The Game Part 1

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In the movie *The Game,* Nicholas Van Orton (played by Michael Douglas) is a very wealthy and successful businessman. Unfortunately, his successes come at the cost of his family life and close, personal relationships. His brother, Conrad (played by Sean Penn), gives him a gift on his 48th birthday. The gift is enrollment into a live-action game where Nicholas is the principal player. This game initially consumes then seemingly destroys his life. Conrad, remarks, "They won't leave me alone! I'm a goddam human piñata!" The movie plot takes Van Orton through many twists and turns and just when he believes he has it figured out, he is thrown a new set of facts and plot twists. At the end of the movie, after nearly killing himself by jumping off a building, he realizes it is really just a game.

Many providers feel like a human piñata when they go through their first encounter with the legal system if the encounter relates to defending a medical malpractice suit. Malpractice suits have been known to initially consume and sometimes destroy well-meaning medical providers who find out too late that in the eyes of some of the participants, it is just a game.

This is the first of two articles in which I will provide an overview of the twists and turns one encounters while going through a medical malpractice suit. Understanding this process will allow the uninitiated to better understand the game in which they were thrust.

The game begins

When you are accused of medical negligence it does not feel anything like a game. It feels like you are thrown into an abyss the end of which is nowhere in sight. Many providers hope that by doing nothing, a lawsuit will simply go away, which rarely happens. Typically the legal process can take years to completely resolve the issues in dispute.

The resolution is often in the hands of others, thus leaving providers feeling powerless over the outcome. As a medical provider, you are by no means powerless. In fact, there are many things you can do to significantly improve your chances of a favorable outcome. One of the most important things you can do is remain positive, forward thinking, and not reactionary. Everyone involved—from your attorney to the insurance claims adjuster to the plaintiff's attorney—is simply doing their job the best they know how. And by way of full disclosure, there are many things you can do to negatively impact your chances for a favorable outcome.

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Jurisdiction

Suits involving medical malpractice are civil. They are heard, adjudicated, and resolved in civil court which is governed by substantive and statutorily-based laws and rules. Your case will be heard in one of three courts: your own state court, the federal court, or in the court of another state. The case can be heard in federal court if a plaintiff is a citizen of one state and the medical provider is a citizen of another state. The same is true if the medical provider is not a US citizen and none of the co-defendants (if any exist) are citizens of the state where the defendant practices. Finally, if the suit involves a federal question or it is against a federal employee, it can wind up in federal court. Conversely you can be sued in another state if you treated the patient in that state, regularly practice in that state, live in the state, or maintain an office within or solicit patients to your practice from that state.

Generally speaking, the plaintiff's attorney will file a case in

the jurisdiction in which he/she believes the plaintiff is most likely to prevail.

Elements of a Medical Malpractice Case

There are four elements of a medical malpractice case and all must be proven to the extent it is more likely true than not.

Duty. The provider must have had a duty to take care of the patient. This duty is established as a result of the doctor-patient relationship. Some providers mistakenly believe that if someone at the front desk person sends the patient to another facility, no doctor-patient relationship exists. That can be argued, but the claim may simply be that the front office person was negligible and that the practice or provider on site had a duty to supervise that individual's actions. As a general rule, I would have the provider see and document information about every patient who enters the center. If an untoward event happens and you have no documentation, you are left somewhat defenseless. If, however, you have recorded a patient's vital signs and chief complaint and done a cursory exam, you can argue based upon performing to the standard of care.

Breach. The plaintiff's attorney must prove that the provider failed to exercise a reasonable degree of care, skill, and learning that a reasonably prudent health care provider of the same or similar specialty in similar circumstances would have undertaken. This is called the standard of care. The jury will be aided in the standard-of-care determination by expert witnesses who are called upon to opine upon the facts of the case.

Proximate cause. The plaintiff must demonstrate that your failure to perform within the standard of care was a proximate cause of the plaintiff's injury. This does not mean that the provider's negligence was necessarily the only cause or even the major cause of the damage. It simply means that the provider's actions or inactions were a contributing factor to the ultimate injury.

Injury As a result of the breach of the standard of care, the patient had to have suffered an injury. His injury can be physical, emotional, financial or any combination of the three. In addition, a spouse or parent can claim a type of noneconomic injury called loss of consortium i.e. loss of companionship and services.

