OBG MANAGEMENT

COVER ARTICLE

Chicken soup for the defendant physician

BY RICHARD M. SODERSTROM, MD

Facing litigation over an adverse outcome? You're not alone. An expert offers advice on keeping records, choosing an attorney, preparing a defense—and just plain surviving.

The emotional impact of medical litigation upon the defendant physician can be profound—particularly since the average claim takes approximately 4.2 years to resolve, from its occurrence to the closing of the case.[1] Unfortunately, litigation affects almost all Ob/Gyns sooner or later. According to a 1999 survey of American College of Obstetricians and Gynecologists (ACOG) members, an Ob/Gyn can expect

an average of 2.5 liability claims over the course of his or her career.[1] In that survey, 75.6% of respondents indicated that 1 or more claims had been filed against them, and approximately 28% of Fellows reported at least 1 claim for care rendered during residency training.[1]

For more than 25 years now, I have been involved in some aspect of medical litigation—as an expert witness, a case reviewer for medical liability insurance carriers, and even a defendant. Much of my experience comes from reading the depositions of defendants. Over the years, a number of important elements have become apparent—most of them arising when the defendant is called on to explain his or her medical decisions in relation to an untoward outcome. The pivotal issue often is proper and thorough preparation by the defendant. In some cases, this preparation should begin even before a lawsuit is filed.

The following recommendations are offered as a template for readers facing the threat of litigation. If a lawsuit becomes a reality, be sure to discuss this advice with your attorney, since each case is unique. Note that most insurance companies provide the physician with their own in-house documents designed to aid in the defense process.

The standard of care

A maloccurrence is not necessarily malpractice. The physician simply needs to demonstrate that the diagnostic or therapeutic rationales he or she used were reasonable and in line with the usual and customary standards of medical practice at the time of the incident.

The burden of proof rests with the plaintiff and his or her attorney, who must show that a well-trained and competent physician, operating under the same or similar circumstances, would not have committed the same error. The plaintiff also must demonstrate that the defendant's alleged error was the proximate cause of an injury.

Although the definition of "standard of care" varies from state to state, 1 description is worth pondering: what a reasonable, prudent physician would foresee—and what he or she would do in light of this foresight—under like circumstances. If, after careful and complete preparation, the defendant feels he or she has met this definition, the emotional strain will be tempered.

Even so, the process of medical litigation is almost always draining. As ACOG observes in a committee opinion on the subject: "Obstetrician-gynecologists should recognize that being a defendant in a medical liability lawsuit can be one of life's most stressful experiences. Although negative emotions in response to a lawsuit are normal, physicians may need help from professionals or peers to cope with this stress."[2]

CONTINUED

▪ *Dr. Soderstrom is clinical professor of OBG at the University of Washington School of Medicine in Seattle.*

KEY POINTS

- The average claim takes approximately 4.2 years to resolve.
- The burden of proof rests with the plaintiff and his or her attorney, who must demonstrate that the defendant physician's alleged error was the proximate cause of an injury.
- Many insurance carriers require the physician to report any unexpected event that suggests a suit might be filed.
- With surgical cases, it is important that the physician take time to educate the attorney about the technical aspects and limitations of the procedure in question.
- If there appears to be a special allegiance between the insurance carrier and the law firm chosen to handle the defense, the physician should consider hiring a personal attorney, especially when codefendants are involved with whom there may be some dispute.

Defining and responding to an incident

An "incident" is an event that suggests the patient or her friends and relatives may file a claim. This might be as simple as an encounter in which the patient continues to ask, "Why did this happen?" even after you've given what seems to be a reasonable explanation. Or it could be a request for a copy of the records from a legal firm prior to any notice of litigation.

Expecting a claim before it is filed may be crucial to one's defense. Many insurance carriers require the physician to report any unexpected event that suggests a suit might be filed. Doing so does not increase your premium, but failure to do so may leave you without coverage if a suit is filed later. Be sure that you review and understand requirements and obligations of this kind when creating a liability policy.

Clearly, some situations increase a patient's risk of a complication. However, even after the patient has been informed of this increased risk, she may later ask whether the event was preventable. A noncompliant patient or one who refuses a test or even hospitalization poses an additional risk. In such cases, it's wise to have the patient sign a form indicating her refusal to comply with your recommendation. That signed form may thwart a later claim.

When a patient does inquire about an event, explain what happened in a concerned manner. Tell the truth and express empathy. Never avoid the patient, especially after care is transferred to another physician who may be managing the complication.

If the event occurred in a hospital, alert the hospital's risk manager when you alert your insurance carrier. This will afford each the opportunity to collect and record facts early and to evaluate the case for merit. Make sure the facts surrounding the event are well documented. In fact, make it a habit to record all your notes as soon after an event as possible, since delayed dictation of operative notes and discharge summaries may become suspect. Never alter any record; there are many sophisticated methods available to uncover such deception.

Managing a claim

If a formal complaint or declaration is filed and a summons is served by the court, notify your insurance carrier at once—even if you have already alerted it to the possibility of a claim. Usually, an answer is required within 30 days. That answer should be prepared by the attorney you and your carrier agree will defend you.

