Physician's MONEY DIGEST

Protect Your Money and Your Mind

by Laura Joszt / September 15, 2013

Medical malpractice has always been on the minds of physicians, especially considering such litigation is almost becoming commonplace.

In 2011 an article in the *New England Journal of Medicine* revealed that physicians in high-risk specialties are projected to face at least one malpractice claim during their careers. A *Health Affairs* from January 2013 reported that, on average, malpractice claims go unresolved for more than four years. During that time physicians are hit with emotional and financial stresses that they might not be prepared to handle on their own.

In the last few years, medical malpractice has become an even more important issue, not, necessarily, because there are more cases, but because physicians have seen an increase in the severity of these cases and how much money the verdicts are worth, says Jim Saxton, Esq., chair of the Health Care Litigation Group at Stevens & Lee.

“Every month they see a report in the newspaper about a multi-million dollar lawsuit or a multi-million dollar verdict and it really weighs heavy on their minds,” he says.

And while many plaintiffs or their lawyers might view this as “business as usual,” physicians, who spent years working hard to get through medical school and subsequent training, don’t take the blow of a malpractice lawsuit lightly, Saxton says. Often, the emotional stress physicians go through can be underestimated.

Paula A. Jenkins, senior vice president of The Doctors Company, the nation’s largest insurer of physician and surgeon medical liability, adds that physicians are usually unprepared for just how affected they will be.

“I think medical schools are getting better at educating medical students about the potential for malpractice litigation,” says Jenkins. “But I don’t think anyone can ever be fully prepared for being sued. I don’t think any physician ever wants to do harm or cause injury to a patient.”

Easing the Stress

The emotional strain is far and away the one aspect of medical malpractice litigation that takes physicians the most by surprise, according to Steven Abernathy, founder, principal and chairman of The Abernathy Group II, a professional investment firm that runs a physician family office geared toward helping high-net-worth physicians. One of the services that the firm provides is putting physicians in touch with attorneys.

During the course of litigation, the plaintiff’s attorney will dreg up anything from the physician’s past that could paint him or her in a bad light.

“Anything you’ve done wrong in your life, it’s going to be under a microscope,” Abernathy says. “These guys are professionals and your credibility is going to be challenged. It’s awful.”

For physicians, this strike on their character and career is particularly difficult as they internalize their job until it becomes a part of them. According to Jenkins, being a physician isn’t just a profession; they’re responsible for peoples’ lives and they take that very seriously.

Saxton also has noticed how strongly physicians are affected by malpractice suits.

“When they have a lawsuit, they’re almost never the same,” he says. “They often worry about the next one.”

Jenkins says often physicians experienced serious stress syndrome in the aftermath of litigation and that many physicians told The Doctors Company that their lives often were turned upside down.

“Some physicians were becoming actually unable to practice medicine,” she says. “They were becoming paranoid of treating patients.”

Based on feedback from physicians, The Doctors Company created Litigation Education Retreats (LERs) that not only prepare doctors for the legal process, but also provide emotional support to ease the stress of litigation.

“They really feel that … an enormous amount of pressure is taken off of them because they don’t feel isolated, they don’t feel alone, they don’t feel like they’re the only person to have this experience,” Jenkins says.

Financial Strain

When it comes to physicians’ money, it’s better to be safe than sorry. They should have the right legal minds involved to protect their money before a case is ever brought against them. Once a physician is sued, it’s too late to move his or her money to a safe, untouchable place, Abernathy says. As soon as someone tries to move the money out of an estate, it’s considered fraudulent conveyance, which could be criminal.

“So you might say ‘aw shucks you caught me; here it is, I’ll put it back in,’” he says. “No ma’am; it’s too late. You can’t do that.”

The Abernathy Group II’s Physician Family Office involves physician clients with the best asset protection attorneys and estate planning attorneys so physicians can protect their money before anything happens.

Abernathy calls the acts of protecting assets legally and structuring estates to avoid excess taxation “incredibly synergistic.” For instance, money in a trust is also protected from litigation.

