So you're being sued: Do's and don'ts for the defendant

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ABSTRACT

Many physicians find themselves involved in malpractice litigation during their careers, either as defendants or as expert witnesses. Knowing a few do's and don'ts can help make the process easier, prevent professional and financial disaster for you or other medical professionals, and even prevent a lawsuit altogether.

Don't let the risk of lawsuits stop you from enjoying practicing medicine

IN MEDICAL SCHOOL, you studied many diseases you probably will never encounter. However, you may be dangerously uninformed about a process you may well have to face: malpractice litigation.

Whether you are the defendant in a lawsuit or act as an expert witness, it is important to understand how lawsuits are initiated and how they proceed through the legal system. Part of being educated in this arena is knowing how to give a deposition and recognizing the difference between deposition testimony and trial testimony. Most importantly, you need to know how to avoid a lawsuit in the first place, and when a patient is referred to you or you provide follow-up care, you should avoid careless comments that could engender a lawsuit.

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Medical Grand Rounds articles are based on edited transcripts from Division of Medicine Grand Rounds presentations at The Cleveland Clinic. They are approved by the author but are not peer-reviewed.

WHAT IS MALPRACTICE?

The word "malpractice" is much overused: an allegation of negligence is only a claimed medical malpractice case until proven. To be awarded damages, the plaintiff must prove negligence and that the negligence was the proximate cause of the injury.

Negligence is a physician's failure to meet the standard of care as defined by the US Supreme Court: "that which a reasonable physician would do under the same or similar circumstances." In many cases—but not all—the plaintiff must present an expert witness to testify that the defendant failed to comply with the standard of care.

An exception in which expert witnesses are not necessary is any litigation based on the doctrine of *res ipsa loquitur* (translates as "the thing speaks for itself"), defined in the statutes as something that is "obvious to the common man." For example, if the patient is to have his left foot amputated and the surgeon amputates the right foot instead, this is a deviation obvious to anyone and does not require expert testimony.

Proximate cause refers to a physician being directly responsible for an adverse outcome by not meeting the standard of care. For example, if a physician does not order appropriate studies for a patient with a breast lump and 6 months later a biopsy confirms breast cancer, that physician may be found liable if he cannot prove that the disease would have progressed despite early intervention.

Ohio has joined an increasing number of states that recognize the "lost chance" doctrine. Using the stated example, if there is even a slight chance that the patient's disease would not have progressed with earlier diagnosis, there is a cause of action.

AVOIDING A MALPRACTICE LAWSUIT

As much as possible, try to give equal weight to each patient's needs. The cases that lead to a lawsuit often are the ones that appear unremarkable.

Do…

- Be available to patients and families who have an adverse medical outcome while under your care. Most malpractice lawsuits are initiated by people who feel that their physician did not communicate with them adequately or that they have been treated in an uncaring manner.
- Keep thorough records that reflect your clinical decision-making processes (eg, what you did, why you did it, why you did not do something else).
- Try to focus on the patient you are treating at that moment. It is all too easy to fail to order a test or miss a crucial piece of a diagnosis when you are preoccupied or thinking about how to treat a different patient.

WHEN PROVIDING FOLLOW-UP CARE, AVOID IMPLICATING OTHERS

When you provide follow-up care or act as a consultant on a case, you can prevent bringing other medical professionals into litigation by following a few guidelines.

As a specialist or tertiary care provider

Many primary care physicians perceive that specialists and physicians at tertiary care centers get them in trouble by commenting on situations in prior care when they do not have all the facts. When you provide follow-up care, what you do not say can be as important as what you do say. It is important for the patient to feel that the care you are providing is simply part of the continuum of care, rather than an unnecessary and expensive detour.

Don't…

- Accept patient memories of past care uncritically. They are not always accurate.
- Make statements such as "If I had seen you earlier, I could have helped you a lot more than I can now." This can lead not only to a lawsuit, but also to a loss of credibility on the part of all physicians for that patient. It does not hurt to say "I would have done things pretty much the same way" or "Now that your doctor has ordered these tests, I have a much better idea of what to do next."

Although physicians are often accused of not informing patients when there has been negligence, in reality it can be extremely difficult to determine if negligence has truly occurred. After all, in a malpractice case many hours are spent reviewing records, deposition testimony, and outside information before an opinion can be presented. Even then there is frequently considerable difference of opinion among experts. On the other hand, you should never lie or make up excuses for what may be errors in a case.

