

The Pitfalls and Perils of Countersuits

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The term "countersuit" is taking on an enchanting status to physicians, as if it were a miracle drug to cure the malpractice malady. Despite the fact that insurance industry studies show few nefarious malpractice suits, many physicians are convinced that there would be fewer claims if patients and their attorneys knew they might be back in court as defendants for instituting a nonmeritorious suit. Eliminating these few spurious suits, which are very difficult to establish at best, would have little impact on the overall problem. One countersuit may beget another.

Although a few physicians have been successful, a review of reported cases reveals that most countersuits have ultimately gone against the physician. Additional problems arise when medical societies attempt to alleviate the physician's financial burden by fostering countersuit funds. The funds may relieve the legal expenses, but in turn are fraught with formidable legal consequences, including conspiracy to intimidate prospective litigants and appearance of encouraging litigation. Physicians should proceed with deliberate caution in creating funds and undertaking countersuits.

Physicians have searched for a variety of solutions to the medical malpractice crisis. They have sometimes succeeded in securing legislative measures which impose procedural barriers to malpractice suits. Negotiations with the carriers of their insurance policies to reduce the costs have been another approach. Some have tried work slowdowns or have eliminated high-risk procedures. Others have moved to a less vulnerable area, taken jobs, or retired. Still others are going "bare" — having no insurance and sometimes coupling that with transferring their assets in a vain

attempt to make them judgment-proof.

Recently a new tactic has begun to capture the imaginations of physicians around the country. Most who are sued for medical malpractice first become bitter and angry.¹ They feel that their patients have acted unfairly out of malice or greed. Blackmail is a not infrequently used description. Few of them believe the suit against them is justified, believing rather that it is frivolous. Soon the feeling of anger is joined by a sense of frustration and desperation. As a consequence, physicians are conjuring up ways of striking back at litigious patients and their lawyers. The result is that they want to turn the tables on those who are suing and give them a taste of their own medicine.²

The new tactic that appears to be gaining popularity in evangelical proportions is to bide their time and countersue the unsuccessful patient and his/her lawyer.³ The grounds for

the countersuit are that the original suit against the physician was spurious, unwarranted, frivolous, or merely a nuisance lawsuit for the purpose of securing a small settlement. In increasing numbers physicians themselves are becoming the plaintiffs, countersuing their patients since they believe the malpractice charges against them are completely unfounded. Over the past two years the number of countersuits has begun to grow.⁴ A small number of physicians have met with success despite the legal barriers and lack of precedents in this area.⁵⁻⁹ Some medical societies are actively participating in this pursuit. They are setting up or fostering organizations that will accumulate funds to assist these physicians financially, since a countersuit must be brought at the physician's and not the carrier's expense.^{10,11*}

Considerations Regarding Countersuits

Despite these few successes, and before this enterprise assumes vigilante-like proportions, physicians should temper their emotions with practical considerations.¹² In some of the victorious countersuits the final verdict is not yet in because it is awaiting appeal to a higher court.⁷ In others the damages awarded the aggrieved physician were so small that no appeal was sought by the patients and lawyers.⁶ These verdicts have no precedential value as they represent a decision in a lower court. Also, a number of verdicts have gone against the countersuing physician.¹³⁻¹⁷

Recently, a physician employed a novel legal maneuver in an attempt to get back at an unsuccessful plaintiff-patient. He sued the patient and attorney for "constructive contempt" on the grounds that their malpractice suit against him was groundless. He sought \$750,000 in damages for embarrassment and for probable loss of future earnings. Both the lower and appeals courts held that there was no cause of action for "constructive con-

*Personal Communication from TE Curtin, MD, President of the Medical Society of the District of Columbia to all section chairmen: "Countersuit Fund." May 12, 1976.

