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What to Do When a Patient Threatens to Sue

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EXECUTIVE SUMMARY

The moments after a patient threatens to sue for medical malpractice can be critical. How clinicians and risk managers react can affect the likelihood of a lawsuit and its outcome.

- Take any lawsuit threat seriously.
- Consider notifying your professional liability carrier.
- Look for ways to remedy the source of concern.

It might not be heard every day, but any time a patient says, “I’m going to sue you for malpractice,” a serious response should follow. What does — or does not — happen afterward could significantly affect the course of events far down the road.

Risk managers and clinicians might let their guard down. Data show a decrease in the frequency of medical malpractice lawsuits, with a 2019 report (https://www.rmf.harvard.edu/mplAmerica) from the insurer CRICO noting a 27% drop in the frequency of malpractice claims and suits against physicians.

But a recent report from the American Medical Association (AMA), titled *New Data Show the Highest Prevalence of Medical Liability Premium Increases in 15 Years* (https://www.ama-assn.org/system/files/2021-03/prp-mlm-premiums-2020.pdf), shows otherwise. “Increases in medical liability premiums compound the economic stress on medical practices as the COVID-19 pandemic resulted in significant reductions to patient volume and revenue, and higher expenses for scarce medical supplies,” AMA President **Susan R. Bailey**, MD, said in a statement.

In 14 states, premiums increased 10% or more between 2019 and 2020, according to the report. Kentucky saw the highest premium increases (29.6%), followed by South Carolina (27.8%).

In 2018, the average payout for medical malpractice claims was $348,065, according to data from the National Practitioner Data Bank, analyzed by LeverageRx (https://www.leveragerx.com/malpractice-insurance/2019-medical-malpractice-report/). Plaintiffs received more than $4 billion in malpractice payouts, with 96.5% coming from settlements and 3.5% from court judgments.

Those numbers show the threat of malpractice claims remains a serious matter for hospitals, health systems, and physicians.

Any threat of a malpractice suit should be taken seriously, regardless of whether it sounds legitimate, says **Andrew Barovick**, JD, an attorney in White Plains, NY, who represents plaintiffs in medical malpractice suits. He started in this practice area representing doctors and hospitals.

“I would encourage the patient to meet with the hospital’s patient advocate to learn the nature of the complaint, and to get an idea about the credibility of the patient,” Barovik says. “I would also institute a policy within the hospital requiring doctors, nurses, or any other staff members to alert risk management if they hear of such complaints.”

If the complaint appears legitimate and the patient is credible, Barovick says risk managers should consider informing the hospital’s professional liability carrier. If the patient follows through with a lawsuit, the carrier will not have an excuse to disclaim against the hospital.

The risk manager also should investigate the patient’s complaint if it sounds serious enough. The sooner the hospital knows what it is up against, the sooner and better it can prepare for a lawsuit, or even a settlement.

“If investigation shows that a true error took place and caused a real injury or death, I would consider having the staff involved apologize to the patient or family,” Barovick says. “However, this remains a controversial practice, since the apology may end up being an issue at a trial, which the patient will use to argue that the hospital knew it had done something wrong.”

The hospital also might consider how to remedy the error. Could a revision surgery be performed to improve the outcome? Consider performing it at a lower cost, or at no cost.

“If all else fails, consider offering a pre-trial settlement, before lawyers get involved,” Barovik advises.

Any Complaint Can Be Costly

Confidence in quality of care does not negate the threat posed by a patient who wants to sue, says **Jonathan C. LaMendola**, JD, an attorney with Cobb Martinez Woodward in Dallas. Anytime a patient or patient’s family threatens to sue, it is a potentially serious matter — even if the standard of care was met, he says.

Regardless of the claim’s merits, litigation is costly, time-consuming, and can negatively affect the organization. Often, the threat of litigation comes about after an adverse or unexpected outcome, and the patient and family do not understand why.

“Think about things from the patient’s perspective. Many are dealing with emotional, financial, or family stressors, in addition to whatever medical condition or event is at issue,” LaMendola says.

Assessment and appropriate communication is key to minimizing the likelihood the threat of litigation will actually result in a claim or lawsuit — and minimizing your exposure.

“I’ve seen many claims result simply because of the failure to listen to the complaint and explain what happened,” LaMendola notes. “Litigation can result when the patient or family did not understand what happened or felt their concerns weren’t heard. They suspect negligence or a cover-up because no one explained what happened or what was done to try and address their complaints.”

What you say and how you respond varies based on the circumstances, he says, comparing the situation to how a physician makes a differential diagnosis. In some cases, simply listening to and addressing the patient’s or family’s concerns is sufficient to mitigate the likelihood they will pursue legal action.

“Sometimes, an apology or expression of empathy can de-escalate the situation. Remember, you can be empathetic without admitting fault. In most circumstances, it’s inappropriate to comment on the quality of care of others, particularly other disciplines or specialists,” LaMendola says. “I’ve seen lots of lawsuits result from a family member being told by a subsequent caregiver that a prior healthcare provider was negligent or didn’t do the right thing.”

When confronted by a credible threat of legal action, administration should be notified to take appropriate steps. This may involve remedial steps and other measures to mitigate harm, preserve potential evidence, and establish privilege should any investigation be necessary.

Assess Every Claim

While the level of concern will be fact-specific, every credible threat of litigation should be assessed to some degree for its likelihood and potential exposure, says **David Verschell**, JD, partner with Abrams Fensterman in Lake Success, NY.

