

Trial by Trial: A Firsthand Account of Being Sued

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We all talk about malpractice legislation, litigation reform and even "what to do once you've been sued". But, what happens personally once you've been sued? Let me share my story.

First, there was the shock of being served, which occurred during a work shift. Let's talk about patient safety. In my experience, it became hard to concentrate when my entire ego had just been smashed with a thousand-pound subpoena. Then, I looked at the name. Did I even remember this person?

Experts tell us it isn't personal. From my experience, it certainly feels personal when your name is on the page of "legalese" next to words like "willingly neglected" and "malfeasance".

We've all attended the seminars on "what to do when you are sued". In the abstract it is all well and good. You get served, your insurance company gets you a lawyer or maybe they decide to settle (game over). Now starts the endless rounds of meetings and paperwork. I saw my chart and thought to myself, "Oh, we were using those charts back then. Why was I so terse in my history of present illness? Boy, we treat this differently than we did then!"

I cringed every time a fancy high bond envelope showed up with my attorney's firm name on the return address. Large thick bundles of paper showed up containing interrogatories and counter interrogatories. It was still all "boiler plate" stuff, but my name was featured prominently amongst all the pejorative adjectives such as "willingly", "mindlessly", and "negligently". I began to wonder: what do my colleagues think? (I actually thought twice about telling my spouse – What makes you think anyone tells their colleagues?) Being sued is the elephant in the room: nobody wants to acknowledge it or even think about it. I had to tell my spouse who was, by the way, the only one to whom I could talk. I just asked for odd days off and hoped that the lawyers didn't reschedule everything, which happens constantly.

The physician being sued generally meets with his or her lawyer to practice for the deposition. In my case, it was scheduled and rescheduled multiples of times. I thought to myself, "Why did it have to happen at that hospital? The lawyers are 50 miles from home. I hate driving in that city." After oaths are sworn, questions are asked by the plaintiff's lawyer. With proper coaching from the physician's lawyer, this part is generally tolerable. It is actually kind of like a trial without a courtroom, jury, or judge. The reporter is there to take down every word, and then it's over.

Next, there will be months, if not years, of waiting. There is nothing for you, the physician, to do as the attorneys are doing all the behind the scenes work. I just filed it away in a little locked box in my brain and only think about it when one of those fancy envelopes shows up in the mail. My kids wondered about my mood. I seemed snappish on some days when I brought in the mail; other times I was sad and even tearful. I told my spouse. He is also an ER doc so he had a clue.

Does anybody have any idea what kind of mental torture the physician goes through? My case happened in 1998. What emotions did I feel when I thought about the case? Doubt: Maybe they

are right; maybe I did mess up and cause a bad outcome. It's hard to leave that feeling at home before the next shift. Anger: How dare they sue me after everything I tried to do-that is if you even remember the patient? It can be years before you are sued. Frustration: I can't believe this is taking so long! I also noticed a change in practice habits. Wow, this one kind of reminds me of my malpractice case. Maybe I will do the extra tests and CT scan even though they will probably be negative. So are doubt, frustration, and anger only applied to the case? It's hard to remember it's not personal when these emotions seep out into life at home as well as work. Patients that remind the physician of the malpractice case may end up getting more tests done than necessary.

In my situation, life went on. I didn't get any fancy envelopes for a while and was able to let the case slide to the back of my brain until, out of the blue, the lawyer called about court dates. There it was, real and alive; we were having a trial. It was now 8 years after the case occurred. Although most cases don't take 8 years to come to trial, three postponements will do just that. A trial is the most exquisite form of torture designed for a physician. On the first day, they picked a jury of people that I hoped could follow the arguments. Court only lasts from 9 am to 1 pm. Lots of paperwork and counter motions get done. I was only there for 4 hours a day. Do I go home, go to work or run away? How do I spend the time I'm not in court? I studied my copy of the chart and depositions until I can see through them. The commute was a bear. Fortunately I had friends with whom I did stay.

The next day, after lots of motions, counter motions and passing of papers, the trial got going with opening statements. So, I sat there in my nice clothes and listened to an attorney describe me as the worst doctor to practice medicine in this century. I was presented as stupid, inattentive, careless, and reckless and a disgrace to the practice of medicine, and they had an "expert" to back up that claim! All the time I sat there with my best attentive but pleasant face on, while inside I was thinking about how I would love to strangle that weasel with my bare hands. My attorney described me as hard working and caring and said that I followed the standard of care rendered by an average emergency physician. Even that comment hurts a little. I always considered myself a little above average. However, "average" is the standard that the plaintiff has to prove the physician has violated. I had to stop thinking so hard and keep my face in order.

