The physician's guide to medical malpractice

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Becoming involved in a lawsuit can be a significant event for anyone, including a physician. It can require a great deal of the physician's time and effort, can be emotionally draining, and can serve a psychological blow to the physician's professional psyche.

When legal claims arise, physicians must trust their lawyers to address them, just as patients must trust their physicians to treat disease. As with the physician-patient relationship, the effectiveness of the lawyer-client relationship depends on the physician's absolute candidness about the events surrounding the legal claim. These communications between lawyer and client are protected as confidential to encourage this necessary candidness. And, just as patient compliance promotes effective treatment, a physician must heed the lawyer's advice and instructions to ensure an effective defense.

This guide is designed to give physicians a context for understanding the impact of a legal claim so that, if a claim does arise, the physician can react appropriately and know what to expect. It focuses on the 3 phases of a legal claim: the presuit notice period, the life of a lawsuit, and trial. And, because legal claims invoke the issue of insurance, this guide initially attempts to familiarize physicians with the nature of a medical malpractice insurance policy.

THE MEDICAL MALPRACTICE INSURANCE POLICY

Duties of the carrier

Defense and indemnity. The carrier has 2 primary obligations under a medical malpractice policy: the duty to defend and the duty to indemnify. The duty to defend requires the carrier to retain a lawyer to defend legal claims that are brought against the physician. This duty also requires the carrier to pay expenses relating to the defense. The duty to indemnify requires the carrier to pay an amount up to the policy limits for a settlement or judgment on any covered claim against the physician.

Assignment of counsel. An insurance carrier will generally retain counsel for a physician when a lawsuit is filed, although some will do so early on when the notice letter is received. Typically, the carrier will assign a lawyer who has been approved to work on its cases, and a carrier will often honor a physician's request for a specific attorney. The carrier pays the fees of the lawyer it ultimately retains. While the physician may obtain a personal lawyer in addition to counsel retained by the carrier, the carrier will not pay those fees.

Consent to settle. Some insurance policies have a "consent clause" that requires the insurance carrier to obtain the physician's consent in order to settle a case. By giving consent, the physician places the power of decision regarding settlement in the hands of the insurance company. Settlements, like adverse judgments, are reported to the National Practitioner Data Bank.

Duties of the insured physician

Prompt notice. To preserve coverage, the policy typically requires insureds to provide the carrier with prompt notice of any potential claims or lawsuits against them. An insured physician's failure to provide prompt notice could jeopardize the carrier's obligations both to defend and to indemnify. As such, with respect to coverage, it is in a physician's best interest to provide prompt notice.

Cooperation. A policy also typically contains a "cooperation clause," which requires insured physicians to cooperate in the defense of a legal claim.

PHASE ONE: THE PRESUIT NOTICE PERIOD

The presuit notice period is perhaps the most critical to understand because a physician usually receives notice of a claim and must react to it before having the benefit of a lawyer's guidance. Understanding the significance of this notice can enable a physician to respond protectively and avoid potentially harmful conduct.

The notice letter

The legal process typically begins when a physician is served with a notice letter. This is a letter from a plaintiff's attorney advising the physician of an intent to bring suit. Article 4590i, the Texas statute governing medical malpractice law, requires this notice in order to encourage presuit negotiations and settlement. Though required by law, the notice letter is not a lawsuit, is not filed with the court, and simply places physicians on notice of potential claims against them.

Immediate notice to the carrier

Upon receipt of a notice letter, the physician must immediately notify the insurance carrier and forward it any relevant

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papers. Immediate notification can operate to institute insurance coverage; delaying notification can jeopardize coverage.

A physician should also notify the carrier upon service or notice of anything resembling a legal claim, whether or not the physician has first received a notice letter. These items could include a citation, petition, discovery request, or deposition notice. The carrier is in a much better position than the physician to evaluate the effect of any material received.

A physician should also provide notice if contacted by a plaintiff's lawyer who is "generally considering" a claim or pursuing a claim against another health care provider. Physicians who try on their own to convince the plaintiff's lawyer they don't belong in a lawsuit can unwittingly cause adverse consequences and guarantee their own involvement in the lawsuit. Not only can the delayed notification damage the physician's position with respect to coverage, but it prevents the opportunity for an experienced professional, either an attorney or an insurance adjuster, to evaluate this initial contact and take steps to protect the physician's interest. If contacted, the best strategy is to refrain from discussing the case and immediately call the carrier.

The patient's chart

The next immediate step the physician must take after receiving a notice letter is to pull the patient's chart and place it somewhere safe. *It is imperative that no changes, alterations, or deletions be made in the chart.* If a lawsuit does develop, even the *appearance* that an alteration has been made can have a devastating impact. The chart must remain in exactly the same condition it was in before the physician had notice of the claim.

Discussing the claim

Upon receiving a notice letter, a physician may be tempted to discuss the claim with colleagues to obtain their opinions. However, if a lawsuit does develop, the physician would likely be required to recount those conversations—even those unfavorable to the physician's position. Physicians should discuss claims only with their insurance carrier and their lawyer.