If you feel that mistakes have been made, ask yourself if it really would have made a significant difference. Avoid using legal terms such as "negligence" or "malpractice." Remember that cases have to be judged as they would have presented to the physician at the time. You don't want to be judged with the "retrospectoscope" and neither do other physicians. Allow an independent expert witness who is not involved in the patient's care to be the one to present a definitive opinion.

Be available to patients and families who have had an adverse outcome

HOW ARE LAWSUITS INITIATED?

Most medical malpractice lawsuits begin with a patient who has an adverse outcome and feels dissatisfied with the response from the physician or medical institution. The patient or a family member visits a plaintiff attorney, who refers him or her to a legal specialist in medical malpractice.

Because most plaintiff attorneys get paid only if they obtain monetary damages for their client, they carefully evaluate the likelihood of winning the case. In the evaluation process, the attorney consults a medical professional for an opinion on whether the standard of care was met. If there is a good chance of winning the lawsuit, the attorney files a lawsuit at the local county courthouse.

THE SUMMONS

Once the lawsuit is filed, a summons is sent to the physician through certified mail. If the

summons is not accepted, it is returned to the courthouse to be served by a process server or through standard mail.

Do…

- Notify your private insurance carrier or the legal department of your hospital or clinic within 30 days. If no response to the complaint is filed during that interval, the assumption is that you are admitting to all of the allegations.
- Refresh your memory by reviewing records of the case.
- Meet with the attorney who has been appointed by your insurance carrier or legal department. Make yourself available to your attorney even if you must give up your early mornings, evenings, or weekends to do so. Your attorney cannot defend you without your help.

DISCOVERY

Discovery is the period between when a lawsuit is filed and when it is tried, during which both the plaintiff and the defendant have the right to find out all they can about the other's case. If he or she has not done so already, the plaintiff will request the medical records from your office. Then each side will begin questioning the other, as well as witnesses and other treating health care providers, in a process called deposition.

Your attorney cannot defend you without your help

Do…

- Be candid with your attorney. Discussions between attorneys and clients are privileged, which means they are not discoverable.

Don't…

- Engage in any pretrial conversation with the plaintiff, the plaintiff's attorney—or anyone else, including colleagues. These conversations are discoverable and admissible in court. Ohio has some protection for discussion during morbidity and mortality rounds, but it is not as impenetrable as it is in other states.
- Change anything in the medical record. Even if you think it is insignificant (eg, correcting a misspelling), such an act can lead to destruction of your credibility.

THE DEPOSITION

A deposition is a question-and-answer session with the plaintiff's attorney, who wants to find out what occurred and why. The plaintiff's attorney is also sizing up your potential impact on a jury. The information gained in a deposition, which can be used in the trial, is also used by the plaintiff's attorney to decide how far to pursue a case. The deposition also gives the defendant the opportunity to find out what points the plaintiff is likely to raise during trial.

In addition to giving a deposition as the defendant or as an expert witness, you may be involved as a fact witness, someone who had a role in the patient's care and is asked to give his or her perspective on it. Here we deal with the defendant's role in a deposition. Many of these guidelines also apply to trial testimony.

Do…

- Review the medical record of the patient in question and anticipate questions the plaintiff's attorney is likely to raise.
- Tell the truth. You will be under oath and liable for perjury. Remember, however, that the attorney doing the questioning is not under oath and therefore is not held to the same standard. He may make statements to you that are not true; you must be vigilant.
- Take control of the deposition in terms of when and how it is held. If you are summoned for a time that is inconvenient for you, you can have your attorney reschedule it. If you need to use the bathroom, get a glass of water, or review the patient record, feel free to do so. The more physically comfortable you are, the more confident you'll appear; this is important—particularly if the deposition is videotaped.
- Pause a second before answering a question to give your attorney an opportunity to object. Just as there are times your attorney will advise you not to answer a question, there are times "I don't know" or "I don't remember" are acceptable answers.
- Answer each question in a way that a court reporter can record. This means that answers such as "uh huh" or nods of the head are not allowed.

