

THE BIGGEST LEGAL MISTAKES PHYSICIANS MAKE

AND HOW TO AVOID THEM

LEGAL DESK REFERENCE FOR PHYSICIANS

<i>Antitrust</i>	1
<i>Asset Protection</i>	15
<i>Bankruptcy</i>	53
<i>Business Planning and Structuring</i>	67
<i>Compliance</i>	117
<i>Contracts</i>	157
<i>Criminal Law</i>	197
<i>Disability Insurance</i>	227
<i>Divorce</i>	233
<i>Employment Law</i>	247
<i>ERISA and Retirement Plans</i>	301
<i>Estate Planning</i>	321
<i>Hospital Relations</i>	359
<i>Immigration</i>	371
<i>Intellectual Property</i>	387
<i>Litigation</i>	399
<i>Malpractice</i>	419
<i>Managed Care</i>	471
<i>Medicaid</i>	495
<i>Mergers and Aquisitions</i>	501
<i>Professional Discipline and Licensing</i>	515
<i>Real Estate</i>	549
<i>Risk Management</i>	569
<i>Taxation</i>	619

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17.4 The 10 Biggest Legal Mistakes Physicians Make When Reporting and Not Reporting Cases to Malpractice Insurers By James C. Goodwin, Esq.

Executive Summary

One of the more troubling situations physicians face during their careers is that inevitable day when they must decide whether to report a potential claim to their malpractice insurer. The fact that this question often arises on the heels of either a patient problem or a patient conflict only makes matters worse. After all, physicians practice medicine out of a desire to help people. When they fail in that endeavor, or are at least perceived to have failed, they are emotionally affected, and potentially so is their livelihood. After all, reporting can sometimes trigger review by those who grant hospital privileges, credentialing with health insurance networks, or even self-reporting obligations to state licensing agencies. But many physicians let their emotions or their fears about the resulting effect on their medical practice get in the way of a rational reporting response. These 10 commonsense recommendations may just help keep physicians out of trouble.

Mistake 1 Not Reading the Policy

Instead of wondering whether to report, physicians should pick up a copy of their policy and spend a minute reviewing it. Does the policy require them to report certain things but not others? Most, but not all policies, have a requirement to report potential lawsuits, insurance claims, and sometimes even patient complaints or threats. Some policies even require that physicians report in a specific manner, such as in writing or verbally. Many policies have requirements that physicians report within a certain amount of time.

Action Step Physicians who do not understand the requirements of their policies, and perhaps even if they think they do but are not quite sure, may want to meet with an attorney to have their questions answered or call their insurer for guidance.

Mistake 2 Thinking “Ignoring It Will Make It Go Away”

Ignoring it will not make it go away. If something happens that is atypical enough to cause a physician to fret over it or to want to avoid dealing with it, then that physician is dealing with exactly the type of issue that should be reported to the physician’s insurer. Sometimes it may be a bad outcome resulting from bad care. More often, it is simply a bad outcome, which can occur even when the physician thinks he or she did everything right. Patient dissatisfaction is a simple fact of life and learning how to deal with it appropriately is an entirely different topic all together.

Action Step The goal here is simply to figure out when that dissatisfaction is serious enough to warrant reporting to the insurer. In general, if a patient has taken time to write

MALPRACTICE: REPORTING TO INSURERS

down his or her concerns, then they are serious and the physician should report. If a patient has taken time out of a busy schedule to see the physician without making an appointment, the physician should report. If a patient has telephoned multiple times or continues to express concerns even after the physician has explained the situation to the best of his or her ability, the physician should report. If a patient's attorney calls, the physician certainly should report. Conversely, if a patient merely expresses some grumbling after a procedure but has not followed up, then depending on the situation, the physician may be okay not reporting. In situations in which the physician is personally concerned that he or she may have been negligent, the physician must analyze the degree of any resulting harm. If it was something as simple as not charting appropriately, but without resulting harm, then the physician probably does not need to report. On the other hand, if a patient's health was affected, the physician probably should.

