Litigation is too important to be entrusted to lawyers

Key words: Consent to settle, malpractice insurance.

Although anesthesia is very safe, nurse anesthetists face occasional litigation, and professional liability insurance is important. One of the biggest benefits of professional liability insurance is that it will cover the cost of a lawyer to represent the nurse anesthetist who faces suit. There are a number of ramifications to being sued. The lawyer provided and paid for by professional liability insurance will face a number of important, if conflicting concerns, as he or she addresses a case.

Litigation can be and often is extremely expensive. For example, nurse anesthetists set their own standard of care. In most litigation involving the professional activities of a nurse anesthetist, the standard of care must be established by expert testimony. Experts for each side must review and become familiar with the records of the case. The nurse anesthetist's expert will give an opinion that the conduct of the nurse anesthetist met the standard of care and will assist the lawyer to understand the testimony and rebut the plaintiff's expert. Retaining an expert is an important but expensive requirement in negligence cases.

Litigation is uncertain. We all like to think that we govern our activities solely on the basis of logic. Human beings, including those who serve on juries, are complicated. Sometimes we are affected by things that are not logical, including emotions such as sympathy for a severely damaged patient.

Finally, the parties in any given litigation matter are engaged in a complex drama in which interests and relationships often are not what they appear to be. For example, the nurse anesthetist involved in a malpractice lawsuit is provided a lawyer by the insurance carrier. The nurse anesthetist's attorney has a duty of loyalty to the nurse anesthetist. However, the lawyer is hired by the insurance company, and the attorney's bills will be paid by the insurance company. Usually, this will not be the only matter that is referred to the attorney by the insurance company. On the other hand, nurse anesthetists are rarely involved in more than one malpractice claim. A nurse anesthetist whose practice creates enough malpractice claims to have a regular relationship with a malpractice attorney will probably lose the ability to practice either because of the inability to obtain malpractice insurance or as a result of a licensing decision. Human nature makes it likely the attorney will have more loyalty to the insurance company than to the insured.

Miller v Sloan, Listrom, Eisenbarth, Sloan & Glassman, et al.

These considerations recently appeared in a case involving an anesthesiologist in Kansas. (Miller v Sloan, Listrom, Eisenbarth, Sloan & Glassman, et al., 1999 W.1., 236085, ___ P.2d ____ (Kansas, 1999). Although the cases discussed in this article concern anesthesiologists, the principles of law are equally applicable to nurse anesthetists.) Dr. Miller was sued in a case where a patient had suffered severe brain damage. When Miller learned that the plaintiff was considering a lawsuit, he advised his professional liability insurance carrier, St. Paul Fire and Marine Insurance Company. St. Paul retained Mr. Theis, a lawyer, to defend Miller. St. Paul investigated and came to the conclusion that a jury might find Miller liable for the patient's injuries in an amount that would exceed Miller's policy limits. Significantly, the published decision does not state that St. Paul determined that Miller was negligent or had done anything wrong. What St. Paul determined was only that a jury could find against Miller and in an amount that would exceed his policy coverage. There is nothing in the case to question the anesthesiologist's conduct or to believe he committed malpractice.
Kansas Health Care Stabilization Fund

It may seem somewhat peculiar that Miller had so little malpractice coverage that St. Paul would have determined early in the proceedings that a recovery could exceed the amount of the policy. Did the anesthesiologist purposely maintain insurance at such a low rate that his personal assets could be at risk from a potential claimant? Kansas, in response to concerns about soaring malpractice insurance costs, had created the Kansas Health Care Stabilization Fund. The fund provided state-sponsored insurance for claims that exceeded a certain level. Thus, Miller and other healthcare practitioners within the state of Kansas had to maintain only a certain level of insurance after which the fund provided malpractice coverage.

The enabling statute for the Kansas Health Care Stabilization Fund provided that if the primary insurance company, in this case St. Paul, determined that liability would exceed its policy limits, St. Paul could make a payment to the fund equal to the policy limit, and the fund would handle the case after that point. St. Paul paid the fund the entire policy limit on behalf of Miller, and the fund took over the defense of the claim against Miller. The fund also asked Mr. Theis, the attorney originally appointed by St. Paul, to continue to represent Miller. Ultimately, the fund agreed to a settlement with the plaintiff. The settlement agreement stated that Miller did not admit liability for any wrong and that he denied that he was negligent in his treatment of the patient. A hearing was held in the trial court to approve the settlement. Mr. Theis could not attend, and another attorney from Mr. Theis' law firm attended. The attorneys for the parties presented their proposed settlement to the court. Miller's attorney, another attorney from Mr. Theis' firm, represented that Miller had approved the settlement and did not object to it, and the trial court approved the settlement as valid, just, and equitable.

