PROFESSIONAL ISSUES

Be prepared: A lawsuit could happen to you

A physician with firsthand experience of the stress of being sued has teamed up with a lawyer to help other doctors cope.


In 1975, Sara C. Charles, MD, was sued for medical malpractice. "I felt very strongly the need to get back into some sort of control," said Dr. Charles, a professor of psychiatry at the University of Illinois College of Medicine in Chicago.

"One way to do that was active participation in my case, working with the lawyers and helping them plan for depositions," she said.

Not only did Dr. Charles actively participate in her own case, which went to trial in 1980, but she spent more than 20 years working with physicians who have been sued and studying the effects on their professional and personal lives.

"It can be a life-changing experience," said Dr. Charles, who wrote a book, Defendant, with her husband after the two-week trial, in which she was found not liable.

Only about 7% of lawsuits go to trial. Most of those, about 80%, result in verdicts for the physician, according to the Physician Insurers Assn. of America.

But the lengthy legal process is no cakewalk. Physicians accustomed to being in control and receiving respect suddenly find their integrity and actions called into question.

As a result, being sued is often one of the most trying events physicians face.

Dr. Charles and Paul Frisch, general counsel for the Oregon Medical Assn., wrote Adverse Events, Stress and Litigation: A Physician’s Guide. In it, Dr. Charles shares tips for managing stress and understanding emotions. Frisch describes the legal system and offers strategies. Lawsuit
prevention also is discussed. AMNews talked with the authors.

**Question:** What was the impetus for writing this book?

**Dr. Charles:** Physicians, when they are sued, experience it as an assault on their integrity. Our research has shown there are a number of reactions physicians have. Most of them are emotional responses, but they’re asked to go back to work the next day like nothing has happened. The goal of this book is to encourage all health professionals to take an active role in the defense of their integrity.

**Q:** How is this book different from others examining physicians and litigation?

**Dr. Charles:** There are many books that help people through the legal aspect. We explore the total human experience. That's really what makes the book different. No one has really focused on the emotional experience.

**Q:** How can physicians best handle the stress?

**Dr. Charles:** They should talk about their feelings with a trusted confidante and see if there are resources for support. One of the best things you can do is anticipate what the legal process is like.

Also, try to gain control over the aspects of your life you can control. Many aspects of litigation you can't control.

Physicians often feel vulnerable, and for people who are expected to be in control at all times, this can be difficult. If we can show them there are ways they can be in control, they feel much better about themselves.

They may also be spread too thin. For example, this may be the time to cut down the amount of hospitals you visit and spend more time with your family. Physicians may also find visiting the Physician Litigation Stress Resource Center Web site helpful (www.physicianlitigationstress.org).

**Q:** How can physicians avoid or prevent lawsuits?

**Frisch:** People file lawsuits for three reasons: anger, a sense of being ignored or a sense of being misled. Physicians really need to get into the spirit of something like an apology. There's a difference between an apology that expresses sympathy and bereavement and one that expresses responsibility.

People whose doctors talk to them are much less inclined to pursue conversations with lawyers than those with doctors who hide from them.

In Oregon, physicians are able to say they are sorry and that they are
unhappy for the patient, and none of that is admissible in court.

It is often the conversation before an adverse event that determines whether there will be a claim afterward.

A strong informed-consent conference lays the groundwork in the sense that the patient is not surprised and does not feel misled, and then there is basis for future conversation.

Q: How should doctors handle those critical conversations with patients or family members?

Dr. Charles: The bottom line is you can tell a patient you are sorry this has happened. In our book, we recommend you don't take responsibility for the event itself without talking to your insurer first. Some people may dispute that.

One of the mistakes doctors make is to take responsibility and then call their insurance company. If you admit liability before discussing it with your insurance company, they may exempt you from coverage. Every insurance company is different. Many doctors don't think about this ahead of time, but they should. Make sure to familiarize yourself with your insurance policy.

Also, some states have legislation that protects physicians' statements of sympathy. All doctors should know whether their state has passed such laws.

Doctors want to be honest, but they fear that if they are totally honest, they will get sued. A doctor can be empathic and concerned and express that without saying, "I am the one who did this." Doctors may blame themselves when they were not to blame. Regardless of the source of the problem, doctors should not speculate about the possibilities of blame in their discussions with patients.

Q: What are the best steps to take if you're being sued?

Dr. Charles: Call your professional liability carrier immediately. You may call your personal lawyer if you have one, and if the media calls, don't respond.

Q: When should a doctor hire a personal attorney?

Frisch: Usually physicians do not need their own attorney. It's necessary when in the discovery process the evaluation of the case suggests the possibility of an award greater than [insurance] coverage. At that point, the insurance company should send a letter saying it is in your best interest to hire your own lawyer. An experienced lawyer should evaluate the case and make a recommendation. That recommendation can be a demand that the insurance company settle within the policy limits. If the
carrier then insists on trying the case and the award is greater, the carrier becomes responsible for the excess.

Q: *What surprises physicians about the process?*

Frisch: So much of this boils down to the issue of credibility.

It does seem to leave the physician somewhat helpless. There is the use of a lot of arcane language and concepts. It's very difficult for laypeople to follow the medical testimony and the instructions from the judge.

Doctors can do things that take away the benefit of the doubt: They don't appear to be knowledgeable about their care, they appear arrogant, they lose their humanity and humility and most important, they come across in their testimony as a caricature of how they must have acted while they treated the patient.

Q: *What would you offer as solutions to the medical liability crisis?*

Dr. Charles: We talk about some of the solutions at the end of the book. The AMA has worked hard to make changes in tort law. The tort reform with caps is clearly the next step.

However, regardless of what changes are made in the tort system, as long as the accusation of fault against a physician remains, physicians will continue to have an emotional response to litigation.

There will always be bad outcomes in medicine. We can, of course, look at a no-fault system, but this is a very complex issue.

We wish there were solutions to this problem, but in the meantime, the book is one way to help doctors through it. One of the doctors we interviewed said he could either be bitter or better, and he decided to be better.

Q: *What do you want physicians to take away from this book?*

Dr. Charles: There is a way to deal with litigation that is active, participatory and helpful in the long run.

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**ADDITIONAL INFORMATION:**

**Must-knows of litigation**

**Good record-keeping is crucial.** If information is not recorded in a patient's chart, the jury may question your memory. But altering the
record after a bad result destroys credibility and can result in higher settlement and loss of insurance coverage. Know the patient's record backwards and forwards. If you can't effectively communicate it, the jury will question your competence.

**Physicians and lawyers think differently.** Physicians deal with a multitude of facts and try to deduce the best decision in real time. Lawyers deal with hard facts, have the advantage of hindsight and use language as a weapon.

**Lawsuits are not a search for the truth.** They are about assigning blame and affixing financial responsibility. Remembering this can help you understand the process.

**Knowing your carrier's reputation is key.** Talk to the insurance company itself, talk to colleagues and check with your state's insurance commission.

**Knowing what your insurance covers is also important.** You need to know if your liability carrier can settle a claim without your consent then refuse to renew your policy after litigation or settlement. Read every line of your insurance policy and understand it.

**There is difference between a deposition and a trial.** In deposition, the other side is trying to gain information and you are trying not to be pinned down to a particular story or make any major mistakes.

The trial brings the chance to tell your story, demonstrate your knowledge, skill and competency, and convey to the jury that your care was appropriate.

**No matter what, you need to stay calm.** Practice keeping your cool. If you react to the rattling techniques lawyers use, you'll just be improving the plaintiff's case. Once you stop being calm, you stop being able to effectively show that you are a competent, caring physician.

Source: Paul Frisch

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