Ask An Attorney

BY COLIN RAMSEY, ESQ., UNDERBERG & KESSLER, LLP

Q **My practice just got served with a malpractice lawsuit; what do I need to do?**

A Being named as a defendant in a malpractice lawsuit is obviously a situation that all physicians and practice groups would like to avoid. However, the reality is that nearly every practice group (and many physicians) are going to face a lawsuit at some point. While the underlying facts and what is being alleged will typically drive the ultimate outcome, the initial steps taken after first being served with the lawsuit can help posture the case for the most effective defense.

First, as soon as you are served (either in person by a process server or through the New York State Secretary of State), you should notify your liability insurance carrier. If the insurance carrier is not notified in a timely manner, and the delay in notifying the carrier somehow prejudices the defense of the case, the carrier can potentially disclaim coverage. Every insurance policy contains language requiring the insured to cooperate in the defense of any lawsuit, including notifying the carrier as soon as the insured becomes aware of a potential claim. A delay of a few days is almost certainly inconsequential, but a delay of weeks or months can put insurance coverage at risk.

Second, institute a "litigation hold" to preserve all documents relating to the plaintiff. Certainly, this would include the plaintiff's medical chart but could also include communications and emails, or other substantive documents regarding the plaintiff or issues with the plaintiff that might not be in the chart itself. These documents should be compiled as soon as reasonably possible, as they will be requested by the insurance carrier or defense counsel assigned to defend the case. A failure to preserve relevant documents could result in a chart of spoliation (i.e., destruction of evidence).

Third, a discussion with any employees or providers who had contact with the plaintiff should take place. In theory, all relevant information should be contained in the chart or related documents, but there is always the potential that someone has a recollection of something that did or did not occur that for some reason did not make its way into the chart. The sooner this can be determined, the more time will be available to determine how to utilize such information.

Q **Should I contact the plaintiff?**

A No. The plaintiff has engaged a lawyer to file a lawsuit, and almost certainly will have been directed by that lawyer not to speak with you. Further, even if the plaintiff were willing to speak with you, anything that you say will likely be reported to their attorney and potentially used against you in the lawsuit. While it may be tempting to reach out to the plaintiff to try and resolve the matter, it is highly unlikely that doing so will result in a positive outcome – and could make the situation worse.

Q **Can I supplement or correct the plaintiff's medical chart?**

A If a review of the chart after being served with a lawsuit uncovers deficiencies or missing information, it may be tempting to supplement or revise the chart to try and remedy such deficiencies. This should not be done. The electronic medical record will detail when chart entries are made. When plaintiff's counsel or their expert reviews the chart, he or she will be able to tell when a particular entry was made or revised. Making any corrections or revisions after a lawsuit has been commenced can lead to multiple negative inferences. Ideally, the omission or deficiency can be explained during the course of discovery, but even if it cannot, the chart should not be altered in any way. Good or bad, you are stuck with the chart.

Q **How long does a malpractice case last?**

A Each case is unique, and how long it lasts will depend on the particular allegations and parties involved. However, in most instances, a malpractice lawsuit will last multiple years. It takes a significant amount of time to (a) gather the relevant records, (b) exchange discovery demands and responses, and (c) take the depositions of parties with relevant information. Further, once discovery is complete, most courts have a very busy trial calendar and are typically scheduling trials at least one year away. It is not unusual for malpractice lawsuits to last two or three years – sometimes even longer. Though some cases can move much more quickly.

That said, relatively few cases actually make it to trial. Cases are often settled or dismissed during or after discovery, so the likelihood of a trial actually occurring is fairly low. However, the actions taken shortly after a lawsuit is served can set the tone and beneficially position the defense regardless of how long the lawsuit ultimately takes.

Colin Ramsey is a Partner in Underberg & Kessler LLP's Health Care, Litigation, and Municipal Law practice groups. He represents health care providers and facilities, municipalities, individuals, and businesses in complex litigation in state and federal courts. Colin can be reached at cramsey@underbergkessler.com or 716-848-9000.