Your First Lawsuit

Tips on how to conduct yourself and increase your chance of a successful defense.

BY LEE T. NORDAN, MD

As you are scrubbing between your third and fourth case of the day, your nurse comes to tell you that there is a US Marshal in your office. You meet with him, and, after he verifies your identification, he hands you a packet of papers, which includes a legal complaint—the first document filed when initiating a lawsuit. You have been served with your first complaint, a lawsuit alleging medical negligence. In some states, individuals may first receive a notice that they will be served with a complaint in the near future.

You read the contents of the packet that outline your alleged destruction of a patient's sight and ability to have a normal life. Although you will probably feel scared and then angry, as discussed in this article, you must do your best to learn to function in this adversarial environment. I am not a lawyer, but I hope to share some useful advice based on my experience as a private practitioner for 25 years who has served as both an expert witness and a contributor to many professional meetings and publications pertaining to informed consent and ophthalmic medical negligence. This article discusses a few of the issues you will face during the process of your first lawsuit.

THE FIRST DAYS

After you are sued, remind yourself that you are a worthwhile human being, that thousands of physicians have withstood litigation, and that there is a system to support you in this travail. You are not going to lose your honor, your practice, or your livelihood. If you feel you are mentally capable, go perform your remaining surgical cases of the day to the best of your ability.

When you are finished, notify your malpractice carrier of the claim; the carrier will ask for a written summary of the case. After you report the claim to your insurer, do not assume that your carrier will take care of the matter. Find out who at your insurer's office is handling your case and which attorney will be representing you and stay in touch with them. The sooner you are able to contact your attorney, the better. Determine whether your policy allows you to select an attorney to represent you. If not, you will want to make sure that you are comfortable with the attorney assigned by your carrier to represent you. If you are not, you may need to explore hiring your own attorney to defend your interests in addition to the attorney assigned to represent you by your insurance carrier.

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In my experience, you should also call an office meeting so that you can inform the staff that a lawsuit has been initiated and that any contact from the patient in question or his representatives is to be politely transferred to a special employee whom you have designated. The patient's chart should be copied, and the copies should be placed in two different, secure places, one of them outside the office. All nonmedical correspondence concerning the patient should be placed in a folder marked *confidential, personal property of your name* and kept outside the office. You and the staff will not discuss the case with anyone except in the presence of your lawyer.

A copying service will come to your office to make copies of the chart for the Plaintiff. Do not make any changes to the chart. If it can be proven that you altered the chart, you will likely lose the case. A jury can understand less-than-perfect record keeping, but it will not tolerate changes made after the fact.

Resume relative normalcy at your practice as the process of defending your case begins.

THE DEPOSITION

Your insurance company will soon assign a lawyer to your case, and you will meet with him to explain the situation from your point of view. The lawyer will respond to the complaint in writing, file this response with the court, and deny the accusations. You will become involved in creating written questions called *interrogatories* that will be submitted to the Plaintiff as well as responding to the

written interrogatories that the Plaintiff submits to you. Sooner or later, you will become involved in what is referred to as a *deposition*.

A deposition is an opportunity for the Plaintiff's attorney to personally pose questions relevant to the case to you and anyone else who may have knowledge of the relevant issues to the Plaintiff's claims under oath. Similarly, your attorney will have an opportunity to depose the Plaintiff and any individuals who may have information relevant to your defense. The Plaintiff may be present during your deposition but is not permitted to speak.

It is important to remember that your answers are being recorded and will be reproduced in a written transcript that will be provided to both the Plaintiff's attorney and your attorney. These answers may be read in front of the jury during a trial. Some tips for the deposition are to be careful not to explain an answer unless so required, to try to answer yes or no to a yes-or-no question, and to be articulate. Words such as *yeah*, *kinda*, and *um* are transcribed accurately and may make you sound uneducated and unsure in the courtroom. Never spar with the Plaintiff's attorney. You may appear arrogant to the jury and thus hurt your case. Above all, do not offer too extensive an explanation. If the Plaintiff's attorney asks you a tough question, answer it as truthfully as you can and do not speculate. Remember, your lawyer will ask you questions to elicit necessary clarifications.

OPPORTUNITIES TO SETTLE

After the answering of interrogatories is concluded and both parties have completed all depositions, all of which is known as the *discovery process*, you will begin to prepare for trial. At some point, the judge will probably order mandatory mediation. This process often does not result in the resolution of the case, but sometimes the Plaintiff's attorney will realize that he does not have a strong case and will offer to settle for a minimal amount.

In general, I would advise against entering into binding arbitration, in which the decision is legally binding and neither party has the right to appeal the decision of the arbitrators. I have found that most arbitrators end up splitting their vote and awarding what they consider to be a reduced monetary award. They rarely side completely with the surgeon.

Some medical insurance companies will want to settle a case for less than it will cost them to defend it. If the company has the right to settle a case without your agreement, then you will have to hire a lawyer to continue your defense, and you may become personally liable for any further judgment against you. You may find that your insurance company has no interest in maintaining your reputation or your financial health. Be sure you understand your insurance company's stance on settlements as well as the policy's limits.

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Although an insurance company has a fiduciary responsibility to settle a case within your policy's limits, you may wish to consider estate planning and asset protection. Contact a lawyer who specializes in asset protection and learn about the various means available to you to protect your assets such as limited partnerships and trusts as well as the important differences in the rules that govern trust formation in various states. There is no corporate shield for a physician found negligent of medical malpractice, as there would be for the corporate employees of a nonmedical corporation. You will need to implement all asset protections prior to being sued, or they may be undone by the court. Consult with an attorney about asset-protection measures before you encounter a lawsuit, or it is too late.

THE COURTROOM

The majority of medical negligence cases are decided in favor of the physician. The following suggestions may help you avoid becoming a part of the minority.

Always be present during the trial. Avoid the appearance of arrogance or smugness. Instead, maintain and exhibit a reasonable attitude.

Allow your attorney to do his job. Do not attempt to manage your own defense.

Learn to testify. When answering a lawyer's question, address your response to the jury.

Show that you still care about the patient's welfare. Juries understand that complications occur. They are likely to view you more favorably if you demonstrate pride in your work and reputation and loyalty to your patients.

Be an educator. Use diagrams, not long words. Explain some simple ocular concepts and build a rapport with the jury.

Use appropriate staff members to testify on your behalf if they have knowledge relevant to your defense.

Enlist a Defense attorney and expert witness who will demonstrate that the Plaintiff's expert witness is not infallible but has experienced surgical complications.

If your lawyer and expert witness are not willing to fight it out with the opposition, then replace them. The goal is to win the trial, not to have an intellectual discussion about ophthalmic trivia and differences in opinion concerning current ophthalmic practice in the US.

CONCLUSION

Every lawsuit is different. I have attempted to highlight portions of the process based on my experience. If you encounter a lawsuit, get involved and stay involved with your defense, both with your insurer and your defense attorney. Do not assume that your insurer and attorney will handle everything. The strength and effectiveness of your defense, both prior to and during your trial, depend on lengthy preparation that will require a significant commitment of your time and your active participation. Your active involvement will also enable you to monitor the progress of your case as well as the strength of the Plaintiff's case based on what you learn during the discovery process. Additionally, you will be able to assess any settlement offers more effectively prior to trial. ■

Lee T. Nordan, MD, is a technology consultant for Vision Membrane Technologies, Inc., in San Diego. Dr. Nordan may be reached at (858) 487-9600; laserltn@aol.com.

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