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Take the Right Steps to Speed Resolution of Malpractice Litigation

Steps taken in the early phase of malpractice litigation can significantly affect the length of the case, with the right moves resulting in a faster, cheaper resolution. On the other hand, missteps and oversights can draw out the case, costing more in legal fees and more on the eventual settlement.

The risk manager, in-house counsel, and top administrators can encourage and facilitate the steps that effectively streamline the resolution of a case — or they can discourage them and inadvertently lengthen the process.

The best way to resolve a case quickly is to obtain an expert review early on, says **Kelli L. Sullivan, JD**, shareholder with Turner Padgett in Columbia, SC.

“[Obtain a review] as soon as you possibly can,” Sullivan says. “As soon as you know there is a claim, and can get your records together, get that expert in to look at everything and give you an assessment of where you stand. That

tells you whether you have something to defend.”

The defense attorney will have a good idea of the merits, but an expert review by a physician will either back up that notion or suggest more issues to explore.

“I call it a curbside consult. It might not be an in-depth review because some of the issues might not be apparent yet, but you can get a quick assessment that tells you [there is] a problem, or no, these facts don't indicate any wrongdoing by your clinicians,” she explains. “Or, it might tell you that you won't really know either way until you investigate some particular areas further.”

The expert used for this stage of consultation does not necessarily have to be used as an expert witness if the case proceeds to trial. Sullivan says she tries to complete the consultation within 60 days of accepting a malpractice case.

Risk managers and defense counsel might question such an early expenditure for attorney's costs and the expert

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consultation, but Sullivan says it always is a good investment. If an early review shortens the review window by six months, it could save the defendant \$20,000 in legal expenses.

With that assessment, the defense may be better able to determine whether to focus on damages or causation. The better insurance companies require this type of review early in the process, Sullivan notes.

Defense counsel and healthcare organizations often keep two or three physicians on standby to provide these quick assessments as soon as a lawsuit arises.

“With that knowledge, you can immediately tell the carrier that you have a problem and need to look at settling. Or, you can tell them that this is complex, and they need to plan to be in it for the long haul,” Sullivan says. “When you know you have a liability problem, you might want to consider early mediation and try to be done with it.”

Sullivan also meets with the defendants as early as possible to review the incident and their approach to the litigation. Risk managers and in-house counsel should expect that request and be prepared to respond without delay. A key goal in that meeting is to gauge the defendant’s appetite for settlement.

Another goal is to quickly gather as much information as possible. Sullivan visits the healthcare facility

as soon as she can to meet with any clinicians involved with the patient’s care for an initial interview. Risk managers and other administrators are not always happy when Sullivan wants to talk to the clinicians immediately, but she insists.

“I try to track down everyone who looks like they might have information and see if they still work at the facility. If they do, I hot-foot it there and talk to them,” she says. “I want to know what they are going to say. Or, if they’re not there, why are they not there? Did they move to Timbuktu and it’s going to be hard to get their deposition? You want to know what the unknowns are.”

Some insurance policies include consent clauses that require the clinician or the hospital to consent to any settlement decision. Sullivan says this can create difficulties in moving forward strategically. The expert review might suggest a quick settlement is the best choice, but defendants can sometimes refuse.

Risk managers should remember those refusals can draw out the litigation and even lead to larger payouts, and advise their clinicians or administrators accordingly.

“Let’s assume you have your expert review and it’s kind of negative,” Sullivan says. “But you have a very strident physician or nurse or entity who insists they did nothing wrong. Then, the attorney has to spend some time working on

EXECUTIVE SUMMARY

The time and money required to resolve a malpractice case can be reduced by taking the right steps up front. Some mistakes also can extend the time and increase costs.

- Obtaining an expert assessment early is key.
- Mediation can reduce the time and costs, but know your mediator.
- Ensure medical records are complete before providing them to anyone.

the client, and that can add to the time and expense.”

Offers of Judgment Can Complicate

Some issues that can extend litigation and increase costs are not completely within the control of the defendants and their counsel. Sullivan notes plaintiff attorneys often file an offer of judgment as soon as the lawsuit is filed. Without researching the case early, the defense might not be ready to respond.

“This really puts the defense behind the 8 ball,” Sullivan says. “They offer what they consider to be a reasonable amount, which is not always, but it usually is, in the ballpark of reasonability. If you have not gotten your ducks in a row and don’t know what the case is worth, it might take you six or eight months to get those ducks in a row. Then, your offer of judgment has expired.”

