

Before We Begin

A copyrighted excerpt from
Adverse Events, Stress, and Litigation: A Physician's Guide
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What Should Physicians Do?

DECIDE TO BE A GOOD DEFENDANT. It takes work to learn how to become good defendants. We cannot change the event that has occurred in which contemporaneous, and presumably accurate, documentation exists. Although lawsuits may not change the basic facts of, or our feelings about, the precipitating event, they do intensify and extend our focus on them and, theoretically, provide the setting in which the whole truth will finally come out. The way others perceive and react to the event broadens and deepens our understanding of exactly what happened.

RESOLVE TO BE ACTIVE. We may feel initially impotent, overwhelmed, and uncertain about how, or even whether, we want to actively cooperate. Some physicians are stricken with a fated hopelessness: No matter what we do or how well we do it, we are going to be sued anyway. Monetary awards continue to rise and insurance premiums follow in their wake. Nothing about who we are or what we do seems to make any difference. This *swept away by cruel destiny* scenario depresses us, leaving us feeling vulnerable and defeated before the battle begins. Our cure for the numbing passivity that can set in is through becoming active and going on full alert to defend ourselves aggressively.

Any decision to forget it or leave it to the lawyers joins us to the many defendants who later regret being passive and vow to be more fully involved the next time. Like it or not, our case is personal. Indeed, nothing is more personal than having our integrity, our reputation, and our honor as persons and professionals

put on trial. Working cooperatively and energetically with our attorneys engages us in ways that both strengthen our case and control our anxieties. More important, our participation spurs our lawyers and claims representatives to work more diligently, to stretch themselves to look beyond the obvious, and to go the extra mile on our behalf. Our being in the lineup—watching everything, asking questions, helping out, and holding them accountable—motivates them to transcend their best past work.

We probably transfer our habits of control over our professional lives to the defense of our case. Most of us, however, are not skilled advocates and there is no loss of honor or independence in sensibly following the advice of our attorneys. We need to be active team members, in concert with our lawyers, blending our particular medical skills with their legal expertise to the advantage of our common cause. Throughout the process, successful defense attorneys draw on our expertise as medical experts and consultants to the defense team while maintaining control and management of the legal defense. But they must lead the team and they will decide how to use our input in helpful ways.

TELL THE TRUTH. We begin by being honest with our defense counsel. Protected by the lawyer-client privilege, we can speak openly and without fear. The mutual uncertainty of regard in our first meeting may lead us to withhold, for the moment, or to gloss over some of the less-than-flattering information about the case. We should reject temptations to spin the facts, because they will come out anyway, leaving us feeling embarrassed and more vulnerable. Honesty is not only the best policy, it is the only policy when so much is at stake.

The first meeting, according to defense attorneys, is the most important one with their clients. At this first meeting, we not only provide the lawyers with their foundational understanding of the case but we also help them conceptualize the probable plaintiff's theory of the case. We simply must take the time before we meet with our attorneys to learn, memorizing, if necessary, the facts, by reviewing our own notes and the entire hospital chart of the case. We must know and inform our lawyers of the contents of the nurses' notes because these often play a significant role in supporting or undercutting the physician's case. We should also inform the lawyer about any questions that occurred to us at the time of the incident about our medical approach as well as any intuitions we had that the patient was a problem even before the adverse event occurred.

We may also be tempted during the session to blame the outcome on the faults of others. And, indeed, others may be partially or fully culpable and, as we learn later, may not be entirely honest about their role in the event. Our primary responsibility, however, is not to speculate about these perceptions or testimony of others but rather to tell our side of the story honestly and fully. We can only hope that if others are responsible, the testimony will reveal their role in the incident.

Dr. Richard Allen was disheartened when his partner falsely accused him of being responsible for the follow-up of a CAT scan.

Suddenly the team fractures. It's almost like what soldiers feel when they go into combat. The first duty you have is to your buddies to get through this thing the best way you can. That's the way I feel about medicine. It's kind of a war and you have to help each other out to try to get through it. We're all working toward the same purpose, which is to achieve a good outcome. (A lawsuit) is one of the battles in the war and people should stick together and help each other out and if mistakes are made, we need to be honest about it and help each other with that and don't go around pointing fingers and trying to rat on each other and make the best deal you can for yourself. That's the way I always thought about it and I was very surprised that that's not the way it works.⁸

DO NOT HESITATE TO CLARIFY MISUNDERSTANDINGS. Stress sometimes distorts what we say, so that our judgment that we are conveying our thoughts successfully may be that is vastly off the mark. The attorney may get a picture of what happened that is vastly different than the one we intended to convey. It is prudent to ask our attorneys to summarize for us their understanding of what we said. We should then immediately correct any misperceptions or misinterpretations. Uncorrected distortions have a long half-life and linger on, breeding further distortions.

