So You’ve Been Sued! Now What??

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Disclosure

• I have no conflicts of interest to disclose
• I am pure
What We Will Discuss Today

• The Scope of the Problem
• What Actually Happens in a Lawsuit?
• O.K. You’ve Been Sued. Now What?
• The Most Important Consideration
  • You and Your Family
The Scope of the Problem

- Emergency Physicians are medium risk
- Sued about the same as the average physician - 7.5% each year
- About 20% of suits result in monetary payout
- Less than both the average and median awards vs other specialties


The Scope of the Problem

2010 ACEP
Non-scientific survey of all members
10% response

Andrew L: Malpractice weighs heavily on EP’s.
Emergency Medicine News.
September 2012, Volume 34, Issue 9, p3-4.
doi: 10.1097/01.EEM.0000419526.26894.2a
The Scope of the Problem

• > 50% had been named in a suit
  • > 50% of these more than once
• Only 29% of those sued were aware they had been reported to the National Practitioner Data Bank
• Nearly 90% of respondents said they practice defensive medicine

The Scope of the Problem

• < Half had a copy of their insurance policy
  • < 15% had actually read it
• About half did not know if their insurance company could settle without their permission.
• The remainder were evenly split between policies that did or did not permit settlement without their permission
• 10% did not know if they had tail coverage, i.e. coverage if they left their group

The Scope of the Problem

• 87% of those sued had not sought professional help in dealing with the stress

• 73% were not aware of ACEP’s Standard of Care Review Process
The Scope of the Problem

- 2/3 not aware that ACEP has investigated charges against its members regarding compliance with ACEP guidelines for expert witness testimony

- About 2/3 were not aware that all members - including themselves - had signed ACEP’s Expert Witness Reaffirmation Statement on renewing their membership

- Hardly anyone had used the Statement to challenge testimony against them
Some Basic Facts

- Medical malpractice is civil litigation
- It is not criminal litigation - you are not being charged with a crime
- You won’t go to jail!
  - (unless…!)
Some Basic Facts

• Your are insured

• You will not lose money!
  • The judgment rarely exceeds the policy limit
    • (unless…!)

Some Basic Facts

• Claims Made vs. Occurrence Insurance Policy

• Know what you have!

• If Claims Made -
  • make sure your “tail” is covered…
Some Basic Facts

- Three requirements must be proved
  - Violation of the Standard of Care
  - Harm to the patient
  - Proximate Causation
    - Your action - or inaction - must be the direct cause of the harm

Some Basic Facts

The Standard of Care

The basic concept, depending on the state statute

The care that should be rendered by a reasonably prudent physician under the same or similar circumstances
Some Basic Facts

National Practitioner Data Bank

- All judgments - and settlements - are reported
- You do have to right to submit your own statement disagreeing with the statement or supplementing the facts
- Has been a double-edged sword for plaintiffs’ attorneys
  - Less willingness to submit to extortion

Some Basic Facts

State Licensing Board

- Depends on the state
- Report may just be filed - or published
- Your license may be called into question (rare)
- Your malpractice insurance usually covers defense
Some Basic Facts

EMTALA

- Your policy will usually cover defense
- If not, your attorney may charge you
- Your carrier will not pay fines if assessed

Some Basic Facts

In California

Medical Injury Compensation Recovery Act (MICRA)

- Limits on plaintiffs’ attorneys’ take
- Continually under attack
- This year’s referendum
Ballot Initiative to Overturn MICRA
November 2014

- Increased cap on pain & suffering from $250 thousand to $1.1 million - adjusted periodically for inflation
- Random drug and alcohol testing of physicians, as well as mandatory drug and alcohol testing of physicians after unexpected patient death or injury
- Requires checking the CURES database prior to prescribing certain controlled substances
- Requires doctors to report medical negligence

Some Basic Facts

- Typical litigation from start to finish lasts 3-5 years
- Excruciating process
- So - Don’t get sued!
- Do the Right Things
- Topics for another course
  - Good care
  - Good charting
  - Good communication
OK
You’ve Been Sued

Now What?