Apparently, Miller had not approved the settlement. It was not until a month after the hearing, claimed Miller, that he discovered, to his surprise, the matter had been settled. He filed suit against the law firm that represented him, St. Paul, the Kansas Health Care Stabilization Fund, the state of Kansas, the executive director of the Kansas Health Care Stabilization Fund, and the Kansas commissioner of insurance who oversaw the operation of the Kansas Health Care Stabilization Fund. He claimed fraud by omission in that his attorney failed to give him notice of the settlement hearing, fraud by the fund for settling the malpractice claim without giving him notice, negligence on the part of his attorneys for failing to adequately research the claim and advising him of the settlement, negligence on the part of the fund for failing to protect his rights and benefits, denial of due process by the state and the fund, bad faith on the part of St. Paul, and "outrageous conduct" on the part of the defendants. It is easy to sympathize with Miller. No one said he did anything wrong, and nonetheless his lawyer and his insurance company are paying large sums of money to someone suing him.

Conflict between insurance company and insured

Underlying the suit is a basic conflict between the insurance company and the insured. To the insurance company, the course of action was a simple financial decision. If it was going to cost a lot of legal fees to defend the case, and if a jury was likely to award a large recovery regardless of fault, then business concerns suggested that the case be settled and the risk of greater loss be avoided. To a healthcare practitioner, who views himself or herself as innocent, the decision was not that easy. Agreeing to a settlement carries with it a number of unpleasant ramifications. The practitioner's name will be turned into the National Practitioner Data Bank. A lot of people who may not be as sophisticated as St. Paul would assume that if a practitioner settled, he must have done something wrong. The settlement could cause problems later on. It may have to be explained to future employers. The decision could be problematic even for sophisticated St. Paul. Business decision or no business decision, the case would cost St. Paul a fair amount of money. How willing were they going to be to continue to provide insurance coverage for someone who has cost them a lot of money?

Dr. Miller tried to take advantage of a growing doctrine in the law. Increasingly, courts are ruling that all contracts have a built-in requirement of good faith. Even though the St. Paul policy gave St. Paul the right to settle as it saw fit, surely the requirement of good faith meant that it had to consider Miller's interests when they exercised that discretion. Miller claimed that they had not acted in good faith but only in their own short-term interest. From the insurance company's standpoint, it is easy for insureds to want the insurance company to defend their honor, no matter the cost. Insureds do not have to pay for it.
Court determines Miller's claims

With both sides staking out their territory, which one would the courts favor? The district court dismissed all of Miller's claims. Miller appealed to the Supreme Court of Kansas, and on April 23, 1999, the Supreme Court affirmed the dismissal of all of his claims by the district court. The supreme court examined each of the charges before affirming the dismissal, and determined that St. Paul had no liability once it paid the policy limit to the Health Care Stabilization Fund. St. Paul's obligation was only to provide Miller a defense and to pay claims against him to the limits of its policy. When it determined that the recovery in the case would exceed the amount of its policy, it turned over a sum of money equal to the policy limit to the Kansas Health Care Stabilization Fund. This was the ultimate that St. Paul was required to do under the contract of insurance. Once it turned the maximum over to the Stabilization Fund, it was the fund that was responsible for Miller's defense. St. Paul's obligations had ended.

With regard to the fund, the fund was covered by the defense of governmental immunity. In feudal England, the king was deemed the owner of everything and everyone, and, out of his beneficence, he provided a court system to handle disputes between his subjects. It seemed silly to believe that the king could be sued in the very courts that he provided. So, the doctrine evolved that the king and ultimately the government was immune from suit. To some extent, this doctrine has carried over into the American legal system. Absent an exception, government entities that stand in the position of the King, such as the federal government and state governments, are immune from suit. Because of the unfairness that governmental immunity creates, statutes at both federal and state levels permit federal and state governments to be sued. However, absent such a statute, the government cannot be sued. The court found that there was no provision for suing the state of Kansas in the Kansas Health Care Stabilization Fund.

