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# Navigating the Malpractice Miasma

*Unfortunate outcomes are a fact of medicine, as too are lawsuits for alleged malpractice. We all want to do our best, and part of our self-awareness as physicians comes from that expectation. When it is alleged that we didn't do our best, our sense as a physician comes under attack. We can respond in many ways, some of them counterproductive. The legal process can be confusing and difficult to understand, contributing to the anxiety of the defendant physician and sometimes creating doubt as to his or her competence. One way to cope with the stress imposed by a lawsuit is to be actively involved in the process, understanding and participating at each step. This issue of* EM Reports *reviews the medical practice legal process in an effort to remove the mystery and help the physician survive the process, whatever the outcome.*

*—J. Stephan Stapczynski, MD, Editor*

## Introduction

All physicians experience adverse outcomes, and many will experience at least one malpractice claim during a practice career. National medical liability claim data indicate that emergency physicians are the fifth most sued specialty, and 75% can expect to be sued at least once by the age of 55.[1] According to statistics compiled by the Physician Insurers Association of America (whose members collectively insure 60% of practicing physicians in the U.S.), more than 70% of emergency department claims are closed without any payment to the claimant, most (29%) via settlement. Only 7% of claims are tried to verdict, and 85% of trials are adjudicated in favor of the physician.[2] These promising statistics do not, however, blunt the enormous negative impact of a claim for malpractice on the life of a physician.

While most physicians receive some education in the fundamentals of risk management, physicians rarely receive direction about what to do when malpractice is alleged and all the litigation-avoidance strategies prove unsuccessful. Since the only foolproof method of avoiding malpractice exposure is not to see patients, it is a wise strategy for clinicians to anticipate at least the possibility of a malpractice claim, and to educate themselves about what that entails. The following article is a guide for dealing with the legal system and its principal players.

## Preparation Is Prevention

Like everything else in emergency medicine, anticipation and preparation for the worst outcome are always in order. Before you begin your very first shift in a new practice setting, you must be thoroughly familiar with your contract and liability coverage, as well as with any hospital and practice policies that relate to risk management issues. For example, you must know what type of insurance you have (occurrence based or claims made), the dollar limits of your coverage (per claim and in the aggregate), and any stipulated limitations of coverage, such as Good Samaritan coverage, coverage for illegal acts including EMTALA violations, and coverage in the case of admissions such as apology or statements

## Executive Summary

- Be proactive: Notify the risk manager and/or liability carrier of any unexpected adverse event or outcome.
- Maintain attorney-client privilege: Wait until after your initial meeting with the attorney to pursue review of the medical literature regarding the case.
- For deposition testimony: Answer using medical terminology and with minimal explanation.
- For trial testimony: Answer using layman's terms and educate the jury using explanations.

of responsibility. Your hospital and your group will have policies or guidelines relating to reporting of errors and conduct of patient and family discussions that have liability implications. Your state may have so called "I'm sorry" laws that provide legal protection for certain forms of disclosure after adverse events. If there are any inconsistencies between your liability carrier, hospital, and practice policies and state laws, the time to address these is *before* any need to use them arises.

This article will not go into detail regarding various programs in effect for early disclosure of errors because they are so specific to the institution, state, and policy. Nonetheless, these procedures may have very significant legal ramifications, and they can also be very important in the initial management of emotional responses to adverse events in patients.[3] Successful management of our own human responses to unexpected results in patients can either reinforce or undermine our persistence in the specialty or profession, and can dramatically affect our ability to defend ourselves against a malpractice claim.[4]

When an adverse or catastrophic outcome has occurred, the most critical first step after notifying the patient's family is to notify the liability carrier and ask for specific clarification about what further actions should be taken to document the outcome and any subsequent events. This formal notification is crucial to the dating of a claim in "claims made" insurance coverage. If your claims-made policy should expire before a legal action is commenced, an unreported catastrophic event is considered a prior occurrence, for which coverage can be denied. After discussion with your group or hospital risk management representative, documentation of your notice to the carrier (such as a certified letter to the carrier, or the letter from the carrier acknowledging receipt of the report) and any related items such as copies of the medical record or a narrative of events, should be maintained by you in a private file (*not* the medical record). The insurer should provide a claims representative to you as a point of contact regarding any future developments.

Be aware that anything placed in the medical record will be made available to the patient or representatives and to their counsel (lawyer) upon request. This is why you must maintain exclusively in your private file all communications with the insurer or with your attorney regarding the incident that could, or does, become a malpractice case.

Occasionally upon review of the record, a physician may discover an error or omission in documentation of the medical interaction with a patient who experienced an adverse outcome. Here it is important to remember the most critical risk management advice of all. Never covertly alter a medical record, even so much as to add punctuation. To do so risks loss of all credibility with jurors in the setting of a malpractice case. It is possible, however, to make a formal addendum to a medical record when the additional information could be necessary for someone reviewing the care provided to properly determine the conduct or intermediate outcome of care. Such documentation may even be necessary in order to prevent future harm to the patient seeking further care, as for example, if there is a delayed unexpected outcome resulting from a given therapy that might be repeated in a future clinical encounter.

When discovery of the need to make an addendum occurs after a report about an incident/potential case has been made to the insurer and risk manager, it is wise to ask one of these parties about the proper form for making such an addendum. Generally, a clearly dated and titled entry ("Addendum to medical notes of [date of encounter]") can be entered safely on a separate page in the record with some explanation of the need for the late entry, such as the return of significant laboratory or imaging studies not available at of the time of the initial writing, or additional information that was omitted initially but that might relate to future care.

Some time after an adverse event, the physician may receive a letter from an attorney or notification from medical records that an attorney has requested medical records on the patient. At this point, there is no way of knowing what is transpiring, but the need for caution is reinforced. Never respond personally to an attorney demand letter or a request for records. Forward the letter to your liability carrier, and request a copy of any response for your private records. Direct your medical records department to fulfill the request and ask if institutional policies allow the original record to be sequestered, as this could be the first sign of an incipient legal case.

