Arm Yourself Against Malpractice

By Keith L. Martin [5]

Looking for the best defense against possible litigation? According to plaintiffs' attorneys, good communication and proper documentation are your best weapons when legal action threatens. Here's the inside scoop on how to protect yourself against lawsuits, straight from the people who make a living filing them.

The subpoena — that little piece of paper that seems to shout, "Thank you for practicing medicine, now please defend yourself."

Ilene Brenner remembers her encounter with the subpoena very well. A sheriff's deputy knocked on the door of her home, kindly introduced himself, and handed over the paperwork to the shocked emergency department physician, now working in Atlanta.
"I had this horrible feeling in the pit of my stomach," she says. "I thought there was a robber in the neighborhood, but instead, I got a subpoena. My heart just sank."
Standing stunned after closing the door, Brenner did something many of us would — she called a family member to relay the events that had just unfolded. For Brenner, that call was to her father, a defense attorney who handles medical malpractice cases.
"I was as clueless as everyone else in terms of that moment when you are sued," she says. "I had someone I could call for help."

For the rest of you without legal assistance in your bloodline or an attorney on retainer, we asked experts on both sides of medical malpractice cases how to avoid being sued and the best strategies to prevent your case ever seeing a courtroom if you do get served a subpoena.

Making a case

A subpoena can be a request to appear in court, but most likely, in medical malpractice cases, it is a request to turn over medical files to a plaintiff's attorney for review. Once the files arrive at that law firm, the process begins of poring over your every note, thought, and communication from the moment you met the patient to the outcome that brought you into the legal arena.

Plaintiff's attorneys usually work on commission; they don't get paid unless they attain a judgment or settlement in their client's favor. For that reason they need to be careful about the cases they pursue. Chicago-based plaintiff's attorney Regina P. Etherton says that she's looking for demonstrable negligence on the part of a medical provider when deciding whether to take on a case, mindful a bad medical outcome does not prove negligence. Etherton says this first step can be a "substantial discussion," and the cases she takes are the ones, "where anyone picking up that file would agree something shouldn't have happened in the fashion it did."
To reach that conclusion, many plaintiffs' attorneys utilize medical professionals as consultants to review files. Etherton has a physician partner at her firm who reviews all of her cases. The consultants are looking for evidence in the record of gaps between the accepted standard of care and what actually transpired. Documentation errors. Miscommunication. Misdiagnosis. Tests that should have been performed but weren't. Anything that might, in retrospect, explain why the patient experienced an unexpectedly negative outcome.
Bruce G. Clark, a plaintiffs' attorney in New York most famous for representing the family of artist Andy Warhol who died following gallbladder surgery — the hospital reached a settlement with the artist's family without admitting liability — estimates that each case he takes on will cost his firm $20,000 in pretrial expenses, and an additional $20,000 after it reaches a courtroom (if it goes that far). That's a big risk, he says.
"Contrary to what doctors think, [plaintiff's attorneys] don't take nonsense cases," he says.

The power of the apology

Want to avoid a possible lawsuit altogether? Our experts agree that a powerful first step lies in an expression of regret if you believe that some action or inaction of yours, or someone on your team, has led to a patient's bad outcome or aggravated a problem.
If you think that apologizing for having done something wrong is apt to increase your chance of being sued or be used as damning evidence against you at trial, please know that plaintiffs' lawyers
want you to think that way.

"As the plaintiff’s attorney, I live in dread of that situation," Clark says of physicians who apologize. "The client is likely to say that is all I want."

Fellow New York-based plaintiff's attorney Gerry Oginski agrees with Clark that it is much harder to prosecute a case once a physician apologizes. "It totally shifts the focus," he says. "That's not to say a jury won't award money or a case won't be settled ... but it is much, much harder for me to get a jury to dislike a doctor or to even hate a doctor based upon what he did or did not do."

A visit by a physician and the risk management person from the hospital can turn a potential lawsuit into a settlement, monetary or otherwise, between the patient and the provider, never precipitating a call to an attorney. But for many physicians, an apology means admitting a mistake, hence inviting a lawsuit. Research indicates, however, that a well-crafted apology reduces the likelihood of a lawsuit ever being filed. And more than 30 states have some sort of "apology law" for physicians, making apologies inadmissible to prove fault even if a suit occurs following a mea culpa.

Etherton agrees that an apology reduces the chance that a patient will contact a plaintiff's attorney, and is torn on how to advise clients. "As a person in this world hoping that physicians will do the right thing and be the better person when something does go wrong, I would really encourage the apology," she says. "...I think when there is no apology and something has gone terribly wrong, you almost guarantee yourself a lawsuit."

As a plaintiffs' attorney, Etherton is "not a big fan" of the physician apology as it decreases the number of cases that are litigated and results in reduced financial awards for the plaintiff. "There are so many clients out there who will call us who simply are looking for answers to some basic questions about what happened," Etherton says. "I think a lot of that could be prevented by a five-minute discussion."

But suppose you don't think that you or anyone else on the patient's care team is to blame for an unfortunate turn of events. Even then, you're wise to offer an expression of sympathy: "I'm sorry your health has taken this turn and I promise to do everything we can to help you get better."