Mistake 3 Thinking "Reporting Will Cause My Rates to Rise"

Malpractice insurers recognize that mistakes are inevitable. They are in the business of paying money to compensate for those mistakes. The earlier they can get involved in the process of evaluating errors, the better financial decisions they can make. Physicians also will be better off personally in situations in which a report leads to the determination that counsel should be appointed for you. Attorneys who represent doctors always want to represent them as early as possible.

Action Step Having knowledgeable legal counsel on board from the start can help avoid the types of mistakes that can quickly turn a precautionary matter into full-blown litigation. In addition, it is a fact of life that attorneys cost a lot of money, so the sooner a bad case can be identified and settled, the better it is for everyone. Conversely, if it is not a bad case, but the physician is confronted by aggressive patients, their family members, or their attorneys, then all the more reason for the physician to get help from his or her malpractice insurer quickly. (See Mistake 2.) Physicians should leave the legally maneuvering to the experts; in doing so, they will avoid a lot of personal stress.

Mistake 4 Thinking "Not Everything Needs to Be Reported"

While there certainly is a time for putting the right spin on things, and revealing only what absolutely must be revealed, this is not one of those times. Again, malpractice insurers are on the physician's side.

Action Step To assist a physician, insurers need to know the full extent of the problem and the resulting possible harm. There is a caveat, however. Most insurance policies have clauses that permit malpractice insurers to deny coverage if the physician has intentionally engaged in wrongful behavior, such as in a criminal act, or perhaps by altering evidence to cover up potential mistakes. Although rare, physicians who find themselves in such a position should make their first telephone call to an attorney. (See Mistake 1.)

THE BIGGEST LEGAL MISTAKES PHYSICIANS MAKE

Mistake 5 Thinking “I Can Handle This Myself”

Some physicians believe they can give a patient a personal check and settle the issue without having to report. The idea, apparently, is to settle for a few thousand dollars in order to avoid a potential huge increase in malpractice rates. Those physicians should remember that they are doctors not salesmen. Even worse, some physicians find themselves in a position of having done something that causes them concern that they may be denied coverage. These physicians need an attorney not only to help evaluate how best to deal with the insurer, but possibly how best to defend them in a potential criminal action. Even if the issue is not that serious, physicians absolutely must avoid any urge to try and alter prior negligence by modifying records or covering up evidence. The accidental “loss” of a chart, a page from a chart, film, and so on can actually prove more damaging than the contents of it would have been in the first place. In most jurisdictions, if evidence is lost or destroyed, jurors may be told that they can presume that it contained damaging evidence. Even records that still exist but have been altered can prove to be a physician’s downfall.

Action Step Medical charts get copied repeatedly and distributed to many different entities, including other health providers, health insurance networks, and the patients themselves. Good trial attorneys track all those copies down and compare them. Good trial attorneys hunt documents for a living; physicians do not. Good trial attorneys know handwriting experts; physicians do not. In such situations, physicians would be well advised to seek a good trial attorney.

Mistake 6 Not Cooperating After Reporting

Physicians should not presume that, without their assistance, their insurer will be able to handle everything after they report. Even the best claims representative is almost never a physician, and if medicine were easy, everybody would do it. The insurer and the attorneys it hires need the physician’s expertise, advice, and time. Often, they also need the physician’s records, and that may mean all of the records. They may need films, consultations, billing statements, and phone records, and they may need the physician to take the time to help explain all of those records to them. A physician cannot just stick it all in an envelope with a sticky note on top saying “deal with this,” drop it in a mailbox, and then walk away. In such situations, if a physician is lucky, a simple telephone call may suffice, and the report of a potential problem will simply end up in the files and computer systems of the malpractice insurer until the statute of limitations passes and everything is purged.