“Having some foresight and spending some time and not a lot of money allows you to both protect your assets legally and avoid [unnecessary] estate taxes,” he says, but adds, “the converse of that is true, also.”

There are certain places where the money is safe and cannot be touched by a creditor if the physician loses a case. Plaintiffs don’t have access to the defendant’s retirement plan assets, which include:

- Roth IRAs
- Rollover IRAs
- 401(k)s

- 403(b)s
- Defined benefit plans
- Defined contribution plans

"Any type of qualified retirement asset — off the table," Abernathy says.

Plus, anything that is jointly owned is protected. If a couple jointly owns a house and one is sued, the house is protected because it's not just the person's getting sued, it's *theirs*. Trust assets, limited partnerships and LLCs are jointly owned assets.

However, the financial ruin a physician might face isn't from personal financial losses as most cases are settled within the boundaries of the insurance policy.

"The financial drain comes from loss of practice," Abernathy says. "When you're in there with the lawyer you're not seeing patients, you're not performing procedures."

The financial troubles, though, are just the third most onerous aspect of a lawsuit, Abernathy admits, following the time drain and — far and away the most important — the emotional strain.

The Fallacy of Limited Partnerships

Although there are a number of places where a physician's money is safe if there is a lawsuit, the limited partnership is not necessarily one of them, according to Steven Abernathy, founder, principal and chairman of The Abernathy Group II.

The purpose of the LP is to allow people to invest money and not be liable for more than they invest. Each limited partner has direct access to the flow of income and expenses within the LP.

Unfortunately, if the plaintiff wins, he or she has first lien against the LP and a claim upon the physician's share in the LP until the debt is satisfied. The money is safe as long as it stays within the LP, but as soon as a distribution is made and money comes out of the LP, the physician's shares goes to the creditor.

"[The creditor] stands in the way the limited partners getting their distributions," Abernathy explains. "That's the fallacy of the limited partnership."

The best use of a LP structure is to use it as a bargaining chip, he says. For instance, the physician can sit on the money and refuse to make any distributions until the creditor is open to settling for a lesser payment.

Another option is to leave the money in the LP and let the creditor pay taxes on any gains. Even while the lien is in place, there can still be activity within the LP, leading to costly capital gains taxes. And as long as the creditor has the right to the physician's shares, the creditor pays taxes on any money those shares earned. According to Abernathy, the taxes can be painful enough that a creditor could drop the lien.

"Until [the creditor] is satisfied and the lien goes away, that lien has to be paid first," Abernathy says.

The First Steps

After finding out that he or she is being sued for medical malpractice, the physician needs to contact his or her insurance carrier. Jim Saxton, Esq., chair of the Health Care Litigation Group at Stevens & Lee, recommends documenting this contact in some way whether they reach out by letter or phone.

Contacting the insurance carrier and meeting all the obligations for notice is extraordinarily important.

“There’s a deadline attached to a lot of these actions,” he says. “[Physicians] want to make sure their insurance carrier can’t say, ‘We’re not going to provide you with coverage because you didn’t provide us with notice that you had been sued.’”

The physician should also secure the chart, whether it is paper or electronic, connected to the patient in question, and ensure it can’t get lost. The chart is evidence and the other side can claim spoliation of evidence if it goes missing, Saxton says. The physician also needs to make sure that the integrity of the chart is maintained until the trial.

“Don’t you touch it, don’t you amend it, don’t you clarify it,” Saxton warns. “You do nothing to it.”

If it’s a paper chart, the plaintiff’s lawyer will get FBI experts who can date ink and tell if anything has been added. It’s even easier with electronic charts because there’s metadata behind the data — everyone can see anything that’s ever been done to the file.

Lastly, physicians have to be very careful about what they say and about who they speak to. That means no venting, no looking for reassurance and no attempting to get information.

“Everything is discoverable,” Saxton says. “What they need to do is refrain from that and wait for their insurance company to put counsel in touch with them, because, of course, they have attorney-client privilege with their counsel.”

