstetricians and gynecologists within Dade County were quoted a premium base rate of $201,000 while the same insurer quoted a premium base rate of $103,000 for obstetricians and gynecologists outside Dade County.[2] The report is clear in its recommendations that better data is needed to provide a well-founded explanation of the causes of increased premiums. Specifically, it suggested improved reporting of the details of malpractice claims on a state-by-state basis including economic and non-economic damages awarded.[2] Interestingly, in an earlier GAO report from May 1987, almost identical recommendations were made at that time to seek such data to avert future malpractice crises.[3] It is unclear why those studies did not take place.

The second commonly cited reason for increasing malpractice premiums is the poor return on investments. Some report that as early as the late 1980s, premiums were not sufficient to pay for losses. However, good returns on investments were compensating for this inadequacy. By the late 1990s to the present, diminishing returns on investments were no longer able to compensate for the loss as a result, premiums rose. An analysis of the 15 largest medical malpractice insurers showed that the average return on investment fell from 5.6 percent in 2000 to 4.0 percent in 2002. The exact degree decreased returns contributed to rising premiums is not known – or at least is not available to the public. Coincident with that, the rates on reinsurance also rose. In general, insurers purchase reinsurance to protect themselves against large unpredictable losses. Officials in this industry cite two reasons for the increase in rates: losses related to the terrorist attacks of September 11, 2001 and the higher losses from medical malpractice. Industry participants cite rate increases as high as 50 to 100 percent. Logically, all of these factors have dramatically decreased the profitability of offering medical malpractice insurance. As a result, many large insurers have pulled out of this market. The lack of insurers subsequently diminishes price competition and therefore exerts less downward force on premium rates.

Proposed Solutions

Proposed policy solutions to improve the malpractice insurance problem can be broadly categorized into improving predictability of claims and payouts, abolishing double compensation, reducing unmerited suits and using alternative arbitration rather than the tort system. Policy changes proposed to improve predictability of claims include placing limits on damages, eliminating joint and several liability and reducing the statute of limitations. Many groups have advocated placing limits on damages, in particular non-economic damages (i.e. pain and suffering) since these are particularly difficult to quantify. Many insurers find this to be the least predictable portion of a suit. In fact, some have argued that many attorneys will not take a case unless they foresee a significant award in non-economic damages. Since most plaintiff attorneys are paid on a contingency fee basis (meaning they do not get paid if they do not win), they are highly motivated to take cases that will have large potential payouts. Even in California, which places limits on contingency fees, plaintiff attorneys are entitled to up to 40 percent of the first $50,000 recovered, 33 percent of the next $50,0000 recovered, 25 percent of the next $500,000 recovered, and 15 percent of any amount exceeding $600,000. Many also advocate eliminating joint and several liability which is the common law rule that a plaintiff can collect the entire judgment from any defendant regardless of his or her proportionate contribution to the harm of the patient. For example, an Emergency Medicine physician may be attributed only one percent of blame for a poor patient outcome by a jury; however, under these rules, he or she can be asked to pay 100 percent of the judgment. This makes estimating losses for insurers very difficult. In addition, by decreasing the statute of limitations – the amount of time a plaintiff has to file his or her claim – insurers will be better be able to predict future losses. The current statute of limitations for many states is within two to three years of the discovery of the malpractice. For minors, it is often until the patient reaches the age of majority – 18. It is understandable why insuring obstetricians and pediatric specialties becomes a risky proposition.

The next approach many advocate is to abolish overcompensation by allowing the defendant to show that the claimant is receiving collateral source payments. For example, a defendant would be able to demonstrate that the plaintiff had already received funds from health insurance, automobile insurance and thereby decrease the defendant's liability by the amount the plaintiff had received from other sources. Some have advocated requiring expert certification of cases where a state would require medical experts to validate the case as having merit before proceeding to legal action. Others have suggested that the current tort system is so dysfunctional that a separate system of arbitration should be established with judges who are trained and experienced in issues of medical care.

Despite the politicization of the issue, it is clear that increased malpractice costs are expensive from many points of view. First, it causes some physicians to view patients as potential law suits instead of people in need of help which injures the doctor-patient relationship. Second, there is both objective and copious anecdotal evidence that physicians practice "defensive medicine" as a result of fear of malpractice which has been estimated to increase health care costs by as much as $600 million a year[4]. The term defensive medicine has been defined by the Office of Technology Assessment as "when doctors order tests, procedures, or visits, or high-risk patients or procedures primarily (but not necessarily solely) to reduce their exposure to malpractice liability." In addition, fear of litigation prevents health professionals from being honest and forward about medical errors. Intuitively, lack of good data and voluntary reporting will undermine improving medical errors. A significant problem as reported by the Institute of Medicine. If indeed, the current tort system is intended to improve patient care and compensate those who suffer from negligence, it is not performing well towards these objectives.

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[2] "Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates." GAO-03-702. Washington, D.C.: June, 2003.

[3] "Medical Malpractice: A Framework for Action." GAO/HRD-87-73. Washington, D.C.: May 1987

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Chapter Two

Risk Reduction: Identifying Hi-Risk Cases and What you can do to Minimize Risk

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Why is this chapter important?

A goal of risk management is to reduce claims against medical professionals. Recognizing high risk situations can help us to avoid law suits based on that type of situation. The purpose of this chapter is to share the author's experience in predicting type of care or situations which are high risk for law suits. "Forewarned is forearmed."

General types of claims

Legal claims can be divided into categories, i.e., is the allegation that: Was there a misdiagnosis? Was there a correct diagnosis but incorrect treatment? Was the treatment correct in nature but incorrect in application (too slow, too little, too late, etc.). Any of these different categories can become a high risk area.

There are certain organizational situations which, in the author's experience, seem to become high risk situations. (change of shifts etc discharge instructions, discharge to home)

Law suits tend to result of care which has an unexpectedly bad outcome which is significant in its dimensions. For example, when care which should be routine results in death or serious injury, a law suit may be likely. In those situations, the health care professional will want to chart with extra care (see chapter 3 below regarding charting suggestions).

Common High Risk Claims

Some medical conditions have been more likely to lead to law suits from emergency room care, including:

-***Cardiac conditions*** - especially those leading to death or disability.

-Failure to diagnose ***meningitis*** in children

-For ***infections***, failing to either diagnose or correctly treat.

-missed **appendicitis**.

-Failure to give the ***correct tests***

-Giving the correct tests but failing to ***correctly interpret*** test results, i.e., the correct test was given but the significance of the abnormal results was

not appreciated. This category includes the failure to properly act on abnormal results (both the content and timing of the response to an abnormal result).

Organizational Situations

Organizational situations which are commonly involved in emergency department law suits include:

Shift changes - in your author's experience, there are many law suits when care which is started on one shift carries over onto another shift. This is especially true when a test which is ordered on one shift has its results reported on the next shift.

Language barriers - as America becomes more polyglotinal in nature, more information is gathered and care is delivered through informal interpreters, many of whom are fairly young children interpreting for an adult. The dangers for the doctor increase as the linguistic barriers increase.

Teaching hospitals - obviously new doctors have to be educated but it should be in an environment where both teacher and student feel comfortable questioning and guiding.

Fatigue - by all of the health care providers. The longer a nurse or doctor works without rest, the more likely it seems that a possible error might occur.

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Chapter Three

The Chart: Making it Your Friend in Risk Reduction

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Why is this chapter important?

This chapter is important because the chart is the most important piece of evidence in the entire case. More than any other piece of evidence (more than even your own live testimony), the chart will decide if you get sued to begin with (since plaintiffs' lawyers will not file a suit if the chart reflects good care timely given) and will decide if you win after a suit is filed. Generally, jurors believe the chart more than they believe you. Thus, it is absolutely crucial to legal success that the chart be your friend and protector.

So if the chart is so important, how can be make the chart more legally protective without taking more time to do so? The answer is that there are a number of charting techniques which make the chart "better" in a legal sense (i.e., more accurate, detailed, specific) without taking more of your time to do so. Rather than more time, the "improved" chart takes better thought and planning, not more time.