There may be no further activity if, for example, the statute of limitations (legally prescribed time frame during which suit can be filed) expires, if legal representation cannot be secured by the plaintiff after review

**Table 1:** Emergency Physician Claims Experience

| | |
|---|---|
| Ever sued | 49.8% |
| Sued more than once | 30.9% |
| Sued in previous 12 months | 8.7% |
| Claims per physician | 1.09 |

Source: Kane, CK, Medical Liability Claim Frequency: A 2007-2008 Snapshot of Physicians, AMA Center for Economics and Health Policy Research, Aug 2010

**Table 2:** Most Common ED Diagnoses Resulting in Claims

- Acute myocardial infarction*
- Chest pain unspecified*
- Abdominal and pelvic symptoms*
- Multisystem injury
- Appendicitis
- Fractured vertebra
- Fractured radius or ulna
- Aortic aneurysm*
- Open wound to fingers
- Fractured tibia or fibula

*Highest indemnity

Source: Brown, et al. Acad Emerg Med 2010;17:556.

of the records, or if the plaintiff dies and there are no other representatives of the estate. A physician should nonetheless remain vigilant. This is a good time to assess your liability coverage (especially if the insurance carrier may have changed in the interim between the event and such an inquiry) to be sure that coverage is in effect, and that the event has been reported and is covered in the event it should become a claim, and to review personal asset protection and estate planning. If there is an actual claim pending, such personal asset protection might be voided by a court at a subsequent date, but with no knowledge of an actual claim it is still prudent to plan contingently.

## Receiving a Claim

But at some point, the worst can happen. A physician may be notified while on duty or at home with family or friends by a process server, whose duty it is to deliver the formal claim document personally. This can be quite an upsetting event, as process servers are notorious for their lack of tact, and in some cases can be quite intimidating.

When a physician first receives a claim (sometimes called a complaint or summons), the initial reaction (despite some foreknowledge of the possibility), is usually shock and disbelief that this is actually happening. The physician may experience both anger and fear that the worst is yet to come. It can be very difficult to calmly and methodically complete a shift having received a claim while on duty, and yet an EP may be reluctant to call for backup.

It is always best to read any legal document in private. The charging document might be formally titled as a "claim for relief" or "complaint" or "action for damages in medical malpractice" and will contain the names of all plaintiffs, their lawyer(s), and all defendants currently named in the case. Reading the document, one may be angry or even enraged at the language used by the plaintiff attorney in order to paint the physician and the care rendered to the patient in the worst possible light. Hyperbolic terms such as "negligently," "carelessly," or even "maliciously" or "recklessly" and "with willful and wanton disregard for the welfare of the patient," are all designed to justify the claim to the court for a monetary damages judgment. The amount demanded may be specified, but is usually left open "in excess of (some statutorily defined amount)" or for "such further relief as the court determines." Lawyers have the ability to amend complaints to add more claims and defendants, but they typically attempt to cast a very wide and inclusive net initially, especially if the statute of limitations is approaching, so as to avoid inadvertently omitting a pivotal defendant. They hope that by so doing they will have access to as many deep pockets (insured defendants) as possible; and also hope to force a quick settlement of the case without having to expend significant funds. It is for this reason that other inflammatory terms and threats such as criminal negligence charges, EMTALA, or other statutory violations such as false imprisonment and astonishingly high damage demands may be thrown in for shock value.

At this point, it will be impossible to reassure yourself that everything will work out eventually, so it is best to begin immediately to work on a defense strategy. If you have not already notified the liability carrier of the possibility of a claim based on a known bad outcome, then the notice must be immediately reported and a copy of the claim forwarded to the carrier. Some answer to the claim must be filed with the court in an amount of time specified in the document, and it could be as soon as two or three weeks from receipt. Not responding within this period of time can result in a default judgment against you, so there is a very real deadline for action.

A claims adjuster will be assigned to your case and will start the process of securing legal representation. Ask the adjuster whether at this point it would be legally prudent to begin to create a narrative of events for the attorney about all of your recollected events surrounding the patient encounter, given that the actual meeting may not occur for several weeks. If the adjuster agrees, ask for the exact title of such a document, such as "Confidential attorney correspondence in anticipation of possible litigation." You may find that writing such a narrative affords some relief because you have an compelling need to do something constructive to deal with the anxiety a claim provokes. As more recollections come to you about the event, you will also have an orderly place to record them. Do not record your recollections or thoughts about the case anywhere other than in an approved and properly labeled document stored in your secure file.

**Table 3:** Emergency Physician Claims Outcomes

| |
|---|
| Closed without trial: 93% |
| Settled with payment: 29% |
| Dismissed without payment: 64% |
| Tried to verdict: 7% |
| Defense verdict: 85% |
| Plaintiff verdict: 15% |
| Average indemnity all claims $185,226 |

Source: Brown, et al. Acad Emerg Med 2010;17:556.

**Table 4:** Emergency Physician Claims Experience by Age

| |
|---|
| Under Age 40: 16.5% |
| Age 40-54: 54.9% |
| 55 and Over: 75% |

Source: Kane CK. Medical Liability Claim Frequency: A 2007-2008 Snapshot of Physicians, AMA Center for Economics and Health Policy Research, Aug 2010.

## What Not To Do

When you are initially reeling from receipt of a claim, it could occur to you that a suit might be avoided if certain steps are taken quickly, such as offering an explanation to the patient or family or their lawyer about what actually happened. Dismiss this notion promptly, because it is too late for such an action. From the first contact of any kind with or from an attorney, including request for records, your only communication with anyone acting on behalf of the patient must occur exclusively through your lawyer. From the time of the incident, and certainly after the case has been formally initiated, you can be sure that "anything you say can and will be used against you." Furthermore, such communications may void your contract of liability carriage, leaving you uninsured with respect to this case.

