

MALPRACTICE

Survival Strategies

Step-by-step advice to help you get through a suit

BY LAIN CHROUST EHMANN

WHEN JOSEPH LABRICCIOSA, DO, graduated from the University of New England College of Osteopathic Medicine in the late 1980s, medical malpractice was the furthest thing from his mind. “It wasn’t discussed,” says the Springfield, Pennsylvania, physician. “It wasn’t an issue. People didn’t sue their doctors.” With his malpractice insurance totaling less than \$2000 per year, LaBricciosa didn’t think too much about the possibility of being sued.

That is, until the wife of a patient brought suit against him in 1996 for failing to diagnose a rare form of rectal cancer which resulted in the patient’s death. Although LaBricciosa had recommended testing and follow-up—which the 32-year-old male refused—the jury found the physician guilty of malpractice and awarded the widow \$8.2 million.

The dollar figure alone might cause jaws to drop, but the real shock is this: The plaintiff was his sister-in-law, suing on behalf of his deceased younger brother, Robert.

“In my wildest dreams, I never would have considered a malpractice suit against me [by] my sister-in-law,” says LaBricciosa, whose malpractice insurance now runs \$17,000 a year. “But if I can be sued by [her] for the death of my brother, no one is safe. It’s just a matter of time. All physicians will be sued, and many will be sued for big bucks.”

All too common

While suits by family members are rare, malpractice cases against doctors are not. “A lawsuit is an expected occupational hazard of being a doctor in America,” says Joseph Scherger, MD, MPH, a family physician in California who also serves as professor and chair of the Department of Family Medicine at the University of California at Irvine.

On the up side, statistics favor the physician. “Most lawsuits against doctors end up going away,” adds Scherger, who has been sued for malpractice three times, with all three cases reaching settlement before trial. A good number of suits are dismissed, dropped, or settled without reaching a courtroom.



ILLUSTRATION / SUSAN NEVIAN

Regardless of how well-prepared you are, a malpractice suit will engender all sorts of emotions, most of which you'd rather not experience.

And if a case does go to trial, sixty to eighty percent of the time the physician wins, says Jim Rosenblum, a malpractice defense attorney with Rosenblum and Tannenbaum, a firm with offices in Connecticut and New York.

But rare or common, justified or unjustified, successful or not, a malpractice suit can wreak havoc on a doctor's personal and private life. "It's emotionally devastating. It's personally devastating. The insult is not only professional, but personal. It eats you up inside," says Thomas Tilkens, MD, a Green Bay, Wisconsin, podiatrist who won a multimillion-dollar malpractice lawsuit against him in late 2000.

Dollar values of judgments are on

the rise. According to Jury Verdict Research, a nationwide database of verdicts and settlements, the median medical malpractice award increased 76 percent from 1996 to 1999. With the number of suits filed remaining high, every medical professional needs to know how to respond if sued; the more you know about the process and the claims against you, the higher your chances of success.

A lengthy process

Contrary to what television shows may depict, the law moves slowly. Though it's declined over the past five years, the median time between the date a claim is filed and the trial date is 25 months, according to

1999 Jury Verdict Research data. And cases can last much longer depending on the state in which you practice; Connecticut, for instance, can take up to four or five years before a case reaches trial, says Rosenblum, while on the "fast track" in New York, two years is closer to the norm.

Don't assume, however, that you'll have to put your life completely on hold during this period. Activity associated with a court case comes in fits and starts. spurts of activity occur at certain stages, especially in the early days and again around the pre-trial deposition. And then, "as it gets closer to the trial, it will take over [a physician's] time," says Joseph Fasi, II, the chair of the

Defense Research Institute's Medical Liability Committee and an attorney with the Milwaukee firm of Peterson, Johnson, and Murray.

How involved in the process you become is, to an extent, at your discretion; some physicians want to be aware of every step in the process while others want to be notified only at major junctures, says Fasi, who successfully defended Tilkens' case. Regardless of the camp into which you fall, your best defense is a thorough understanding of the process. Once you know what to expect—and when—you'll be better able to advocate on your own behalf.

In the beginning

Notification of a malpractice suit against you typically comes in the form of a claim letter or written summons, says Maureen Mondor, the vice president of risk management services for ProMutual Group of Boston, the largest insurance carrier in the Northeast. Upon receiving such notification, immediately contact your insurance carrier and forward the necessary forms and information by certified mail, return receipt requested, says Rosenblum. Your insurer will assign a representative from the company and an attorney who will meet with you to begin the investigation process.

Though you may be tempted to bury the paperwork in a drawer—something ProMutual has observed, Mondor reports—doing so may put you in default and end up losing you the case. Quick action can also help your defense, Mondor adds. Not only will your recollection of the events be clearer and more complete, if there's the possibility that an equipment malfunction was at fault or contributed to the problem, the insurance company can quickly impound the equipment and begin a line of product li-

ability research, she says.

