3 Risk Reduction From a Plaintiff Attorney's Perspective

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SUMMARY

This chapter looks at malpractice litigation from the unique viewpoint of the plaintiff attorney. The necessary legal elements for a legally sound claim are discussed. What aspects of the doctor–patient relationship most affect the likelihood of litigation? What aspects of a physician's care, demeanor, and communication skills make him or her more or less formidable as a defendant? The chapter also discusses the physician's role in educating his or her own attorney and the preparation needed for a successful defense.

Key Words: Witness; negligence; communicating to a jury; risk reduction; working with your attorney; plaintiff's perspective.

INTRODUCTION

From a plaintiff attorney's perspective, risk reduction for a physician named in a malpractice claim is based on that physician's understanding of the way an experienced attorney approaches a potential medical negligence case. There is a widely held myth that a plaintiff attorney always uses professional witnesses who are paid to give expert testimony. That

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is untrue. The majority of plaintiff attorneys today use the best physician experts they can find to review a potential case. They are sent many cases and end up filing a very small percentage of them. To believe that the selected cases are built on the testimony of unreliable doctors is to give yourself a false sense of security and will increase the risk not only of being sued but also of being sued successfully.

This chapter is designed to give a basic understanding of the approach a plaintiff attorney uses in determining whether your case is the one that will be pursued. You first need to understand that keeping your patient away from an attorney's office is the first step; second, understand that if the patient gets to that office, then you need to know how to discourage the attorney from accepting the case and pursuing a claim against you.

BASIC UNDERSTANDING OF THE PROCESS

Just because a patient does not like the care he or she received or you personally does not mean he or she can sue you successfully. Although it is true that anyone can file a lawsuit, the time and money required to pursue litigation has made most plaintiff attorneys reluctant to accept a case that does not contain the three elements necessary to be successful in winning a lawsuit. These elements are negligence, proximate cause, and damage.

Negligence is defined as a deviation from the standard of medical care. *Standard of care* is defined as medical practice exercised with the same degree of skill used by physicians in your community under the same or similar circumstances. Demonstrating this is a very difficult burden to meet. It is only met by expert testimony.

Plaintiff attorneys know that juries will be persuaded only by the best possible expert medical witnesses. Do not deceive yourself by thinking that plaintiffs hire only paid "professional" experts. There may be isolated cases of this happening, but the majority of plaintiff attorneys know that even with the strongest case, juries want to believe the defendant doctor. Therefore, the plaintiff needs to get the best possible expert to overcome this innate bias in favor of the doctor.

Negligence means that you did something outside your area of expertise or did it in a fashion that others in your profession would not have done. This usually occurs when you try to do something new that you are not adequately trained for or when you do something in a careless way.

Risk reduction begins here. You can reduce your risk of a malpractice claim by documenting all possible complications in your records and explaining how and why they occurred. If you hide information, it will