Other communications may be hazardous as well. Even though you may feel an urgent need to explore and learn more details about the case with others who were involved in the care of the patient, to do so now could easily backfire. During the next phase of the case, with several exceptions, the plaintiff attorney will have the right to question you under oath as to whom you may have spoken with and the contents of any discussion about the case. You may speak freely to your liability carrier, attorney, spouse, physician, clergy or counselor, because these relationships and discussions are protected by certain legal privileges. But if you share your thoughts or recollections or questions with anyone with whom you do not have such a relationship, that individual could be forced to reveal the contents of the discussion to the court. Furthermore, some of these discussants could be actual or potential co-defendants if they were involved in the care of the patient. Their defense (or yours) could be affected by what you say to them.

Also avoid the temptation at this stage to educate yourself about any condition you believe the patient may have had that led to the claim. The reason for this precaution is that, before you touch base with your attorney, any research that you undertake can be "discovered" (ascertained by the plaintiff attorney in a sworn deposition), giving the opposition free medical education and tipping your hand about what you believe actually happened in the case before it is strategically helpful to do so. There will be plenty of time for in-depth research about the case after your initial meeting with the lawyer, as of which time such research is protected under a legal rule (attorney-client privilege or work product) from disclosure to the other side.

## Vetting Your Attorney

Most liability carriers have a panel of defense attorneys whom they employ for medical malpractice claims in your jurisdiction. One of these attorneys will ordinarily be assigned to your case soon after you have notified the claims representative of the claim. If you have requested to have a specific attorney who is not on this panel, the carrier must approve the attorney before he or she can officially represent you under the policy. With some carriers, negotiating about your representation is possible, but with many it can be extremely difficult. Your attorney would need to agree to the fee schedule employed by the insurer, and the insurer would have to be comfortable with your attorney and his or her record. Of course, nothing precludes your consulting with a personal attorney, at your own expense, as co-counsel, and this can be very helpful if you believe your representation to be inadequate or need to negotiate about the wisdom of settling the case versus proceeding to trial.

The assigned attorney will contact you to begin the process of answering the claim, usually within a short time after the receipt of the document. If no contact is forthcoming and the claims response deadline is approaching, you should contact the adjuster again and make contact with the attorney directly if necessary. The carrier should be informed if there is any difficulty contacting the attorney or getting a prompt appointment.

Meeting with your assigned attorney is in part a strategy session to generate the initial response to the claim and in part a mutual assessment. The attorney needs to know enough details about the case to make a response to the claim to the court and also to determine what kind of a client you will be. You need to decide if you have confidence in the attorney to handle your case effectively and to treat you professionally. Although you and the insurer need to get the response to the claim in motion, there is still an assessment process to decide whether you can work together in the long haul to resolution of the case.

Some specific questions to ask your attorney include whether he or she is a partner in the firm, how many malpractice cases he or she has handled, how many have been settled and how many tried to verdict, and

of these how many were wins and losses. Most medical malpractice cases are tried in state court, but occasionally they can be brought in federal court. If your claim happens to be one, it is important to be sure that your attorney has experience trying federal cases because the rules can be quite different. Any experience in emergency medicine or related cases, any firsthand medical knowledge from training or exposure to medical personnel, and any prior experience with the plaintiff attorney is helpful background information.

The attorney will of course want to know the details of your training and experience, your prior legal experience, license history, and any other relevant issues such as health concerns that you might have. It is a good idea to bring a current CV to this first meeting, as well as your narrative of the case. It is not inappropriate to request the attorney's CV as well, especially if you have a feeling that this may be his or her first case or first case as a defending counsel. You don't have to like your assigned attorney, but any immediate concerns or negative "gut feelings" you have could be significant.

An attorney will recuse him- or herself from the case if there are any obvious conflicts of interest, such as personal acquaintance with, or the firm's prior representation of the plaintiff or family. However, certain other types of conflict may occur that could detract from your representation. In some cases, where several defendants are insured by the same carrier, one attorney might be assigned to all the defendants. This can occasionally be helpful, but often is not. The situation can be helpful if all defendants participated equally in the care of the patient and all will be using the same defense, because more experts can be hired to reinforce the same points before a jury. However, if there are significant differences in your degree of involvement in patient care from that of other providers, a joint defense leaves open the possibility in some jurisdictions that a jury cannot decide the responsibility of any one party and will simply decide that all defendants should share in any damage award. Furthermore, if your involvement differs substantially from that of other defendants, you can be mistakenly included in such an award even if you are blameless. For example, if you were asked to assist in a resuscitation or were the initial examining physician but went off duty and did not make the disposition decision, or were simply present in the emergency department but did not have responsibility for the care of the patient, your defense would be significantly different from that of a physician whose primary patient is the subject of the case.

Although it occasionally happens that the hospital and an emergency physician share the same malpractice liability carrier, an EP should never agree to representation by the same attorney who is representing the hospital. There is a fundamental conflict of interest because a physician's duty of care to a patient is never the same as the duty of care of a hospital, and therefore the defense will by definition be disparate. Furthermore, juries consider hospitals to be "deep pockets," so awards against hospitals tend to be larger and perhaps more readily dispensed, and you could be made jointly liable with the hospital for any judgment. Many if not most of the things that happen to a patient in the emergency department or admitted to the hospital (for example, speed of triage, frequency of routine observations, actual medication administration, promptness of notification of a physician regarding changes in status) are not under direct control by the physician, so one cannot risk being held responsible for them if an attorney representing both defers to the greater economic power of the hospital and ignores the physician's defense.

If you find that you have been assigned an attorney who is also representing other individuals or institutions involved in the case, you should immediately notify the liability carrier in writing that you are uncomfortable with the situation, and that you believe that there may be a conflict of interest inherent in such representation. Generally this will result in your being assigned another attorney. If it does not, and if your attorney does not convince you that there is some reason that multiple representation in this case is advantageous for you, then send (or have another lawyer send) a certified letter to the insurer and to the attorney involved stating that you believe a conflict of interest exists that jeopardizes your contractual right to qualified representation. Generally this is sufficient to secure such representation, especially if it is obvious or if you make it clear that you are in the process of seeking separate representation for yourself if necessary to pursue your contractual rights. However, there are further avenues of redress, such as the state insurance commissioner, or ethics council of the state bar association that can be accessed if necessary.[5]

If you are simply not convinced that your assigned attorney is competent to represent you, then begin with a simple request for a partner in the firm or an attorney more experienced in medical malpractice or another local firm that you know to be highly experienced in medical malpractice to represent you. Most insurers would comply with such a request. If necessary, take the same steps as above for change of representation based on conflict of interest, but substitute the terms "contractual right to effective representation by counsel." If you are unsuccessful, then place the insurer and your assigned counsel on notice that you will be hiring your own co-counsel, and that you will seek reimbursement for the cost of such additional representation if necessary to secure adequate representation for yourself.