Specific charting improvement techniques include the following:

1. **Review entries by other health care providers.** Acknowledging that you did not know what was in your own patient's chart is at best embarrassing and at worst disastrous.
2. **Chart exact times.**
   As much as possible, chart exact times. By the time a case goes to court, all memories will have been erased, such that we must rely upon the chart only.
3. **Put times on progress notes.**
   Do not simply date a progress note, but also indicate a time when it was entered.
4. **Do not chart for an entire shift.**
   For example, an entry which says "11P-7A - patient asleep" may be true at one specific time but not another. All contacts with the patient should be charted, especially by physicians. The next several suggestions relate to this topic.
5. **Chart every contact between physician and patient**
   A physician should document every time they see a hospitalized patient.
6. **Chart if a patient is not seen**

If you fail to write a progress note on a patient document the reason therefore, e.g., doctor was preoccupied with a code blue.

7. **Chart "mini-history and physical"**
For example, how are you doing? What hurts? Why are you here?) or a mini-neuro exam, these should be charted. Remember, if these are not in the chart, it is presumed that they did not occur.

8. **Chart contacts between HCPs**
There are several suggestions in this area, noted in the paragraph below.

9. **Chart contacts between physicians & staff**
All in-person or telephone contacts between the physician and any member of the hospital staff (nurse, technician, etc.) should be charted.

10. **Chart Calls to/from physicians**
The nurse should chart when she calls the physician or receives a call from the physician. When the physician returns to the hospital, he should check the accuracy of these entries. Accurate entries are the best protection for all involved.

11. **Chart information reported**
When a nurse or lab contacts a physician with results (either lab results or vital signs, etc.), the chart entry should indicate exactly what results were reported as documented in the chart. Again, this is for the mutual protection of everyone. For example, a doctor orders a CBC on a patient, the results of which are received by the nurse on the floor.

12. **Cosign all telephone/verbal orders**
For the mutual protection of all involved, cosigning should not be a mindless routine. The physician should make sure that the telephone or verbal order was accurately charted, implemented and timely performed.

13. **Use precise wording**
Use precise wording, for example hypoglycemia resolved versus hypoglycemia resolving. Obviously, one indicates the problem is over while the other indicates it is not. Cases have been won or lost on such points.

14. **Specific and descriptive terms**
Use terms that are as specific and as descriptive as possible. For example, the difference between a patient suffering a "seizure" and "tremors" may be debatable.

15. **Avoid ambiguous meanings**

Avoid terms which have several different meanings and are, therefore, subject to misinterpretation. If necessary, use more than one adjective or adverb to clarify the description.

16. **Avoid "red flag" terms**

Avoid terms which are "red flags" to cause trouble. For example, in an infant, any mention of "asphyxia" in the chart will draw the immediate attention of plaintiff's attorney, closely followed by an allegation of malpractice. Of course, if asphyxia is the true and accurate description of what occurred, you must use it.

17. **Identify hearsay information**

For example, if the chart indicates how much the patient drinks, was this information reported by the patient or someone else, e.g., a spouse or family member.

18. **Document all non-cooperation**

Document this even if not technically AMA and also all interference by the family. Document this in a factual and nonjudgmental way (describing what was done, what was said, what occurred, etc.). Often, interfering family members are the persons who instigate lawsuits, such that information concerning those family members becomes valuable in defense of the case.

19. **Document any bizarre behavior**

Document any bizarre behavior by the patient or family members, again in a nonjudgmental manner. If this type of behavior is not documented at the time it occurs, it looks like you are being vindictive to suddenly remember this type of behavior after suit is filed.

20. **Chart when family present**

While it may be a personal preference of mine, I like to know in the chart when the spouse, children or family is at the patient's bedside. Frequently, I have found it useful to coordinate the spouse's presence with the patient's condition at the time.

21. **Chart treats to sue/dissatisfaction**

If the patient or the family threatens to sue you or the hospital, always document that point, stating specifically what was said, if possible. Likewise, if the patient or family states dissatisfaction with the care being rendered, make a chart note. Such a note should be factually, specific and non-judgmental, e.g., a better entry would be "Patient's spouse states

that nurses are sadists who enjoy hurting her husband" as opposed to "Patient's spouse makes irrational statements about nurses."

22. Refusals of requested treatment

If the patient requests a specific form of treatment which the doctor refuses to provide, the chart should reflect the request, the refusal and the basis for the refusal. Obviously, a common request is for narcotics or pain medications.

23. Discussions with patient/family

While it is probably difficult to have a hard and fast rule about how much discussion must occur before it is charted, you do want the record to reflect any discussions which you consider significant for any reason.

24. Avoid premature conclusions

Avoid premature conclusions, e.g., that medications (or too much or too little medication) caused a condition.

25. Malfunctioning Equipment or devices

If something goes wrong with a piece of equipment, drug, medical device, etc., make a note of what happened on the chart and save the item. The durable medical equipment reporting requirements are beyond the scope of this lecture; however, this suggestion applies to many situations which are not technically within the scope of the DME reporting requirements.

26. Patient reviewing their own records

Chart if the patient examines his record. As a general rule, if a patient wants to see his records, he should be allowed to do so. Refusal to allow him to see the records, even if he is hospitalized, makes the patient think there is something being hidden from him. However, always have a hospital representative present when the patient or family reviews the chart. Most hospitals would probably have a policy regarding patient's examining their own charts.

27. Note access by others to the patient's chart

Do not let any one have access to a medical record without good reason and compliance with applicable policies. Charts should not leave the unit unless it is required to accompany the patient to tests, therapy, etc.

28. Use standard abbreviations

From the point of view of counsel, it is extremely embarrassing when a doctor or nurse cannot read another part of the chart, because they do not understand the system of abbreviations.

29. **Record injection sites**
For intramuscular injections, record as specifically as possible the site of the injection. This can help defend a later claim by the patient that there was nerve or muscle damage from the injection.

30. **Note normal findings**
Some physicians do not chart normal findings, e.g., a normal blood pressure. Your author would strongly encourage the noting of normal (as well as abnormal) findings.

31. **Use of herbal supplements**
This point is new and evolving such that it is probably not yet a requirement. So many patients take some form of herbal supplement that it is probably a good idea during the H&P to ask about supplements and note them in the chart. If the physician is not familiar with the herb, he should probably say so, to prevent a later accusation that the doctor failed to recognize an interaction between the herb and a medication.

32. **Consultations**
It is very important that the date and time of consultations be recorded as well as the consultant's response. If it is not already clear, the chart should reflect who (ED or consultant) is responsible for the patient.

33. **Specific treatment facts**
In addition to the points discussed above, among the specific treatment facts which should be routinely charted are:
Site and intensity of pain
Change in condition
Medications given
Whether patient was informed of test results and when

34. **Be legible.**
In a legal case, this is most serious. We have had cases where doctors could not read or decipher their own chart entries.

Conclusion

The "perfect" chart will never exist but by using the techniques described above and you own creative additions,

you can create a chart which is much more protective in legal proceedings without taking more time to do so. If you get sued, you will be very glad that you invested the extra thought to improve the chart.

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Chapter Four

You've Been Sued: What Now? 10 Things You Should Know & Do

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Why is this chapter important?

The specter of being sued is a development which frightens all medical professionals. In many ways, it is our worse nightmare come true.

This chapter focuses on how to respond immediately upon being sued. This chapter is important since it will help you control your initial response - concentrating on activities which are productive and helpful while avoiding activities which are destructive and dangerous. Most doctors have no idea how to respond once they receiving this distressing news; this chapter is intended to help focus our energy into useful activity.

Remember - when you are notified that you have been sued, you will be upset. If you remember nothing else from this chapter, remember to be very selective about *who* you talk to and *what* you say to them. You want to be very careful that you speak only to people who are within the penumbra of confidentiality, i.e., you cannot later be forced to disclose what you say to them.

Following is a 10-point list of steps to take when you are confronted with a lawsuit, based upon our experience in myriad lawsuits.

#1. Report the Lawsuit

Report the lawsuit to the insurance company the second you are handed the papers. Generally, a defendant has at the most 30 days to respond to a lawsuit; that's not much time to prepare and file a response.

Do not put the suit papers aside with the intention of forwarding them to the insurance company once you have had a chance to review and digest them. You should forward the papers immediately and your analysis can follow later.

#2. Tell the Appropriate Pertinent People

Tell your supervisors or the other doctors in your office that you are being sued. They have a right to know, and you are going to need their help. Someone should also inform the hospital risk manager so that the facility is also aware of the lawsuit. The hospital may or may not have been joined as a party in the law suit. However, do not discuss the content of the suit until you have

discussed it with your attorney. The hospital and you may (or may not) be allies in responding the lawsuit - let your attorney decide that point.

