Anatomy of a Malpractice Claim: What Every Health Care Professional Needs to Know

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A recent *New England Journal of Medicine* article estimated that, by retirement age, 75% of physicians in low-risk specialties and 99% of physicians in high-risk specialties will face a malpractice claim.[1] No physician relishes finding themselves a target of a legal claim any more than a patient relishes hearing a challenging diagnosis. In many respects, the experiences are similar. It is unnerving. One is thrust into a world where people speak in new and strange terms. The procedures to which one is subjected are invasive. It is a world where no one gives any guarantees. No amount of confidence that it will turn out fine can fully relieve the attendant anxiety.

While those of us who work with health care professionals cannot stop all claims from happening, we can help our clients understand the process. We find that with even rudimentary knowledge of the process, the physician becomes more a part of the legal team and better results ensue. What follows is a basic primer designed to help health care professionals understand what is involved in a medical malpractice claim.

There are two basic types of medical malpractice claims that account for the overwhelming majority of the actions filed. The first are claims asserting a violation of the standard of care. The second type of claim asserts that a provider failed to obtain informed consent. These are not mutually exclusive and can be (and frequently are) alleged in the same action.

While definitions of "standard of care" vary slightly, these are claims asserting that the provider failed to use the same care, skill, and judgment a similarly situated provider would have done when faced with the same patient situation. The concept takes into account the provider's area of specialty and the state of medical knowledge at the time the service was rendered. These claims apply to all health care professionals.

Informed-consent claims, in most jurisdictions, apply only to physicians. They are generally codified by statute, where the duties and exceptions are defined. They focus on what information must be shared with patients so that the patients can make informed choices regarding their medical care.

All claims arise out of patient dissatisfaction, whether justified or not. When a claim arises, several people become involved on the health care professional's behalf. Usually, the first person a professional deals with is the risk manager for the institution where the professional works. One of the risk manager's first tasks is to tender the claim to the professional insurance company, where the matter will be assigned to a claims handler. The claims handler's job is to oversee the claim from the insurer's perspective. One of the claim handler's tasks is to assign the matter to legal counsel who will be the provider's attorney. These three individuals comprise the professional's legal team.

While lawsuits proper do not begin until a plaintiff files a "Summons and Complaint" in court, the process usually starts well before then. Some jurisdictions, such as Wisconsin, even have mandatory diversion processes that are prerequisite to prosecution of a medical malpractice action. Generally, a patient contemplating a claim will have raised concerns previously to someone regarding the care. As soon as any concern is raised, the risk manager should become involved. He or she will investigate and invoke possible interventions, such as arranging for medical directors to contact the patient, referring to the insurer, or setting up an independent review, which may include patient input. All of this can occur well before any lawsuit is filed, and with proper intervention some suits are avoided altogether.

A Complaint, which is the formal document filed with the court to commence a lawsuit, must be served on the person being sued. This is a critical event because there is a set amount of time in which it must be answered; failure to do so can result in the suit being lost on procedural grounds before any defense is mounted. A Complaint is a set of numbered paragraphs containing the plaintiff's allegations and the Answer admits or denies each of these allegations. The allegations denied define the scope of the controversy. Lawsuits then move into their next phase, discovery.

Discovery is a broad term, premised on the notion that during this phase of a pro-

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ceeding, each side gets an opportunity to discover what the other knows or believes. It is during this phase that written questions and answers are exchanged, documents are collected and depositions are taken. Each side will retain experts to stake out the contours of their positions. When the parties reach the point where they fully know both their case and the opponent's, decisions are made whether to settle or try a claim.

Trials are involved events, and to do them justice in summary form would require an article longer than this space allows. While trials can be heard by a judge sitting alone, medical malpractice cases usually are presented to a jury. They are rarely less than 3 days long and can stretch into weeks. It is, unfortunately, necessary for the provider to be present during the entirety of a trial, even when doing so causes a serious disruption to his or her practice.

There are many ways health care professionals can assist in their defense. The points we repeatedly stress with our clients are:

- Notify your risk manager at the first sign of patient dissatisfaction.
- Never become defensive or angry with a patient—refer them to the systems in place to address their concerns.
- Never alter medical records—if a correction to the record needs to be made, follow approved protocols for doing so.
- If you are served with a Summons and Complaint, contact your risk manager or assigned attorney immediately.
- Do not discuss the claim with colleagues or others outside your legal team—you may inadvertently bring them into the matter.
- Do not conduct independent research on the care being questioned.
- Be prepared to educate your counsel on your medical decision-making process and the medical concepts involved, but recognize you do not have to, nor should you, assume responsibility for building your case.
- Understand the nature of the claim asserted and give thought to how your conduct is justified in that context.
- Be prepared for a slow process—legal matters may take more than a year to bring to conclusion.
- Resist the temptation to "overcorrect" your practices simply because one of them has been called into question.
- Remember that you are not alone, recognize that it is a stressful process, and address that stress in a healthy manner.

In the end, physicians and other health care professionals survive lawsuits because there is a refined system in place to shepherd them through the process. While it is not always possible to prevail on every matter, those providers who understand the basics of the process, and their role in it, will maximize their chances for a successful outcome.

Reference

1. Anupam, et al. Malpractice Risk According to Specialty. *N Engl J Med.* 2011;365:629-636.

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