One such "apology law" is in effect in California, where Daniel Groszkruger serves as program manager of risk management for the Stanford University Medical Center. The facility includes a 600-bed adult hospital, a 300-bed children's hospital, and 1,400 members in its faculty practice group for the university's school of medicine.

While Groszkruger does not make it a practice to recommend an apology for a medical error, he says, "I think that a physician who feels genuine regret, for example, regret the patient's recovery was prolonged or incomplete," should be able to offer an expression of sympathy "without fear that such a gesture will be misinterpreted as an admission of fault."

A study in the journal Medical Care recently indicated that only about 25 percent of patients, when told about a medical error in the context of an apology, would still file a medical malpractice lawsuit; with an offer of remediation, 38 percent would still recommend the hospital after the error. Additionally, 60 percent of respondents who indicated faith that their physician would disclose an error said they would still recommend that doctor to another person.

**Communication is key**

Apologies are just one form of what our experts say is another key element to decrease the potential of a lawsuit: proper communication.

Patients and family members involved in a bad outcome are looking for information, and they are turning to you for it. Proper communication can truly avoid litigation, according to retired family physician V. Franklin Colon.

"In more than 40 years of medicine, I never faced a malpractice suit. How? I maintained open communication with my patients," says Colon, director emeritus of the Bethesda Family Practice Residency Program in Ohio and professor emeritus of family medicine at the University of Cincinnati. Colon was still involved in the legal arena, however, having reviewed more than 300 cases for both plaintiff and defense attorneys. That experience helped him author several pieces on how physicians can avoid malpractice suits, as well as a book, "Medical Malpractice: Risk Management."

He recalls cases where surgeons got sued in part because they would not talk to a patient's family. They made rounds at 5 a.m. and 10 p.m. to avoid such contact, so angry family members sought answers from an attorney.

"All you have to do is sit down with these folks for a few minutes and deal with them on a person-to-person basis, not doctor-to-patient," he says. "People think doctors are arrogant already." Groszkruger, who is also an attorney and had his own practice for more than 20 years, says the
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patient-physician relationship can be boiled down to one key question when it comes to malpractice: "Tell me doctor, at what point did your patient feel more comfortable talking to an attorney than to you?"

He notes that it is key for physicians to stay in touch with patients, especially if there is a bad outcome as a result of their care.

"When the physician is no longer willing to make that telephone call, that return telephone call, or engage in that conversation — because it is too awkward or they are too busy — that's when patients begin to wonder and think, 'maybe I am not getting the straight skinny on this from my physician,' and they start talking to other people," Groszcruger says.

Plaintiff's attorney Clark puts it more succinctly: "I always consider it a good start when a client comes to me and they are outraged at the way they were treated by their doctor."

**Documented defense**

What you say to patients is important, but so is what you document in their medical file, which plaintiff's attorneys will review with a fine-tooth comb. And remember, documentation can both hurt and help your case.

Clark says it is very important to take the time to write down your thoughts — not just what happened with the patient, but what you were thinking about at the time you made key decisions. Why are you proposing one course of action rather than another? What actions are you recommending your patient take, and why? Clark recently declined to represent a case where a patient wanted to sue his physician, but a review of the file showed repeated documentation that this patient was not following doctor's orders that were clearly explained to him.

Oginski says proper documentation is "absolutely one of the best ways" to prevent a lawsuit, especially when a physician is detailed and specific about the patient and her symptoms, and does not simply use a boilerplate note after each visit.

"It is very, very useful for the physician to note 'patient complained of x, y, and z' because what typically happens is that if it is not indicated now, two years from now when a complaint is filed, the physician will not remember," he says. "The doctor is not expected to remember, but if it is documented, it becomes clear cut."

Can physicians over-document? Experts differ. John Minier, a defense attorney in Raleigh, N.C. advises very thorough documentation because plaintiff's attorneys will specifically look for gaps in a chart to argue that a lack of information means a lack of thinking on the part of the physician.

"Most of the time, a physician did think it through thoroughly and sometimes did not document it as well as they [should have], as they are busy or have something else on their mind," he says. "I say chart pertinent negatives — like abdomen normal, bowel sounds normal — and be as specific as you can; the more so, the better."

In her book, "How to Survive a Medical Malpractice Lawsuit," Brenner concurs that plaintiffs' attorneys are less likely to take on a physician who writes a lot in the chart, because it is harder to make them seem incompetent or sloppy. A thorough record is a sign of professional conscientiousness.

"Jurors like doctors who write a lot," she says. "A lot of doctors believe the myth that the less you document the better, meaning that is there is less that can be used against you. Whoever tells you this is not a practicing attorney and has not talked to juries."

Even plaintiff's attorney Etherton agrees: "With a well-documented record, you will never be sued."

Speaking of boilerplate language, Oginski says this is a potential pitfall when physicians are using EHRs. Oginski recently won a case where the wrong foot surgery was performed on a patient. The physician was using an early-version EHR, he says, and simply duplicating information across visits.

"If [physicians] spend that few extra seconds or minutes to make personalized notations in the EHR, they will be golden versus cutting and pasting," he says.