#3. Promptly Meet with an Attorney.

All legal papers have a time limit for a response. For an initial lawsuit, it would be very rare for the response time to be more than 30 days; it is frequently a shorter time, depending on the law where you are.

With only up to 30 days to respond, your attorney will need help in getting a quick understanding of the case and medical issues, which you can give her or him. While more detailed preparation will take several years, as an attorney, I need a quick but coherent grasp of what the case is about before I file the response; otherwise, I may admit a point which I should have denied.

In this first meeting (or series of meetings), we will not be able to do all of the preparation which your case needs, but it will give me at least an introductory understanding. Be prepared to explain to me such points as: what happened; why it happened; is there any concern about the quality of care we gave and, if so, why? .

#4. Don't Discuss the Case with Anyone

In simple terms, do not say anything to anyone (not protected by confidentiality) that you do not want to repeat to a judge and jury.

Don't discuss the suit with anyone except your lawyer, insurance company and proper person at your organization. The proper person is limited to a supervisor, risk manager or fellow practitioner who is protected by peer review privilege.

It's natural for the doctor being sued to stop a colleague in the hallway and make comments like, "Do you know what so-and-so is doing to me," or "Maybe I could have been more careful." Such comments could become known during the discovery phase, i.e., you could be forced to disclose such conversations to the plaintiffs attorney.

If people ask you to discuss the case with them (e.g., "I heard you got sued; what happened?"), politely respond that you have been told not to discuss the case with anyone until you have met with the attorney. When you have met

with me as the attorney, I will tell you not to discuss the case with anyone except the people listed here: Counsel, insurance representatives; and those protected by confidentiality.

#5. Don't Call the Patient

A very good argument can be made that most medical malpractice suits are a result of poor or ineffective communication. If the doctor and patient are communicating well about what needs to be done, why, the risks involved, etc., law suits generally will not result. However, you must be very careful when speaking to patients and their families.

Particularly for those patients you know or have treated before, and have built a professional relationship of trust, it may seem appropriate for you to call the patient and say: "Mary, what are you doing to me? Why don't you come in and we'll talk about it." However, it is almost always a bad idea to have this type of contact with the person suing you.

Comments that you make to the patient to be polite could be construed in court as a confession of error. If you express disbelief, your statement could be taken as arrogance.

The bottom line is you should have no contact with the person/family suing you unless directed to do so by your attorney (which would be a very rare instruction from counsel). If the person/family contacts you, politely tell them that you would love to talk to them but you need to clear it with your attorney first; notify your attorney immediately. If the person/family offers to drop the suit if you will immediately pay them a small sum of money, be very wary.

#6. Segregate the Records

Take the records out of the general records and segregate it to a place where it cannot be tampered with. If you work in a small office, take the record out yourself and put them under lock and key; if you work in a large office get the appropriate person to do this. Segregating the records prevents them from being tampered with. You want them to be preserved as they are. I also like to send a copy to the insurance company. I like my copy to have the pages numbered.

#7. Do Not Change the Records

Changing the record without following the policies for late entries is always dangerous and sometimes is a disaster.

Sometimes a doctor will remember some information that was not put in the patient's record, and the doctor may just "fill in some details." Usually the reason a doctor does this is to make the record more accurate, but changing the record is a disaster if the patient in question is suing you. On a scale of disasters from 1 to 10, this is a 10. It may void your insurance coverage and may make a defensible case indefensible.

See #8, below, for recording information you did not put in the chart or have remembered since you closed the medical chart.

#8. Immediately Record Everything You Can Remember

In most jurisdictions a plaintiff has up to three years to file a lawsuit; further, a case can take two to five years to adjudicate. With such prolonged time considerations, it is important for you to record everything you can remember as soon as you find out about the suit.

Record conversations you had, impressions, etc. It's important to make sure your memory is protected. However, do not record these items in the chart, record them in a separate diary for your attorney. At the top of each page of your diary write "Confidential communication. Attorney Client Communication" which should help protect your notes from prying eyes.

#9. Work with Your Attorney

I have been working as a defense attorney for 35 years but I don't know everything; while I have learned a fair amount of medicine from professionals, I am not medically trained. Your attorney will have to understand what you do and what you did in this case. Attorneys are not doctors. Give the attorney reading material; suggest expert witnesses and people to talk to; explain your procedures.

Is the suit's contention a recognized complication, or just bad luck?

Remember that you as the health care professional and your attorney as the legal professional are on the same

team. The more you can help the attorney to understand the medical issues quickly and accurately, the better it is for your defense.

#10. Follow the Case as It Develops

Cases develop over a long period of time, usually somewhere between two and five years depending on the jurisdiction involved. During this development time, the details of the case are filled in, e.g., instead of general allegations (an alleged "breach of the standard of care") to specific allegations (e.g., failure to diagnose an infection on a certain date at a certain time) and the facts to support the allegation (the lab tests taken on that date at that time).

During this development, the attorney needs your help to understand what is happening and its medical significance. While we will, of course, be advised by our retained experts, it is most helpful if you can be our guide through the medical maze.

Specific assistance could include: Paying attention to the depositions, etc. Read the information your attorney sends you. Attend the plaintiff's deposition. If anything, at the deposition, it's another pair of eyes and ears. The attorney might miss something, or a medical expert might say "ABC," and during the next break you might suggest that the attorney ask him "XYZ" in response.

Conclusion

Being sued is not an easy thing. These steps won't guarantee that you will win the suit, but they will keep you from making some costly mistakes. These steps will definitely help you direct your time and effort into pathways which help our defense rather than hurt it.

Why Settle?

Introduction

Generally speaking, settling is an agreement ending a dispute or lawsuit. Insurance companies are not shy about exercising this option. The 1966 Survey of Professional Liability by the American College of Obstetrician and Gynecologists concluded that only 8.3% of closed claims were actually closed by way of jury or court verdict.[1] An insurer's decision to settle, however, is not one of convenience. Economic and legal factors contribute to the finding that over 90% of cases filed end in settlement. Physicians should appreciate these factors as well as the ramifications a claims record of settlement has on their ability to practice medicine.

Duty to Settle

Insurance companies have a duty to settle a claim of medical malpractice against a physician when there is a reasonable probability that the physician will be personally liable for the claim. How the duty originated remains controversial. Some believe the duty originates from an insurer's duty to defend, while others see the duty as the progeny of state common law. Irrespective of who is right, the duty prevents insurers from gambling with their insured's money at trial.[2]

Economic Considerations

Insurers weigh the amount at stake, the cost of the defense and the probability of success when deciding whether to settle. To the insurer, settling means no longer having to pay for the cost of defending the claim. It may also mean escaping the obligation to tender the policy limits and sometimes amounts in excess of those limits. Insurers may be liable for amounts in excess of policy limits when they act in bad faith. In the end there exists a certain amount of business acumen when deciding whether to settle a malpractice claim.

Ramifications of Settling

What a history of a malpractice settlement means for physicians depends on the physician's claim record as well as the prevailing malpractice insurance climate. On the positive side, settling represents the termination of further legal action regarding the incident. This "release" is a typical component of the settlement. A growing concern, however, is the negative ramifications settlement can have on physicians. Due to the current medical malpractice climate, many insurers have left the medical malpractice market. The remaining insurers seek to mitigate their risk by refusing to take on new insureds, offering insurance only to those with unblemished claims records or only at markedly elevated rates. Interestingly, insurers have little obligation to consider the negative effects settling has on physicians when considering this option.

Conclusion

Whether physicians defending a malpractice claim have a say in whether their insurer may settle a case varies depending on the policy and state law. Know whether your state law and policy requires physician consent before committing to a policy or an insurer's course of action.

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[1] Griffen LP, Heland KV, Esser L. et al. Guest Editorial: Overview of the 1996 Professional Liability Survey. 1999;54:77-80.
[2] Baker T. Insurance Law and Policy Cases, Materials, and Problems. 1st ed. Aspen Publishers, 2003.

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Chapter Six

The Skills of Giving a Deposition

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Why is this chapter important?

Except for actually appearing in the courtroom, giving a deposition is the most important thing you will do in a lawsuit. Thus, it is important that you do it well, since it will directly affect the outcome of the case. If you do a poor presentation at your deposition, it will become much more difficult to win at trial the case or to settle it on attractive terms.

What is a deposition?