State laws vary, but if a case goes to trial in South Carolina and the plaintiff is awarded more than the offer of judgment, the plaintiff receives the verdict amount, 8% interest, and costs (not including attorneys’ fees). It is typical for a case to take two years to go to trial, Sullivan notes, so the interest can add up significantly.

“Let’s say they put in an offer of judgment for \$200,000, which you think is too high, so you don’t respond to it — it’s off the table, it’s gone. Two years later, they get a verdict for \$300,000,” Sullivan explains. “Not only are you paying the \$300,000, but you are paying 8% interest on that \$300,000 for two years. That \$300,000 just turned into \$350,000.”

Sullivan is in a similar situation with a nursing home malpractice case that was delayed by an appellate

issue with an arbitration clause. Sullivan was not on the case when the plaintiff’s counsel filed an offer of judgment for only medical expenses two years ago, but she is now handling the defense. The case will not be ready for trial for another year. Sullivan now must explain to the defendant that even if the jury reaches a verdict equal to the original judgment offer, the defendant has to pay 24% interest on that amount.

IF AN EARLY REVIEW REDUCES THE RESOLUTION BY SIX MONTHS, IT COULD SAVE THE DEFENDANT \$20,000 IN LEGAL EXPENSES.

“Plaintiffs’ attorneys are on to this tactic. It can be very effective for them if you don’t do your research early and know whether you should accept that offer,” she says.

Defendants can use the same tactic, Sullivan notes. When it appears the defendant is liable, the defense can make an offer of judgment protected by South Carolina’s law. If the plaintiff rejects the offer and later receives a smaller verdict, that award is reduced by 8% per year.

“The only way those strategies have any teeth at all is if you do them early. The only way you can do them early is to know what you have, and the only way you can do them early is get your records and your experts quickly,” Sullivan says. “That early assessment puts you in a position to either make that offer of judgment or to accurately assess the other side’s offer.”

Early investigation reveals the strengths and weaknesses of a claim. This can hinge on the actions risk management takes after notification of an adverse event, says **Carol Michel**, JD, partner with Weinberg Wheeler Hudgins Gunn & Dial in Atlanta.

An in-depth assessment may proceed after a claim is made, but the results of that investigation will improve when risk management has reacted appropriately to any initial report of a mishap or unexpected outcome. That is not always possible when the claim involves an alleged injury that was unapparent at the time, but Michel urges risk managers to fully document any reported adverse events in anticipation of a possible future claim.

The key question is if a legitimate claim of negligence exists. That will guide the strategy moving forward.

“Then, you will determine whether to defend and take the posture that you’re going to take the case to trial vs. acknowledging an error and developing a strategy to resolve the case,” Michel says. “I’ve had the full gamut, including where we identified the issue before the patient or family, and we acknowledged that things weren’t done correctly. We went about working to find a resolution.”

It is crucial to notify defense counsel as soon as possible when a claim is expected or has been filed, Michel says. Any delay means the defense team will fall behind the plaintiff in terms of assessing the merits of the case, obtaining experts, and researching the facts.

“Another thing that can extend the length and cost of litigation is engaging with the opposing party without the guidance and assistance of counsel, because you may not appreciate the nuances of the law, discovery

rules, and what the opposing side is entitled to get,” Michel explains. “Unnecessary finger-pointing, with the defendant saying, ‘It’s not me, but it’s everybody but me,’ can expand and protract the litigation as well.”

Asserting positions unsupported by medicine or the law also can draw out the process, Michel says. Taking a position that cannot be supported when pressed at deposition or at trial can greatly extend the time required for resolution and the ultimate cost of the experience.

“Taking the position that you are going to deny and defend at all costs can result not only in the case drawing out longer, but also in new claims being brought as well as punitive damages being asserted,” Michel says. “The overarching position needs to be one of trying to identify specifically what the correct legal and medical issues are and addressing those, without expanding the scope to other issues that really did not play a role in the case, but which plaintiff’s counsel can try to make it about more than just this particular plaintiff.”