## Legal Response and Discovery

A formal legal response to the claim will be made by your initial assigned attorney even if you embark on a campaign to secure another. Typically, a response will consist of a series of denials of all of the claims of any wrongdoing made in the

document, as well as a general denial of any further breach of any duty and denial of any right to relief by the plaintiff. There may be affirmation of some underlying factual matters such as the fact of a relationship with the patient on the date and at the place in question.

As soon as a response to the claim is received by the court, a series of legally prescribed steps designed to advance the case can commence, and each jurisdiction has a set of rules as to when such steps may be taken and must be completed. The principal goal of any court is to clear its dockets of cases, preferably prior to trial. For this reason, court rules have been developed that allow all parties to each case to get as much information as possible from each other, in the hopes that full disclosure of all of the facts will result in an out-of-court closure of the case (settlement). These rules facilitate and authorize what is called "discovery."

Principal vehicles for discovery include interrogatories, requests for admissions, requests for production of documents, and depositions. The discovery mechanism that is most commonly used in medical malpractice claims is the taking of the depositions of the parties. All parties to a case can be deposed by the opposing parties. A deposition is a formal questioning by the opposing lawyer of a party under oath in the presence of a court reporter who is usually also a notary public.

Although it is framed as a simple mechanism for further discovery of evidence, there is far more going on at a deposition than a simple attempt to get all the facts on the table. How you manage your deposition can be pivotal to the outcome of your case. The plaintiff lawyer will be trying to to learn more about the medicine in the case, to discover any significant details about the case that are known only to you, to learn the basis for your defense of the case, and to learn if there are other defendants who can be brought into the case. He or she also wants to know how convincing a witness you are, whether there are any vulnerabilities you have that might be exploited at trial, and how effective your lawyer is at defending your interests. And he or she is attempting to force you into stating something on the record that can be used to impeach you (give jurors reason to question your credibility) at trial. Much can be lost at deposition, so careful preparation is essential. It is almost more important to prepare well for deposition than for trial, since a case might even conceivably be dropped before trial based on deposition findings.

## Managing the Deposition

The deposition can only be taken by appointment, and the setting must be one that both parties can agree upon, typically a law office or the offices of a court reporter. As a physician, you should never agree to give a deposition in your home or office because clues about you or your practice are potentially directly exposed to the opposing party who could then use them in a variety of ways against you. For example, the journals and books that you maintain in your professional library, or private files that you keep on cases that might result in a future claim are vulnerable to discovery if they are on site at your deposition. By the same token, any materials that you bring with you to a deposition in a neutral location can be examined by the opposing party, so do not bring anything with you. Your attorney should prepare you thoroughly for the actual taking of your deposition by giving you examples of the range and type of questions that will be asked and the anticipated approach of the opposing attorney. Many attorneys will know the deposition tactics of other attorneys and can tell you whether to expect civility, confrontation, well-formulated or off-the-cuff questioning, or simply to expect the unexpected. Your attorney will also instruct you on the varying types of objections he or she may interject (see below) and how you should respond to them.

Almost any question that could lead to discovery of evidence relevant to the disposition of your case may be asked in deposition, though there are a variety of objections that can be interposed. Objections vary somewhat by jurisdiction, but are generally based on considerations of fairness and clarity. If an attorney asks you questions that are too convoluted or are patently unclear, are repetitive or lacking in any basis for relevance to the case, your attorney can ask that the questioner rephrase, cease and desist, or establish relevance before you attempt an answer. Although rare in a malpractice case, if a question is potentially incriminating to a deponent, an objection can be made on this basis as well. All objections are recorded by the court reporter, so if the other side is unhappy with a non-response, a judge can be asked to read the transcript and decide whether or not the question must be answered at a later date. There are some objections that your attorney may make in order to encourage you simply to think very carefully before you answer, and others in which your attorney does not want you to answer at all. In such a case you will probably hear "I object and instruct the witness not to answer." However, whenever your attorney objects, there are valid reasons for doing so, and you should therefore very carefully consider what caution is being given before answering. Never attempt to answer a question until it has been completely stated, and always wait long enough to see if there will be an objection before answering.

The deposition is not the time to teach the opposing side. If you have

***Table 5:*** Deposition Tactics

- Demand substantial preparation
- Know records and medicine
- Bring nothing with you
- Dress and act professionally
- Keep answers minimal and technical
- Pay close attention to objections
- Maintain equanimity
- Review transcript for errors

done any research about the case at your attorney's request, you will appropriately refuse to answer questions about the research based upon the attorney work product privilege. Keep your answers as short as possible, ideally to a single word, so that the questioner has to dig for every morsel of information. Use medical terminology and do not explain yourself unless the questioner asks you to. If this draws attention to his ignorance, especially in the presence of his clients, there will be fewer questions. Never answer any question you do not completely understand, especially any convoluted or multiple-part questions. Ask repeatedly for rephrasing of any confusing questions, and sometimes the attorney will tire of the repetition and go on to another line of questioning. Never introduce any new information while answering a question, as this will inevitably lead to a new question or questions. Don't answer a hypothetical question, or if forced to do so, be sure to preface your answer with something like "Unlike my patient, the hypothetical patient you describe…" Be especially wary of leading questions such as "Isn't it true that…" or of a series of questions where the same answer seems obvious. The last of the questions (whenever it may fall) may well contain a trap for you.