A deposition is an oral "question and answer" examination of a witness (usually a hostile or adverse witness). The deposition is conducted in a lawyer's office, without a judge present. The proceedings are taken down verbatim (without editing or correction) by an official court reporter.

There is little difference between testimony at a deposition and testimony in the courtroom, except there is no judge presiding and ruling over the matters as they arise. The judge may do so later. The opposing lawyer may, if he wishes, read your deposition word for word to the jury during the trial. Every word you say at the deposition (no matter how thoughtful or how careless) will be taken down by the court reporter; it may then be read to the jury. Obviously, you should choose your words carefully and thoughtfully.

What is the purpose of a deposition?

The opposing side is taking your deposition for three reasons. The **first** reason is that they want to find out what facts you have in your actual knowledge and possession regarding the issues in the lawsuit. In other words, they are interested in what your story is now and what it is going to be at the trial. **Second**, they want to pin you down to a specific story so that you will have to tell the same story at the trial and they will know in advance what your story is going to be. **Third**, they hope to catch you in a lie because if they were to catch you in a lie, they can show at the trial that you are not a truthful person and therefore your testimony should not be believed on any of the points, particularly the crucial ones.

These are very legitimate purposes and the opposing side has every right to take your discovery deposition for these purposes and in this fashion.

How do you prepare for a deposition?

As a general rule, good preparation leads to a good deposition. A "good" deposition is one in which the facts are accurately and succinctly stated with convincing sincerity as to their truthfulness. A "bad" deposition is one in which the answers are confused, misleading, incomplete or give an impression that the witness is not truthful or possibly hiding relevant information.

Since a deposition is just like being in court, you should prepare for the deposition just as if you were appearing before the jury. If there are documents involved in your case (for example, an automobile accident report, medical. records, a contract, a lease, photographs, etc.), you should review them repeatedly and carefully to assure that they are fresh in your mind. If you have previously answered in writing questions called 'interrogatories", you should review those written answers carefully.

Generally, by the time a deposition is taken, you have received copies of numerous documents from your attorney. While some documents are more important than other documents, you should review these copies carefully also. If you say something orally at the deposition which contradicts a document, the opposing counsel may confront you with contradiction at trial. Pre-deposition preparation is extremely important.

Since every case is unique, it is impossible to have an all-inclusive list of "must reading" in preparation for the deposition. However, some items will appear consistently, such as:

(1) the Plaintiff's complaint against you. The complaint is the Plaintiff's formal, written statement of why he is suing. You should read the complaint (even though parts of it are in legalese) to understand why the suit has been fled and what the issues are.

(2) any answers to interrogatories which you have previously filed,

(3) any answers to interrogatories filed by other parties especially your opponents,

(4) depositions of other witnesses whose testimony is relevant to your own. For example, if you are a treating physician, you should read the depositions of the other physicians who treated the patient before you and after you.

(5) the medical chart involved in the care given. While you are not expected to have memorized every lab value or vital sign, you should be familiar enough with the chart that you can quickly locate the specific information you may need to answer a specific questions, such as what lab tests were ordered.

If, in the course of preparing for your deposition, you have questions, then contact your attorney immediately.

Specific Suggestions for Testifying at Deposition

In the next several sections, we outline specific suggestions on how to present yourself and your case at deposition.

Tell the truth

The truth in the deposition or on the witness stand will never really hurt a litigant. A lawyer may explain away the truth, but there is no explaining why a client lied or concealed the truth. The mere fact that you may have sued or been sued by other people at other times, or had similar claims, or even have a criminal record does not destroy the validity of your defense.

However, the deliberate concealing of the truth would be devastating to your veracity at the trial, and would hurt your case immeasurably.

Never become angry

A person cannot think clearly when angry. It is most important that you do your best thinking when answering questions at trial or deposition.

Anger destroys the effect of your testimony and you say things which may be used to your disadvantage later. It is sometimes the intent of attorneys to get a deponent excited during his testimony hoping that he will say things which may be used against him. Under no circumstances should you argue with the opposing attorney. Give him only the information which you have. That is all he is entitled to. Give him the information in the same tone of voice and manner that you do in answer to your own attorney's questions. The mere fact that you get emotional about a certain point could be to your opponent's advantage in a lawsuit.

In the course of your deposition, you may be asked questions which you consider to be disrespectful,

insulting, irrelevant or downright silly. No matter how justified your anger may be, you absolutely cannot surrender yourself to anger. An angry witness is never an effective witness. If necessary during a deposition, ask your attorney for a recess, while you calm down.

Do not justify your answer

Never attempt to explain or justify your answer. You are there to give the facts as you know them. You are not supposed to apologize or attempt to justify those facts. And any attempt at such would make it appear as if you doubt the sincerity, accurateness or authenticity of your own testimony.

Stop speaking when your attorney speaks

If your attorney begins to speak, stop whatever answer you may be giving and allow him or her to make his statement. If he is making any objection to the question that is being asked of you, do not answer the question until he, after he has made his objection, advises you to go ahead an complete your answer. If you attorney tells you not to answer a question, then you should refuse to do so.

Frequently, when the attorney is objecting to a question, he or she is really speaking to you as the witness. For example, my objection that the question is unclear whether it means X or Y is my clue to the witness to be careful in their answer.

Never joke in a deposition

First, jokes are not the truth. Your primary role at the deposition is to report facts as accurately as possible. Humor is rarely accurate fact.

Second, a joke which is uproariously funny at deposition will be taken out of context later at the trial, making it appear that you regard a serious case as no more than a joke.

It is almost assured that any attempt at humor will be misconstrued and twisted, to the serious detriment of your case. Absolutely avoid all efforts at sarcasm.

Understand the question before you answer

If you do not fully hear and understand the entire question, then make no attempt to answer it. Rather, you should tell the questioner that you did not hear or understand the question.

Answer the question concisely

A "Yes" or "No" type of answer is certainly preferable, if possible. Otherwise, you should answer as succinctly as possible.

Answer the question in a deliberate and thoughtful manner

Since the interval of time which elapses between a question and an answer is not reflected in the transcript there simply is no reason to hurry to answer a question; moreover, adherence to many of these other suggestions will require some time and the taking of time to answer a question is perfectly all right.

Answer only the question asked; do not volunteer

Do not volunteer any additional information.

Do not, without your counsel's request, reach in your pocked or briefcase for documents. A discovery deposition is to elicit facts which you know and have in your mind and is not for the production of documents, unless otherwise arranged. If the opposing side is interested in obtaining documents from you, there are other legal procedures with which to obtain them. Do not ask your counsel to produce anything which is in his file at the time, because generally the same rule for obtaining them applies to those matters that applies to things which may be in your pocket.

As a general rule, any piece of paper which you touch or look at during your testimony must be shown to the opposing attorney. You may, if it is helpful, make notes in advance of testifying, planning to use those notes during your testimony. Such notes are permissible; however, your opponent is entitled to see them. Therefore, do not put in your notes "secret" thoughts which you do not want your opponent to see. "Good" notes could be, for example, a list of vital signs or lab results for ready reference. "Bad" notes would have at the bottom f the page such secret thoughts as, "this attorney is a jerk."

Review with your attorney any notes you plan to use during your testimony.

Answer the question only with first hand knowledge

Do not guess or speculate. Therefore, if you do not know the answer to the question, you must simply answer "I do not know the answer."

You are only to give the information which you have readily at hand. If you do not know certain information, do not give it. Do not turn to your counsel and ask him for the information or do not turn to another witness, if one should be present, and ask him for the information. Do not promise to get information that you don't have readily at hand unless your attorney advises it. If you know an answer to a question at the time that it is being asked, then you should answer it. Do not agree to look up anything in the future and then supplement the answer you are then giving unless your counsel advises you to.

Quite frequently, you will be asked a question by an attorney and in spite of the fact that you feel that you should know the answer, you do not; therefore, you will be tempted to guess or estimate what the answer should be. This is a mistake. If you do not know an answer to a question (even though you would appear ignorant or evasive by stating that you don't know), you should nevertheless do so, because a guess or an estimate for an answer is almost always the wrong answer and one from which the opponent can show that you either don't know what you are talking about, or imply that you are deliberately misstating the truth. Generally speaking, the attorney is in a position to know what the answer should have been, and it may very well be that the reason he asked the question was because he knew you wouldn't know the answer, but felt that you would be compelled to guess.