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tempt" because the patient had not violated any court order. Furthermore the malpractice suit had not invaded the physician's privacy because communications in judicial proceedings are absolutely privileged and are immune from actions for invasion of privacy.¹⁸

In light of the unsuccessful countersuits, physicians must recognize the basic policy of US law. A wrongfully sued defendant physician has virtually no recourse, when the plaintiff-patient honestly believes that he has been treated negligently by the physician. Even though that premise is ill conceived by the patient, he has a fundamental constitutional right to his day in court to have that claim adjudicated. This pertains even though there is a difference as to the facts and there is only a scintilla of evidence presented on the patient's behalf. Furthermore, the lawyer is duty-bound to pursue such a claim as long as the investigation does not conclusively refute the patient's allegations. Sometimes the lawyer is obliged to file suit with minimal investigation in order to preserve the patient's rights under the statute of limitations. For the physician to successfully prove that the right was exercised maliciously or frivolously is fraught with the greatest legal difficulty. The downfall of all lost countersuits to date is basically that the physician could not satisfy these legal criteria.

Although the physician may validly and successfully complain that he/she was damaged as a result of the baseless malpractice suit, the physician still must establish a money value for the loss of time and earnings during the defense process. This is also required when claims of emotional trauma and injury to reputation and practice (loss of probable earnings) are made. Allegations that insurance premiums have risen must be shown to be directly related to the lawsuit.

If it is satisfaction and deterrence rather than money damages that the physician seeks, there is the practical consideration that more time and earnings will be lost in pursuit of the countersuit as well as the additional anxiety and tension. Even if the legal costs come out of a fund, are the intangible costs worth the derived satisfaction? There is also the possibility that the patient and lawyer may seek the same remedy. They may countersue and allege, perhaps success-

fully, that the physician's countersuit was based on retribution and not because of actual damages. One countersuit may beget another.*

Invariably the insurers do not want a countersuit joined to the original malpractice suit brought by the patient. The insurance companies are not willing to bear the additional costs, particularly the lawyer's fees, in the pursuance of the countersuit. Furthermore, they are fearful that it will obfuscate the issues in the suit against the physician. Though the court costs and lawyer's fees may be paid out of a fund, the carriers still do not want their lawyers wearing two hats. Even if the physician secures his own lawyer for the countersuit, insurers do not want two lawyers with two different purposes involved in the same lawsuit.

Countersuit funds have serious implications for both the contributors and the physicians who use them. They may incur serious legal hazards.¹⁹ Physicians must recognize that funds to pursue countersuits are completely different from legal defense funds. The latter are created to assist a defendant who has been placed in legal jeopardy. On the other hand, the purpose of a countersuit fund is to facilitate a lawsuit that might not have been undertaken if there were no funds available to the plaintiff.

It is conceivable that countersued patients and lawyers may institute a lawsuit for barratry against the contributors. Barratry is defined as the illegal act of encouraging litigation: a countersuit could be construed as inciting litigation. A claim of barratry may be one of the reactions to countersuits.

Another legal response to countersuits may be a charge of conspiracy against the contributors and users of the fund monies. It is reasonably foreseeable that an allegation could be made that the fund had been created by physicians who conspired with the avowed purpose of intimidating patients to prevent them from suing physicians for alleged malpractice. This would infringe on the patients' constitutional right to seek redress in court. Charges of conspiracy have been upheld against medical societies and

* There is at least one such counter-counter-suit filed already.

physicians accused of interfering with other physicians' rights to practice their profession.^{20,21} It would be easy to subpoena organizational minutes to prove either conspiracy or barratry under present "discovery" rules.

There could be an extension of the chilling effect of the fund on patients' right to sue for malpractice. Lawyers, either individually or as a group, could bring either a single or class action suit against the countersuit fund association as well as the individual contributors. The grounds for such a suit might be that the existence of the fund is responsible for the loss of potential fees resulting from the decreased pursuance by patients of their legal rights. They could predicate such suits on the grounds that such funds are contrary to public policy and public good. They might even seek punitive damages from the association fund and its members as willfully contrived for an evil purpose. Such awards, unlike the claims for loss of earnings, may be considerable and exceed the fund's assets. The individual physician would be personally responsible to pay a share of the judgment. This has already happened to members of a medical society, in which the society was held to have interfered with a physician's practice. The society's assets were insufficient to pay the judgment and the individual members were assessed to make up the deficit.²¹

Physicians who have decided to countersue have encountered a lawyer's conspiracy of silence.⁴ Securing a lawyer to pursue a countersuit against another lawyer has proven to be extremely difficult. Some lawyers refuse to prosecute a countersuit against a patient plaintiff because they believe in a person's right to his day in court.