Action Step If a physician is unfortunate enough to be the recipient of a lawsuit stemming from an incident that he or she reported, that physician will certainly have to make time to work with his or her insurer and the counsel that they retain to represent the physician. The physician is a critical member of that team, and even if it is not convenient, easy, or pleasant, the physician’s personal participation in the process can make all the difference in the world.

MALPRACTICE: REPORTING TO INSURERS

Mistake 7 Blaming Another Provider

Physicians often get lulled into thinking that they can avoid litigation or medical board complaints if they can simply make a patient or a patient's family (or even the patient's attorney) understand that the problem was the result of something someone else did. Typically, the only result is that the "someone else" is now going to be confronted and possibly sued too, and then that person is going to be inclined to point the finger right back at the one originally blamed. Even if a physician is not targeted, arguments that he or she controlled the actions of others are fairly common, and even if such an argument is not raised, then someone is probably going to claim that the physician should have discovered the error and done something to fix it.

Action Step When the subpoena to appear at deposition arrives at a physician's door, even if it is only about the care he or she provided to a patient who happened to have received negligent care by someone else, the physician should call his or her insurer. Doctors who are not represented by an attorney at deposition are at risk of saying something that may come back to haunt them. While the insurer may not be guaranteed to provide courtesy counsel to appear at a deposition such as this, most of the time the carrier will choose to hire counsel for the physician. The hour or two the physician spends with an attorney preparing for a deposition may save the physician many hours of grief later.

Mistake 8 Thinking That Making a Mistake and Reporting it Will Be Ruinous

Many doctors are still practicing medicine who have settled claims and/or received verdicts resulting in payment of policy limits of their malpractice insurance, with a resulting report filed with a credentialing agency. Those physicians are still practicing because everyone knows mistakes are inevitable but recognize that it is often how physicians address those mistakes that makes all the difference.

Action Step Even if a physician's first inclination is to beg for forgiveness from a family, a patient, or an attorney who wants to sue, the physician should start by making a report to his or her insurer. The insurer can help the physician determine the best way to deal with the problem and get an attorney if necessary. Physicians should remember that telling someone that they are sorry for their loss is vastly different from telling someone that they are sorry because they caused their loss. Expressing sympathy and compassion is natural and generally a good thing to do, but before confessing responsibility, a physician should make a report to his or her insurer.

Mistake 9 Not Reporting All Problems

Just because a physician has had multiple reports in the recent past does not mean that the next report is any more or less worrisome than the underlying facts it is based on. Sometimes the only reason for having to make multiple reports is because the physician ran into a particularly ornery group of patients, or a particularly litigious attorney who represents them.

THE BIGGEST LEGAL MISTAKES PHYSICIANS MAKE

Action Step Some attorneys intentionally try to sue a doctor multiple times in a serial fashion knowing that the pressure of defending multiple lawsuits tends to be cumulative and may lead to a doctor eventually throwing in the towel. Insurers recognize this strategy and are good at evaluating each claim on its own merits, and physicians should recognize this in making their decision whether to report.

Mistake 10 Reporting Everything

Physicians should not be nervous about every potential problem. Just as they cannot go about admitting into the hospital every patient who stubs a toe, they need to evaluate how serious the issue is before reporting to an insurer.

Action Step Physicians who are waffling about whether there is a need to report should refrain from discussing the matter with a colleague to get a second opinion because such conversations may later be admissible as evidence. Instead, the physician should consider calling a knowledgeable malpractice attorney for advice. When in doubt, the default should probably be to pick up the phone and call the malpractice carrier. Most malpractice insurers will not actually open a report file unless they also deem the matter to be sufficiently worrisome.

Conclusion

Physicians pay a lot of money to obtain malpractice insurance, but they do not always make the best decisions when it comes time to decide how to deal with a potential claim. It is inevitable that they will need to decide how best to respond to a potential claim and must resist the urge to simply ignore potential problems. Malpractice insurance is there for a reason, so if physicians take the time to report the claims that should be reported and participate in whatever process that ensues thereafter, they will be much more satisfied with the outcome.

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