In cases involving multiple defendants, it is common for the attorneys for other defendants to be present for a deposition, and these attorneys also have the right to ask questions. As a rule they will primarily be interested in whether your defense will in any way jeopardize their client's defense. Nonetheless, it is wise to carefully consider any questions they pose before answering because, as previously discussed, there may well be an inherent conflict of interest with some of your codefendants. It is also not uncommon for plaintiffs themselves to attend depositions of defendant doctors, and sometimes to be intentionally intimidating. This can be an uncomfortable situation, but any behavior on their part that is disruptive to the deposition will result in their reprimand or removal.

Incidentally, some attorneys may ask physician defendants to attend the depositions of plaintiffs, and the same rules of behavior will apply to you. During a deposition it is always advisable to dress appropriately and act in a civil manner. Even, or perhaps especially if the opposing lawyer's tactics are provocative, you should maintain your professional demeanor at all times. Abusive, evasive, or derisive remarks are almost always worse when committed to writing and read to jurors, so leave that mistake to the attorneys.

Take breaks liberally, so that you will be focused, fed, hydrated, and comfortable. Typically you will be asked whether you communicated with your attorney during these breaks, but the content of such discussions is protected. As soon as the deposition is concluded, leave the premises, as it is otherwise possible to reopen the deposition.

When you receive the deposition transcript some weeks later, take the time to read it carefully because transcription errors are not uncommon and can be corrected if requested in writing within a specified time. Major misstatements can also be corrected at this opportunity, but only if they are truly damaging. Any substantial changes could be examined minutely in court.

The ultimate goal of deposition for the plaintiff is to find ways to use your testimony to further their theory of the case and to refute yours in court. So if you have survived the deposition without making significant errors, you have a kind of interim victory and you can relax a bit personally until such time as an actual trial is scheduled.

## Battle of Experts

In the meantime, both sides will be seeking expert witnesses who will support their case. In order to prevail in a negligence case, a plaintiff must prove four elements. These are a duty to treat (the existence of a patient-physician relationship), breach of that duty, damages (or harm) to the patient, and proximate cause (the harm would not have occurred except for the breach of duty). The duty that is required of physicians is to meet the standard of care. The standard of care is defined by case law in each jurisdiction, but is typically some version of "the degree of care required of a reasonably competent practitioner practicing under the same or similar circumstances."[6] In the majority of medical malpractice cases, whether or not the standard of care has been met can only be established by way of expert testimony. Likewise, proximate cause in most cases requires the opinion of an expert witness. Damages must also be established through expert witness testimony.

As the content expert in emergency medicine and on the specifics of the patient encounter, you are in an excellent position to assist your attorney to find the best experts on your behalf. Although you should generally not suggest close colleagues (because of the perception of possible bias), you may well know respected practitioners in your community or those who teach or have authored materials relative to the disease process that involved your patient. Do not approach a witness yourself, but rather give contact details to your attorney.

If the plaintiff is unable to find an expert to support his or her theory of the case before the court-imposed deadline for naming experts, then it is possible that a case may be dismissed prior to trial. If there are multiple defendants, it is also possible for you to be dismissed from the claim at this stage if it cannot be proved that you had any duty to treat the patient, for example if you were not involved at all but were named because of an illegible signature on the chart. Your attorney would bring a motion to dismiss the case or to dismiss you from the case. Both sides need to submit briefs to the court to address the motion, which could also require expert witness affidavits. This is a costly and time-consuming process, but is sometimes indicated and certainly rewarding when successful. Even when unsuccessful at winning a dismissal, it can still be advantageous

because it puts all of the issues that will otherwise come out at trial onto the virtual table.

Of course, if your attorney is unable with your assistance to locate an expert who can testify on your behalf, then it is time to begin settlement negotiations.

But assuming you have your experts, if motions have been denied, there is nothing more that you as the defendant can do but wait for a trial date. The wait can take from several months to several years, depending on the court docket. This is a time to remain vigilant and reflective, but also to get on with your life and redouble your efforts to maintain a healthy lifestyle and practice, to keep up your medical skills and personal relationships, and to trust that the case will end eventually.

## Preparing for Trial

Lawyers spend days or weeks preparing full time for trials, while you are probably attempting to work. Attempt to negotiate a decent schedule, and discuss with your attorney which days to anticipate the need to be present in court. Let your partners know that trial schedules are notoriously changeable, and you may need to urgently exchange shifts with them during trial. It is also possible that the entire trial will be rescheduled at a moment's notice, so that the ability to get more work at short notice when you have been scheduled to be off for a trial that is postponed would likely be a blessing.

Try to spend a dedicated portion of each day preparing for the trial, and outside of this specific period to focus on work and especially on more enjoyable activities. You will prepare for trial by in-depth discussion with your attorney about the course of trial, the preferences of this judge, courtroom protocols and procedures, his or her approach to the conduct of testimony, and what is known about the plaintiff attorney's courtroom style.

Your testimony may well be the most pivotal testimony to the outcome of your case, and therefore extensive and careful preparation is mandatory. Be sure that your attorney commits substantial time to your preparation, and ask for more if you are at all insecure. If the attorney cannot commit, ask for a coach or consultant who can spend sufficient time to help you become confident and polished in the process of testifying.

Ask specifically what materials you should read, which you should know in complete detail, and which will be available to you during trial. Obviously, the medical record is the most crucial document for you to master, followed closely by your own deposition transcript. Although it will definitely be available as an exhibit, it is essential that you know every part of the medical record in minute detail. This is because, however incongruously, your degree of knowledge of the record in the case will be assumed, by the jury, to reflect the quality of your care of the patient. So you must achieve complete mastery of the record. When the plaintiff tries to point out some deficiency, you must be prepared to explain how it is not a deficiency at all, for example that there is corroboration of the facts that you give elsewhere in the record. There will be copies of the record available in the courtroom (perhaps blown up 10x), but your rapid and accurate retrieval from memory of details without significant reference to the chart will go far to convince the jury that you are on top of things — just as you were on the day of the interaction.

