Being a Defendant in a Medical Malpractice Lawsuit

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In spite of best efforts, some oral and maxillofacial surgeons will have a medical malpractice lawsuit filed against them at some point in their careers. Roughly 5% of medical malpractice claims find their way to trial, and I happened to be involved in one of them. The details of my particular case are not as important as my experience navigating through the process. There are several “Reality Checks” I learned along the way that helped achieve a successful outcome. While I cannot say for certain that one can ever be truly prepared to go from doctor to defendant, I hope that sharing my experience will somehow benefit others who find themselves in a similar situation.

Reality Check One: The process is slow.
The wheels of justice turn very slowly through many phases. Depending on your particular jurisdiction, it can take years before a case is actually tried. The immediate reaction to a lawsuit is a sense of urgency and haste. After all, in our world as surgeons a problem is identified, solved, and then it is over. In a legal situation, you have little control over how fast or slow the proceedings go, and you have to come to terms with it.
The slow periods provide an opportunity for personal preparation, which is important for a successful outcome. To combat anxiety and depression, I kept an active fitness regimen, which was enough to help manage my stress. I also found helpful information on OMSNIC’s website. There is a link to PhysicianLitigationStress.org that contains a great deal of information for doctors who are in the midst of litigation and looking for support.

Reality Check Two: Obtaining as much information as possible is extremely valuable.
Discovery is the process of gathering records and building a solid defense. In this phase, all the players are identified. It also clarifies why the case was filed, and whether it was justified. In my particular case, my OMSNIC insurance agent and claims analyst worked together organizing information for my attorney. I personally spent several hours combing through the discovery documents. For example, I was able to review records of previous and subsequent treaters. The review helped me analyze facts and theories, gain confidence in our plan as it evolved and generate useful tools at trial.

Reality Check Three: An attorney is a legal expert and not a doctor.
There were certain key facts in my case that had a scientific medical relevance. It was my job to explain them so that my attorney could effectively translate technical information to lay people who would make judgments about me in the legal theater. OMSNIC paired me with an experienced attorney familiar with the oral and maxillofacial surgery specialty. I felt his personality complimented mine well. My attorney was an extremely good listener and made sure I knew that, while compensated by OMSNIC, he essentially was working for me and in my best interest.

Reality Check Four: Being an active participant is a must.
My attorney spent many hours preparing me for my deposition. I reviewed information available on the OMSNIC website. In particular, I found the course, “Mock Deposition: What To Expect During Witness Testimony” helped me prepare for the deposition process. It was also important...
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for me to be involved and present during the depositions of the plaintiff and the plaintiff’s expert. A personal presence is powerful and demonstrates your commitment to your defense. It helps you become more comfortable with the legal world and jargon. Most importantly, it allows you and your attorney, in real time, to ask follow up questions of a plaintiff or expert that can become valuable during a trial. Being prepared can reduce anxiety and is critical to success at trial.

Reality Check Five: Reduce your variables.

It is much easier to solve a problem when there are only one or two variables. During the process, summaries of the issues can be submitted by both sides in an attempt to reach a settlement. In my case, the plaintiff’s summary provided a template for how they were building their case. Analyzing the plaintiff’s theories reduced variables and allowed me to prepare to answer the questions I expected to be asked during my deposition and trial.

Reality Check Six: 2/3 of the case begins at the trial.

The judge, the jury, and even the layout of the courtroom is unfamiliar territory, no different than if your attorney were to go to the OR with all its strange equipment, activity, and personnel. My attorney consulted with me during jury selection, which is a skilled process requiring specific criteria. Focusing on questions and answers during jury selection was important in understanding predispositions relevant to how jurors evaluated issues.

Reality Check Seven: The defendant is the star of the show.

Defense experts are very helpful in supporting the defense. However, the judge, and most importantly the jury, want to hear from the defendant. This was my opportunity to connect personally with the jurors. The more they got to know me, the greater the likelihood they would find my testimony and records more credible. I was able to stand in front of the jury and use my records, including photographs, radiographs, and models to tell my side of the story. I imagined each juror a patient, explaining the risks, benefits, and complications in terms I use every day in practice.

Final Thoughts

The jury deliberated for 45 minutes before delivering a defense verdict (7-0). The entire process lasted 2 ½ years. It would have been easier to settle, but I sought the sense of justice only a jury could deliver. Medical malpractice lawsuits are, unfortunately, a reality of our profession. What I learned is that a combination of being patient and prepared, while keeping things in perspective during the ups and downs of litigation, helps one survive the process.

Coping With Litigation Resources

PhysicianLitigationStress.Org: Support resources to help you survive malpractice litigation.

OMSNIC e-Learning Center: Litigation Courses

ALL 206 – Anatomy of a Malpractice Suit

Mock Deposition: What To Expect During Witness Testimony