- Listen carefully and answer only what is asked. Do not elaborate or feel you must continue talking during a pause in the conversation. You will have opportunity to elaborate during the trial. For example, the best answer to the question "So, the blood pressure control guidelines state that you should aim for a reading under 140/90 mm Hg?" is simply "Yes."
- Elaborate if a "yes" or "no" cannot adequately answer a question. For example, textbooks are rapidly outmoded and may be considered "authoritative" for only a short time. For that reason, if you are asked what "authoritative" textbook you rely on, you can ask what is meant by "authoritative" and then either answer that the legal definition cannot be applied in a medical context or, if the definition is qualified, you may safely supply the name of the textbook in question.
- Be very careful with hypothetical questions, for example: "The patient had chest pain and pain in his left arm. Isn't that typical of angina?" The truth may be that the patient had muscular pain because he was left-handed and had been refinishing his kitchen cabinets that day. In this case, the best response is "Are you talking about angina in general or about this particular case?" The attorney's answer will guide you on whether to elaborate.
- Take apart compound questions and answer them separately. This may be difficult for people whose native language is not English; if you do not understand a question, ask for clarification.

Don't…

- Clear up the plaintiff's attorney's confusion if it does not affect your testimony. For example, if he asserts that one of your statements was contradictory, you can simply say "Well no, it wasn't" and then let him work for the answer.
- Appear arrogant. Nothing turns people off faster.
- Get into an argument during a deposition. A good way to avoid doing this is to remember that if the plaintiff's attorney gets angry, you have won; he is angry because you are ruining his case with your testimony.
- Allow an attorney to insist that if something is not in the patient's record, it did not happen. Attorneys need to be reminded that this is not the case or physicians would be required to employ court reporters to record every patient encounter.
- Try to guess the rationale for another medical professional's actions. For example, the best answer to the question "Why did the cardiologist order enzyme tests?" is "I don't know. Ask the cardiologist."

LIMITS OF LIABILITY AND SECOND ATTORNEYS

Physicians in private practice purchase malpractice insurance with a certain limit of liability, typically not less than $1 million. However, a plaintiff could obtain a judgment in excess of the liability limit.

Although multimillion-dollar awards make headlines, in reality most judgments are in favor of the physician, and those against the physician are usually for much smaller amounts. Even in large judgments, plaintiffs' attorneys may be reluctant to pursue a physician's personal assets because this is a difficult process. Nevertheless, it may become a more frequent occurrence in the future.

Do secure a second attorney if you think the judgment could exceed your limits of liability. While the first attorney's job is to defend the assets of the insurance carrier, the second attorney's role is to protect your personal assets. Even if you have an excellent chance of winning the case, there is always a risk when a case goes to the jury.

Do not talk with the plaintiff or his attorney

OUT-OF-COURT SETTLEMENTS

Most malpractice insurance policies have provisions that allow a physician or institution to settle a case within the policy limits without a trial. This maneuver allows you to limit your personal exposure.

Do…

- Consider an out-of-court settlement if you feel that your defense is weak or that taking 2 weeks off from your practice to attend a trial is not feasible.
- Think about your reputation—all settlements are reported to the National Practitioner Data Bank.

GETTING THROUGH THE TRIAL

After months of depositions and preparation, the time of the trial will finally arrive. Remember that everyone gets nervous at times, including the plaintiff's attorney.

On the witness stand, you should follow the same guidelines as with deposition testimony, with a few significant exceptions.

Do…

- Engage the jury, because they are the ones who ultimately will judge you. Direct your answers to the jury. Look each juror directly in the eyes. If you see that the jurors are sleepy or uninterested, you need to get them back by changing the pace of your answer, coughing, or talking loudly.
- Teach the jury and explain the crux of the case.
- Express sympathy for the patient and the patient's family. There is nothing wrong with saying "I'm really sorry that this happened to Mrs. Jones; I just don't feel that I'm responsible for it."

Look each juror in the eyes

Don't…

- Use medical terminology. If jurors do not understand what you are saying, they will assume that the patient did not understand you either.

YOUR TESTIMONY AS AN EXPERT WITNESS

As an expert witness, your role is to decide whether a caregiver met the standard of care.

Do…

- Remember that the standard of care does not rely only on published guidelines and is specific to the specialty. For example, a physician who does not manage to increase a patient's high-density lipoprotein cholesterol from 20 mg/dL up to the optimal level of 60 mg/dL is not necessarily negligent.
- Consider whether suboptimal care would have made a difference in a particular case. For example, if metastatic cancer would have been diagnosed 2 months earlier, would it have made a difference in the patient's outcome?

THE MOST IMPORTANT DON'T

In the course of your career, you could well have more than 100,000 patient encounters. Don't let the threat that a few of these might result in a malpractice risk keep you from enjoying your wonderful patients and the great privilege that it is to practice medicine.

SUGGESTED READING

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