Also immediately lock up the relevant medical records to avoid tampering. A common temptation for physicians under siege is to review the files for the patient in question and begin changing or adding information. But even innocent editing—like noting legitimate data such as age or blood pressure that's noted elsewhere in the chart—causes big problems. "Leave

the records alone. [Tampering] hurts credibility significantly," says Fasi. "The medical record is considered a legal document," explains Mondor, who notes that out of ProMutual's current 4,000 open malpractice cases, records have been "adjusted" in 67. "We can't defend those types of cases," she says.

No matter how good an idea it may seem, restrain yourself from calling the

To Settle or Not to Settle: The Choice May Not Be Yours

Every case settled out of court or which goes to trial and is decided against the physician results in an entry in the National Practitioner Data Bank, a listing of medical malpractice payments and adverse licensure, clinical privilege, and professional society membership actions.

To avoid such a listing or if you're intent on winning rather than settling the case, you may wish to go to trial, even if the plaintiff is willing to settle for a minor sum. Your insurance carrier, however, may be counting dollars and come to the opposite conclusion. So, must you abide by your insurance company's decision if your carrier wants to settle and you don't? It depends.

"In many states, by law the doctor does not have veto power," says Joseph Fasi, II, the chair of the Medical Liability Committee for the Defense Research Institute and a partner with the Milwaukee law firm of Peterson, Johnson, and Murray. In addition, says defense attorney Jim Rosenblum of Rosenblum and Tannenbaum, there's a trend toward policies where hospitals and doctors have the same insurance carrier, are covered by the same policy, and are represented by the same attorney when sued. "Usually with these policies, the doctor doesn't have a right to consent, even if they feel the case is defensible," says Rosenblum, who practices in Connecticut and New York.

However, many insurance companies have a clause in their policies saying they'll seek the doctor's permission before settling a case. If a disagreement exists, the parties may go to arbitration. Even if such a clause is not included in the policy, most insurance carriers will work with physicians to come to an agreement.

And what if the physician is the one who wants to settle but the insurance company doesn't? The case will go to trial, says Fasi. That might not be a bad thing, though, he adds: "Every case I've had like that? We've won every one of them." ■

SURVIVAL STRATEGIES

Continued from previous page

plaintiff's attorney in the hopes that once he or she knows what a great doctor you are, the litigant will drop the case. "What [doctors] really end up doing is making statements that come back to haunt them later," says Fasi. "Anything you say to them is in admission," stresses Kerry Kearney, a defense attorney with Reed Smith in Pittsburgh. "[Calling the other attorney] would be really, really, really stupid."

By the same token, don't call the patient, don't talk to the press, and don't discuss the case with other doctors, even if they're involved in the suit, says Fasi. "It gives the impression of circling the wagons," he explains.

Just the facts

Once your insurance carrier has assigned an investigation team to your case, the interrogatory phase of the process begins, says Mondor. The insurance company representative and attorney will interview the physician and other medical personnel involved in the case and review the relevant records. Be as cooperative as possible, responding to inquiries promptly and doing all you can to speed their work. "If we work together as a team, we can accomplish much more than if I have to chase after them to get them to respond," says Fasi.



PHOTO/ ©2001 STEVE GOLDSTEIN

Work with your attorney to create a detailed narrative of the events as soon as possible, noting in your own words what happened in the disputed case, advises Joseph Scherger. "Your memory starts to fade or get creative on you."

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Scherger recommends working with your attorney to create a detailed narrative of the events as soon as possible, noting in your own words what happened in the disputed case. Because of the length of time between the actual occurrence in question and the trial, this

narrative can refresh your memory as needed as time passes. "Your memory starts to fade or get creative on you," he explains. Fasi says physicians can also assist their lawyers by recommending other physicians to serve as expert witnesses, if necessary, and by performing

SURVIVAL STRATEGIES

Continued from previous page

MedLine searches for applicable articles.

The research stage provides you ample opportunity to see how your attorney works and to determine if he or she is the right person to represent you. While insurance carriers typically assign lawyers, they may give you several choices to select from and are usually open to requests for changes. Do your homework; ask about the lawyer's background and experience, know who in your locale specializes in medical malpractice, and ask for references. And make sure this is a person you can trust absolutely. "If you're second-guessing, you should ask for another attorney," says Fasi.

A trial run?

After the initial flurry of meetings, a physician's direct participation will drop markedly until right before the pre-trial depositions. The deposition is a key element of the case, and your lawyer will assist you in preparing your testimony. It's essential to run through your facts because the opposing lawyer will try to trip you up and catch you in inconsistencies or gray areas. "It's a fishing expedition" for weak areas in your testimony, says ProMutual's Mondor.

Should your case reach the courtroom, says Scherger, "The trial itself is nothing but a formal reenactment of the deposition," with, of course, a judge and jury.

Your attorney—or a consultant hired specifically for this purpose—may make suggestions on everything from what points you cover in which order, to how you talk, walk, sit, and dress. You may feel the facts speak for themselves, but juries don't vote only on facts; they vote on your demeanor and personality as well. More than one case has been lost because of the defensive or condescending attitude of the defendant, says Scherger. "The doctor doesn't want to give anyone any reason not to be liked," he adds.