PHASE TWO: THE LIFE OF A LAWSUIT

Notice to the carrier

A lawsuit formally begins with the filing of a petition in court and service of the petition and citation on the defendant physician. As with the notice letter, the physician must immediately notify the carrier upon receipt of service to ensure that an answer can be filed in a timely manner. It is a good idea to contact the carrier by phone first and then immediately forward a copy of the citation and petition. The carrier will then assign a lawyer, if it has not already done so, and forward all material to the lawyer so that an answer can be filed and the defense begun.

In Texas state court, a defendant's answer to a petition must be filed by the Monday following 20 days after service of the citation. If an answer is not filed by this deadline, the plaintiff can obtain a default judgment against the defendant and begin proceedings to execute on the physician's assets for the judgment amount.

Discovery requests may be served along with the petition. This material is also time sensitive, so any discovery must be forwarded immediately to the insurance carrier as well.

Discovery

Once the lawsuit has been filed, the discovery phase begins. During discovery, each party has the opportunity to obtain relevant information and documents from the other parties to the lawsuit. The standard for discovery is broad. Information and documents are properly discoverable if they are "likely to lead to the discovery of admissible evidence," regardless of whether they will be ultimately admissible at trial. Parties and witnesses *must* respond to requests for material that is properly "discoverable."

The physician's investment of time and effort generally begins at this stage. The physician's lawyer has likely already met with the physician to review the events surrounding the claim, the chart, and any other pertinent medical records. During discovery, however, the physician will likely be required to devote some time providing answers to written discovery and gathering any relevant documents requested. Preparing to give a deposition will require the physician's undivided focus. Beforehand, the physician's lawyer will meet with the physician again to thoroughly prepare for it. The deposition itself could take several hours, and providing the testimony will require a great deal of concentration and focus.

Discovery takes the following forms:

- *Interrogatories* are written questions served by one party on another party.
- *Requests for disclosure* are statutorily predetermined requests for information that must be produced without objection. Disclosures cover the basic information involved in a lawsuit, including potential witnesses, experts, contentions of the parties, damages, and the identity of health care providers who rendered medical care to the plaintiff.
- *Requests for production* are requests for written documentation.
- *Requests for admissions* require the party served to either "admit" or "deny" certain facts and contentions. These requests are particularly time sensitive; failure to respond in a timely manner can result in the admissions being deemed against the party served.
- *Expert reports*, containing the expert's opinion and basis for the opinion, must be exchanged by the parties.
- *Depositions* are question and answer sessions in which witnesses provide sworn testimony. They usually take place after the completion of all written discovery; the parties are generally deposed first, then the experts.

Primary defenses

Failure of an expert. To maintain a medical malpractice action, a plaintiff must present a qualified expert witness to testify both that the physician was negligent and that the physician's actions were the proximate cause of the plaintiff's alleged injuries. *Negligence* is defined as the failure to use ordinary care; that is, the failure to do what a physician of ordinary prudence would have done in the same or similar circumstances. *Proximate cause* is defined as that cause which, in a continuous and uninterrupted sequence, produces an event foreseeable by the physician exercising the degree of care required of him or her.

A properly *qualified* expert must be

- A physician practicing medicine at the time he or she provides testimony in the lawsuit or a physician who was prac-

ticing medicine at the time of the care and treatment that is the basis of the claim; and
- A physician qualified on the basis of training or experience.

Practicing medicine includes training residents or students at an accredited medical or osteopathic school and serving as a consulting physician. Factors considered in determining whether an expert witness is *qualified* include

- Whether the expert is board certified in an area relevant to the claim
- Whether the expert has substantial training or experience in an area relevant to the claim
- Whether the expert is practicing medicine and rendering medical services relevant to the claim

The physician's attorney can challenge both an expert's qualifications and his or her ability to legally establish "negligence" and "proximate cause." However, if the plaintiff's expert succeeds, a defendant physician must then present a qualified expert to contradict the testimony of the plaintiff's expert. Often, an outside expert is retained, but a defendant physician can be used as an expert on his or her own behalf.

Statute of limitations

Medical malpractice claims have a 2-year statute of limitations, which is the time period within which a plaintiff must file a lawsuit. Generally, the 2-year period begins to run from the date of the treatment in question. However, 3 situations can adjust this strict 2-year rule:

- *Notice letter.* Sending a notice letter extends the 2-year period for 75 days.
- *Minor plaintiff.* The 2-year statute of limitations does not begin to run, and is "tolled," until a minor plaintiff is 18 years old. Therefore, a viable claim is alive until the minor turns 20. However, claims for reimbursement of medical bills for treatment rendered a minor while under 18 must be filed by the parents within 2 years from the date of treatment.
- *Failure to discover the basis of the lawsuit: the "discovery rule."* When a plaintiff is unable to discover the basis of the lawsuit, investigate it, and file a lawsuit within 2 years of the date of treatment, the plaintiff can file suit within a "reasonable time" after discovering the basis of the suit. For instance, if a patient does not discover that a surgical instrument was retained until 3 years after the surgery, the Texas Constitution deems the statute of limitations unconstitutional if it precludes the patient from bringing the lawsuit before the basis of it could be discovered.

