

FOCUS ON

PROFESSIONAL LIABILITY

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Got malpractice distress? You can help yourself survive

Prepare for the stress of being sued by knowing what to expect and how to respond

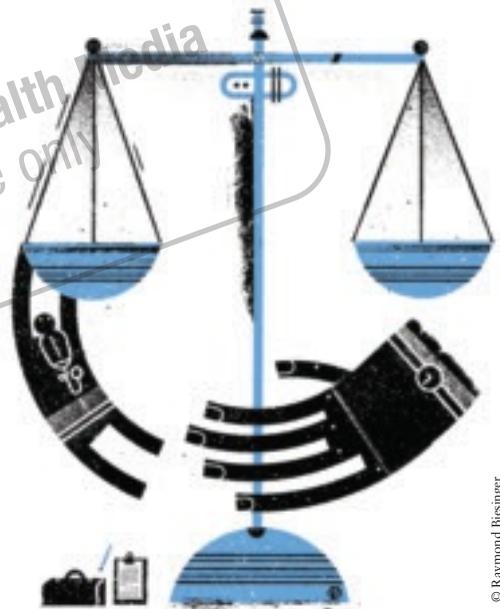
Immediately after the event I was a wreck. I vaguely remember talking to the family; I don't know if I was much use to them.... That night I got drunk. It was the only way I could sleep. A sensitive colleague came and sat with me."¹

As an ObGyn, it is almost certain that you will be sued sometime during your career. Specific actions that I'll describe in this article can help you deal with the stress associated with the adverse event that precipitates the lawsuit and the lawsuit itself. To begin, remember:

- Anticipation is the best defense
- Knowledge is power
- Action counters passivity
- A supportive environment is essential.

How can you anticipate litigation?

What is the risk? No nationwide reporting system tracks the incidence of medical malpractice claims. A recent survey by the American College of Obstetricians and Gynecologists, however, found that 89% of practicing ObGyns had been sued at least once in their career, with an average of 2.62 claims for every ObGyn.² Because a claim usually takes years to resolve, a substantial number of ObGyns are involved in litigation at any one time.



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You can successfully anticipate litigation by maintaining familiarity with your state's statute of limitations—usually, this period is 2 to 3 years after discovery of the incident, with exceptions for children, the disabled, and designated special circumstances. If a plaintiff's case is not filed within this time, a disputed outcome can never be the subject of a malpractice claim.

ObGyns are keenly aware of the exception that extends the time period during which a case may be filed on behalf of a child after discovery of the alleged injury. Many states set 8 years as the cutoff for filing a claim; others, such as Illinois, extend

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TABLE 1

Questions that might nag you after a “bad” outcome

- Is this my fault?
- Could I have prevented this from happening?
- Did I make a mistake in this patient’s diagnosis or treatment?
- Did I make a mistake in judgment?
- Could I have done something else (such as perform a cesarean section or decide not to perform a VBAC)?
- Did I harbor unconscious transference feelings (such as feelings of dislike, mistrust, or anger) toward this patient?
- Did I miss some signs I should have seen?
- Would this have happened no matter what I had done?
- Are others to blame?

TABLE 2

The 3 “must-do” actions after an adverse event

Medical steps

- Take necessary actions to limit further injury or disability
- Obtain appropriate consultations
- Review the medical record; anticipate the patient’s follow-up needs and make recommendations for further treatment

Notifications

- Follow the health-care system’s and insurer’s guidelines for notifying the patient and family
- Inform the institution’s risk manager and your professional liability carrier as soon as possible
- Write a description of the event for the record and a narrative for your personal file (and your lawyer’s) in case a suit is filed later
- Do not talk with the media

Disclosures

- Acknowledge your ethical obligation to be truthful
- Follow your institution’s and insurer’s guidelines on disclosure
- Expect to feel intimidated and uneasy in discussing your role in the event
- Expect the patient and family to be angry and disappointed with you
- Convey an interest in the patient’s and family’s emotional state; express sorrow for their loss
- Tell the patient and family what you know for sure; don’t speculate about what is unknown and don’t make false promises or false reassurances
- Don’t hurry; give the patient and family time to ask questions
- Expect to feel somewhat better after a truthful exchange

the period for as long as 2 years after a child’s 18th birthday. This long tail of vulnerability creates unpredictability for insurers, who must estimate the relationship between current premiums and potential payouts (often in the distant future), resulting in high premiums for ObGyns’ insurance. More importantly, it creates an undercurrent of anxiety and uncertainty for those ObGyns who must contemplate defending themselves in court for incidents that occurred in the distant past.

