

Best Malpractice Defense Is a Competent Lawyer

Poor communication, neglect, and unclear billing policies top the list of complaints against lawyers.

BY SHERRY BOSCHERT
San Francisco Bureau

KOHALA COAST, HAWAII — You're a physician, not a lawyer. How do you know that the lawyer defending you in a malpractice suit is doing a good job?

When a physician gets sued, the malpractice insurer assigns the case to a legal defense firm. According to Annette Friend, M.D.—who is a psychiatrist and also a lawyer—physicians should expect five basic things from a competent lawyer: a plan of action; clear communication; ongoing communications; management of your expectations; and clear explanations of billing policies.

A review of past disciplinary actions against lawyers suggests that more than half stemmed from clients' complaints that the lawyers were neglectful, failed to communicate, or failed to represent clients diligently or competently.

Another complaint—that failure to communicate billing policies led to fee disputes—is an increasing cause of disciplinary dockets, Dr. Friend said at a conference on clinical dermatology sponsored by

the Center for Bio-Medical Communications Inc.

"We want to satisfy you, but you have to insist on being satisfied," Dennis J. Sinclitico, J.D., a defense lawyer, said in a separate presentation at a conference in Cabo San Lucas, Mexico, on obstetrics, gynecology, perinatal medicine, neonatology, and the law.

Get a copy of the malpractice insurance company's guidelines on expectations of lawyers to know what the insurer expects for your case, said Mr. Sinclitico of Long Beach, Calif.

To get your lawyer to do the best job for you, Dr. Friend and Mr. Sinclitico advised, think about the following factors:

► **Plan.** The physician and lawyer jointly plan a course of action. The lawyer should explain what is involved in the case, what needs to be done, what may happen next, and various means of resolving the case. The client makes the final decision about how to resolve the legal matter, said Dr. Friend of Fort Lauderdale, Fla.

She suggested asking whether the lawyer has ever handled this type of case before, and if there is some other way to

settle the matter other than going to trial. Your bill for an inexperienced lawyer may be higher as more hours are needed to learn the matter.

► **Communicate.** Expect plain speaking, clear writing, and good listening skills from your lawyer. When a complex legal issue can be explained in a way that one's grandmother might understand, that's clear speaking, she said. If you don't understand something your lawyer wrote, chances are the judge and others won't understand it, either. The lawyer should be able to listen to the client and think about the case without being distracted by calls, e-mails, or an overload of other cases.

If your lawyer isn't communicating well and regularly or you just don't get along, demand a new lawyer from the firm's associates or from the insurer's panel of lawyers, Mr. Sinclitico said.

Communication is a two-way street, he added. If you see an article in the medical literature that's pertinent to your case, send it to the lawyer. Insist on participating in selecting the medical experts whom your attorney will rely on.

► **Communicate some more.** The legal process can drag on for years, so expect ongoing communication from your legal team, preferably from your lawyer personally, Dr. Friend said.

Request regular, periodic status reports from the lawyer, Mr. Sinclitico advised. If the flow of paper stops, or if you call three or four times without a response from the lawyer, that's a red flag that something's wrong.

► **Manage expectations.** As the lawyer continually analyzes and updates you on the pros and cons of the legal proceedings, options should be articulated in a common-sense way without exaggerating the probable success of the case and without painting an overly bleak outcome.

► **Explain billing.** Demand an up-front, detailed accounting of billing policies. Law firms may bill for face time with the client, phone calls, conversations between firm members, time spent reviewing documents, legal research, preparation of forms or documents, revisions, document reviews, travel time and expenses, and many other services.

If the lawyer in charge of the case changes while the case is in progress, the client should not have to pay for the firm to bring a new lawyer up to speed on the case, Dr. Friend said.

Ask whether legal interns will bill at the same rate as senior lawyers in the firm, and be sure that you'll get access to all legal work generated on your behalf, she added. ■

Texas Doctors Cautiously Optimistic About Tort Reform

BY JOYCE FRIEDEN
Associate Editor, Practice Trends

When it comes to tort reform in Texas, physicians there say "so far, so good."

