

More on My Personal Experience With a Malpractice Case

This month's focus is on professional liability, especially medical liability.

The articles by Drs. Ananth, Cammarata and Lieb, and by Dr. Biggs and Ms. McClure, J.D., are informative and timely. I especially like the article by Dean F. Connors, M.D., "The Process and Evolution of a Lawsuit." While the first two articles are significant for the knowledge they provide, Dr. Connors' column is a nuts-and-bolts presentation of how a lawsuit will progress. This one rings home to me, based on my previous experience.

My lawsuit has been previously discussed (see my editorial "A Frightening Letter," in the February 2013 *ASA NEWSLETTER*). Still, I would like to reiterate one point and present some new thoughts that came to mind as I read Dr. Connors' piece.

First, if you experience a bad outcome, write about it in a factual manner in the medical record. In addition, write yourself a similar document that you keep in a file at home or at the office.

My file has always been titled "Possible Medical Liability." It might sound like my practice has been substandard, but working as a cardiac anesthesiologist for most of my professional life has placed me in situations where many critically ill patients have received my services.

The reason for the note you write to yourself is twofold. First, this file will serve as your extended memory. Lawsuits are often filed up to two years – even longer for a pediatric case – after



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the case occurred. Few of us, who have done perhaps a thousand cases or more since that case, will remember the specifics. This letter to oneself will bring all of those specifics back to the forefront of one's memory, thereby allowing one to begin to consider what might have occurred to lead to the unexpected outcome. Second, this letter will serve as significant baseline information for one's defense attorney. Give the letter to the attorney and it serves an even more appealing purpose – it becomes undiscoverable by the plaintiff's lawyers.

Once you and your attorney begin to work out a defense plan, you will often be asked if you have suggestions about who should be your expert witness. This is an important consideration. You likely don't want one of your partners in this position, as the jury might feel there is a conflict of interest in having them defend your actions. In some regions of the country, the jurors may also look upon out-of-

state experts with disdain, as they wonder why this doctor from a thousand miles away should have any influence on the standard of medical practice in your city and state. In these situations, an expert from another city in your state might be the best approach. This is a good reason to stay involved with your state specialty society; contacts made there may serve you well in this instance. In my case, the plaintiff's expert was from out of state. My expert also came from out of state, from a prestigious institution where anesthesia for pediatric heart surgery was practiced in a similar manner as my own. This made me very comfortable with my expert witness.

Dr. Connors mentions that you will have to give a deposition. Typically, before you are deposed, you will have the ability to either be present for, or read the document produced as a result of, the deposition of the plaintiff's expert. The plaintiff's lawyer will use their expert to help build a case against you. Be familiar with this deposition and discuss it at length with your attorney and your expert, if your defense attorney considers that appropriate. Remember that the deposition is somewhat theatrical. You will be asked many insinuating, insulting questions. From my point of view, the goal of the plaintiff's lawyer is to see you lose your cool, to squirm, to sweat. It is important that you keep this in mind, as you very likely will be videotaped. The funny thing about the videotape is that you may be the only person in the room in a suit and tie. All the attorneys will be in comfortable clothes – they never appear before the camera, so no one



will know that they weren't dressed the way they will be in court. In my point of view, this is just a game they play to make you ill at ease. They are wearing blue jeans and sneakers, with their shirts untucked. They are asking you questions that demonstrate the power they have over you in this situation. Go with the flow. As Dr. Connors suggests, the practice and work you put in with your attorney beforehand will pay off. Finally, don't immediately answer questions. Give your attorney time to object or make a point before you answer. These objections may become important as the legal process unfolds.

Even if you have served as an expert witness and been through many depositions, managing one's emotions during that first lawsuit may prove difficult. Over the course of my lawsuit, my outlook ranged from incredulity to exasperation, from anxiety to depression. A strong support system – your family, colleagues, and defense team – will play key roles in keeping you on an even keel. Practice at or above the level you experienced in your residency training and you will never have to doubt yourself or the actions you made.



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