Answer the question without exaggeration

Do not consciously attempt to cast whatever the facts might be in a more favorable manner since this approach will undoubtedly be recognized by the questioner who will later take advantage of the variance.

If an honest answer to a question is "five", some witnesses erroneously believe that by exaggerating and saying "ten" they are somewhat giving a "better answer". This is not true. Rather, you are opening the door for opposing counsel to expose your exaggeration; at best, you have not testified honestly; at worst, opposing counsel will make you look like a liar.

As a specific example, if a patient were monitored at periodic intervals, then an honest answer would be, 'the patient was monitored at periodic intervals." An honest answer would not be the exaggerated statement, "This patient could not have been monitored more closely than she was. We watched this patient every second."

Such an exaggeration will make you look foolish on cross-examination.

Do not "second guess" what a good answer would be

Do not try to figure out before you answer whether a truthful answer will help or hinder your case. Answer truthfully. Your lawyer can most likely deal with the truth effectively. He is handicapped when you answer any other way.

Many witnesses commit a serious error by trying to figure out what the "correct" answer should be to the question and then trying to give that "correct" answer. First, the witness rarely figures out the "correct" answer. Second, it is usually obvious that the witness is not giving an honest answer. Third, a good lawyer on cross-examination will take the artificially "correct" answer and twist it against you.

Stick to the truth.

Answer the question without qualification When the facts are favorable

Questions relating to favorable facts should be answered as definitely as possible.

Answer the question with a clear enunciation and Maintain a sincere and pleasant demeanor

Since a stenographer is recording your testimony you should speak clearly so that the recordation is precise. You should be conscious of your demeanor since your questioner will be making an appraisal which could be significant in whether the matter is resolved in advance of trial.

Scrutinize exhibits with care

If you are uncertain about the subject of an exhibit which is shown you during the course of the deposition then be sure to indicate that uncertainty with reference to any questions which are posed in connection with the exhibit.

Do not chat with opposing counsel

Both before and especially after the deposition, do not chat with and socialize with the opposing attorney, opposing parties or other persons present. Remember, opposing counsel is your legal enemy. Do not let his friendly manner cause you to drop your guard and become chatty. If during a social conversation you say something

which could be used against you, the attorney will remember it and will, in fact, use it.

In many cases, the opposing parties or opposing witnesses know each other from previous social or professional contact. While a courteous good morning or other greeting is appropriate, do not socialize or chat at the deposition.

After the deposition is over, you will almost certainly want comments from your attorney about how the deposition went. Also, your attorney may want to discuss specific points with you, while they are fresh in his or her mind. If you are going to have such a discussion, have it in private, preferably away from the site of the deposition.

Conclusion

By no means is the above list of pointers exhaustive or complete. Indeed, it would be possible to write thousands of pages on how one should conduct himself or herself when testifying. However, you should by now have a general idea of the preparation, thoughtfulness and caution which are appropriate for a witness at deposition or trial.

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Chapter Seven

Being a Witness 101

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Why is this chapter important?

The importance of trial is self apparent - if we lose the trial we have lost the case. We get reported to the Data Bank. Insurance premiums may be affected, not to mention the emotional toll.

Trial is the Big Dance and we want to be a good witness, but how do we do that? While the importance of trial may be self apparent, how to prepare for it is not spontaneously evident. There are skills to being an effective witness; some of those skills are discussed here.

Review the Deposition Preparation Chapter

Depositions and trials are sufficiently similar that good preparation for one is good preparation for the other. Instead of repeating all the deposition pointers from above, we remind the reader to review that chapter as part of trial preparation.

Prepare for court

When your deposition is taken, all of the case preparation is not yet complete, for example, there may be other depositions which are taken after your deposition. Before testifying all trial, it is imperative that you and your attorney review all of the materials which are available and decide which materials you must review in preparation for your testimony.

Be especially sensitive to new information which did not exist when you were treating the patient or when you were deposed, such as subsequent medical records. Analyzing the medical records after your care may help you explain your own care more effectively.

Study your own documents

Witnesses commonly think that they do not need to review their own documents since they lived through those activities, e.g., "I do not need to review the chart; I gave that care." Nothing could be further from the truth.

By the time you appear to testify, it will probably be between two and five years (perhaps longer) since you treated the patient. It is totally unrealistic to expect that you will remember the medical care in sufficient

detail. You must study your own chart just like you had never seen the patient.

If you contradict your own chart because you have forgotten data, you and the chart will both lose credibility. Doctors with low credibility do not win cases.

The same rubrics apply to reviewing your deposition. Even though it was your own deposition, you must take time to read and study it. While hopefully everything you said in the deposition is true, you should study your deposition until you are completely comfortable with everything you discussed. I can assure you that opposing counsel will be very familiar with your deposition. If your opponent is more familiar than you are with your deposition, then your opponent has the advantage.

Facts versus opinion witnesses

A witness may testify at deposition or trial a either (or both) a "fact" witness or an "opinion" witness. As the words indicate, "a fact" witness reports only facts while an "opinion" witness is allowed to pine on different items. Make sure you understand in advance of your testimony whether you will be testifying as a "fact" witness, "opinion" witness or both.

A "fact" witness reports information which is known to him or her through the exercise of the senses - - what did you see, what did you hear, what did you do, what did you see others do, etc.?

An "opinion" witness is allowed to reach conclusions based upon the facts reported, even if those facts are reported by other witnesses. For example, an expert witness may render an opinion that, based upon the nurse's description, the patient was suffering a myocardial infarction.

There are a whole series of additional instructions for "opinion" witnesses which are beyond the scope of these materials. As a general rule, do not render an opinion at deposition or trial, unless the opinion has been disclosed to and approved by your attorney in advance of your testifying.

Become a teacher

Most juries love to learn about the medicine involved. They will naturally look to you for an explanation. You

should become their teacher to guide them through the case. Exactly what you guide the jury through? This point is covered in the next section.

Use language the jury can understand

While we want the jury to appreciate your medical comprehension of the subject matter, you must explain it to them in terms they can understand. This is not the time to prove that your vocabulary (and especially your medical vocabulary) is so huge that no one will ever understand a single point you try to make.

As a teacher, you have failed unless your students (the jury) can grasp you explanation.

Explain your side of the medical care

Your author believes that it is most persuasive if you can be a teacher to educate the jury on your explanation of the medical care involved - ***what*** did you do to the patient, which also includes what you did not do; ***why*** did you do (or not do) the care you gave; explain the ***logic*** of the care you gave or did not give; develop your ***mental process*** of what information (e.g., lab results).

Using as an example a case in which there is an allegation of failure to diagnose an impending myocardial infarction, it would be good for the doctor to educate the jury on what tests were administered to the patient, the purpose of each test, what the results of the test would have shown or not shown, if certain tests results were inconclusive, what was done to gain more definitive information, how the history and physical was conducted, what observations were significant from the H&P and why, what information lead to the conclusion that the patient was not in danger of an impending MI and why, etc.

Stay professional but polite and courteous

Court is probably the ultimate high stress environment. You will be questioned by opposing counsel, for whom you have not only disrespect but contempt. You want nothing more than to bite his or her head off in front of the jury so they can all see how stupid this case is.

You must not, under any circumstances, conduct yourself in an arrogant or disrespectful manner towards anyone involved in the case, no matter how much they may deserve it in your opinion.

The jury will be respectful of you because of your professional education and standing in the community. If you have been a good teacher to them, they will be even

more respectful to you. However, if you are discourteous, condescending, arrogant or disrespectful to other people, the jury will turn on you.

You should, of course, maintain a professional demeanor. You are appearing as a doctor, not as one of their buddies from the local club. You want to testify with the confidence and professionalism to which you are entitled; however, you do not want to become arrogant.

Act like you are on stage at all times

Because you are on stage. Most medical malpractice trials will last between two and six weeks. During this entire time, the jury will be watch you to see if you are a decent person who should be believed or a charlatan who is trying to trick them.

During recesses, lunch breaks, before or after court, they will be watching you. You must be on your best behavior. If you are courteous while you are testifying on the witness stand but are an arrogant jerk in the courthouse cafeteria, the latter impression will prevail.

Be familiar with the exhibits

Learn from your attorney what items or documents will be offered as exhibits by either the plaintiff's side or your side. These exhibits could be documents (like medical records), items (like medical equipment such as forceps), diagrams (e.g., summarizing all the lab values), models of body parts or pretty much anything else which is relevant and useful to the case.