Mediation

Typically, at some point during the discovery process and before a trial takes place, the court will order the case to mediation in an effort to settle it. However, the parties can also agree to mediate the case without a court order.

Mediation is a nonbinding process in which an independent third party, the mediator, acts to facilitate settlement of the lawsuit. The mediator does not have independent adjudicatory power; that is, the mediator does not listen to both sides of the story and impose a settlement on the parties. Rather, the mediator can only attempt to persuade the parties to reach a resolution. Information disclosed during mediation, if not otherwise admissible, does not become admissible at a trial solely by virtue of its having been disclosed.

Typically, mediation takes a half or full day and requires the attendance of all parties and lawyers, the mediator, and an insurance representative having authority to settle. If the case is not resolved in mediation, the mediator reports to the court only that the parties were unable to reach a settlement.

Pretrial modes of disposition

Typically, if a lawsuit is resolved before trial, the resolution is accomplished by one of the following methods:

- *Motion for summary judgment.* A motion for summary judgment is a dispositive motion and, if granted, constitutes a judgment on the merits. This motion is typically filed to assert the defense of limitations or to test the plaintiff's ability to produce a qualified expert able to establish negligence and proximate cause.
- *Motion to dismiss.* A motion to dismiss is also a dispositive motion. It is typically filed when a plaintiff fails to produce a curriculum vitae and a qualified expert report establishing negligence and proximate cause within the 180-day period required by statute. Although the statute does allow the court to provide a plaintiff with additional time to comply with this provision, at some point the plaintiff must produce an expert report and curriculum vitae in order to survive this motion.
- *Voluntary nonsuit.* From time to time, though it is rare, a plaintiff may decide to drop the claim against the physician. This is usually a strategic decision made in a multiparty case when a plaintiff's attorney must choose the theory of the case and narrow the field of medical providers to pursue. This is not a dismissal on the merits, and a claim voluntarily dismissed can be successfully refiled if the statute of limitations period has not expired.
- *Settlement.* Parties settling a lawsuit will typically execute a compromise settlement agreement setting forth the terms of settlement. It can include language stating that the physician does not admit negligence and that the settlement is made only to avoid the time and harassment of defending a lawsuit. The parties will also execute an agreed motion for nonsuit to be filed in court. To formally dispose of the case, the judge executes an order of nonsuit in response to the agreed motion.

PHASE THREE: TRIAL

Trial of a lawsuit is an extremely demanding undertaking, not only on the part of the lawyer, but also on the part of the physician. It can be emotionally, physically, and psychologically exhausting, often requiring the physician's complete and undivided attention to the exclusion of all else.

The trial setting

It may take several years after a lawsuit is filed before it actually goes to trial. A lawsuit filed in a Texas state district court in a large county can typically take from 1½ to 3 years; a lawsuit filed in the same county, but in a county court at law, can be reached as early as 1 to 1½ years. Lawsuits filed in district courts in smaller counties are also generally reached for trial much earlier, between 1 and 2 years.

Preparing for trial can be frustrating because a trial date often cannot be firmly established. Generally, the parties to a lawsuit will not know for certain whether they are going to trial until the day of trial, and "special settings," which attempt to set a firm trial date in advance, can also fail. Nonetheless, when trial on a given date is possible but uncertain, both the physician and the lawyer must adequately prepare.

The physician's role

Before trial, the physician must prepare to provide trial testimony, usually by extensively reviewing in depth the medical records, the physician's own deposition, and the depositions of other experts and any plaintiffs. Before trial, the physician will meet with counsel to prepare for direct testimony and anticipated cross-examination questions. Presentation of trial testimony requires complete focus and concentration.

It is best that the physician be present at the counsel table during the entire trial. This means a substantial cut into the physician's practice, perhaps 1 to 2 weeks. In addition, it can be difficult for physicians to sit through constant testimony criticizing their actions, qualifications, and knowledge. Even when the testimony is finally finished, relinquishing control over the outcome of the case to a jury of strangers is very stressful; waiting for their decision is appropriately termed "sweating a jury."

CONCLUSION

Knowledge is power. The information contained in this guide should prepare physicians in advance so that they can respond appropriately to a claim. But it is also meant to apprise physicians of the magnitude of what they have just become involved in and warn them that a lawsuit will require their time, effort, and focus. While most lawsuits are resolved before trial, a few do warrant a full-blown trial and so require an additional block of time and attention from the physician.

When legal claims arise, the best way for physicians to help themselves is to involve their carrier immediately, be open with their lawyer, be compliant, be available, and be ready to devote some time and effort. To keep peace of mind, however, physicians should rely on their legal team to manage the defense so that they can continue to live life and practice medicine.