Throughout the investigation, any money spent up front usually is a good investment, says **Bradley P. Blystone**, JD, shareholder with Marshall Dennehey in Orlando, FL. That includes attorney time spent on the initial assessment, expert review, and meeting with the defendants to discuss options. The initial assessment is not written in stone and can change

when new information is gathered, but it is important for everyone to be on the same page.

“So many of the insurers look to save money on attorney’s fees, and sometimes they balk at spending the time to do a thorough review, but you can save so much more money in the long run by thoroughly investigating your case than you ever can by trying to skimp on attorney’s fees,” he says.

Blystone also advises hospitals to ensure medical records are certified complete before disclosing them to anyone. Electronic medical records can be efficient for the clinicians in the hospital system, but compiling them in an electronic form that can be transferred to an outside party can be challenging. Trying to print them is even worse.

“If you produce a record initially and then find out that something was missing, like a nurse’s notes or a doctor’s order, then you’ve created a problem that is going to introduce misunderstandings and doubts that will take time and money to sort out,” Blystone warns. “It leads to all kinds of situations down the road where they try to hit you with creating false evidence or spoliation of evidence. It doesn’t look good when you say, ‘This was supposed to be included in the record, and we just forgot it.’”

Early resolution of malpractice claims result from informal settlement negotiations, formal mediation, or successful motion practice, says **Elizabeth E. Baer**,

JD, attorney with Eastman & Smith in Toledo, OH. In cases where the plaintiff likely will prevail in establishing a breach of the standard of care, or in cases where negligence by the care provider is reasonably disputed but damages are substantial, early settlement discussions can help lower both litigation costs and the settlement amount.

“In cases where early resolution is warranted, it is preferable to undertake formal mediation over informal settlement discussions. An experienced mediator can be very effective in facilitating discussions that lead to a reasonable compromise,” Baer says. “Know your mediator. If possible, select a mediator who has successfully negotiated prior settlements with defense counsel. When defense counsel has a rapport with the mediator and is perceived as credible, a case can be postured more aggressively.”

In a mediation, defense counsel can focus on a reasonable compromise of damages without acknowledging liability, Baer says.

Many mediators were once in private practice. Knowing the details of this practice is important, so ask other attorneys their experience with a particular mediator, Baer suggests.

Undertaking mediation with a mediator with a “plaintiff’s bend” can be counterproductive and costly. Additionally, know your opposing counsel.

“Some plaintiffs’ attorneys recognize that a mediation is a bit

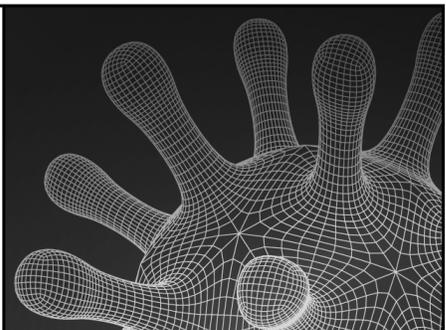
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of a game of chess that begins with an excessively high demand and an excessively low first offer,” Baer says. “Other plaintiff’s attorneys are easily offended by the excessively low first offer, which can negatively impact progress and lead to a higher settlement.”

Defense counsel should hold frank discussions with the claims adjuster who will be authorizing settlement, Baer explains. While the adjuster may be reluctant to disclose an exact amount they are willing to pay to settle the case, it is important to understand the settlement range before mediation.

However, even if early settlement discussions are entertained, certain information is critical to assessing the value of the case, Baer says. First, if a suit has been filed, the plaintiff’s deposition should be taken to ascertain credibility and sympathy, and to explore damages.

Consider Settlement Before Depositions

If liability is a concern, it can be beneficial to discuss settlement before the depositions of the defendant physicians and expert witnesses, Baer says. Documentation confirming all claimed economic damages must be available.

“[Regarding] economic damages, it is important to know state law on any applicable damage caps and evidentiary rules on a defendant’s ability to refute medical bills with the amount actually paid and accepted in full by a care provider,” Baer explains. “The amount accepted in full payment typically is significantly lower than the amount billed and can be a tool for reducing settlement.”

Deposing expert witnesses is costly to the plaintiff, thus increasing their

settlement posture, Baer notes. In cases concerning a breach of the standard of care, defense counsel often is better able to posture the case where the details of the experts’ testimony is unknown to the other side.

Discovery expenses in medical negligence can be significant and can drive up the cost of settlement.

