Five Ways to Avoid Being Sued for Malpractice

By Gerry Oginski, Esq. and Lawrence B. Keller, CFP

One of the greatest challenges physicians face today is the threat of losing their assets to a practice lawsuit. Unfortunately, if you perform any type of surgery the probability that you will be sued at some point in your career is almost 100 percent—even if the suit might be considered frivolous from a technical standpoint. As a matter of fact, Larry Smarr, president, Physicians Insurance Association of America, stated in the Jan. 16, 2003 edition of Online NewsHour with Jim Lehrer, “Over 70 percent of all claims made against physicians are without merit and do not have indemnity payment. When a doctor goes to trial, the doctor wins 80 percent of the time. But our studies show that 50 percent of all the money available to pay claims goes to fund the lawyers’ lottery system.” Hopefully, this article will help you avoid becoming the victim of a malpractice lawsuit.

Keep Good Records and Make them Legible

If you can’t write legibly, consider dictating or typing your notes. Having a clean legible record makes it that much easier for an attorney and an expert to confirm what you did. If no one can read your handwriting, you might get dragged into a case just so you can read your notes into a court record.

Don’t let your junior resident dictate your note and don’t rely on the resident to include key information that you know has to go into your operative or office note. Take the extra minute to record it yourself.

If you examined the patient with the resident present, write your own note. Don’t simply countersign a resident’s note. Your countersignature doesn’t tell anyone that you were there, or that you examined the patient. It only indicates that you signed your name at some later time. Countersigning a note is a lazy man’s way of saying “Yeah, yeah…whatever you wrote I accept…just show me where to sign.”

Keep the Lines of Communication Open with Your Patient and their Family

If the family pages you constantly during the day and you ignore them, they’ll feel like you’re hiding something from them. Tell the patient and the family what’s going on. Bring them into the fold and enlighten them. They’re worried and are starved for information.

Don’t be Afraid to Say “I’m Sorry.”

Many defense firms would find this statement to be terrifying and tantamount to sacrificing yourself at the altar. On the other hand, there are many who believe that if you are a human being, and accept that humans do make mistakes, that taking responsibility for your mistakes is a better approach. Apologize and try to find a way to make it better.

The Veterans Administration has an ‘open door’ policy where doctors and nurses are urged to fess up and tell patients about mistakes they’ve made that caused injury. The VA has found that this reduces the overall number of claims made against the doctors and the hospitals.

Don’t Point a Finger at Another Doctor When You Don’t Know All the Facts

What do we mean? Mrs. Discontent comes to you after having a Mohs procedure. You examine her and casually remark “What a horrible job! Who did this to you, a butcher?” This type of unwarranted comment tells the patient that the treatment rendered to her in the first place was substandard and almost encourages them to seek out a lawyer to justify your comment.

The patient asks you point blank “Do you think what my other doctor did was appropriate?” In all probability it wasn’t, but is it really necessary to tell the patient this information? Are you going to be the incendiary device that sets the patient off in search of a malpractice lawyer? The better approach is to say “I can’t tell one way or the other, but what I can tell you is that we need to address your current problem now. Here’s what I propose…”

Don’t Hide

Not behind your notes, not behind your operative reports, another doctor’s actions, or your own. Stand up for what you believe in, and what was done appropriately. Explain to your patient that it was a medical judgment call to try and freeze the suspicious area. If that didn’t work then you’d surgically excise it. Explain that there was no need to get a plastic surgeon to remove half the skin on her arm when a simple excisional biopsy would suffice.

Explain away the patient’s fears, regardless of whether they were justified or not.

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Remember, there will always be someone who is unhappy no matter what you do for them. Avoid those patients whenever possible. For all the others, don’t be so arrogant that you don’t have time to explain. If you don’t have time to explain, tell the patient or their family that you’ll call them late that night – and do it. The family will love you for it.

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