Keep a copy of the summons for your records and forward the original to the carrier or the assigned attorney. Unless directed otherwise, any narrative summary that you prepare about your view of the facts should be delivered to the attorney rather than the insurance carrier, since most states protect attorney-client privilege. (In contrast, correspondence to the carrier may be discoverable.) Such summaries should not be filed with the patient's records.

When patient-care records are requested, send copies and keep the originals, but make sure the request is properly authorized by the patient. Do not attempt to contact the patient to negotiate. Any communication you have with the patient after you've received the summons should be promptly recorded, preferably by dictation (since a physician's scrawl is notoriously illegible).

Be forthright and truthful with your carrier and your attorney. An attorney's worst nightmare is the later discovery of unanticipated facts. Keep calm. Don't overreact or become hostile; a level-headed approach will help you prepare for a successful defense. If you feel you fell below the standard of care in regard to the event in question, now is the time to say so. Before you make that decision, however, review the literature that was current at the time the complication

CONTINUED

occurred. You will need to be up-to-date on such information if and when you are deposed. More importantly, you may find that the complication was not preventable in similar situations.

Working with your attorney. Choosing an attorney is like picking an investment counselor: You want to check the reputation of the law firm as well as the individual lawyer. Large firms use a team approach, but you will want to know who is to be the lead attorney.

In the beginning, try to evaluate your future relationship with this lawyer. Determine whether the attorney is experienced in this type of litigation. Is she or he willing to learn the medical facts? How accessible is the attorney when you call? You don't have to be good friends with your lawyer, but you should feel comfortable communicating with one another.

Should you perceive unresolvable problems with the attorney-client relationship, bring them to the carrier's attention immediately. It is in the interest of both you and the carrier that this relationship be solid. If this cannot be, the carrier should, with your approval, assign another attorney.

If you detect a special allegiance between your insurance carrier and the law firm, consider hiring a personal attorney, especially when co-defendants are involved with whom there may be some dispute. Ask your personal attorney to evaluate state law as to whether a "common defense" may be fraught with peril for you and your personal assets.

The defendant's responsibilities. Cooperate and participate. Make the time to work on your defense. This includes time for research so that you can provide literature relevant to the case. In the process, you may find the right defense expert for your circumstances.

If you are able to identify the plaintiff's experts before testimony is given, find out as much as possible about their medical reputations, especially any peer-reviewed articles they have written. Consider reviewing their previous testimony in similar cases; contradictions may surface that will help impeach their opinions.

Review the case records with your attorney and explain your treatment rationale. If alternatives were available, you will need to articulate why you chose the course you did.

The defense attorney's responsibilities. You should be informed at all times about the litigation process, including your role, and its progress. Legal strategies should be explained and discussed in detail, and your appearance and credibility—as well as those of the experts for each side—should be evaluated. Previous similar cases in your community should be investigated. Your attorney should have a thorough understanding of your case, and you should be comfortable with his or her approach. With surgical cases, it is important that you take the time to educate your attorney about the technical aspects and limitations of the procedure in question.

Settlement

The possibility of settling the case should be considered and reconsidered as discovery progresses. Remember: Far more cases are settled than are tried in the courts. Issues that must be addressed include the cost of a trial (including your lost office time) and the risk of an unfavorable outcome if indicators suggest not only a plaintiff verdict but a substantial award. On the other hand, if your community tends to favor the physician in professional liability cases, the plaintiff's attorney may be eager to make a reasonable settlement.

Like court decisions, settlements must be reported to the National Practitioner Data Bank. Make sure all the information this body will retain is accurate, and follow the proper procedures if you feel the report is incorrect or does not meet the reporting requirements. In some cases, you may be allowed to amend the report if the basic facts remain the same.

Take advantage of your attorney's expertise when deciding whether or not to accept a settlement, especially in a questionable case.

CONTINUED

Be aware, however, that settling a clearly defensible case sets a bad precedent for the future. Be realistic and objective.

Discovery

Interrogatories. These are written answers that must be provided to a series of questions from the opposing attorney. Because these answers must be given under oath, they are admissible as evidence at a trial. Your lawyer should manage this discovery process with your close attention to the answers, which you will have to live with throughout the litigation. At times, there may be a request for admission of facts (a series of factual statements). Such an admission speeds the legal process if some or all of these facts are agreed upon, since there is no need to present evidence to prove them.

Deposition. This aspect of the discovery process may become more important than your appearance at trial. Although the formalities of the courtroom are absent, the statements made at the time of deposition are admissible. Because many depositions are recorded on videotape, it is important that you dress appropriately, with guidance from your attorney. The deposition is not a dry run! Your preparation for the case should be complete by this stage of the process.

This is your chance to show what you know about the events in question and to explain why your medical decisions were formed. Because the medical records will be on hand at the deposition, you must know their entire contents. Have the pertinent areas tabbed for quick review. When there is a confusing chain of events, prepare a clear storyboard that includes dates and times taken from the records. The use of demonstrative "visuals" may prove helpful.

