Avoid Common Mistakes in Malpractice Cases

By Greg Freeman

Handling an allegation of medical malpractice is never easy, but the experience and eventual outcome can be greatly improved by avoiding some of the most common mistakes.

One of the biggest mistakes is altering a record after the fact, says **Eric S. Strober**, JD, partner with Rivkin Radler in New York City. Evidence in litigation comes primarily from medical records and deposition testimony.

"Changing a record will always look bad — and more often than not, [it will] come back to haunt you," Strober says.

Often, a plaintiff's lawyer will send a records request before they file a suit, and they will receive it through the electronic medical record (EMR). During discovery, the lawyer often will demand EMR audit trails and metadata for the to see who accessed the records. Any evidence suggesting the record was changed, especially after a lawsuit was filed, can be devastating to the defense.

However, that does not mean clinicians cannot access the records. Strober says it is acceptable for a physician to review a chart to refresh his or her memory about the case, but only if no changes are made.

Risk managers should remind clinicians any changes are easily detected in an electronic record. Years ago, plaintiff attorneys would use handwriting analysis and investigations into the paper and ink that were used, Strober notes. But now changes in the EMR are clearly noted with details on who made the change and when.

Strober also cautions about directly contacting the plaintiff or others involved with the case. "Particularly if it's your first time, there's a tendency to potentially panic about it and start reaching out to the family, or the patient, or other doctors. 'Why are you suing me? What have I done?'" he says. "When someone's represented by counsel, you certainly should not be contacting the patient or their family. You should not be trying to cover your tracks or talk someone out of it. It never is going to work in your favor."

Hospitals and health systems also should avoid hastily firing or otherwise penalizing someone accused of wrongdoing in a lawsuit. That response could be interpreted as a finding of fault.

"It could have a bad look to it. If that person is no longer your employee, they have no incentive to help you defend the case," Strober explains. "You may not even be able to find them at that point, and if you do, they may not be willing to cooperate."

Even before a hospital or clinician is notified of a medical malpractice claim, it can be a good idea to get ahead of the potential claim and gather information for their medical malpractice insurance carrier, says **Paul F. Schmeltzer**, JD, senior attorney with Clark Hill in Los Angeles.

Recently, a patient of one of his healthcare clients notified the client of prescribing error. While never explicitly threatening litigation, after several months the patient left the practice and requested a complete copy of their medical records from the client. These were signs the patient might be preparing to sue.

"Because there was correspondence from the potential plaintiff that would constitute a demand, I recommended to my client that they provide a preliminary notice to their medical malpractice insurance carrier," Schmeltzer recalls. "In my experience, insurers appreciate the preliminary notice of a potential claim from the patient so that they are on alert should this turn into a lawsuit down the road."

Other healthcare clients consult attorneys or incur other pre-litigation expenses regarding malpractice claims they either failed to timely report or failed to report to their insurer. This resulted in the insurer denying any responsibility for covering these expenses related to the claim.

"However, the healthcare practice should choose their words carefully when putting their carrier on advance notice," Schmeltzer says. "I typically advise clients that they should let their insurer know that an investigation is underway rather than oversharing facts or admitting to any actions that would confirm medical malpractice."

Additionally, Schmeltzer recommends healthcare organizations

EXECUTIVE SUMMARY

Common mistakes can adversely affect the outcome of a medical malpractice claim. Risk managers should avoid these errors.

- Changing medical records always is damaging.
- Notify insurance carriers as early as possible.
- Know how a physician's stress can affect the case.

conduct an internal investigation and prepare a corrective active action plan in response to the findings.

"I've had matters where a client came to me with an allegation of medical malpractice in which an internal investigation found a third party, such as a pharmacy, to be the liable party," Schmeltzer says. "As an attorney, I always appreciate a healthcare client who comes to the initial meeting with documentation of the alleged incident and the findings from an internal investigation. It allows me to move their case forward more quickly when we don't have to backpedal in our understanding and documentation of the incident."

Some mistakes can make a case last longer and cost more to resolve. These include not responding to discovery and generally acting uncooperative during the litigation process.

"I've defended healthcare clients accused of medical malpractice and negligence where the directive from senior attorneys and insurance was to be very adversarial and uncooperative with the plaintiff's attorneys in discovery," Schmeltzer says. "I cannot recall a case where such a posture led to either a quicker or more favorable settlement for my client. Playing games during discovery only serves to anger the other side."

Encourage Clinicians to Notify Risk Management

Another mistake is making initial settlement demands that are so high above the general settlement range for similar medical malpractice cases that it unnecessarily prolongs pre-trial settlement negotiations, Schmeltzer says. The parties have to spend considerable time adjusting their client's expectations regarding a proper settlement amount.