In 2003, the state enacted a tort reform law similar to that of California, including a \$250,000 cap on noneconomic damages. So far, that's been good news for Texas physicians, according to R. Moss Hampton, M.D., head of the Texas Association of Ob.Gyns.

"Everybody here would say it's been a success," said Dr. Hampton, who practices in Amarillo. He noted that the Texas Medical Liability Trust, the state's largest medical malpractice insurer, has reduced its rates by 17% since the law went into effect.

"That's kind of set the tone for the state, and the state board of insurance is trying to get other carriers to do same thing, with some success," he said.

"And a number of carriers are moving back into the state," Dr. Hampton added.

However, "it's obviously early in the process," Dr. Hampton cautioned. "Everyone told us to expect initially that claims would go down, and [the question is] how soon it would take to start going back up. ... We've also seen bills in the legislature trying to erode some of the gains we made, but so far none [has] taken hold."

Not everyone is pleased with the law. "I have no problems with my malpractice carrier, but this [law] is not the answer," said Jerry Frankel, M.D., a urologist practicing in McKinney, Tex.

"The answer is to totally change the

concept of malpractice," Dr. Frankel said.

Instead of the current system, Dr. Frankel supports a no-fault liability system, in which injured patients are reimbursed based on a set formula. "The way the system works now, only a tiny percentage of people get compensation, and 70% of money goes to lawyers and the court system," he said. "But if you leave the lawyers out and the courts out, 100% of compensation would go to victims of bad outcomes."

Using caps to compensate patients who have been harmed is not a fair approach, Dr. Frankel said. "The trouble with caps is, we do have nightmares. One woman had a bilateral mastectomy, and she had benign disease. She got \$100,000. If this had happened to my wife, a trillion dollars wouldn't be enough."

To make sure that bad physicians are appropriately disciplined, Dr. Frankel said there should be a separate system to monitor them. "That would be much better than now, and once these doctors piled up enough points, there would be some sort of disciplinary action—retraining them, restricting their privileges, or having them lose their license."

Dr. Frankel said the reason malpractice premiums had been going up does not appear to be related to lawsuits. "Maybe 1% of people who are injured get some kind of compensation, and nobody's shown that the number of injuries is growing or the number of bad doctors is increasing." Instead, he said, "all that

departments limit malpractice insurers in the amount of assets they can invest in the stock market. "Most companies, if they're going to do it, put in 10%-15%," he said. "At SCPIE, we do 3%. You're not going to do [more] because you're not going to take the chance."

Mr. Zuk said that his company left the Texas market because of losses from lawsuits. In 1999, for instance, the company's loss ratio in the state was 177%—it paid out 77% more in claims than it had taken in premiums. The loss ratio increased over the next 2 years to 228% in 2001; by 2004 it had dropped to 139%, still well over the amount it had taken in.

"The problem is not so much frequency as severity—that's where we're getting killed," he noted.

Despite the new law, Mr. Zuk said his company has no plans to re-enter the Texas market. "We're out of Texas for the immediate future because it's just too dangerous."

In the meantime, Dr. Hampton thinks that he might be seeing an upturn in the supply of ob.gyns. in the state of Texas. "In our area, we have not seen a big shift, but in Austin and some other metropolitan areas, we have seen the number of practicing ob.gyn. doctors increase," he explained.

"I'd be reluctant to say that malpractice rates came down, and we've now got people rushing back in, but from an ob.gyn. standpoint, [tort reform has] made it more attractive to younger physicians to stay in the state rather than go somewhere else where rates are lower," Dr. Hampton said. ■



The largest malpractice insurer in Texas has lowered its rates by 17% since the tort reform law, Dr. R. Moss Hampton said.

happens is when the stock market goes bad, premiums go up."

Not so, according to Donald J. Zuk, president and CEO of SCPIE, a medical malpractice insurer that left the Texas market in 2002. "Insurers cannot raise premiums to cover past losses," he said at a conference sponsored by the American Enterprise Institute in Washington. Rather, "premiums are tied to estimates of future paid losses."

Mr. Zuk also noted that state insurance