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IN PRACTICE

MEDICAL MALPRACTICE

By DAVID BARMAK

Talking May Be Best Preventative Medicine

Many malpractice actions are the result of physicians' inability to communicate with their patients

Many lawsuits are the result of a physician's inability or unwillingness to communicate with a patient after a complication arises. For example, a complication in a surgical procedure may not have been caused by the physician's negligence — but the patient needs answers.

Often the physician is "too busy" to discuss complications after surgery with a patient. A patient wants to know why something happened or did not happen as a result of surgery. The longer a patient waits for answers, the more likely the patient is to turn to someone who will listen — an attorney. The attorney then retains an expert witness, usually another physician. Information from the patient and expert witness may be sufficient to support a claim for negligence, but may not be enough to sustain a real case of negligence. Regardless, many attorneys and patients will press forward with a lawsuit once a claim for negligence can be minimally supported, hopeful that during the discovery process, stronger support for the negligence claim will

Barmak is a solo practitioner in Skillman.

be uncovered. Is this a fair and appropriate modus operandi? Perhaps not, but this is how many personal injury attorneys proceed.

Obviously, you can not avoid being sued. What you can avoid, however, are the lawsuits that have less merit but are filed primarily because of the physician's poor "bedside manners."

In New Jersey, 70 percent of all medical negligence cases tried result in verdicts in favor of the physicians. If this is the case, the obvious conclusion is that many negligence cases of questionable merit are filed with the courts. If a physician can prevent even a small percentage of these types of cases from being filed, then 1) the physician's malpractice premiums will be less; and 2) the physician may have more time to do what the physician enjoys and was trained to do; i.e., "practice medicine." Depositions and court appearances require huge amounts of a physician's time.

In New Jersey, insurance companies often write their medical malpractice policies with a requirement that the physician consent to any settlements the insurance company attempts to

make. The insurance companies do this for two purposes. First, ostensibly, such a requirement gives the physician more control over the litigation process, especially since the physician pays thousands of dollars per year in premiums. Second, and more importantly, these consent policies are actually written for the benefit of the insurance companies.

If an insurance company recommends a settlement, the physician chooses not to settle and there is a verdict for an amount in excess of the insurance policy limits, the physician will be unable to collect the excess amount from the insurance company. In other words, the physician must pay the amount of the judgment that exceeds the insurance policy limit. In the past, if a settlement was left solely up to the insurance company and there was a verdict in excess of the policy limits, it was likely that the insurance company would pay the full amount of the verdict. This exposure highlights the importance of physicians having a qualified attorney monitor all medical malpractice lawsuits brought against them. How else could a physician knowledgeably consent to a proposed settlement by the patient in a medical malpractice lawsuit?

Most preliminary medical malpractice inquiries result from some type of complication during surgery. A

complication is simply a result that was not the clear intended result of the surgical procedure. In nonorthopedic cases, for example, this may mean something as simple as continued abdominal pain after an appendectomy. Another example could include a situation in which, for medical reasons, the entire appendix may not be removed during surgery. In the latter example, if a patient does not fully understand that there may have been some medical reason for not removing the entire appendix, the patient may attempt to claim that the physician "botched" the surgery for failing to do what the general public sees as a very simple proce-

dure. If a physician sits down with patients after surgery to explain fully what occurred, this may be the first step in creating an amicable dialogue between the patient and the physician.

What is more important, however, is the continuation of this dialogue weeks or months following the surgery. Physicians are all extremely busy and may not accept a telephone call from a patient on whom the physician performed surgery months ago. Yet a few minutes on the telephone may avoid what can easily become a small snowball rolling down the hill and gathering momentum and size.

Of course, what was said in the previous paragraphs was not meant to convey a prescription for preventing all negligence lawsuits. As with most things in society today, perception is sometimes more important than reality. If a patient perceives that the physician is caring, understanding, and communicative, then the patient may not look beyond this. It is only when patients truly believe that their physician has "disappeared" after a surgical procedure that they begin to think other things which may eventually lead to an investigation as to whether the physician committed negligence. ■