Be familiar with all those exhibits. If you are fumbling and uncomfortable around the exhibits, it may give the jury the mistaken impression that you do not really know the medicine involved in the law suit.

Conclusion

Being sued is very unpleasant. Going to trial is probably even more unpleasant. However, by good preparation, study and working closely with your attorney, most doctors can be good to very good witnesses on their own behalf. You want to give yourself every possible advantage in preparing to testify.

On Being an Expert Witness

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Overview

Agreeing to serve as an expert witness in a medical malpractice case requires careful consideration. Expert witnesses are called on to assess the standard of care for emergency physicians in matters of alleged medical malpractice and peer review. Serving as an expert requires a significant commitment of time and requires thoughtful and careful evaluation of the case, complete understanding of the standard of care, and the ability to convey your opinion to the lay public. Serving as an expert witness is always challenging, stimulating, and educational and can be personally rewarding.

The expert witness plays an essential role in determining medical negligence under the US system of jurisprudence. In medical malpractice, expert witness testimony may be used (and is required in some jurisdictions) to evaluate the merits of a malpractice claim in preliminary hearings before filing legal action. By and large, courts rely on expert witness testimony to establish the standards of care germane to a malpractice suit. Generally, the purpose of expert witness testimony in medical malpractice is to describe standards of care relevant to a given case, identify any breaches in those standards, and if so noted, render an opinion as to whether those breaches are the most likely cause of injury. The standard of certainty required in this civil action is the "balance of probability", that is, greater than 50% likelihood. For example, is it greater than 50% probability that failure to timely diagnosis a critical condition or the administration of an inappropriate treatment resulted in increased morbidity or death? Experts for the plaintiff and defendant often disagree on this percentage of probability.

In civil litigation, expert witness testimony is much different from that of other witnesses. In legal proceedings involving allegations of medical negligence, "witnesses of fact" (those testifying because they have personal knowledge of the incident or people involved in the lawsuit) must restrict their testimony to the facts of the case at issue. The expert witness is given more latitude. The expert witness is allowed to compare the applicable standards of care with the facts of the case and interpret whether the evidence indicates a deviation from the standards of care. The medical expert also provides an opinion (within a reasonable degree of medical certainty) as to whether that breach in care is the most likely the proximate cause of the patient's injury. Without the expert's explanation of the range of acceptable treatment modalities within the standard of care and interpretation of medical facts, juries would not have the technical expertise needed to distinguish malpractice (an adverse event caused by negligent care or "bad care") from maloccurrence (an adverse event or "bad outcome"). The expert may also be asked to evaluate whether the factual testimony provided by other witnesses indicates any deviation from acceptable standards. Because courts and juries depend on medical experts to make medical standards understandable, the testimony should be clear, coherent, and consistent with the standards applicable at the time of the incident. Although experts may testify as to what they think the most appropriate standard of care was at the time of occurrence, they should know and consider alternative acceptable standards. Expert witnesses should not define the standard so

narrowly that it only encompasses their opinion on the standard of care to the exclusion of other acceptable treatment options.

The plaintiff bears the burden of proof and must convince a jury by a preponderance of the evidence that their case is more plausible. The plaintiff and defense attorneys will present their respective experts, each side hoping their witnesses will appear more knowledgeable, objective, and credible than their counterparts.

Some states have enacted laws requiring that a competent medical professional in the same area of expertise as the defendant review the claim and be willing to testify that the standard of care was breached. A few states require that the expert have an active unrestricted license in the state in which the alleged negligence occurred.

Because of growing concerns about inaccurate medical expert testimony, many medical professions have developed guidelines for the minimum guidelines and appropriate behaviors of expert witnesses. These organizations include the American Academy of Pediatrics, the American College of Emergency Physicians, the American College of Physicians, the American Academy of Neurology, the American Academy of Orthopedic Surgeons, and the American College of Medical Genetics. These guidelines support physicians serving as expert witnesses yet argue that these physicians be fully qualified as experts. These organizations have strongly advocated that experts be accountable for their testimony. Expert witnesses are accountable for their statements and should be aware that transcripts of depositions and courtroom testimony are public records and may be subject to independent peer review. Giving testimony that is false, fraudulent, misleading, or without medical foundation may expose the physician expert to disciplinary action.

Guidelines for Being an Expert Witness

It is strongly recommended by a number of medical organizations, including ACEP, that expert witnesses should meet the following criteria:

1. Be certified by a recognized certifying body (e.g. Board certification in emergency medicine);
2. Be active in the clinical practice of emergency medicine for at least three of the previous five years immediately before the date of the incident;
3. Have a current, valid, and unrestricted license as a doctor of medicine or osteopathic medicine;
4. Possess current experience and ongoing knowledge in the area in which he or she is asked to testify;
5. Be prepared to state the basis of the testimony presented, and whether it is based on personal experience, specific clinical or scientific reference, or generally accepted standards in the specialty field or area;
6. Affirm and be able to document that not more than 20% of his or her professional activities involve serving as an expert witness;
7. Accept compensation for expert services that is reasonable and commensurate with expertise and the time and effort necessary to evaluate the facts of the case. It is unethical for an expert witness to agree to or accept a fee that is contingent upon the outcome of a case;

8. Should not engage in advertising or soliciting employment as an expert witness if such advertising or solicitation contains false or misleading representations about the expert's qualifications, experience, or background.

Physician experts have a moral and legal responsibility to provide an unbiased and complete testimony. Physicians serving as experts in medical negligence actions should take all necessary steps to provide thorough, fair, objective, and impartial review of medical facts. Regardless of the source of the request for testimony (plaintiff or defendant attorney), expert witnesses should lend their knowledge, experience, and best judgment to all relevant facts of the case. Expert witnesses should take necessary steps to ensure that they have access to all documents used to establish the facts of the case and the circumstances surrounding the occurrence and must be knowledgeable of contemporaneous literature concerning the case being examined. Relevant information should not be excluded for any reason and certainly not to create a perspective favoring the plaintiff or the defendant.

The anatomy of a malpractice case – the role of the expert

Most physicians will typically become involved in expert witness work initially by referral from physician colleague to an attorney looking for an expert in defense of plaintiff work. With time, experience, and a growing professional reputation, physicians interested in expert witness work will become known in their legal community and will be asked to review cases regularly. The minority of physicians advertise their services either solely or through a search firm. In general, it is not recommended that physicians advertise their services as an expert witness.

The purpose of discovery is to identify all the facts and opinions related to the case. Physician experts become involved in a malpractice case when they are contacted by an attorney to initially review a case. The attorney(s) for the plaintiff will initially contact one or more physicians to provide an initial review of the records to determine if there was a deviation in the standard of care and if that deviation contributed to an adverse outcome. If the essential components of medical malpractice appear to have been met, the attorney will file the case with the courts. These physician reviewers may or may not be asked to serve as experts for the plaintiff. The attorney(s) for the defendant will likewise contact expert physicians to review the case to determine if there has been a violation in the standard of care and if that violation contributed to an adverse outcome. Physicians in support of some or all components of the care delivered may be asked to serve as experts for the defense. In general, both attorneys for the plaintiff(s) and the defendant(s) must designate their experts early in the legal process and all experts will submit a certificate of meritorious claim.

This initial stage is critical for the physician expert and the physician must be willing to spend the appropriate amount of time necessary to render an opinion. Before rendering an opinion, it is essential that the prospective physician experts carefully and thoughtfully reviews all relevant available data, completely understands the standard of care issues, and is knowledgeable of the medical supporting data. Additional data may include the filed complaint, personal statements of the patient, family and associates, and perhaps initial depositions of fact witnesses and family members and possibly medical experts. Fully understanding the medical standards and medical supporting data <u>after</u> accepting a case may lead to biased understanding of the issue. In emergency medicine, your testimony will primarily focus on standard of care yet you may be asked to comment on causation. You should only agree to accept to serve as an expert witness once you have determined that you can appropriately support (defense) or challenge (plaintiff) the

care provided based on your clinical experience, the standard of care and the existing evidenced-based medical literature, guidelines, etc. at the time the care was delivered.