Etherton says her office has been busy with cases where EHRs have played a role as well. She says the problem with the technology is that while making physicians more efficient, they often make it too easy to take shortcuts.

"Not all situations fit into the codes used by an EHR ... so rather than document the complete condition or different aspects as they would have previously done, they are short-circuiting it," she says. "Then others are picking up that chart and continuing care without all of the information."

For more on how to avoid tech-specific malpractice risks from a physician-turned-defense lawyer, check out "How Your EHR Increases Your Malpractice Risk."

**More methods to slay suits**

While communication and documentation are perhaps the two biggest tools in your arsenal, there
are even more things you can do — starting today — to shield yourself from lawsuits or make your case unattractive to plaintiff's attorneys.

**Document informed consent.** This one is going to sound obvious, but Brenner says that informed consent issues "are probably the number one reason why doctors will win or lose a case as far as documentation." Get the signature from the patient, from a fellow physician, from a family member in the room about a treatment or procedure, she says, and if you are using a standard form, go outside the lines and document more than required.

"Draw pictures, sketch it out," she says. "The jury will say, 'wow, the physician took the time to write on the form and so clearly explained it to the patient,' because most times, patients will sue because they feel they were never told what was going to happen."

And once the form is done, also note informed consent in the medical file, including who signed off and who witnessed signatures. As an ER doctor, Brenner has seen that in times of stress — especially for family members — things can be forgotten.

**Don't change your chart.** As Groszkruger puts it, the record is "almost sacred" in the sense that whatever is captured at the time is it and isn't to be touched later on.

He says it is probably "the first instinctive move" by a physician who learns of a potential complaint that their documentation was thin and that if they could only add more detail, it would be crystal clear.

"From a legal point of view, you take a case that is totally defensible and turn it into a loser, because somebody was trying to embellish the record or make it sound better than it actually does," Groszkruger says.

You might think you were simply trying to provide more thorough document than what's included in the original record, but a plaintiff's lawyer will likely make it seem like you were trying to cover your tracks. Groszkruger likens it to Watergate, "where the cover-up was worse" than the actual event. There are instead proper channels to add addenda or notes to a chart without impacting the record itself.

Brenner has seen cases where physicians ripped out a page of the record thinking it would never be discovered — it was— as well as physicians who have asked a PA or nurse to take the fall for an altered record, so as not to jeopardize their own careers.

She has even faced a situation where a patient's symptoms of appendicitis were diagnosed as related to her pregnancy. When the woman's appendicitis worsened, a colleague recommended to Brenner that she change her initial diagnosis in the yet-to-be-completed chart to conceal her error.

**Don't pass the buck.** Along those lines, if a mistake is made or a bad outcome occurs, don't blame a colleague, another member of the health team, or the patient.

Etherton recently settled a case where a doctor blamed the patient's bad outcome his own failure to take prescribed medication, but the doctor's chart "was a mess" and could not be clarified by the physician as to what he meant in his entries.

"Blaming the plaintiff never helps the doctor," she says. "It embroils everything, takes it to a different level than a physician being able to argue that this was just a bad outcome or this was my clinical judgment. It makes it really personal and I think that is a bad way to go."

Groszkruger also notes not to blame the current public villain in healthcare: insurance companies.

"Even if you genuinely feel that way ... it really does not help you individually, and in the litigation context, is absolutely going to harm you," he says.

**Develop systems at your practice.** Colon is a big proponent of monitoring a patient's lab work and having a set follow-up plan for communicating the results to physicians and patients. Failure to deliver positive or negative news to a patient in a timely manner, with next steps for treatment, could spur a claim of negligence.

"This is something you can work on at your practice," Colon says. "You can reduce the risk of medical malpractice by developing systems within your office. They are not real hard to figure out."

**Don't practice in fear.** Yes, you might get sued. If you practice long enough, chances are good that you will get sued. Chances are also good that at some point along the way, you'll make a few mistakes. But practicing defensively by ordering every test under the sun, "just in case," even when you know it isn't clinically called for, isn't good medicine. Clamming up the moment something goes wrong, or treating patients and their families as rank amateurs who must be spoken down to or avoided altogether isn't good practice either.

**Practice your best medicine.** Be honest, friendly, communicative, and conscientious. Does this guarantee you won't be sued? Certainly not. But it reduces your chances of a lawsuit and gives your best chance to prevail should there be one.

**In Summary**
Looking to stop a malpractice suit in its tracks? Start with the following:
• A sympathetic — or, when appropriate, apologetic — gesture to a patient and his family following a bad outcome will most likely help rather than hurt.
• Patients and their families are often looking for answers — especially from you; take the time to talk with them despite busy schedules or discomfort about an outcome.
• Document fully today because if a lawsuit comes somewhere down the line, you may not remember the treatment or even that patient.
• EHRs are great, but don't just copy and paste from patient to patient; unique notes are good lawsuit eliminators.
• Don't alter your chart; it is the record of what happened at that moment. If you have a thought after the fact, use a dated addendum.
• Don't blame colleagues, insurance companies, or the patient. This will look bad to a jury.

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