It is also essential to know your deposition in excruciating detail. Your attorney may know which parts of your deposition testimony will be the focus of attack by the plaintiff, but you must be prepared to promptly counter any allegations made out of context from your deposition testimony at a moment's notice. Although your curriculum vitae is probably incorporated into your deposition, your confident recitation of your qualifications before the jury without reading will also give the jury the sense that you are well trained and have no memory deficits.

Your attorney will tell you which other documents, articles, or medical reports to be intimately familiar with. Ideally he or she will give you a list of questions to anticipate, and either pose them to you in practice sessions or have an associate or consultant do this with you. Gotcha-type questions should be rehearsed in detail when they can reasonably be anticipated.

***Table 6:*** Trial Preparation

- Negotiate flexible schedule with partners
- Intensive preparation for limited time daily
- Healthful nutrition and recreation
- Ask family for extra support
- Request coaching for trial testimony
- Know records and deposition COLD
- Get a good night's sleep

## Your Day(s) in Court

The day of the trial finally has come. You will arrive, professionally dressed and on time, and respectfully observe any courtroom customs following the lead of your lawyer. You may participate in *voir dire* or jury selection, which can be enormously helpful to your attorney. Likewise, it will be helpful to you to know firsthand some of the characteristics of the jurors later when you are addressing the group during your testimony. The judge is also a uniquely powerful player in the drama that is about to unfold, and observing during this process will also help you to become familiar with him or her. Some of the ground rules will be given by the judge to the jury at the beginning, and many more at the end of the trial. You will gain some idea of the expected duration of the trial as witness scheduling is discussed between the attorneys and the judge. You may actually prefer being present and getting started with the trial to being elsewhere and worrying about it.

Both lawyers will give opening statements after the seating of the jury. The plaintiff case is always

heard first, because the plaintiff has the burden of proof that there even is a case. It may be difficult to listen to potentially inaccurate statements or innuendos made by the plaintiff attorney. Nonetheless, this is your first opportunity to know directly (as opposed to guessing from questions) what the plaintiff thinks the case is about, and to size up the lawyer's capabilities as a persuasive orator. Also you will learn what the plaintiff hopes to prove using experts, and whether or not the plaintiff will testify. You will be carefully (and respectfully) watching the attorney and also the jury, to gauge their response and degree of interest. Your attorney will be listening intently and possibly taking notes. Ask before trial whether note taking by you is advisable, but don't speak to your attorney while someone else is talking unless there is an urgent need.

The entire course of the trial will consist of a progression of witnesses, called and questioned by one side and then the other. All of the plaintiff's witnesses will typically come in the first phase of the trial. This can feel a bit daunting, as more and more information is expressed to the jury before you get the chance to effectively redress it. However, each witness will be cross-examined by your attorney, who will use the opportunity to mitigate the witnesses' testimony. Although the plaintiff attorney can then attempt to "rehabilitate" the testimony by "redirect" examination, your attorney will have another opportunity to "recross" examine and undo the "rehabilitation." This dance will continue with all of the plaintiff's witnesses, all of your witnesses, and probably also with the plaintiff and you.

The testimony may be punctuated by sidebars, in which the judge speaks with both attorneys in the hearing of the court reporter only, and occasionally with meetings in the judge's chambers. Sometimes these interruptions are discussions about what is and is not allowable in court, and sometimes they are aimed at scheduling matters or settlement. These sidebars can be a welcome break or an incredible annoyance, but they are inevitable in any trial. Ask your attorney what you are allowed to do during such breaks, especially when the jury is in the room. The jury will be bored, and you are one of the more interesting characters on whom they may focus. Thus you should always assume that at least one of them is looking at you, and act accordingly, which is to say, attentive, respectful, and unfailingly professional. This demeanor can be especially challenging to maintain during certain testimony, such as listening to what you know to be false and possibly malicious statements about you by a plaintiff or a plaintiff's witness.

## Having Your Say

More likely than not, you will be called to the witness stand by the plaintiff's attorney, possibly even at the very beginning of the case. Your testimony is often a pivotal point in any malpractice trial, and it will be most closely attended to by the jury. Every day of the trial, but especially on the day you testify, you should dress the part of a professional, neatly tailored and not flashy. In most jurisdictions this will mean a suit or dress with conservative accessories. When called to the witness stand, approach the bailiff with confidence and show great deference to the judge.

When responding to questions from an attorney, always address your answer to the jury directly, making eye contact with receptive faces whenever possible. Plaintiff attorneys can attempt to make you look evasive by questioning you from the opposite side of the courtroom, or by deliberately placing exhibits where you will have to look away from the jury. Nonetheless, your principal goal is to make the jurors your allies. All questions are being asked for their benefit, and all responses should be directed toward them.

Always listen carefully to questions that are being asked, and think for at least several seconds before responding, "What is the attorney trying to prove by asking me this?" If you can understand and answer a question very simply and in layman's terms, by all means do so. If, however, there is any part of a question you do not understand, ask that it be rephrased until you are sure that you do understand. This will not make you appear dense, it will demonstrate that you are diligent; and if the attorney cannot rephrase the question and must have it be reread by the court reporter it will make him or her appear incompetent. You should be very clear and use simple rather than medical terms in courtroom testimony, because here it is made for the benefit of the jury, whom you want to educate, enlighten, and enlist in understanding the facts of your case.

Just as in deposition, beware of a series of questions with a similar answer, and elucidate your answer wherever possible with short explanations. Even if a "yes" or "no" might suffice, it could leave the jury wondering about the specifics. Beware of any question that contains a double negative, or a leading question such as one that begins "Isn't it true, doctor, that…" because these are almost always intended to confuse and entrap you.

If you find that you have made a misstatement on the witness stand, don't hesitate to correct yourself; however, this should not be done often or you may appear to be dissembling. Your ultimate goal is to appear honest and open, and to have such a lucid way of explaining complex matters to the jury that they begin to wish that you were their doctor.