SET ASIDE ALL THE TIME NEEDED. The time spent defending a lawsuit is never convenient or predictable and we can never get it back. Although it causes unrecoverable economic losses, its greatest impact is the time permanently lost to patient care. Conscious of our time constraints, we may be tempted to resist spending any more of it by responding to our attorneys' requests for information or documents. We may be tempted to use delaying tactics, claiming to be too busy to respond or playing hard to get in scheduling depositions and meetings. We may not realize that we are acting out our anger by being late for depositions or other legal meetings.

We are also irritated by the seemingly casual way in which lawyers view time. We respond as quickly as possible to the demands of patients; they seem to respond to their clients when it fits their schedule and timetable. We have some control over the scheduling of our office hours and procedures, and we resent it when depositions and review sessions appear to accommodate somebody else's schedule rather than our own. We conduct the examination, the operation, or the consultation as scheduled and on time and then they are done; delays and set-overs are the norm in the legal process. Motions and rulings are "continued," as if they were incidental rather than vital events in our case, leaving us adrift in an unfamiliar dimension. We cancel our schedule to give a deposition, only to learn that it is canceled because one of the attorneys is delayed in court.

We mark our calendar to go to trial, only to have the court date rescheduled because the judge is away at a seminar. We go to trial with no certain knowledge of whether it will take two days or a week. Rather than endure endless frustration and grumbling, we serve ourselves and our cause best by accepting philosophically the legal world's attitudes toward time, knowing, as Dr. Allen did, "that there was a finite amount of time that I was going to be involved in this."⁸

FOLLOW THE ATTORNEY'S ADVICE. We all appreciate being heard and agree that listening is an art practiced by two. Because our case is played out in the unfamiliar territory of the court, we must sharpen our listening skills and keep our minds open to what our defense attorneys advise about the strategies, approaches, and timing necessary for a successful defense. We have an obligation to ask questions if we do not understand their advice or if it seems inappropriate or in conflict with common sense.

KEEP THE LINES OF COMMUNICATION OPEN. Just as we expect our lawyers to answer our telephone calls and to keep us in the loop regarding progress in our case, so we should answer their calls and correspondence in a timely manner. Ignoring reminders that we are currently defendants may seem to relieve us of stress but it can harm our case. Open lines of communication with our lawyer guarantee that they will accept and be forthright with us as team members.

EXPECT TO PLAY DIFFERENT ROLES AT DIFFERENT STAGES OF THE LAWSUIT. Our initial responsibility may be limited to gathering the information necessary for the lawyers to begin to prepare our defense. We must read over carefully every document we copy and forward to them. Do chart notes exist that we were supposed to, but did not, countersign? Do nurses' or housestaff notes exist that we failed to review? Do laboratory results or radiology reports exist that we overlooked or skimmed over at the time of the incident? Neither we, nor our lawyers, want to be surprised about unexpected future testimony on such issues by other participants in the case. We need to prepare for our depositions in ways specified by our attorneys. We may be asked to help them choose our experts but will be warned to refrain from contacting them ourselves. We may be asked to help lawyers prepare for the depositions of both the defense and plaintiff experts by researching and formulating appropriate questions. We can also obtain useful background material on the reputations, credentials, and publications of potential experts. Our careful objective review of all depositions—our own and those of the experts—is essential. Our extensive training, experience, and familiarity with the vocabulary and the processes of medicine prepare us to identify and note any errors or omissions in these case documents. Our attorney may recommend that we engage in formal instruction or coaching, if we go to trial,

to prepare us for the experience. We may also be asked to help in the development of visual aids for the education of the jury. Our attorneys relying on our familiarity with all the relevant documentation may require our reviewing hundreds, sometimes thousands, of pages of testimony and records. By working closely with our attorneys, we can anticipate the amount of work and time that our involvement will require at each of these different phases and to plan our work schedule accordingly.