O.K. You’ve Been Sued. Now What?

The Warning

• “You know that patient you saw….”

• Even before that - gut feeling, especially in middle of the night….

• Risk Management call - complaint by patient
O.K. You’ve Been Sued. Now What?

First thing to do after the warning:
- Review the chart -
  - Do NOT alter it!
- Notify your boss if you have one?
- Notify your group?
- Notify hospital Risk Management?
- Notify your insurance carrier?

• Letter from attorney - notice of intent to sue
• First, stay calm. Maintain perspective.
• Now is definitely the time to notify
  • Your boss
  • Hospital Risk Management
  • Your insurance carrier
O.K. You’ve Been Sued. Now What?

- Better not to discuss with colleagues if possible
- You will be asked whether you have discussed the case with others - and that conversation is discoverable
- Your colleagues may be subpoenaed to testify under oath
- A charge of collusion can be made if the colleague was involved in the case

O.K. You’ve Been Sued. Now What?

- Do not contact the patient!
- Do not accept calls from the plaintiff’s attorney
  - Refer their attorney to your attorney
  - Review the medical record but do NOT alter it
  - Rarely - with the approval of your attorney - you may add an addendum, clearly dated and marked as such
O.K. You’ve Been Sued. Now What?

• Do discuss the case with your attorney

• Even though they are paid by the carrier, the attorneys are YOUR lawyer, not the carrier’s

• Do not hold back anything. They need to know all the negative aspects in order to defend against them

• Communications between you and the attorney are privileged - they are not discoverable.

O.K. You’ve Been Sued. Now What?

• Formal peer review proceedings are also protected

• Though rarely that has been overruled by a judge’s order
O.K. You’ve Been Sued. Now What?

• You will receive the Complaint

• It will basically say your are the worst scum ever born - and that your parents should be jailed for not using birth control!

• Just laugh. This is boilerplate verbiage straight off a word processor. Sometimes you can tell because portions may not even be relevant to your case - or even your gender.

It’s just business
O.K. You’ve Been Sued. Now What?

- What’s next?
- Case sent to expert reviewers, often more than one
  - Wide range - from lenient to hard-ass
  - With community hospital experience or academic “experts”

O.K. You’ve Been Sued. Now What?

- If the review is positive for you, consider -
  - Motion for Summary Judgment
  - i.e. Dismissal
O.K. You’ve Been Sued. Now What?

- If reviews are positive, the fight’s on!
- If negative, may be sent to additional reviewers
- If still negative - what to do?
  - Fight?
  - Settle?

O.K. You’ve Been Sued. Now What?

If you think your case is defendable - but the experts don’t

- Try to be objective. What would you think if this were not your own case?
- Weigh the chance of winning against 3-5 years of angst.
- May be better to just settle and move on
O.K. You’ve Been Sued. Now What?

What if your carrier wants to settle and you don’t?

• Will they be able to find an expert to defend you?
• Can they settle without your permission?
  • Not in California
  • How about your state? Or your policy?
• They may know what’s better for you than you do!
O.K. You’ve Been Sued. Now What?

What if you and the experts think the case is defendable - but your carrier thinks it’s just not worth the effort to litigate and wants to settle for a small amount?

- They may be correct
- 3-5 years of angst
- But you will be reported to the National Practitioner Data Bank
- May still be worth it to settle - or not

O.K. You’ve Been Sued. Now What?

For whom does your attorney work?

- Insurance company
  - Paid by them
    - Fee-for-service (i.e. hourly) or capitated?
  - Wants to please them to get future cases
O.K. You’ve Been Sued. Now What?

For whom does your attorney work?

- For you
  - You really are the client
    - Professionally, ethically, and personally
  - But you do have the right to ask your insurer for another attorney
    - Or hire your own at your own expense

O.K. You’ve Been Sued. Now What?

What if the expert reviewers and your carrier want to fight - but you don’t?

- What’s most important is your emotional well-being - and that of your family
- Do what you think is best
- Life will go on either way
O.K. You’ve Been Sued. Now What?

But if you all agree to fight:

• GO FOR IT !!!
• SCREW THE BASTARDS!
• THE FIGHT IS ON!!