***Table 7:*** Trial Testimony

| |
|---|
| • Dress and act professionally at all times |
| • Ask for clarification and listen for objection |
| • Read any exhibits carefully and in context |
| • Think before answering |
| • Address the jury directly with eye contact |
| • Use simple terms |
| • Reiterate defense theme when possible |
| • Make the jury your allies |

If you are read a quote from your deposition or are asked to read from any exhibit whatsoever, take the time to read it carefully and completely before attempting any response. This will contradict the attorney whose goal it is to take something out of context to use against you. If you are presented with any new material during trial, ask for a break (if your attorney does not) so that you can completely absorb the new material before being asked anything about it.

Regardless of how unpleasant the questioning attorney may be, you must at all times maintain your equanimity. If you know that you are easily rattled, practice with a coach can be critically important before trial to learn how to respond calmly to provocation. The attorney's baiting behavior will then influence the jury against him, and your measured response will assure them that you are the professional.

Your attorney will help you to formulate a statement expressing your "theme" or "theory of the case," which should be interjected into your testimony anytime the opportunity allows. At the end of your direct testimony elicited by the plaintiff, your attorney will have the opportunity to cross-examine you and to correct any mis-impressions that the direct examination may have left with the jury. Your "theme" statement might also be elicited at this time. Of course, another round of re-direct and re-cross-examination may follow, but these are generally quick in relation to the rest of your testimony.

At the conclusion of the plaintiff's case there is another opportunity for your attorney to make a motion to dismiss the case, or to dismiss you from it, if the plaintiff has failed to prove one of the four required elements of negligence against you. Usually the judge will not rule immediately on such a motion, unless there is absolutely no interpretation of facts that have been proven, by which a jury could decide in favor of the plaintiff. This does not mean that the judge could not rule at a later point in the case.

## Your Defense

The defense of your case will consist of testimony by the various witnesses who have evaluated your case and have agreed to testify as to your duty, the standard of care, causation of any injury, and degree of any damages. Although it is unusual, if you have not been called by the plaintiff to testify, then you will testify for the first time during this phase of the trial. The same is true of the plaintiff(s). It is usually a relief to be able to hear and give your side of the case, especially after sitting through days or even weeks of the plaintiff's case. Of course, there could be some difficult moments during the defense phase of the trial. Just as in the plaintiff's phase, you must comport yourself in a professional manner, listening politely to the testimony.

When the defense is concluded, both sides will be allowed to give closing statements to the jury that could last several hours before the jury is adjourned to its deliberations. These could take from several hours to several days. Waiting for the verdict can be one of the most difficult times for you, especially if deliberations are protracted.

## Settlements Happen

Throughout the trial, your attorney or attorneys, the claims adjuster, the opposing attorney, and even the judge may be involved in settlement discussions. So even after all of the preparation and conduct of a trial, a decision might be made without the input of the jury. Unless you have a clause in your liability policy that gives you the right to refuse to settle, you may not have any say in the matter, though you will usually be consulted.

This is important because any monetary award made on behalf of a physician to a plaintiff, whether as a result of a judgment or settlement of a claim, with rare exceptions, must by law[7] be reported by the paying entity to the National Practitioner Data Bank (NPDB) and by the physician to the state licensure authority. Furthermore, all licensure boards, hospitals, and other health care entities are required to query the Data Bank regarding any reports on physicians, which could affect future credentialing decisions and could result in further investigation and licensure action. Since 1990, 235,942 reports regarding physicians and osteopaths have been made to the NPDB in conjunction with medical malpractice payments.[8] While a report to the Data Bank is certainly not career ending, it is an embarrassment that most practitioners will try valiantly to avoid.

Although rare, after the verdict is made, a judge may set aside the verdict if he or she feels that the jury could not have properly arrived at the decision that is made given the facts that were proven at trial. If there are believed to be grounds for appeal, your attorney will generally make a motion for a dismissal at the conclusion of the case against you.

Even after a jury verdict, settlement of the case directly between the parties may still occur for a variety of reasons. The plaintiff may prefer a quick payout of a lesser amount than the award as opposed to a prolonged appeals process. Appeals of adverse decisions may be made by either plaintiff or defense, but the costs are not inconsiderable and the reward could be as little as the opportunity to retry the case. The liability carrier will have the sole discretion in the decision to appeal a decision against a physician.

## After the Verdict or Settlement

After a dismissal, judgment, or settlement, you the physician will need to return to normalcy and to put the case in some kind of perspective. If there is a dismissal, many physicians entertain thoughts of countersuing either the plaintiff or expert witnesses or even the plaintiff's attorney. Such suits are rarely successful, even though the prospect is satisfying.

After a judgment or settlement, a physician defendant will need to prepare a statement in response to inquiries regarding the case for future credentialing purposes. It is

best to have the attorney's input on the most appropriate wording for such a statement. If a report is made to the NPDB, it is possible to dispute the fact or the content of the report or to request a review by the Secretary of Health and Human Services. This route is rarely pursued, and even more rarely successful, but your attorney can help to formulate such a dispute.

It is probably best to return to practice with the relief that the case has concluded, and to focus your efforts toward avoiding or ameliorating the circumstances that initially led to suit. This could involve improving documentation or practice habits, polishing communications skills, or even changing practice location where certain risks are recurring and unchangeable. Some physicians go so far as to change specialty or to leave medicine altogether in the wake of litigation. Most, however, get on with their chosen profession. To the extent possible, be open about the experience of litigation so that others can realize that it is a survivable if extremely unpleasant aspect of medical practice today. The more education, honesty, and openness shared between practitioners, the more tolerable will be the experience of malpractice litigation, so much a part of the equation of medical practice today.

