

## Early analysis of claim could deter plaintiff

*Defense attorneys should offer strong opinion by expert*

If a physician defendant believes a malpractice lawsuit is baseless, one strategy to prevent protracted litigation is for defense attorneys to hire an expert early on to review the case.

“The expert wouldn’t necessarily prepare a report, since that would then be discoverable, but could give an opinion as to whether the case has merit,” says Jennafer Groswith, JD, an attorney with Wilson Elser Moskowitz Edelman & Dicker in Dallas. “We ended up getting a case settled for much less than it otherwise would have been, by getting a leading expert on heparin-induced thrombocytopenia. Had the expert been able to present his findings early on, it might have curtailed the litigation altogether.”

If defense attorneys educate the

plaintiff attorney early about the weakness of their claim before they make a significant monetary investment in a case, they sometimes drop it, says Joshua M. McCaig, JD, an attorney with Polsinelli Shughart in Kansas City, MO. Early analysis and having good expert support is the first step, says McCaig, who generally makes an initial phone call to engage the opposing attorney and then follows up with a written analysis of why the case has no merit.

“In certain situations, I will even let the attorney meet with my client or speak with my experts if it may influence their decision to dismiss the case,” adds McCaig

Recently, McCaig was contacted by a plaintiff attorney and obtained a

quick review by a well-qualified expert fully supporting the care of the family practice physician. At the end of the call, the attorney said he was not going to file the lawsuit. “I suspected that the plaintiff attorney would not have a great expert, if he had one at all, so I let him question my expert,” he says. “While this will not work for every case, if you have a strong liability defense, it should be considered.” Normally, experts aren’t disclosed until the deadline to allow for time to complete discovery, but a report with an expert’s strong favorable opinion might be worth producing earlier in the process. “If you let the plaintiff attorney know they are barking up the wrong tree, that could be an effective strategy,” Groswith says. ♦

## Consent refused? Take appropriate action

*The courts are most likely to side with the doctor*

*(Editor’s Note: This is a two-part series on legal risks involving parents refusing medical care for a child. This month, we cover reporting obligations for physicians in this scenario. Last month, we covered what to document to reduce risks.)*

In 2002, a police officer took custody of a 5-week-old febrile infant girl after her parents refused to consent to a spinal tap to rule out meningitis.

“The physicians were concerned that failure to timely diagnose and treat meningitis could lead to death or permanent brain injury. Additionally, published guidelines recommend a spinal tap in this situation,” says Jonathan

M. Fanaroff, MD, JD, associate professor of pediatrics at Case Western Reserve University School of Medicine and co-director of the Neonatal Intensive Care Unit at Rainbow

Babies & Children’s Hospital, both in Cleveland, OH.

The parents sued the police department, hospital, and physician, and alleged a violation of their constitu-

### *Executive Summary*

If a parent’s refusal to consent to treatment is life-threatening for the child or places the child at risk of serious harm, physicians have a legal duty to report this to the appropriate child protection agency or law enforcement.

- ♦ Child protection agencies and courts are empowered to take emergency custody of the child and provide consent for medical treatment.
- ♦ The federal government has deferred to states to define abuse/neglect.
- ♦ Physicians should be familiar with reporting obligations and state definitions of neglect.

tional rights. A federal jury rejected the parent's claims and found in favor of the police, hospital, and physicians.<sup>1</sup>

Parents are the primary decision-makers when it comes to medical treatment for their children, and this is the basis for the requirement to obtain parental informed consent, says Fanaroff. "Parents have an obligation, however, to provide needed medical care for their children," he says. "Additionally society has an interest in protecting children from harm. This is known as the doctrine of *parens patriae*."

When a parent's refusal to consent to treatment is life-threatening for the child or places the child at risk of serious harm, then the physician has a legal duty to report the situation to the appropriate child protection agency or law enforcement. "Child protection agencies, as well as the court system, are both empowered to take emergency custody of the child and provide consent for medical treatment," says Fanaroff.

Though Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) in 1974, the federal government has deferred to states to define abuse/neglect, notes **John W. Miller II**, principal at Sterling Risk Advisors, Marietta, GA. The CAPTA amendments of 1996 and 2003 contained no federal requirement for a parent to provide any medical treatment for a child if that treatment is against the parent's religious beliefs. "However, CAPTA also designates that there is no requirement that a state either find,

or be prohibited from finding, abuse or neglect in cases where parents or legal guardians act in accordance with their religious beliefs," says Miller.

In almost every state, physicians are mandatory reporters and are legally required to report suspected child abuse or neglect when presented with reasonable cause, says Miller.

"An [against medical advice] discharge or elopement can rise to the level of neglect depending upon your state's definition," adds Miller. "Be familiar with your state's definitions of neglect. Be aware of your obligations to report such activity to the proper authorities." (*The U.S. Department of Health & Human Services' Child Welfare Information Gateway provides searchable by state definitions of child abuse and neglect, along with definitions for who are mandatory reporters in each state and what duties they have to report suspected abuse. Go to <http://1.usa.gov/LsWxGs>.)*

## Reference

1. Mueller v. Aufer, 576 F. 3d 979-Court of Appeals, Ninth Circuit 2009.

## SOURCES

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## CME OBJECTIVES

After reading *Physician Risk Management*, the participant will be able to:

- describe the legal, clinical, financial, and managerial issues pertinent to physician risk management;
- explain the impact of risk management issues on patients, physicians, legal counsel, and management;
- identify solutions to risk management problems for physicians, administrators, risk managers, and insurers to use in overcoming the challenges they face in daily practice.

## CME INSTRUCTIONS

To earn credit for this activity, please follow these instructions.

1. Read and study the activity, using the provided references for further research.
2. Log on to [www.cmecity.com](http://www.cmecity.com) to take a post-test; tests can be taken after each issue or collectively at the end of the semester. First-time users will have to register on the site using the 8-digit subscriber number printed on their mailing label, invoice or renewal notice.
3. Pass the online tests with a score of 100%; you will be allowed to answer the questions as many times as needed to achieve a score of 100%.
4. After successfully completing the last test of the semester, your browser will be automatically directed to the activity evaluation form, which you will submit online.
5. Once the completed evaluation is received, a credit letter will be e-mailed to you instantly. ♦

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♦ Avoid legal pitfalls with late EMR entries