What’s Next?
Discovery
What's Next? Discovery

The Depositions

• Experts on both sides
• Patient (if alive…) & family
• YOU!
What’s Next?  
Discovery
The Depositions

• Other Caregivers

• Other doctors

• Paramedics

• Nurses

• Respiratory therapists

• Radiology techs

What’s Next?  
Discovery

The Depositions

• Discovery may take years!

• Read everything

• Discuss each one with your attorney
The Depositions

Who’s on your side?

• Or not?
  • The Hospital?
  • Your colleagues who also treated the patient?
    • From other specialties?
    • Your own partners??
The Depositions

Who’s on your side?

• You and the hospital will have separate counsel
• You and doctors outside your group will have separate counsel
• And you and your partners MAY NEED separate counsel!

The Depositions

Who’s on your side?

• Hopefully the attorneys will all work together
• Hopefully there is no conflict of interest
  • Especially within your group!
• Hopefully all defendants will try not to blame one another
  • But self-defense is paramount
The Depositions

Who’s NOT on your side?

- The opposing counsel
- Expert witnesses for the plaintiff

The Depositions

Expert Witness in Emergency Medicine

ACEP Guideline

- Must be certified by a recognized certifying body in emergency medicine
- ABEM or ABOEM
- Must be in the active clinical practice of emergency medicine for three years immediately preceding the date of the event giving rise to the case
The Depositions

California Law (Thanks to CAL/ACEP!)

Expert Witness in Emergency Medicine regarding care in the E.D. of an acute care hospital

Must have had “substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department”

California Health & Safety Code - Section 1799.110

Unethical Testimony

ACEP Resources

Procedure for Review of Testimony Regarding Standard of Care in Emergency Medicine

http://www.acep.org/content.aspx?id=30090

Procedures for Addressing Charges of Ethical Violations and Other Misconduct

http://www.acep.org/content.aspx?id=33698
Discovery

Your Own Deposition

• Be prepared!
• Read everything, especially every prior deposition
• And read them again
• Know the medical record - especially your own!
• But no need to memorize - will be available
• Practice with your attorney
**Your Own Deposition**

- Get plenty of rest before your depo
- Eat a good breakfast or lunch - but not a heavy one
- Take as much time as you need to answer questions
  - The transcript will not reflect that
- Feel free to ask for breaks - you don’t have to state a reason
  - Bladder, coffee, respite
  - Or to speak in private with your attorney

**Your Own Deposition**

- Every word is recorded by a court reporter.
- It is a permanent record
- Your own words can - and will - be read back to you in court in front of a jury
- Remember the admonition from the crime shows”
  - “Everything you say can - and will - be used against you in a court of law.”
Your Own Deposition

- Speak clearly and slowly
- Make sure the court reporter can comfortably record your exact words
- Ask the reporter periodically if you're speaking O.K.

Your Own Deposition

- Play it straight
- Be truthful
- But do NOT volunteer anything
- Answer only the specific questions asked
- Do NOT “help” the opposing attorney
Your Own Deposition

What should be discovered?

• You have a strong case
• You cannot be shaken
• You will make an excellent witness in court
• They’re going to lose!

Your Own Deposition

• Your manner should reflect calm and confidence
  • Whatever you’re feeling inside!
• Be respectful but not arrogant
• Do not be apologetic
• Do not act like a victim - either cowed or angry
Your Own Deposition

- Do not “play doctor”
- Do not be condescending
  - The lawyer may know much more medicine than s/he is letting on - or not
- Just be yourself
  - Assuming you’re not an ass!

Your Own Deposition

- Plaintiff’s attorney may be respectful and friendly

Columbo??
Your Own Deposition

- May be aggressive and rude

- Stay calm

- S/he’s only trying to see if you can be shaken

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Your Own Deposition

- Above all, remember you’re discussing medicine

- You know the subject

  - And make sure you do!

- This is your turf. You are the doctor.