Finally, the court found no liability for the firm of attorneys that St. Paul hired to represent Miller and whose representation was continued by the Kansas Health Care Stabilization Fund. The court's conclusion was that their failure to notify Miller, even if it was a breach of their duty, did not cause him any damage. The attitude of the court seems to be that Miller really had no cause for complaint because, although a fair amount of money may have been paid to the plaintiff, none of it came from his pocket. First, St. Paul had paid the full amount of his policy and any excess (the case does not say how much money was, in fact, paid to the plaintiff) came out of the fund. Therefore, even if the attorneys did breach their duty to Miller, it did not cause him any harm.

It is this last point which to me is most troubling about this decision. Is it clear that Miller did not suffer any monetary damage because of the settlement with the plaintiff? Between his own insurance carrier and the fund, he was adequately insured. Moreover, just in case Miller might have had some exposure, he filed for bankruptcy in June 1992, a little more than 5 months after the incident occurred. But even though the incident did not cost Miller any money, it did cost him. In December 1992, the settlement of the malpractice claim was reported to the National Practitioner Data Bank. This is a public disclosure, and, in fact, Miller claimed that he found out about the settlement of the malpractice claim only when the settlement was reported to the National Practitioner Data Bank. Next, Miller's malpractice insurance with St. Paul was canceled on July 30, 1993. The court noted that Miller had entered into an insurance contract that gave the insurance company the ability to settle claims at the insurance company's discretion. The court's dismissal of the very real consequences to Miller of a settlement made without his knowledge and consent seems hard-hearted. The court's focus on monetary damages and a clause giving the insurance company the discretion to settle, a clause Miller probably could not have changed, seems unfair.

Schuster v South Broward Hospital District Physicians Professional Liability Insurance Trust

Courts in other states have also come to the same conclusion that an insured cannot sue his malpractice insurer for bad faith settlement of a claim. In Schuster v South Broward Hospital District Physicians Professional Liability Insurance Trust (591 So.2d 174, Fla., 1992), an insurance company had settled 3 matters filed against a physician for amounts within the limits of his policy. The physician had objected, alleging that the insurance company had acted in bad faith by settling the matters without investigating. The Florida Supreme Court discussed the conflict between the insurance company making an economic decision to settle a matter within its policy limits and the practitioner facing a blemished record. The so-called "indemnity value" of the policy, that is, the obligation of the insurance company to provide an
attorney to defend on the one hand conflicts with the insurance company's economic exposure on the other hand. To an insurance company, it is clearly better to spend $25,000 in settlement of a claim than to spend $50,000 in legal fees to defeat a claim that it would only have cost $25,000 to settle. The courts seem reluctant to force expensive financial decisions on insurance companies, even if the ramifications to insureds are serious. In the Schuster case, for example, the doctor believed that he was innocent and yet as a result of the claims filed against him, his insurance was canceled and he was unable to practice.

**Bleday v OUM Group**

The same issue was discussed in *Bleday v OUM Group* (435 P.A. Sup. 395, 645 A.2d 1358, 1994). A podiatrist brought suit against his insurance company for settling for $10,000 a claim which the podiatrist believed to be worthless. The podiatrist claimed that he would be subjected to increased insurance premiums, loss of earnings, and a harmed reputation, especially since the matter would be reported to the National Practitioner Data Bank. The court gave great weight to the terms of the insurance contract, which gave the insurance companies the ability to "make such investigation and settlement of any claim or suit as it deems expedient."

**St. Paul Insurance Companies**

An interesting twist to Dr. Miller's case is that he was insured by St. Paul. AANA Insurance Services, the AANA's insurance subsidiary that provides malpractice insurance for a large number of CRNAs, also represents St. Paul. St. Paul's CRNA malpractice policy now provides, in those states that will permit it, that under circumstances described in the policy, St. Paul will not settle malpractice claims against insured nurse anesthetists without their consent. This policy feature recognizes the nonmonetary consideration that causes healthcare providers to be wary of an insurance company's ability to settle cases against them without their consent. Nurse anesthetists insured by AANA Insurance Services should realize, however, that there are states that do not permit a "consent to settle" clause, and therefore, not every insured CRNA may have the benefit of this type of provision. Moreover, in states such as Kansas, there may be specific statutory requirements that in practice will override the provisions of the insurance policy.

Nonetheless, without suggesting that this was Dr. Miller's fault or responsibility, the *Miller* case shows the need for insureds to carefully monitor litigation carried on in their names. The threat of malpractice actions is just another business risk of anesthesia. While the legal system is supposed to recognize your rights, these cases demonstrate that the best defender of your rights continues to be you.
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