Listen to your feelings whenever you suspect that a patient is dissatisfied or that a bad outcome may lead to a claim, and take appropriate action. Reexamine your risk management procedures and discuss your concerns with your risk manager. Because it may take years for a case to be filed and many more for it to be adjudicated, possibly by trial, your best defense is clear, accurate, comprehensive, and contemporaneous documentation of the situation. Any later review of the case will be based on records that, if clearly kept, will be easily and unambiguously interpreted despite the passage of time.

Responding to an adverse event

The severity of the outcome, the nature of your relationship with the patient, and the degree of your responsibility for an adverse event contribute to the intensity of your initial emotional response. If a mistake caused the event, your reaction may be even more severe.³⁻⁶ Whatever the specifics of the event, you may ruminate about your role and degree of responsibility (**TABLE 1**).

Expect that your view of the circumstances will generate a complex array of feelings: shock, anxiety, depression, shame, guilt, self-blame, disbelief, self-doubt and inadequacy, anger, and, even, relief from not having to work with a difficult patient anymore.

Most physicians feel a personal sense of failure and inadequacy when they are unable to prevent a patient’s death or serious injury. Although serious events evoke greater distress, any event that may

TABLE 3

Get a grip on your emotions, before and during litigation

Anticipate having repeated thoughts and preoccupations about the event; work toward a realistic view of it
Recognize your feelings and work to understand their source
Talk with a trusted confidant (spouse, colleague) about your feelings
Monitor your emotional and physical status; if indicated, seek appropriate consultation
Avoid situations that generate anxiety and increase stress
Monitor and address changes in your relationships with family, patients, colleagues, and staff
Be understanding of yourself and others; develop a realistic view of yourself as a "good doctor"
Engage in active sports and take regular vacations unrelated to professional activities
Control what can be controlled

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A malpractice lawsuit will challenge your self-esteem and ideals and may bring on feelings of failure and shame

eventually be judged an error or become the subject of a lawsuit can give rise to anxiety, decreased confidence, sleep disturbances, and decreased job satisfaction.⁶ In the midst of such feelings, you must:

- deal with the event's medical complications, relevant notifications, and disclosures (TABLE 2, page 42)
- address the emotional pain of the injured patient or family
- participate in mandated reviews
- recognize and manage the emotional disruption to you (TABLE 3).

Self-evaluation. To cope with distress when a patient dies, you could attend the funeral. You also might:

- make changes in your practice that alert you to problem patients
- introduce a more structured approach to patients with particular clinical conditions, using practice guidelines as a resource⁷
- become more alert to patients who may benefit from consultation or referral.

Balance the time you devote to work and personal life. Schedule regular time for recreation and active sports, which can

help you prepare for the prolonged stress that follows being sued. Engage a personal physician to monitor your physical and emotional health and to recommend appropriate referrals, when indicated.

Knowledge is power

What can I expect? A lawsuit generates a mixture of common emotions and exacerbates those felt at the time of the bad outcome: shock, outrage, anxiety, anguish, dread, depression, helplessness, hopelessness, feelings of being misunderstood, and the anger and vulnerability associated with a narcissistic injury. Ordinarily we possess a healthy narcissism—that is, good feelings of self-esteem and a set of ideals that motivate and gratify us. When we suffer a tragic outcome or are sued, our self-esteem and ideals are directly challenged, resulting in feelings of failure, criticism, and public humiliation. These feelings can damage our sense of self and generate further feelings of shame, depression, and rage—all signs of a so-called narcissistic injury. As one ObGyn stated, learning that a lawsuit was filed "just prolonged my misery."⁸

Each of us reacts in our own way to a lawsuit—and differently to each lawsuit if we are sued more than once—because of:

- our personality traits and personal circumstances
- the specifics of a case
- our relationship with the patient
- the public nature of a lawsuit
- a range of other variables that makes each case unique.