The process. There are distinct phases of the civil process

The complaint. Different states have different requirements about what is contained in the complaint, which sets out the allegations of what the provider did wrong. These allegations can be very general or very specific and may or may not set forth a dollar amount of damages. Your attorney will respond to this complaint in the form of an answer.

The plaintiff's attorney files this complaint with the clerk of the court. At this point, the lawsuit is initiated. The provider is then notified that the complaint has been filed by means of a summons attached to the complaint. The summons can be served by a process server, sheriff's officer or via registered mail. The summons will order you to appear in court in a certain time on a certain date. You do not need to appear personally; the defense attorney assigned by your malpractice carrier will appear on your behalf.

The process of being served with a summons can be a frightening and shocking experience. I have known more than a few providers who have refused to open their door, run away, hidden, or become extremely belligerent when served. No good comes from this behavior. The process server is simply doing his or her job, so accept the summons.

The complaint will often accuse the provider of incredibly heinous and serious accusations, which are typically things you did not and would not ever do. Complaints are generally written before the plaintiff's attorney has all the facts and thus are extremely broad to cover every base and eventuality.

These complaints are largely boilerplate in nature with the facts filled in amidst the legal jargon. When you receive the complaint and/or summons it is important that you notify your medical malpractice carrier immediately. There is a relatively narrow window of time that your attorney has to answer the complaint. Lack of timely response can actually forfeit your right to respond to a medical malpractice complaint and a default judgment can be entered against you. Moreover, some malpractice carriers will not cover you in the event of a default judgment secondary to improper or untimely notification.

The experience of being served with the summons need not be as traumatic as you may imagine. You should educate your front desk that from time to time all medical practices and medical providers are the subject of a malpractice suit. You should also educate your staff that when the practice is served with a summons, they need to notify you immediately and be polite and professional to the person serving the summons. Most importantly you need to educate the staff that they are not to discuss anything related to the medical malpractice complaint with any other staff members or with anyone outside the practice other than your defense counsel.

The important points during this phase of the legal process are:

1. Notify your carrier immediately.
2. Review your malpractice defense policy to fully understand your rights.
3. Do not talk to the plaintiff, his or her attorney or any family representatives. Do not talk to your staff members or other physicians in the practice or community unless under the protection of peer review.
4. Do not alter the medical record. This means do not attempt to clarify, expound upon, or reconstruct any aspect of the medical record. If your practice uses an electronic health record (HER), a competent plaintiff's attorney will subpoena the metadata that runs continuously in the

background of the EHR. This metafile records all keystrokes and all changes in all areas of the medical record.

5. Review the patient's medical records.
6. Make two separate files:
   a. The patient's original chart should be placed in a secure location.
   b. Start a litigation file that includes a copy of the patient's medical record, correspondence from your attorney and any information, articles or data you collect.
7. Develop good lines of communication and a good working relationship with your appointed attorney.
8. If there are codefendants in the case, the plaintiff's attorney may attempt to divide and conquer. Generally speaking, the strongest defense is a unified defense. Your attorney will work with you to develop the best course of action to protect your interest.

There will be a point in the process when your attorney will talk to you about your options. The carrier and your attorney will want to know how committed you are to the care you provided and your willingness to see this case all the way to the trial and verdict.

This process can take an emotional toll on a defendant and many will elect not to vigorously defend and would prefer to settle the case and move on with their lives. Some insurance policies contain a clause stipulating that if you choose not to settle against the advice of your carrier and attorney, that you are liable for the monetary difference between what the case would have settled for and the ultimate damage award if it exceeds the proposed settlement amount. This is called a *hammer clause* and your attorney should discuss its implications in detail.

You should also be aware that if you do elect to settle the case, the federal law requires reporting of the settlement to the National Practitioner Data Bank (NPDB). Information reported to the NPDB includes your name and address (including your home address); name of your medical or professional school and date of graduation; field of professional license and license number; DEA number(s); names of the hospital or institutions with which you are affiliated; lawsuit name and case number; dates of the acts or omissions that gave rise to the lawsuit; the date of the settlement; the amount of the settlement; any other terms of the settlement; and a description of the actual omissions and injuries upon which the lawsuit was based.

After the NPDB receives notification, you will receive a copy from them and will be given the opportunity submit your own comments. In some states, notification of the state medical board is also mandatory.

In the next issue, we will discuss the disclosure and discovery segment, the comprehensive pretrial conference, depositions, the settlement conference, the trial, and the aftermath. ■