Don't rely on your experts to carry the ball regarding the standard of care. Start with ACOG's educational bulletins as a platform for your medical conduct. The College's committee opinions may provide added support. A Medline search of the subject is easy to obtain from most hospital libraries—but make it a point to read each pertinent article in its entirety, not just the abstract. Remember, a good plaintiff's attorney spends a substantial amount of time on research before the claim is ever filed. Articles that do not support your actions will probably be in the plaintiff's files, and you must be prepared to respond to them.

At the time of deposition, use the same demeanor you would use in the courtroom. If you become hostile during the deposition, the opposing attorney may expose the hostility before the jury by reading your deposition statements out loud. Your attorney should discuss this and other precautions with you prior to any testimony; listen and heed the advice.

Make sure you understand a question before you answer it. Pause before you answer, and answer only that question; do not volunteer information or guess. Instead, say "I don't know" or "I don't recall." Don't use hearsay information; be factual and straightforward. Check facts against the record and testify to the best of your memory. Any explanations should be offered in lay terms. Do not look for traps; your attorney should have the skill to ward these off by objecting. If an objection is made, stop talking. Without an objection, you are bound to answer.

Respond to questions in a clear, concise manner. If you feel you have been prevented from giving a full explanation, you are allowed to speak privately with your attorney. If he or she also feels a more complete response is needed, this can be handled after your direct testimony is completed.

Don't withhold facts to "surprise" the other side at trial unless you are so directed by your attorney. Remember, if you can convince the plaintiff's attorney, by your testimony, that the chances of prevailing against you are slim, you may be able to avoid trial altogether.

To paraphrase Mark Twain: If you tell the truth, there is little to remember should you have to appear in court later. Exercise your

CONTINUED

right to read the transcript of your deposition. Read it slowly, make any corrections, and return the corrected copy promptly. Should you have to go to trial, read it again the day before your scheduled testimony.

At trial

If a trial is inevitable, there is little more for you to do if you have heeded the earlier advice. Dress conservatively and be prompt each day. Also be present for jury selection; you may know something your attorney does not about a prospective juror that could help or hinder your case.

The plaintiff will present his or her case first. Some statements may appear to you to be distortions of the truth—perhaps even complete falsehoods. Do not make any gestures that demonstrate your disapproval, such as facial expressions or head shaking. Take notes as freely as you wish for later reference.

The guidelines for deposition testimony also apply to your turn on the witness stand. You will be nervous in the beginning. However, if you know the facts and are confident about your defense, those feelings should pass. This is your opportunity to speak to the jury, preferably in a manner that is clear and concise. Tell your story to the jury, not the plaintiff's attorney. When it is appropriate, look at the jury as you answer questions. Smile when the occasion arises but, again, refrain from negative facial expressions and body language. An occasional lighthearted statement may be used with caution, but never tell a joke.

I once heard a plaintiff's attorney say, "Any defendant who is an articulate, bright, well-trained doctor with a good medical background and who tells the truth scares the hell out of me." Your attorney will be the best judge of your conduct, testimony, and the progress of the trial. Listen carefully to his or her advice. Even during a trial, a settlement may be possible. Discuss the options with your attorney to determine whether this would be the best course after all.

If you "win" at trial, be grateful but not smug; there are medical lessons to be learned from the experience. In most cases, a review of the principles of risk management—with a special focus on future practice—will reduce the chance of an encore performance. ■

REFERENCES

1. *Professional Liability and Its Effects. Report of a 1999 Survey of ACOG's Membership*. Princeton, NJ: Princeton Survey Research Associates.
2. American College of Obstetricians and Gynecologists, Committee on Professional Liability. *Committee Opinion #236: coping with the stress of malpractice litigation*. Washington, DC: ACOG; June 2000.

Dr. Soderstrom reports no financial relationship with any companies whose products are mentioned in this article.

Suggested reading

American Medical Association. *Medicolegal Forms with Legal Analysis*. Chicago, Ill: AMA; 1991.

Charles SC. How to handle the stress of litigation. *Clin Plast Surg*. 1999;26:69-77.

Clements RV. *Safe Practice in Obstetrics and Gynaecology—A Medico-Legal Handbook*. London, England: Churchill Livingston; 1994.

Danner D. *Medical Malpractice: A Primer for Physicians*. Rochester, NY: Lawyers Cooperative Publishing; 1984.

Dodge AM, Fitzer SF. *When Good Doctors Get Sued*. Wilsonville, Ore: BookPartners; 2001.

Frisch PR, Charles SC, Gibbons RP, Hedeker D. Role of previous claims and specialty on the effectiveness of risk management education for office-based physicians. *West J Med*. 1995;163:346-350.

Roberts DK, Shane JA, Roberts M. *Confronting the Malpractice Crisis*. Kansas City, Mo: Eagle Press; 1985.

Rozovsky FA. *Consent to Treatment, A Practical Guide*. 2nd ed. Boston, Mass: Little, Brown; 1990.

Uribe CG. *The Health Care Provider's Guide to Facing the Malpractice Deposition*. New York, NY: CRC Press; 2000.

Zobel HB, Rous SN. *Doctors and the Law*. New York, NY: Norton; 1993.