It is important for a clinician to notify risk management as soon as they become aware of a malpractice claim, says **Elizabeth L.B. Greene**, JD, partner with Mirick O'Connell in Worcester, MA. Providers should be encouraged to avoid trying to address such claims on their own.

Risk managers and insurance claims personnel should engage legal counsel early to assist in investigating claims, to represent defendants, and where appropriate, engage legal counsel to represent non-party witnesses. Other important goals include understanding the parties involved, including each defendant's specialty, alleged involvement in the care at issue, employment status, and insurance coverages.

"Similarly important at the outset of a claim is securing the medical records, and when appropriate, imaging studies, pathology, instrumentation, and metadata," Greene explains. "In this day and age where providers also communicate with patients by text and email, communications may include pictures. Those pieces of data also should be preserved."

Greene notes that while alteration of the medical record is one of the most significant risks at the outset of a lawsuit, clinicians sometimes do so with good intentions. It remains a mistake.

"Sometimes, the provider remembers details from the encounter that they did not document in the original record, and some add that detail to the patient record when reviewing it," Greene says. "While the information may be accurate, it will invariably be used by the patient's attorney and cast in the light of an attempt by the provider to cover up or change the facts to be more favorable to them."

The anxiety a provider faces when reviewing a record for a patient who claims a missed diagnosis of a pulmonary embolism or a cancer, for example, is significant. When a provider on notice of a claim reviews the patient's record, the temptation to add information can be overwhelming, Greene says. That is particularly true when they are alone, fatigued, or stressed, and believe that adding information they had at the time of the encounter — which was relevant to their decision-making, but is not in the original note — will help them in the defense.

"Instead, they create a significant — and sometimes insurmountable — issue that impacts the resolution of the case, and can make it more expensive to resolve," Greene says.

Review the Case Regularly

From the outset of the claim, Greene says the risk manager can help ensure the best outcome by periodically reviewing the facts and assessing the strengths and weaknesses of the claims and defenses. This includes the discovery and the expert witness opinions. Keeping the insurers and appropriate individuals within the hospital system apprised of any changes in the assessment of the case is important.

A best practice is to note appropriate intervals for case assessment and reporting. When claims change, or parties are added, reassessing the case is important. It is critical to determine potential conflicts of interest between parties and ensure adequate legal representation.

The defendant affects the outcome the most, Greene says. A provider who is well prepared and understands

the litigation process will best be positioned to demonstrate their clinical knowledge and expertise in a non-threatening manner and connect with the jury or alternative dispute resolution (ADR) fact assessor.

"Ultimately, a provider who instills a level of confidence in jurors or ADR fact assessors, such that they would choose that provider to care for them or their loved ones, will have the most favorable impact on the outcome of the case," Greene explains.

Consider Effects of Physician Stress

One of the most significant risks of a lawsuit is the effect on the provider, Greene says. Physicians hold themselves to high standards, and a claim of malpractice — including delay in diagnosis of cancer or wrongful death — can cut to the core of a physician's belief in him- or herself, undermining their confidence.

Some physicians can handle the stress of a malpractice claim, and say they learn from the experience, Greene says, but many physicians suffer in silence over the stress of a malpractice lawsuit, including long after it is resolved. The stress of a malpractice lawsuit can make a case more expensive to resolve and can affect the physician's professional and personal life.

"Awareness of and appropriately addressing the stress of a malpractice claim on a physician by counsel, risk managers, and physicians, including referral to and accessing mental health assistance as necessary, is critically important," Greene explains. "Supporting and preparing the physician for the case, educating them on the litigation process, claims, and defenses, will help them be best prepared for discovery, depositions, and trial. Not doing so can make a case more damaging to the physician and more expensive to resolve." ■

SOURCES

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Time to Review Non-Physician Policies from Pandemic

By Greg Freeman

Workforce shortages prompted many hospitals and health systems to make more use of non-physician practitioners in recent years, particularly during the pandemic. Many continued this practice after seeing how nurse practitioners, physician assistants, and other non-physicians can offer cost savings.

Pandemic-era rules allowing relaxed licensing and supervision requirements for non-physicians are undergoing revisions, which means healthcare employers may need to review their policies. For example, in 2022, CMS ended its blanket waivers and reinstated federal physician supervision requirements and other restrictions for some facilities. In addition, many states relaxed scope of practice requirements during the pandemic and are revising those positions now, says **Amanda J. Newlon**, JD, an attorney with Trenam Law in Tampa, FL.

"The trend that I have been seeing is that the states are kind of falling in line with the federal government, and a lot of states have started to make adjustments to scope of practice for

EXECUTIVE SUMMARY

Policies enacted for non-physician practitioners during the pandemic may need revision. Federal and state authorities are tightening some rules back to pre-pandemic status.

- Non-physician practitioners were given more autonomy during the pandemic.
- States are reverting to tighter controls on prescribing and telehealth services.
- Healthcare organizations should monitor changes in their own states.