- Leave the legal stuff to your attorney.
**Your Own Deposition**

- The patient and family may be there - eyeing you constantly!
  - Don’t let that shake you
    - Anger
    - Guilt
  - Be civil, correct - nothing more

**Your Own Deposition**

- Remember
  - You know medicine
  - Your attorney knows law - and strategy
  - If s/he interrupts you - or kicks you under the table -
    - STOP TALKING!
Your Own Deposition

Word Games

- "Authoritative" publications
- Textbook vs journal article
- Changing your prior testimony
  - Barely noticeable change of your wording
  - Barely noticeable change of context

Remember Robert Frost

- Choice was based on evidence at the time
- Future was unknowable - hindsight is not relevant
Your Own Deposition

The future was unknowable

- Deductive vs. Inductive Trap
- Remember the concept
  - All alcoholics drank milk!
Your Own Deposition

Differential diagnosis - considered initially

- Cannot test for every possibility

Can never “rule out”

- Never use those words - or allow it in testimony!

Your Own Deposition

- Beware of advances in knowledge & practice AFTER you treated the patient

- The standard at the time of the deposition may not have been the standard back then
After the Deposition

- Read your testimony
- Within the time limit for corrections
- Correct typos - especially those with meaning
- Be careful about “improving” your wording

After the Deposition

- Settle ?
- Arbitration ?
- Trial ?
The Trial

• Preparation
  • Same as for deposition
  • Read and know everything
  • Be well rested
  • Coat and tie
The Trial

• Should you attend the entire trial?
• Take your attorney’s advice
• But - your own well-being comes first

The Trial

• The plaintiffs will be present - all of them
  • “Victim”
    • Wheelchair
    • Oxygen
    • “Helped” to walk
*The Trial*

- Plaintiff’s attorney(s) may be different from deposition
  - For real
  - In behavior - in either direction
- Don’t play their game if there is one
  - Remember - they’re acting!

*The Trial*

Your testimony

- Same rules as for deposition
- Stay calm
- But stay alert
The Trial

Interaction with jury

- Everyone will stand when they enter the courtroom
- Be “real” in your conversation
- At times address them directly, especially when explaining something medical - use lay terms
- Establish eye contact
- Be professional - but not overly friendly

The Trial

The Verdict

- May be delayed
- Stay cool
- Whatever the result - your life will go on
The Most Important Consideration
You
and Your Family
Coping with Litigation

“A charge of negligence strikes at the core of our self image, our self esteem, and at our beliefs about the value of our life's work.”

Louise Andrew
Coping with Litigation

- Forced to enter an alien world
  - Strange rules
  - Years of emotional pain & anger
  - Hostile people attacking us personally
  - Entire process seemingly aimed at destroying us

You're Number One Goal?

- Winning the case?
  
  NO!

- MAINTAINING PERSPECTIVE
Coping with Litigation

• Litigation is a game played by jousting knights

• Litigation is only an attempt to win money

• From your insurance company - not you

• You will not lose money - that’s why you pay for insurance

Coping with Litigation

• The case involves only this one minute fraction of your life’s work

• Even if you might have done something different in retrospect, remember the many thousands of people you have helped - and will go on helping in the future.
Coping with Litigation

- Don’t be macho
- You are not alone
  - Remember Bob Dylan!
  - Get help - both informal and formal

Lots of resources
- Your friends and family
- Your partners
- Your hospital
- Your local or state medical association
- Professional counseling
Resources
American College of Emergency Physicians

ACEP Websites Regarding Unethical Testimony

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Coping with Litigation

American College of Emergency Physicians

Medical-Legal Committee

Wellness Committee

Informal peer group support through the Practice Management Department

ACEP WEBSITE - LITIGATION SUPPORT


Fantastic total resource for both technical advice and emotional support

Links to: websites, webinars, books, peer-to-peer counseling, audio series, available speakers, abstracts & manuscripts
Coping with Litigation

Another excellent overall resource
Louise Andrew, M.D.’s website

MDMentor.com

Coping with Litigation

NEVER FORGET

• However painful, this will all be over

• You will go on with your life

• Years from now, many people will be alive because of what you did - and will continue to do - for them
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Now What ??

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