Blow Away the Unknown

One of the ways physicians can prepare themselves for impending litigation is to “blow away the unknown,” according to Saxton, and he lays the burden upon himself and fellow lawyers to do so.

“They’re never going to feel good about this, but they’ll feel better” the more prepared they are and the more they understand the process, he says.

Both Saxton’s law firm and The Doctors Company use techniques to prepare physicians for the actual legal process. Both video tape mock depositions so the real deposition isn’t the first time the physician will be questioned and challenged under the lights. They use the video tape so the physician can see how he or she looks to a group of outsiders.

“How’s your body language?” Saxton asks. “How’s the tone of your voice? Are you looking down at your feet?”

The deposition can be integral to the case as experts will base their opinions, in part, on the deposition, Saxton says. In fact, doctor who perform well and are able to clearly and methodically explain why they did what they did might find the plaintiff and the plaintiff’s lawyer hesitant or unwilling to move forward with the case. Going through prosecution can be very expensive and a deposition might reveal that the case isn’t as strong as initially thought.

“It doesn’t happen a lot, but it’s a legitimate potential,” which makes the investment in preparation worth it, he says.

Saxton also brings clients to the courtroom if the case is going to trial so they know what it looks like and understand all the people working there.

Settling vs. Going to Trial

“We do like to have our day in court,” Jenkins says. “We’re not a company that settles frivolous claims or

claims without merit."

However, deciding whether or not to go to trial or to settle a case is incredibly tough. Settling can have professional consequences since a report will be filed with the National Practitioners Data Bank and the physician will have to explain the case when he or she is credentialed, but an adverse verdict can be just as, if not more, damaging to a physician's career.

"These are very, very tough decisions," Saxton says. "They're not so tough in the abstract or when they're hypothetical. But when they're real life, they're tough."

Sometimes after years of fighting the case, the insurance company decides that it simply wants to settle. This is where good, personal counsel comes into play, according to Saxton.

One thing that can help make the decision is whether or not the physician has the "plus factor," which is something that might drive up the verdict.

"If you have the 'plus factor' that may weigh heavy," Saxton admits.

The Future of Medical Malpractice

Saxton is already beginning to see new medical malpractice lawsuits related to the myriad of changes the industry is going through. While the use of electronic medical records is increasing, they actually can cause liability concerns before reducing them, he says.

"We've been dealing with a whole subset of cases which are EMR related," Saxton says. "There's mistakes that can be made with the EMR."

Some of the issues that Saxton has begun to see in courtrooms are cutting and pasting errors, and the usage of templates and checklists, which might have limited space to enter information or prompts that are collapsed before read.

Furthermore, as the Affordable Care Act is implemented and millions more patients enter the health care system, Saxton and Jenkins are expecting an increase in medical malpractice cases.

Jenkins has been keeping an eye on a shift in recent health professional graduates, which could affect health care and medical malpractice claims. More students coming out of medical school are in specialties and there is also an increase in physician assistants and nurse practitioners. These ancillary medical care providers will be performing day-to-day care for patients.

"We anticipate that a lot more physicians will be in a supervisory role of these ancillary medical care providers verses the treatment of well patients," Jenkins says. "And physicians will really be focusing on seriously ill patients."

However, Saxton is convinced that medical malpractice claims don't have to increase along with the influx of new patients or changes.

"To the extent that our doctors and hospitals can get their arms around these changes and mitigate them through good safety strategies, good documentation strategies, communication strategies, that risk will go down," Saxton says. "This is something that, to an extent, doctors and hospitals can control; but they can't control it by doing nothing differently."

There are strategies that can reduce the potential of a claim significantly, according to Saxton, and the

health industry needs to start embracing them. Practices should employ better informed consent forms; there should be good communication training; and practices should focus on service excellence.

“They can do something about it, but they have to *do* something about it,” he says. “If they throw their hands in the air and they’re just frustrated that’s not going to help. But if they say to themselves, ‘Boy, maybe I should have a five-star practice, because if I do I can improve my chances,’ that’s sort of a more positive way to look at it.”