A threat of litigation by a patient who suffered a complication during a cardiac catheterization certainly will raise more concern than an outburst from an intoxicated patient in the emergency department with a superficial laceration, of course, but each should receive a preliminary assessment. Then, whether the matter warrants any follow-up or investigation can be determined.

“It’s simply too easy for a patient with a supposed real claimed injury to convince an attorney to take his or her case,” Verschell says. “Remember, while not every threat will turn into a lawsuit, this is the one opportunity risk management has to get ahead of the eight ball on a case that ultimately goes to litigation.”

The way clinicians respond to a lawsuit threat is important, Verschell says. Doctors and nurses need to understand that once a patient or family member threatens to sue, any reasonable medical discussion generally is over. A polite “I’m sorry you feel that way,” or “Well, I can’t respond to that,” usually is suffi-

cient to allow the healthcare professional to complete the task at hand and then exit the situation promptly.

“Any attempt to dissuade the proponent from following through on the threat will likely inflame the situation or result. Even worse, the healthcare provider may give ill-conceived explanations or statements which are inaccurate or, more likely, misunderstood,” Verschell says. “If the proponent is intent on speaking with an attorney, any reasonable explanation or discussion will likely fall on deaf ears, while ill-chosen statements will almost certainly register and be remembered.”

A clinician or other staff member who hears a lawsuit threat should provide a brief statement to administration during or after the shift, delivering a general background on the proponent of the threat, the events leading up to the threat, and the contents of the threat. That person also should note anyone else who was present at the time of the threat. That should be sufficient for risk management to determine whether any further inquiry is necessary.

“Keep in mind that initial reports from the healthcare professional may not be protected from disclosure should litigation ensue,” Verschell explains. “It’s only when the written reports or investigation cross over to being directed toward quality assurance or in anticipation of litigation that privileges and protections may apply. Accordingly, the initial information should provide the necessary information while still being succinct.”

Every report needs to be evaluated on a case-specific basis, Verschell says. For any report that raises a red flag, all staff involved should be interviewed to determine whether written statements should be obtained, whether facility policy and procedure was followed, and whether the care and treatment giving rise to the complaint is documented properly and timely.

For example, the failure of staff to follow the facility’s own written policies or procedures, or waiting for weeks for the doctor to dictate an operative/procedure, can easily sway a jury to an adverse verdict, he says.

Avoid the mistakes that can come with getting defensive or emotional. Verschell’s rule of thumb to healthcare providers and administrators is to be polite and “stick to the medicine.”

“Too often, I hear plaintiffs state that they never intended to sue until their complaints were ignored or they were treated poorly by the provider or administration,” he says. “For the healthcare professionals, provide information on the patient’s condition and treatment provided. Don’t drift or be drawn off to discuss treatment options that weren’t provided or considered. The more you speak, the more ammunition you potentially give the patient.”

Also, avoid any statements that could be viewed as an admission of fault. Be careful about expressing remorse.

“While we all have sympathy for a person who is suffering, the open-ended ‘I’m sorry’ can be a powerful weapon for a plaintiff’s attorney,” Verschell says.

All lawsuit threats from patients should be taken seriously. If you do not, there are plenty of plaintiff attorneys who will, says **David N. Vozza**, JD, an attorney with Norris McLaughlin in New York City. One can see from the prevalence of TV and radio advertisements there is no shortage of malpractice attorneys who will pursue lawsuits, even those without merit.

When patients make such comments, this presents a window of opportunity for the practitioner to discuss their concerns in an open and genuine manner.

“Very often, patients are unsophisticated when it comes to complex medical issues. An honest discussion about their health and the practitioners’ treatment plan may go a long way in preventing an uninformed malpractice action,” Vozza says. “Of course, these discussions must be documented in the patient medical records as well.”

Sometimes, healthcare organizations and physicians are obligated to report threatened malpractice claims to their liability insurance carriers. “Very often, the carrier will provide strategic advice on how to proceed and what to do if the patient follows through in filing a claim,” he says. “In a hospital or group setting, it is good practice to notify respective administration, given those entities will likely be exposed to a possible claim as well.”

A risk manager or hospital administrator should implement a procedure for internally investigating such threats and timely introduce remedial measures. As with practitioners, medical groups and hospitals also are encouraged to refer threatened claims to their malpractice carriers.

“Obviously, it is in no one’s best interest to fight or argue with patients who verbalize concerns,” Vozza says. “Most importantly, practitioners must not alter the medical records of a patient who threatens a malpractice claim to help his or her defense to the same. If a practitioner is found to have altered a record, it would almost certainly result in the revocation of his or her medical license.”

SOURCES

- **Andrew Barovick**, JD, Barovick Law, White Plains, NY. Phone: (914) 371-3600. Email: andrew@barovicklawny.com (mailto:andrew@barovicklawny.com).
- **Jonathan C. LaMendola**, JD, Cobb Martinez Woodward, Dallas. Phone: (214) 220-5204. Email: jlamendola@cobbmartinez.com (mailto:jlamendola@cobbmartinez.com).
- **David Verschell**, JD, Partner, Abrams Fensterman, Lake Success, NY. Phone: (516) 328-2300, ext. 287. Email: dverschell@abramslaw.com (mailto:dverschell@abramslaw.com).
- **David N. Vozza**, JD, Norris McLaughlin, New York City. Phone: (917) 369-8867. Email: dnvozza@norris-law.com (mailto:dnvozza@norris-law.com).

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