The deposition of key witnesses is arguably the most important facet of the discovery process in malpractice cases. A deposition is a witness's recorded testimony, given under oath, on being questioned by attorneys for the parties in the case. Throughout the deposition process, attorneys gather information on what factual and expert witnesses will say and assess the relative effectiveness of their testimony. The expert's continued role in the discovery process primarily involves reviewing the depositions of other experts and fact witnesses and any other records not available during the initial case review and giving their deposition. Crucial decisions in determining the next phase of the case (e.g., seeking a settlement, going to trial, moving for summary judgment) are often based on the strength of the expert witness testimony during deposition. It is critical that the expert witness is fully prepared for their deposition.

During the deposition, the expert will be primarily deposed by the opposing counsel, however, attorneys representing all parties will have the opportunity to ask the expert questions. The deposition is the opportunity for opposing counsel to not only determine the experts understanding and opinions about the case but also to attempt to predict how credible the expert will appear before a jury. In addition their expert opinions, the expert will be queried about their training, credentials, any disciplinary actions, malpractice claims, and previous expert witness work. Anything that may portray the expert in an unfavorable light may be advantageous to the opposing counsel.

In the majority of cases, the expert will be sent a transcription of his/her deposition and will be expected to review it for accuracy and submit a signed errata sheet with any corrections. It is important that any errors in the transcription be corrected at this time.

The majority of malpractice claims never go to trial. For the minority of cases that go to trial, the expert will need to re-review any relevant data including their deposition prior to trial testimony. The attorney with whom the expert is working will inevitably meet with the expert prior to trial appearance to update the expert with any new developments in the case and focus on key issues that will likely be addressed at trial. Expert testimony at trial is as much an art as a science. It is important that the expert speaks in clear, concise, layman terms with compassionate demeanor and appropriate eye contact with the jury. The expert may be judged not only on knowledge and credibility but also personableness and likability.

Should one serve as an expert for the defense or plaintiff? It is ultimately a personal decision and medical organizations support the belief that all parties are entitled to good expert services. Serving as an expert witness requires that you are completely honest and objective in your opinions. As long as this dictum is followed, many physician expert witnesses are willing to serve as experts for both plaintiffs and defendants believing that credible experts will represent their opinions regardless of whether their testimony is to be used by the plaintiff or defendant.

Summary

Expert witnesses play a pivotal role in determining medical negligence in our legal system. It is essential that expert witnesses are qualified and this article has review the key criteria for an expert witness. Serving as an expert witness is educational, professionally challenging, and rewarding. Physicians interested in serving as expert witnesses should meet the minimal professional criteria recommended by the medical organizations and societies and be willing to

put the time and commitment necessary to do an exemplary job. Much depends on the integrity of the expert's work.

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An Introduction to Insurance Law

Introduction

Few situations provoke as much angst in physicians as the topic of medical malpractice. Malpractice litigation not only exacts an emotional toll, but now represents a threat to a physician's practice and assets. To mitigate this threat clinicians purchase professional liability insurance. In recent years the cost of this insurance has soared. Today, insurance premiums represent a major expenditure to physicians and their employers. Despite its importance, young physicians have little exposure to the basic concepts of liability insurance. Therefore, it is appropriate to discuss these concepts in light of the growing importance of insurance to the practicing clinician.

Terms[1]

1. Claims-Made Coverage-An agreement to indemnify against all claims arising during the coverage period, regardless of when the incident that gave rise to the claims occurred.
2. Experience Rating-An analysis used to determine premium amounts which weighs the insured's claims record over time to assess (1) the risk that covered events will occur, and (2) the amount of probable damages if they do.
3. Occurrence Insurance-An agreement to indemnify for the loss associated with an event that occurs within the policy period, regardless of when the claim is made.
4. Tail Coverage-Supplemental insurance that covers incidents arising during the time a claims-made policy was in effect but were not brought as claims

against the insured, nor reported to the insurer, before the claims-made policy was terminated.

5. Reinsurance-Indemnity of all or part of one insurer's risk provided by another insurer, who accepts the risk in exchange for a percentage of the original premium.
6. Date of Reporting-The date the insurance company was made aware of the incident.
7. Date of Incident (Date of occurrence)-The date the alleged malpractice took place.
8. Limit-The maximum amount an insurer will pay under the terms of the policy. Professional liability policies usually have multiple limits-a per claim limit and an annual aggregate limit.

Goals of Insurance

There are similarities and differences between professional liability insurance and other forms of insurance. At its core, professional liability insurance, together with, for instance, homeowners insurance, strives to spread risk among a group of people. This is accomplished when a large number of people agree to pay a relatively small amount of money to provide a large sum to the few who fall victim to a harm covered under the policy.

Who the insurance policy attempts to make whole differentiates malpractice insurance from home owners insurance. Home owners insurance is a type of first-party

insurance in that the policyholder and the beneficiary of the policy are one. Malpractice insurance, or third-party insurance, has as the beneficiary some "third party" injured by the policyholder.

Duty

The relationship between insurer and insured represents a quid pro quo of expectation and duty between the two parties. In exchange for premiums paid by the insured (or by the employer on behalf of the insured) the insurance company accepts two major duties. First, the insurer has the duty to defend the policyholder. This duty arises from the policy language and prior court decisions. For example, it is well settled in Pennsylvania case law that an insurer has a duty to defend its insured whenever there is a claim stated in a complaint that "potentially may become one which is within the scope of the policy."[2] Second, insurers have a duty to settle claims they are defending. This duty protects the personal assets of the insured by requiring insurers to settle claims within policy limits should liability exceed the limits of coverage.[3]

Insurers also have expectations of their insureds. To mount an affective defense, policyholders have a duty to cooperate. Physicians must notify their malpractice carriers of claims made against them, provide information to their insurers when requested, show up for deposition and if need be trial.

Common Insurance Problems

Malpractice insurance problems tend to fall into one of three broad categories: accessibility/affordability, coverage, and cooperation.

Today, the rising payout of malpractice claims coupled with the increasing cost to defend claims has driven many insurers out of the market. The insurers that remain frequently offer insurance at markedly elevated rates to all but those with unblemished claim records. As a consequence, some physicians with a history of malpractice suits or who specialize in high-risk specialties may find difficulty in obtaining malpractice insurance in some parts of the country. Graduating residents should know where their chosen field of specialization ranks in regards to risk and be well acquainted with the litigation climate of the state in which they plan to practice.

Another common problem occurs at the termination of a claims made policy. Coverage is typically terminated when one changes employers, insurers or retires. Claims arising after the termination date are not covered even if the incident occurred during the coverage period. Tail insurance is an insurance product designed to protect insureds during the period following a claims made policy. Know in advance whether your employer plans to pay for the "tail" upon completion of your contract since this insurance can be quite expensive.

Lastly, failing to cooperate with your insurance company may allow your insurer to terminate the obligation to defend you. Physicians should notify their insurers early when claims of malpractice are made or threatened. Requests for charts, interviews, and appearances for depositions should be honored since the best defense results from a concerted effort between insurers and their insureds.

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[2] Cadwallader v. New Amsterdam Casualty Co., 152 A.2d 484, 589 (Pa. 1959).

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Asset Protection: Not Losing Your Shirt in a Claim

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A. What is Asset Protection for Physicians?

Asset protection has two main aims, the preservation of assets and the minimization of potential liability. Physicians know all too well the devastating affects that a malpractice claim may have on their assets. However, there are many other potential liabilities to consider as well, such as: automotive liability, liability arising from rental property, liability from serving as an officer or director of a company or charitable organization, and contractual liabilities. Claims for negligence, discrimination, and harassment are additional threats. Finally, divorce may drastically reduce ones assets.

Misconceptions exist about what constitutes asset protection. Asset protection does not involve evading taxes, hiding assets, or defrauding creditors.

B. How to Minimize Potential Liability

Insurance: Having the correct amounts of malpractice and other types of insurance, such as vehicle and homeowner's, is one step in minimizing liability.

Choice of entity: Engaging in a general partnership, whether medical or for any other purpose, drastically opens one to liability. Since all general partners are usually liable for the acts of any of the general partners when they are acting in furtherance of the partnership, a small investment can open one up to significant liability. However, there are many other entity types that offer better protection. Depending on your state, the following entities may be the appropriate choice for your practice: limited liability company, professional limited liability company, or professional corporation.

Investment Choices: Consider carefully whether to invest in businesses where you are likely to be sued. Owning rental property can expose you to significant liability if someone is injured. If you chose to invest in rental property, an LLC or other entity should be formed to hold the property. The idea is to "isolate" the property and "insulate" yourself from potential liability.