## References


1. Kane, CK, Medical Liability Claim Frequency: A 2007-2008 Snapshot of Physicians, AMA Center for Economics and Health Policy Research, Aug 2010, accessed at http://www.ama-assn.org/ama1/pub/upload/mm/363/prp-201001-claim-freq.pdf. Accessed 08/05/2010.
2. Brown TW, McCarthy ML, Kelen GD et al. An epidemiologic study of closed emergency department malpractice claims in a national database of physician malpractice insurers. *Acad Emerg Med* 2010;17:553-560.
3. Goldberg RM, Kuhn G, Andrew LB, et al. Coping with medical mistakes and errors in judgment. *Ann Emerg Med* 2002;39:287.
4. Charles S, Frisch P. Adverse events: What we feel and why. In: *Adverse Events, Stress, and Litigation*. Oxford University Press: New York; 2005:19-27.
5. Brenner I. How to Choose an Attorney. In: *How to Survive a Medical Malpractice Lawsuit*. Wiley Blackwell: London; 2010:23-30.
6. Shilkret v Annapolis Hospital Emergency Association. 349 A 2d 245, 249-250 (Md 1975)
7. Health Care Quality Improvement Act of 1986 (Title IV, Public Law 99-550).
8. 2006 NPD Annual Report, available at http://www.npdb-hipdb.com/pubs/stats/2006_NPDB_Annual_Report.pdf. Accessed 7/19/2010.


## Physician CME Questions

41. When an adverse outcome occurs, the first thing an emergency physician should do is:
    A. notify hospital risk management and the liability carrier
    B. consult the policy and procedure manual regarding proper procedures
    C. call your personal attorney
    D. apologize to the patient and family
    E. notify patient and/or family giving all known details

42. The major disadvantage to "claims made" liability coverage is:
    A. It is more expensive.
    B. It may not provide protection if the legal action is initiated after the policy has expired.
    C. It restricts the defendant's choices for legal representation.
    D. It provides a tempting deep pocket for large settlements.
    E. It provides less coverage.

43. When is it permissible to alter a medical record?
    A. when information necessary for patient care or analysis has been omitted or mistakenly recorded
    B. when the patient has expired
    C. when other providers have failed to leave documentation
    D. to correct false information recorded by others
    E. to protect oneself from implication in malpractice

44. When a physician receives a request for medical records, he or she should immediately:
    A. call the patient or attorney to learn why the request has been made
    B. notify the liability carrier of the request
    C. notify medical records to fulfill the request and notify the liability carrier
    D. call the hospital risk manager
    E. call a personal attorney

45. If you are handed a legal document by an outsider while on duty, you should:
    A. refuse to accept it and ask that the outsider be removed
    B. accept the document and request a short break to compose yourself
    C. ask for relief from duty so that you can contact your liability carrier or insurer
    D. deposit the document in trash and try to forget about it
    E. call the hospital risk manager

46. After receipt of a malpractice claim, the first step to take in your defense is to:
    A. contact others involved in the care of the case to learn more details
    B. review the medical records and begin to research the disease process
    C. call the plaintiff attorney to explain the misunderstanding
    D. contact the hospital risk manager for advice
    E. contact your liability carrier and ask whether to prepare a narrative

47. Your deposition is:
    A. an opportunity to explain your side of the case
    B. a substitute for your appearance at trial
    C. a sworn statement of facts about the case
    D. a legal minefield that can make or break your case
    E. your opportunity to confront the plaintiff(s) with mediators

48. At your deposition, you should:
    A. bring all materials that could be relevant to the case
    B. refuse to answer any questions that might implicate you in malpractice
    C. explain things as simply as possible so that everyone will understand the facts
    D. listen carefully and give only the minimum response
    E. dress casually and comfortably for what could be a long session

49. At trial, remember to:
    A. answer only the question that is being asked
    B. speak directly to the questioning attorney
    C. bring textbooks or other materials to occupy yourself during breaks
    D. use technical language to demonstrate your professionalism
    E. help jurors to understand by showing your disdain for plaintiff expert testimony

50. After the verdict is rendered:
    A. prepare to appeal your case if you have lost
    B. investigate countersuing the plaintiff or experts if you have won
    C. prepare a statement for future credentialing purposes
    D. consider malpractice charges against your assigned attorney
    E. plan to leave the state or specialty and not to think about the case again

## CME Answer Key

41. A; 42. B; 43. A; 44. C; 45. B; 46. E; 47. D; 48. D; 49. A; 50. C

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# Navigating the Malpractice Miasma

## Emergency Physician Claims Experience

Ever sued 49.8%
Sued more than once 30.9%
Sued in previous 12 months 8.7%
Claims per physician 1.09

Source: Kane, CK, Medical Liability Claim Frequency: A 2007-2008 Snapshot of Physicians, AMA Center for Economics and Health Policy Research, Aug 2010

## Emergency Physician Claims Outcomes

Closed without trial: 93%
Settled with payment: 29%
Dismissed without payment: 64%
Tried to verdict: 7%
Defense verdict: 85%
Plaintiff verdict: 15%
Average indemnity all claims $185,226

Source: Brown, et al. Acad Emerg Med 2010;17:556.

## Deposition Tactics

- Demand substantial preparation
- Know records and medicine
- Bring nothing with you
- Dress and act professionally
- Keep answers minimal and technical
- Pay close attention to objections
- Maintain equanimity
- Review transcript for errors

## Trial Testimony

- Dress and act professionally at all times
- Ask for clarification and listen for objection
- Read any exhibits carefully and in context
- Think before answering
- Address the jury directly with eye contact
- Use simple terms
- Reiterate defense theme when possible
- Make the jury your allies

## Most Common ED Diagnoses Resulting in Claims

- Acute myocardial infarction*
- Chest pain unspecified*
- Abdominal and pelvic symptoms*
- Multisystem injury
- Appendicitis
- Fractured vertebra
- Fractured radius or ulna
- Aortic aneurysm*
- Open wound to fingers
- Fractured tibia or fibula

*Highest indemnity
Source: Brown, et al. Acad Emerg Med 2010;17:556.

## Emergency Physician Claims Experience by Age

Under Age 40: 16.5%
Age 40-54: 54.9%
55 and Over: 75%

Source: Kane CK. Medical Liability Claim Frequency: A 2007-2008 Snapshot of Physicians, AMA Center for Economics and Health Policy Research, Aug 2010.

## Trial Preparation

- Negotiate flexible schedule with partners
- Intensive preparation for limited time daily
- Healthful nutrition and recreation
- Ask family for extra support
- Request coaching for trial testimony
- Know records and deposition COLD
- Get a good night's sleep

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