Suddenly, you who perceive yourself as caring, beneficent, well-meaning, and devoted to your patients are publicly accused of being careless and incompetent, of harming the patient by failing to meet your minimal obligations. Psychiatrists Ferrell and Price⁹ capture the impact of these allegations:

Here are the sense of assault and violation, the feelings of outrage

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and fear. Most painfully, here is the narcissistic injury, the astonishing wound to our understanding of ourselves as admirable, well-meaning people.

Litigation is a lengthy process with defined stages (TABLE 4). You have little control over a slow-paced process that involves an array of participants (lawyers, judges, jury, experts) whose behavior is unpredictable. This can make you feel dependent, vulnerable, and impotent.

Be active, not passive

What you can do. Contact your insurer and risk manager immediately. Inquire about the average length of litigation in your jurisdiction (it might be 1 to 5, or more, years, depending on locality, type of case, and severity of injury). Ask your attorney to describe the steps in the process and your role as the case proceeds.

Take whatever steps are necessary to cover your clinical duties. If your initial emotional reaction is disruptive, obtain coverage or rearrange your schedule. Expect to change or limit your schedule before depositions and during trial to allow adequate time for preparation.

Accept the fact that you must play by rules far different from those of medical care. Litigation is time-consuming and frustrating. Delays and so-called continuances are common in legal proceedings, so expect them. Consider adapting to your situation the strategies that other sued physicians have found useful in regaining control over their life and work (TABLE 5, page 48).

Get needed support

Talking about the case. Sharing, with responsible confidants, your emotional reactions to being sued is healthy for you and others affected. Lawyers, however, may caution you not to “talk to anybody” about the case. They don’t want you to say anything that would suggest

TABLE 4

Pocket guide to what happens in court	
STAGE OF ACTION	WHAT IT MEANS FOR DEFENDANT AND PLAINTIFF
Summons	Notification that a suit has been filed
Complaint	The nature of the allegation in legal terms
Pleadings	The attorney begins to communicate with the court by filing motions; a request that the court do something
Discovery	A process designed to obtain information about the case: <ul style="list-style-type: none"> • Interrogatories (written questions) • Depositions (oral questions and answers under oath) • Inspection of documents • Expert witnesses (persons used to establish the relationship between the event and the standard of care)
Summary judgment	A motion asking the court, after the facts have been established by discovery, to decide the validity of the case; if granted, the case is resolved without a trial by jury
Settlement	An agreement between parties that resolves their legal dispute
Trial	Case is presented to the judge or a judge and jury to determine culpability
Verdict	Decision reached by the deciding body
Posttrial	If the defendant receives an unfavorable verdict, motions may be offered to the court to void or appeal the verdict

liability or jeopardize their defense of the case.

This may be good legal advice, but it is not good psychological advice. The support of others is a natural help during major life events that cause enormous stress and disruption.¹⁰ You can resolve this dilemma by accepting the discipline of talking about your feelings regarding the case without discussing the specifics of the case.

In addition to lawyers and claims representatives, you may talk with your spouse or another trusted person or colleague about your feelings. When you choose to talk with a psychiatrist or other mental health professional about your litigation experiences, you are protected by the confidentiality inherent in the doctor–patient relationship.

Trust issues. At the core of all medical work lies trust. As a well-trained and competent professional, you do not expect to be sued by patients with whom

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You’ll learn that litigation isn’t like providing medical care: It’s frustrating, time-consuming, and can rob you of a sense of control

TABLE 5

Regain control and manage your practice during litigation
Learn as much as you can about the legal process
Introduce good risk-management strategies, such as efficient record-keeping, into your practice
Clarify the responsibilities of office personnel and coverage responsibilities with associates
Rearrange office schedules during periods of increased stress
Reevaluate your time commitments to work and family
Participate in relevant continuing education
Make sure your financial and estate planning is current
Cooperate with legal counsel
Devote sufficient time to deposition preparation and other demands of the case
Carefully evaluate the advice of legal and insurance counsel regarding a settlement
Don't try to "fit patients in" while on trial; a trial is a full-time job

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Sued physicians often experience a diagnosable psychiatric illness or behavioral problem, including major depression and PTSD

you have trusting and often long-term relationships. Most physicians acknowledge that after being sued their relationships with patients change.^{11,12} You may find it difficult to reestablish trusting and comfortable relationships with other patients, especially those who have conditions similar, often high-risk, to that of the suing patient.