"Playing" to the jury or relying on your attorney to make critical decisions may go against a physician's natural grain. After all, doctors are trained to be decision-makers and leaders, but in this situation it behooves you to relinquish control. If you've chosen an attorney with whom you feel comfortable, follow his or her lead. "It's a time to shut your mouth and let your attorney guide you," says Tilkens, who says that if he had had his way on some crucial decisions, "I would have lost my case."

But taking direction doesn't mean following blindly. "I do expect it to be a partnership," explains Fasi. Ask questions, offer your opinion, speak your mind—and know when to back off. "There's nothing that hurts a case more than physicians who think they know more than the attorney. What works in the medical suite doesn't work in the courtroom," he says.

Emotionally speaking

Regardless of how well-prepared you are, a malpractice suit will engender all sorts of emotions, most of which you'd rather not experience. Depression, anger, frustration, numbness, resentment, distrust, and self-destructive behavior are all common responses, says Miguel Leibovich, MD, a Cambridge, Massachusetts, psychiatrist who runs individual and group support programs for physicians for ProMutual. "It's an incredible process. It lasts so long. It affects their lives, their patients, their family lives. It's a trauma," he explains.

And such feelings are natural. "It's understandable. They think that a lawsuit means that they're bad doctors, or that somebody's unhappy and they shouldn't be," says Rosenblum. "This is a major assault on who they are," adds osteopath LaBricciosa.

Understandable as they are, negative

emotions can get in the way of presenting your best case. "Emotion is not constructive," says Scherger. "The best approach is a cerebral one; there's a problem that needs to be solved," adds Rosenblum. Though difficult, it is possible to gain control when it seems like your life is spinning away from you:

- **Accept it.** When hit with something as long-lasting and far-reaching as a malpractice suit, it's easy to allow thoughts of the pending litigation to drown out everything else in your life. But obsessing about the situation isn't the answer, says Leibovich. Instead, accept the reality of the situation and "get used to the idea that it's going to be a long, long, long process," he recommends.

- **Get support.** You will probably go through a dizzying array of feelings, so locate some sort of emotional support, whether from a program like ProMutual's, from a professional counselor or member of the clergy, or from your spouse. One word of caution: Be careful when speaking to friends, fellow doctors, or staff. Not all conversations are protected, and as such they may be admitted as evidence in the case against you. That's why one of your best sources of support may be your attorney; all discussions are covered by attorney-client privilege and are inadmissible. "I've had doctors with twenty-plus years experience sit in the chair across from me literally in tears," says Fasi. "Part of my job is to deal with that."

- **Restore your perspective.** As thoughts of the case overtake everything else in your life, you can lose sight of your reasons for becoming a physician and start viewing each patient as a potential litigant. Not only will this affect the care you provide, it will also drain enjoyment from your job. To regain per-

SURVIVAL STRATEGIES

Continued from previous page

spective, Leibovich recommends looking at the suit as an isolated event within the entire scope of the thousands of people you have helped in your career. "It's just one thing in their lives that they have to put aside," he says. "One accusation against you does not make a career," adds Tilkens.

• **Relieve stress.** Just as you'd recommend that a patient dealing with a crisis find a safety valve to blow off steam, identify a healthy one for yourself. While many people—including doctors—undergoing trauma turn to drugs or alcohol or other self-destructive behaviors to numb the pain, these choices will only exacerbate a tense period in your life. "Physicians tend to be somewhat compulsive about their work," says Leibovich, so time away from the office, a new hobby, meditation, exercise, or a vacation will help ease the stress.

• **Distract yourself.** When podiatrist Tilkens was in the midst of his trial, he began doing research on new cars each night after court was adjourned for the day. He promised himself that on the day the verdict was reached, he'd buy the car of his choice if he won. "It was diversion to keep my mind off the trial," he says. If a new car isn't an option, try volunteering or visiting those less fortunate (Tilkens made visits to a burn unit). Helping others may show you that everyone goes through hard times, and you are not unique in your suffering.

Moving on

Win, lose or settle, you'll likely be a different person after your lawsuit. Tilkens says that a malpractice case can be a crucible, separating the good in your life from the bad. He says it has made some of his friendships closer, while others have been lost. And the ones that didn't make it?

"[They] probably should have been tested anyway," he says. On the professional front, some doctors note they've become more cautious, doubting their decisions in the examining room and on the operating table. Some doctors leave practice altogether, while others begin to practice "defensive medicine," hoping to protect themselves from future suits.

As for Joseph LaBricciosa, the massive judgment against him and a decline in income have taken their toll. "I lost a lot more than a malpractice suit. I lost two of my family members," he says. Yet despite the personal and professional setbacks, he's determined to continue his practice and continue helping people. "I'm not going to let the trial lawyers take this away from me," says LaBricciosa. He's walking proof of the philosophy that you can survive a malpractice suit, and be the stronger for it. As Tilkens puts it, "The human spirit is a whole lot stronger than anyone gives it credit." ■

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