Comment

Despite some recent successes by physicians in countersuits, others should think seriously about supporting countersuit funds and undertaking such a suit. Physicians must recognize that in recent times their public stature has diminished. In order for countersuit funds and lawsuits to be maximally effective, their existence must be publicized openly and notoriously. The conspiracy of silence

attributed to physicians because of patients' difficulty in obtaining expert witnesses has tarnished the physicians' image. Being involved in a countersuit fund, as a contributor or participant, would further impair physicians' reputations and images. It would appear that physicians are ganging up again, albeit in another way, against patients.

Despite a common belief, statistics from the US Department of Health, Education, and Welfare's Commission Report and insurance companies' and associations' data, demonstrate that nuisance unwarranted suits by patients have had a negligible impact on the medical malpractice situation.^{22,23} The vast majority of malpractice suits, regardless of outcome, can be justified legally. Although the funds and countersuits may deter the few spurious claims, lawyers will be prepared and able to show that their lawsuit is justified. Logically and practically, the better solution to mal-

practice is prophylaxis rather than countersuits. Physicians should not walk where angels fear to tread.

References

1. Behind the countersuit trend: Physicians' frustration and anger. *Am Med News*, June 14, 1976, pp 1, 8, 9
2. Wills RV: Assault with a deadly lawsuit: A wrong in search of a remedy. *Case and comment* 81:19, 1976
3. Countersuits becoming popular weapon for MDs. *Am Med News*, June 14, 1976, pp 1, 12
4. Countersuit awards are getting fatter (Professional Briefs). *Medical Economics*, January 10, 1977, p 16
5. Physicians fight back — and begin to win — in malpractice case. *Medical Tribune*, January 1, 1977, pp 1, 9
6. Countersuit wins surgeon \$1,000. *Hospitals: J Am Hosp Assoc.* 51:20, 1977
7. *Berlin vs Nathan*, Ill Cir Ct, Cook Co, Docket No 75-M2-542, June 1, 1976
8. *Keller vs Anderson*, 554 P 2d 1253, Wyo Sup Ct, Oct 12, 1976
9. Reilly P: The case against countersuits (Impact). *Am Med News*, March 28, 1977
10. Countersuit support voted in New York. *American Medical News*, November 11, 1976, p 8
11. Malpractice: Illinois counter attack. *Medical World News*, January 1, 1977, pp 7, 8

12. Freidberg E: Attorney outlines considerations for doctors contemplating countersuits. *Malpractice Digest*, September/October 1976, pp 1, 3, 6. Published by St Paul Fire and Marine Insurance, St Paul, Minnesota
13. MD loses suit against lawyer: Free clinic fate uncertain. *American Medical News*, March 1, 1977, p 10
14. *Spencer vs Burglass*, 337 So 2d 596, La Ct of App, Aug 31, 1976 rehearing denied, Oct 13, 1976
15. *Carroll vs Kalar*, 545 P 2d 411, Ariz Sup Ct, Jan 19, 1976
16. Physicians lose suit against two malpractice lawyers. *Hospitals: J Am Hosp Assoc* 51:25, 1977
17. *Goldberg J: Suing a malpractice plaintiff can boomerang.* *Medical Economics*, November 1, 1976, p 108
18. *Wolfe vs Arrogo*, 543 S W 2d 11, Tex Ct of Civil App, Oct 13, 1976
19. Reynolds JA: How plaintiffs' attorneys view the countersuit tactic. *Medical economics*, October 4, 1976, pp 73-79
20. *American Medical Association vs United States*, 317 US 519, 1943
21. *Ascherman vs San Francisco Medical Society*, 39 Cal App 3d 623, 1974
22. *Malpractice Digest*, March/April, 1976, p 4. Published by St Paul Fire and Marine Insurance Company, St Paul, Minnesota
23. Report of the Commission on Medical Malpractice, US Department of Health, Education, and Welfare, Washington, DC, DHEW Publication No. 73-89, January 16, 1973