Joining the physician in the gallery, since we didn't sit with the attorney like on Law and Order, was the patient and/or family that was suing me. Remember, this is civil, not criminal, law. This scenario, however, is anything but civil, and this is something they don't talk about in the classes on malpractice. I skillfully learned to avoid eye contact, find a different bathroom to use on breaks and do everything possible not to look at them. This also applied to the jury. I didn't want to be anywhere near them on breaks. Nothing experienced thus far seemed "civil".

Next, the plaintiff stated the case. In my situation, we listened to an expert – another emergency physician – describe how I egregiously violated the standard of care in this scenario. After the plaintiff attorney put me on the stand to answer questions, the people suing you get to have their say on the stand. My lawyer was polite but firm with them, bringing out all my good points and finding any inconsistencies. Again, I sat there with an attentive but noncommittal face on while other people talk about the thing I have dedicated my life to doing well. It was hard to remember that this was not personal.

Next, it was the defendant's turn. In my situation a "good" emergency medicine doctor came in and told how I clearly met the standard for an "average emergency physician" (why doesn't that feel good?) and the jury seemed to get it. I was next on the stand. My attorney led me through the case and everything seemed good. The plaintiff's attorney then got to take a shot at me. This was so hard. "Listen to the question, don't be in a hurry to answer," raced around the inside my skull as I tried to listen, answer the question and not try to explain. Even if I did, the plaintiff's lawyer, whom I thought of as "the weasel", wouldn't let me. He asked impossibly complex questions to which he required a yes/no answer. Fortunately, my record was reasonably documented, and I don't remember most of the details. I mostly stated, "I have no independent recollection of this case". It was amazing to me what 8 years, a new ER, building a new home and raising kids did to my memory.

Finally, the time in court was nearly done. I didn't manage to damn myself on the stand or come across as arrogant. I remembered that statistic about 90% of physicians winning cases. I was completely emotionally exhausted, but maybe I knew I would get through this. I was driving home that night.

After the closing arguments there was nothing to do but listen. My attorney went first. He was wearing his best suit since the trial started. This was day eight. Thank goodness I worked those shifts over the weekend, I thought. My lawyer described the case, summarized the expert testimony and mine. It was looking pretty good and I started to relax. The plaintiff attorney was the last to speak. It seemed to me somehow unfair that he had the last word. He took everything that had been presented over the last few days and twisted it into some horrible tale with me as the monster. He essentially said I lied in my record, I had lied on the stand, that my experts were just protecting a fellow doctor and my attorney skillfully twisted the truth. While the bile rose in my throat I resisted the urge to fling my water bottle at him. The jury was dismissed and I got out of the courtroom as fast as I could. My lawyer caught up to me, hustled me into an unused room and said "Calm down". Right. All the anger I had been squelching now bubbled up and burst out in a rush of questions laced with profanity. ("How can that *#& say those things about me?? He says I lied!!! He says my chart lied!!! In fact he said our expert lied and even that you lied!!! How can he get away with that?") I felt violated. I felt as if I had been physically attacked. This is the justice system? This is "civil" law??" Once I calmed down, I understood that his closing was just that, a closing just like any lawyer's.

The next day the jury received its charge from the judge. These instructions are complex but the judge is very clear and they seemed to comprehend. They were sent to deliberate and court was adjourned. Now what? I stood there waiting to be told what to do. I felt numb and nauseated. My lawyer made sure he had my cell number, told me to go home and that he would call when the verdict was in, or when deliberations were over for the day. It was assumed I would now I just go home and resume my life.

The call came two hours later. The jury found the case in favor for me. It's over. I "won". Somehow, it doesn't feel like a victory.

*Editor's Note: We strongly suggest our readers refer to the *Litigation Stress* materials on www.acep.org, especially the "So You Have Been Sued" article written by the Medical Legal*

Committee, <http://www.acep.org/practres.aspx?id=32132>. We also recommend <http://www.mdmentor.com> which has many more useful materials and links for folks who find themselves in Connie's situation. It could be lifesaving.