

# Legal Issues for the Gastroenterologist: Part II

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In the previous issue of *The New Gastroenterologist*, we discussed statistics and the basis on which most gastroenterologists are sued as well as what you can do to minimize this risk. In this second article, we discuss steps to assist in your defense in the event you have been sued. The following suggestions are based on our experience as defense attorneys who practice in the arena of medical malpractice.

If you have been sued, it is imperative that you notify your insurer immediately, as this may be required under your policy for coverage. It is also best practice to notify the carrier and/or the hospital (if it occurred at the hospital) of any incident or serious event, bad outcome, or letters from lawyers representing the patients. This allows for early investigation and, in some cases, intervention.

Do not, under any circumstances, add or alter the plaintiff's medical records. Although you have continued access to electronic medical records, accessing or altering these documents leaves an electronic trail. Attorneys are now frequently requesting an "audit trail" during discovery, which shows who and when someone accessed or altered rele-

vant medical records. Additionally, it is likely that the plaintiff's counsel has already obtained and reviewed records for their client. As such, counsel will notice any alterations and will require an explanation as to the same. If you did alter any medical records, it is important that you notify your attorney about the specifics of such.

You should not discuss anything about the case with anyone other than your spouse and attorney. This will prevent plaintiff's counsel from deposing additional witnesses and limit the amount of people potentially forced to testify.

After you have secured an attorney, it is critical that you arrange a meeting to develop a positive relationship early in the litigation process. This is important for many reasons. A medical malpractice case can be a long and arduous process which requires that you be involved with your attorney during the course of the litigation. For the attorney-client relationship to be successful, it is imperative that you know and feel comfortable with your attorney and develop confidence and trust in her. Without this trust, it will be difficult for you to accept various decisions or sugges-

tions that the attorney believes are in your best interest. Conversely, the attorney should get to know you and understand your background, as this will assist in your representation.

A good relationship with you will also aid your attorney in educating herself on medical concepts relating to your case. Remember, your attorney most likely has not attended medical school and many of the medical concepts will initially be new to her. By the time trial arrives, however, your attorney will be very familiar with the medical issues in your case. This learning process can be expedited with your assistance and research.

Finally, be sure to respond fully and honestly to questions from your attorney, regardless of whether you view it as harmful, irrelevant, or unimportant. Anything you tell your attorney is confidential and protected by privilege. Your attorney is your ally. It is her job to help you. Thus, it is essential that you respond fully and honestly to all questions posed by your attorney and disclose all possibly relevant information.

## Your deposition

At some point during the lawsuit,

the plaintiff's attorney will take your deposition. The plaintiff's attorney will strive to obtain concessions that establish the standard of care, breach of the standard, causation, and damages.

Your deposition is not the time for you to provide explanations. It is the time for you to concisely answer specific questions posed by counsel without volunteering any additional information. Ultimately, trials build on what occurs during depositions.

Preparation is key. Be open to advice or criticisms from your lawyer. Try to eliminate any quirks or habits that interfere with the substance of your testimony or perceived credibility.

A deposition is not a casual conversation; nor is it a test of your memory. Limit your answers to personal knowledge; never guess or speculate.

If you do not know the answer to a question, or do not remember something, it is perfectly acceptable for you to say so. Answer only questions that you understand. You are allowed to ask the plaintiff's counsel to repeat or rephrase questions.

Once you have answered a question, stick to your answer if it is accurate. It is fine to change an answer,

but do not change it simply because the plaintiff's counsel is pushing you to do so.

Aggressive interrogation by opposing counsel may occur. Never argue or quibble with the plaintiff's lawyer; leave all arguing to your lawyer. A witness who is calm, courteous, and confident is more likely to appear credible. The plaintiff's attorney may request that your deposition be videotaped. If this is the case, be mindful of your mannerisms, tone of voice, and appearance. The videotape may end up being played in front of a jury.

Finally, and most importantly, always tell the truth. Discuss any anticipated issues or concerns with your lawyer before your deposition.

### Preparing for trial

A trial can last anywhere from 1 to 3 weeks. Your daily presence (including at the jury selection before the trial begins) is mandatory and in your own best interest. Your lawyer will have little control over the date on which the trial will occur. That date will be set by a judge, who will not be sympathetic to your scheduling problems. Be prepared to cancel patients' appointments and any procedures

already scheduled. The jury's perception of you can be influenced by your presence and demonstrated dedication to your defense.

### Conclusion

In summary, remember that there are things you can do both before and after you are sued to minimize litigation and its impact. As mentioned previously, before a lawsuit, and as a regular part of your practice, it is important that you stay current with medical advances, that you take the time to create a relationship with your patients involving quality communication, and that you thoroughly and legibly document all aspects of care provided.

After a suit is filed against you, make sure you notify your insurer immediately, do not alter any records or discuss the case with anyone other than your lawyer or spouse, and do all you can to create a productive and honest relationship with your lawyer. This relationship will be invaluable as you do the difficult and time-consuming work of preparing for your deposition and trial, and it can help you endure and successfully navigate the litigation process. ■

## The Importance of Follow-Up: Further Advice on How to Decrease the Risk of Being Sued

**A** common basis for establishing a malpractice liability claim against a physician is the failure to follow up or track a patient's test results. In today's world, there is an increasing number of moving parts involved in any given patient's care. A particular patient may be treated by numerous physicians, all of whom use different record systems. Electronic medical record systems have made records more accessible and easier to track, but they also present a new set of challenges.

Every physician needs to determine how they plan to track test results. The ideal system would allow a physician to quickly get back any lab or diagnostic test that he

or she orders. All staff members should know how the physician's system works. Otherwise, test results might accidentally be filed before the physician reviews them or a miscommunication could prevent test results from being delivered. Whatever choice of system, it is key to follow and effectively use the program every time.

Additionally, it can be beneficial to let the patient know when he or she can expect to hear about their results, as failure to keep the patient reasonably informed can create a new set of patient concerns and anxiety. Ultimately, establishing a well-defined system for record tracking can help physicians avoid malpractice liability claims because of a failure to follow up. ■