CLAIMS OF MEDICAL MALPRACTICE ARE THE TORTS LEAST SUSCEPTIBLE TO EARLY RESOLUTION, GIVEN THE NATURE OF THE CLAIMS NORMALLY ASSERTED IN THIS TYPE OF LITIGATION.

“An additional tool for early resolution is to conduct a settlement meeting prior to any exchange of discovery or depositions. In this meeting, the parties agree that information is being exchanged only for the purposes of settlement and cannot be used as evidence in trial,” Baer explains. “While the meeting may be recorded or taken down by a court reporter, witnesses are not given an oath. This type of meeting can be productive pre-suit, or in the very early stages of a lawsuit.”

Not only are discovery costs cheaper, but the parties may avoid taking a position based on emotional frustration, anger, or grief, she says. These emotions often are heightened as a case progresses.

The defendant should know whether his or her insurance policy is a consent policy or a non-consent policy, Baer says. A consent policy requires the defendant’s consent before any settlement discussions can take place. However, once a defendant has consented, the insurer has the ultimate say in the amount of the settlement offer.

In a non-consent policy, the insurer can proceed with settlement discussions without consent of the insured. Typically, the defense attorney and the insurance company decide the timing of mediation and selection of a mediator, without input from the defendant, Baer explains.

Early Resolution Might Not Be Possible

Claims of medical malpractice are the torts least susceptible to early resolution, given the nature of the claims normally asserted in this type of litigation, says **David Richman**, JD, partner with Rivkin Radler in Uniondale, NY.

In most other cases, easily determined facts often drive determination of liability. This makes it simpler to reach a resolution — and to do so faster, Richman says. In contrast, claims of medical malpractice are determined by the provider’s adherence to a standard of care: what the standard of care was, whether the treatment at issue adhered to that standard, and, if not, whether that failure caused or contributed to the injury.

“Both the question of the standard and whether the treatment met the standard is often the focus of the dispute and not an issue that is generally determinable at the outset of litigation,” Richman notes.

Moreover, complicating the question is the role of medical judgment in explaining a physician's actions in rendering treatment, Richman explains. The law provides that if a jury finds the physician's exercise of medical judgment was reasonable under the circumstances, the physician cannot be held liable for injuries claimed to have occurred because of the treatment at issue.

The question of the exercise of medical judgment also is not easily determined at the outset of litigation.

"In determining the fundamental questions — what the standard of care was, whether there was a possible deviation from that standard, and whether the physician's treatment reflected a proper exercise of judgment — a great deal of investigation and discovery is needed," Richman says. "Chief among that investigation and discovery is the deposition of the physician in order to fully and properly assess the reasoning behind the treatment rendered and whether it can be said the treatment met the standard of care."

In addition, all the plaintiff's medical records are needed to assess not only the question of negligence, but the question of causation, Richman notes. Causation hinges on whether the claimed injuries were caused by the treatment at issue, or whether other factors were present.

"All of these issues, in turn, need to be fully assessed by an expert in

the provider's field as well as other experts who might be in a position to comment upon the causality question," he says. "The retention of experts early in this type of litigation is rarely of any benefit, as the information that the expert will need to opine upon will not be available."

All these issues and tasks weigh against seeking an early resolution of a claim unless the injury is not in dispute and a blatant mistake was made (e.g., a surgeon operates on the wrong limb or removes the wrong tissue and admits to the error).

"So, too, might be the case where a radiologist or a pathologist improperly interprets a study or tissue sample and is unable to explain the error," Richman says. "In those instances, however, the provider is often unwilling to admit a mistake and pushes back against early resolution."

Richman says the latter issue is related to another factor weighing against early resolution: the provider's unwillingness to admit a mistake. Many insurance policies require the physician to give written consent to settle before the carrier may enter settlement negotiations.

Even in policies where no consent is required, most carriers will tread lightly because of the reporting requirements imposed by the National Practitioner Data Bank and similar reporting requirements imposed by state governments,

Richman says. These reporting requirements can damage the reported physician, both in attracting new patients and gaining approval from insurance carriers who have the right to decline a physician if it feels the provider's claims history is less than stellar.

"Because of these reporting requirements, many physicians are reluctant to agree to allow the carrier to settle without making a maximum effort to structure a defense. Most carriers will abide by the physician's demands whether or not the physician has a consent policy," Richman says. ■

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