Settling the Case

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The deposition is over. Your counsel tells you that, despite your barely concealed disdain for the opposing counsel, you managed to hold your own and not say anything from which you can't recover.

Unfortunately, you had to burn your dark blue suit both for the bad memories associated with it and because you are not sure if even dry cleaning it would help. Nevertheless, you are feeling pretty good!

A few weeks later, your attorney calls while you are seeing patients to say that the court-mandated settlement conference has to be scheduled, and asks if you want to attend. Your ire rises immediately and you respond, "Why on earth would I want to sit across the table from that person—what good can it possibly do? All they want is money!"

That is a very typical response when physicians are asked to attend a settlement conference, but there are some very good reasons why it may be in your best interest to attend.

In an effort to relieve the backlog of cases that exists in some jurisdictions, many states mandate that a settlement conference take place prior to an actual trial. It is very important for physicians to attend the settlement conference in order to help the defense team provide the best defense and the most alternatives.

Whether or not a physician has the right to settle depends on their malpractice policy. Today, most policies give the provider the absolute right to settle the case. However, some polices contain a "hammer" clause which can be as bad as the name implies (the provider is the nail in this scenario). The clause states that if the malpractice carrier believes the case should be settled and the physician chooses not to consent to a settlement proposal, the provider will be liable for any judgment in excess of the settlement offer.

In other words, if you have the chance to settle for $250,000 but elect to go to trial which results in a judgment against you for $1,000,000, you will be on the hook for $750,000.

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Informed Consent

Going to trial can be costly and time consuming, especially for the solo practitioner who has to take time away from a practice to take a seat at the defense table during the proceedings. Moreover, there is no guarantee for winning.

Some physicians have opted to settle a case in order "get on with their lives" only to find out that the settlement was reported to the National Practitioner Data Bank and to their state's medical board. The state medical board may restrict the provider's privileges or require the provider to take continuing education, pay a fine, or be placed on probation and mandatory chart review.

Disputing the board's decision will also take time and money. Not all malpractice carriers pay for attorney representation before licensing boards; therefore, it is important to review malpractice policy limitations and coverage.

Before attending the settlement conference, take stock of your position. Have your attorneys give you "informed consent" much like you give your patients before a planned course of treatment. Going into the conference with a frank assessment of your chances of winning will allow you to make the best decision at the right time.

The following are some barriers which could hinder you from making the correct decision:

Not playing an active part in the representation. It is human nature to attempt to avoid things that are unpleasant. Perhaps as a result of this, many physicians do not want to take an active part in planning their defense. When this happens, they are often not prepared for discussions about settlement since they have not kept up with the case.

To avoid this common issue, make sure that you read all the expert depositions, the attorney correspondence, and the case reviews conducted by the insurance company. You may also want to attend the plaintiff's deposition to see for yourself how credible they will be on the stand. By doing this, you will be able to make an informed decision about the advisability of settling the case.

Searching for 'the truth.' The trial is not a search for truth; it is a battle, and only one party will win. Like in any battle, sometimes the army with the best equipment and tactics

does not win. For example, you can still lose the case even if your care was above the standard, your documentation was perfect, and your experts are the best in the field. Many trial outcomes are based on the selection of the jury, the demeanor of the attorneys, the rulings and biases of the judge, the jurisdiction in which the case was tried, and the personalities of the plaintiff and the defendant (think O.J. Simpson). If you as the defendant physician are viewed as aloof, arrogant, cocky, or uncaring, the jury may want to teach you "a lesson" and rule for the plaintiff despite the facts and findings.

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Fact-based decision making. Although extremely difficult, it is important to remove your emotional response from the equation of whether or not to settle. Being sued is an emotional roller coaster which may foreclose effective decision making. Thus, it is imperative to have an honest, blunt relationship with your counsel so that you trust them to help you make the decision. The last thing you would want to happen is that you make the wrong decision based upon your gut-level emotional response despite having the right facts.

Sometimes, settlement is advisable even if the care was above the standard, particularly if the documentation is inadequate to mount a defense. In these cases, it often comes down to the plaintiff's word against the doctor's and if the jury finds the plaintiff more likeable or believable, the plaintiff will probably prevail.

For example, suppose you have a patient with normal vitals, clear lungs, a normal chest x-ray, and a history of a recent long plane flight. You give her an aspirin and have a detailed discussion with her about the risk of pulmonary embolism and the need for further work-up, including a CT angiogram. You recommend that she goes directly to the emergency department and you place a call to the ED physician notifying her about the patient you are sending. The patient nods in agreement, but never shows up at the hospital. It's busy so you only chart, "discussed possibility of PE, pt understands." There is no mention of going to the emergency department or your discussion with the ED physician.

Unfortunately, the patient dies two days after her visit to your urgent care center. Your only defense is what is in the chart. You know you did the right thing and gave her appropriate informed consent, and that despite her clear understanding she did not follow through. Now her husband and six small children have initiated a cause of action against you.

Here is a set of facts which highlights the need for experienced counsel to help you with your options. You will not want the jury to have to witness each of her kids taking the stand saying, "I miss my mommy."

In cases like this, your best course of action may be to settle and avoid a potentially large plaintiff verdict colored by sympathy for her family.

Second Opinions

Occasionally, insurance companies will pressure physicians to settle for a nominal or nuisance amount even though the facts and documentation are on the physician's side. Sadly, there are times it costs more to mount a defense for a defendable case than it does to simply pay them to go away. When this occurs and you are feeling pressured to sign a consent-to-settle document, retain independent legal counsel for a second opinion. If the attorney agrees with you, he may be able to exert pressure on the insurance company to vigorously defend the case, as opposed to paying a small nuisance amount.

Remember, settlements have to be reported to the National Practitioner Data Bank, so do not enter into one without adequate justification.

The Settlement Conference

Settlement conferences are usually conducted by an attorney or mediator whose role is to get each side to understand the weakness of their case and the potential downside of going to trial. Often, the mediator is a very experienced trial attorney or judge who has witnessed what can go wrong in trial despite a great set of facts.

In a typical conference, all parties start out in the same room and the mediator goes over the ground rules, occasionally allowing each party to make a statement. After that, the parties separate and the mediator goes back and forth trying to broker a settlement.

This can be a very frustrating experience for a physician, since it often becomes a "dance of symmetry" in which both parties are making mirror image dollar concessions. It is important that your attorney outlines your defense with the mediator by citing authoritative texts, expert depositions, and any other pertinent evidence to make your case.

In the end, since your initial position was not to settle, you may not come to an agreement; however, you may gain more of an understanding about the opposition's strengths and weaknesses.

When to settle a case is a very complex decision that should be based on the cold hard facts of the case, the recommendations of counsel, and the risks and benefits of going to trial. Occasionally, the physician's and insurance company's interests diverge. In those rare cases it is imperative that the physician retain independent legal counsel to assist in making the best choice.

In the end, to achieve the best possible outcome physicians should receive informed consent about their options and risks. ■