A charge of negligence exposes our vulnerabilities and leaves us feeling hurt and betrayed, feelings that are not easily overcome. As one psychiatrist ruefully observed: "I lost my innocence."⁸

Conflicted feelings may emerge. The distress associated with a lawsuit often exacerbates the many outside stressors associated with practice. Many solo practitioners find themselves already overextended, working longer hours, covering more hospitals, and rarely taking vacations. Younger physicians who prize "time off" and lifestyle above other incentives remain stressed by the unpredictable schedules associated with ObGyn practice. Women physicians increasingly con-

stitute a greater percentage of the ObGyn specialty. Although some work part-time or, at least, fewer hours than their male counterparts, they must nonetheless keep current and continually hone their skills.

The stress associated with all of these conditions can increase an ObGyn's vulnerability to the occurrence of an adverse event and, eventually, to a lawsuit. It is also known that physicians involved in a claim-producing event are twice as likely as their non-claim-producing counterparts to have another such event within the ensuing 12 months.¹³

When you are sued, you may feel overwhelmed and out of control. Because physicians' ability to control their schedule and work hours is a known major predictor of their overall health (as evidenced by a balance between their work and personal life),¹⁴ regaining control over those aspects of your life that are "controllable" (TABLE 5) is an essential strategy in dealing with a lawsuit.

As a result of your lawsuit, you may contemplate changing practice circumstances or retiring early. Feelings that you must change the way you practice and chronic anxiety about your work are barriers to good practice. Personal therapy may help if you remain uneasy or cannot resolve life choices that overshadow your work with patients.

Seek medical or psychiatric care?

Be alert to the point at which you or others involved in litigation need a referral for medical or psychiatric consultation. Sued physicians, their families, and colleagues often experience psychiatric conditions or other problems, such as:

- major depression
- adjustment disorder
- posttraumatic stress disorder
- worsening of a previously diagnosed psychiatric illness
- physical symptoms that require diagnosis and treatment
- alcohol and drug misuse or abuse
- anxiety and distress that interfere with work

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- self-medication, especially for insomnia
- disturbances and dysfunctional behaviors that affect marital and family life.^{15,16}

Take stock—then, it's "steady as you go"

Most of us have stable and supportive relationships and are, for the most part, psychologically healthy and professionally competent. It is normal, however, to experience distress in response to the trauma of a bad outcome (whatever its origin) and the lawsuit that may follow. Most physicians are resilient—that is, able to manage the stress without developing major symptoms—but some ben-

efit from professional support.

Whatever your reaction to being sued, become familiar with the climate of litigation in the jurisdiction where the case was filed, including the incidence and outcome of cases. For example, does a similar case to yours usually result in settlement or—if it goes to trial—does it take 2 to 5, or more, years to resolve?

Last, it's a comfort to know that approximately 70% of complaints filed result in no payment (no settlement) for the plaintiff. When a case does go to trial, physicians win 80% of the time.

The challenge, then, for you when you are sued? Take an active role in managing your distress in ways that contribute to your vindication and to the continuity of care for your patients. ■

Other resources for coping with a lawsuit

- American College of Obstetricians and Gynecologists. From exam room to court room: navigating litigation and coping with stress (CD-ROM). http://sales.acog.com/acb/stores/1/product1.cfm?SID=1&Product_ID=589.
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- Physician Litigation Stress Resource Center. <http://www.physicianlitigationstress.org>.

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About 70% of malpractice complaints result in no settlement payment, and physicians win in 80% of cases that do go to trial