Home, Life Insurance, IRAs and Pension Plans: The family home, retirement accounts, and life insurance enjoy different levels of creditor protection as dictated by the state law. In some

states, such as Florida, homestead is a traditional protection of the family home from creditors. In these states, the homestead provision offers an additional asset protection option. However, in Maryland, Virginia, and D.C., homestead is of little relevance. Generally, IRAs and ERISA benefits are at least partially protected. Normally, life insurance proceeds are also protected from creditors. Thus, these may be good and safe forms of investment to the extent they are protected from creditors. Again, what state you live in determines the extent of your protection.

Maryland:

A. Homestead: There is no homestead exemption. However, property that is held in tenancy-by-the-entirety may be exempt from the debts and creditors of one spouse.

B. Life Insurance Policies: Proceeds, cash surrender values and loan benefits are exempt, if the beneficiary is the spouse, child or other dependent of the debtor. Disability benefits are also exempt from creditors.

C. IRAs & Pension Plans: IRAs are exempt. ERISA qualified benefits are exempt. State employee pension plans are exempt.

Virginia:

A. Homestead: $5,000 plus $500 per dependent, but a couple may double the amount. Property that is held in tenancy-by-the-entirety is exempt from the debts and creditors of one spouse.

B. Life Insurance Policies: Group life insurance annuities and cooperative life insurance proceeds are exempt.

C. IRAs & Pension Plans: IRAs are exempt up to the amount that would produce a retirement benefit of up to $17,500, per year. ERISA qualified benefits exempt.

District of Columbia:

A. Homestead: There is no homestead exemption. Property that is held in tenancy-by-the-entirety is exempt from the debts and creditors of one spouse.

B. Life Insurance Policies: Individual life insurance proceeds are exempt when the beneficiary is not the insured. Group life insurance is also excluded when payable to all employees.

C. IRA & Pension Plans: IRAs are exempt. ERISA qualified benefits are exempt.

C. How to Protect Family Assets

Hold Assets as "Tenancies by the Entirety": In D.C., Maryland, and Virginia it is possible for a married couple to hold both real and personal property in this form. One advantage to this form of ownership is that on death there is an automatic transfer to the surviving spouse, thereby avoiding

probate. A second advantage is that the creditors of one spouse cannot collect against property held in this form. One disadvantage is that if the non-debtor spouse dies, then there is no creditor protection for the debtor-spouse. A second disadvantage is that property held as tenants-by-the-entirety will normally be treated as marital property in the event of a divorce. Please also note that planning for estate tax purposes may be more difficult when holding property as tenants-by-the-entirety.

Self-Settled Asset Protection Trust: This is an irrevocable trust which someone creates for himself or herself. The purpose is then to protect and shelter your assets from future creditors before any creditor issues arise, as well as to provide some estate tax planning benefits. A Trustee is appointed to have discretionary authority to act for, and to make distributions to, you and your family. You cannot keep control of the trust. Traditionally, these types of irrevocable trusts were not effective. However, many offshore jurisdictions and six asset protection friendly states, i.e., Delaware, Alaska, Nevada, Utah, Rhode Island and Wyoming, have laws that allow these types of trust. Consequently, a self-settled asset protection trust may be the ideal choice for physicians, and other professionals who are members of professions which invite frequent lawsuits and possible creditor attachments.

Family Limited Partnership or Limited Liability Company: These entities change the form of ownership of assets. Due to the nature of the interest retained, a creditor normally may only obtain a "charging order" against your interest. A "charging order" makes the creditor the beneficial owner of the interest. Once the "charging order" is granted, the creditor is entitled to all distributions. However, even if no distributions are paid, the creditor is liable for all income taxes associated with the undistributed income. These entities may also provide some estate tax planning benefits.

Legacy or Dynasty Trust (also often called a Spendthrift Trust): This is a type of irrevocable trust created by someone else, with their assets, for your benefit. This type of trust also minimizes or eliminates the estate taxes that will be paid upon your death. Although a beneficiary can legally be the Trustee or Co-Trustee of this type of trust, for credit protection purposes, it is better to have an independent third party serve as Trustee (most preferably a corporate trustee in an asset protection friendly state). The beneficiary or close friend of the beneficiary may be given the authority to remove and replace the Trustee, as well as potentially the authority to direct the investments of the trust.

If you are comfortable with your parents, or anyone else from whom you are likely to inherit, consider requesting a Spendthrift Trust for your benefit, since assets received outright may be subject to creditor claims. A recent decision by the Maryland Court of Appeals emphasizes the high degree of creditor protection the beneficiaries of a Spendthrift Trust enjoy. *Duvall v. McGee*, 375 Md. 476, 826 A.2d 416 (Md. 2003).

D. Update Your Asset Protection Plan

Understanding your asset protection plan is essential to its success. The plan developed today may not be the "best plan" several years down the road. First, tax law changes and legal developments may alter the effectiveness of certain mechanisms. Additionally, life changes will affect your plan. Marrying, having children, and receiving inheritance require a comprehensive review of your plan. As your practice grows, additional wealth may require estate planning techniques to avoid or minimize the affects of death taxes.

Starting the asset protection process early in your career, not only increases protection from liability, but empowers one to plan for the future.

E. Don't Forget About Estate Planning

Starting the estate planning process with a goal of asset protection can yield both an effective long-term estate plan and increased protection from creditors. Basic estate planning documents include: Will, Durable General Financial Power of Attorney, Advance Medical Directive (including a Health Care Power of Attorney and a Living Will), and possibly a Revocable Trust.

1. ***Will:*** A Will is a document that only takes effect when you die and directs how your individually owned assets will be distributed when you die.

2. ***Durable General Financial Power of Attorney:*** A Durable General Financial Power of Attorney is a separate legal document that allows you to appoint a substitute decision-maker or agent to act on your behalf for financial types of decisions. A Durable General Financial Power of Attorney allows you to avoid the court costs, legal fees, time and aggravation of going to court to appoint a Guardian or Conservator should you become legally incompetent or disabled.

3. ***Advance Medical Directive:*** A Health Care Power of Attorney allows you to appoint a substitute decision-maker or agent to make health care decisions for you if a physician determines that you are "*incapable of making an informed decision*". Your selected agent may refuse or terminate treatment for you when you are either terminal or in a non-terminal state (*e.g.*, persistent vegetative state or coma). Therefore, it is broader than a Living Will.

   A Living Will declares your desire that life-sustaining treatment be withdrawn or withheld under certain specific medical conditions. A Living Will may apply to cases where an individual is terminally ill or in a persistent vegetative state. A Living Will only addresses extraordinary medical decisions regarding life-sustaining decisions in cases of terminal illness or persistent vegetative state. A Living Will may also declare your desire that life-sustaining treatment be continued.

4. ***Trust:*** A trust is an arrangement created by a Grantor or Settlor where a Trustee administers and invests assets for the benefit of Beneficiaries. Trusts can be either revocable or irrevocable. Trusts can be created during your lifetime (living or *inter vivos* trusts) or upon death (testamentary trusts).

   A Revocable or Living Trust is a trust which creates a "legal fiction" while you are living. The person who creates the trust (i.e., the Grantor or Settlor) is also generally the Trustee and the Beneficiary. The Grantor retains full and absolute control over the Revocable Trust and its assets and can amend or revoke the Revocable Trust at any time. A Revocable Trust also acts like a Will when the Grantor dies. Upon the Grantor's death, the successor Trustee distributes the assets to the intended beneficiaries, either outright or in trust. However, a Revocable Trust has the following advantages over a Will:

   - Assets titled in the name of a Revocable Trust are not subject to the probate process upon death, which saves time and money.

- A Revocable Trust can be the beneficiary of life insurance policies and retirement accounts, thereby insuring that your assets are distributed to the proper beneficiaries, at the right time, with the right degree of control and protection.

- A Revocable Trust acts like a power of attorney, allowing for the management of the Revocable Trust assets upon the Grantor's incapacity.

- A Revocable Trust is a private way to manage your affairs and to dispose of your assets. Unlike a Will, a Revocable Trust does not become a part of the public court record.

- A Revocable Trust is more difficult to contest than a Will.

F. Conclusion

The time to begin asset protection planning is before a creditor situation arises. As you begin the process, make sure that the strategies employed fit your specific situation and long-term goals. Encourage your accountant and financial advisor to work with your legal counsel. A collaborative effort often provides for a better plan and an earlier alert to needed modifications.

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