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## **WHO ARE THE REAL WINNERS IN A MEDICAL MAL PRACTICE SUIT?**

**DANIEL M. AVERY, MD AND KATHY T. AVERY, BA, RN, MT(AMT)**

**Abstract:** There are no winners in a medical malpractice suit except for attorneys. While healthcourts have been proposed to remedy the broken legal system of torts in medical negligence cases, the American Bar Association has opposed them. A significant portion of the verdicts in malpractice cases goes to the attorneys. Either the plaintiff wins, the defense loses and a large percentage of the verdict goes to the plaintiff's attorneys or the defense wins, the plaintiff loses and there is no exchange of money per se.

**Case Study 1:** A 30 year old Afro-American female P1001 at 40 weeks gestation was admitted for induction of labor. The head was unengaged and cervix was a fingertip dilated. Vertex presentation was confirmed by ultrasound. Pelvimetry was adequate. Induction was begun and labor progressed adequately. The patient became completely dilated and pushed for two hours to complete cervical dilatation, complete effacement and plus 2 station. She was taken to the delivery room for delivery. The head was easily delivered but retracted quickly to a "turtle sign" pathonomonic of a shoulder dystocia. Fundal pressure, episiotomy and downward traction failed to deliver the baby. After a summons for help, an experienced obstetrician/gynecologist rushed in, put the patient in McRobert's Position, extended the episiotomy and gave suprapubic pressure rotating the shoulders to an oblique angle, sufficient to deliver the shoulders.

The baby was limp, lifeless and had no pulse or respirations. The older OB/GYN took the baby and began mouth-to-mouth resuscitation and chest compressions. Unfortunately no equipment to ventilate the baby was present in the delivery room. The baby resuscitated quickly but there was an obvious Erb's Palsy. The older physician carried the baby to the NICU, awaiting the arrival of a neonatologist. The baby did well but left the hospital

with a permanent injury with pediatric neurology and rehabilitation followup. The child went through extensive evaluation and rehabilitation.

A medical malpractice suit followed that spanned twelve years. The family went through six sets of attorneys and was finally able to procure an expert witness to testify. The case was complicated by a prior working relationship between the trying attorney and the older physician, also named in the suit. That physician had worked for the plaintiff's attorney reviewing cases for years.

The case went to trial after the child was age 12. The child was not brought into court until the very last. She was tall, healthy and had good movement of both arms. She stated that she played basketball, could play the piano and was good at her computer. There were no demonstrable deficits. A verdict was found for the defense. The Plaintiff's attorney took the case on contingency under threat of legal malpractice if he did not try the case and received nothing. The defense firm received more than \$100,000 for defending the physicians. Who are the winners?

**Case Study 2:** Tired and weary from a number of deliveries that night for a large group of OB/GYNs, the physician went to rest in the call room. He was shortly summoned to the labor room where the patient was complete/completed with decelerations on the fetal heart rate monitor. He quickly assessed the situation and prepared for an instrumental delivery with forceps. Forceps were easily applied but slipped off with traction for delivery. They were reapplied with a delivery culminating in a shoulder dystocia. The dystocia was managed appropriately but an Erb's Palsy was apparent. In the nursery, the pediatrician diagnosed a skull fracture. The baby was significantly damaged and was ultimately discharged with followup neurologic and rehabilitative consultation.

A malpractice suit resulted that spanned 10 years. During the trial the child's present situation was clearly depicted and it was evident that long term, life long care would be required to care for the child. The care for the child was estimated to be in the millions of dollars. To both plaintiff and defense counsel's surprise, the jury found for the defense, feeling that the standard of care had not been breached. Before the trial a high-low option was agreed upon. The defendant/physician left the courtroom with the unsettled feeling of who if anyone really won? The physician agreed to \$100,000 to the plaintiff if he won and the plaintiff to a maximum of \$2,000,000 from the defendant if the verdict was for the plaintiff. The plaintiff was to be paid from the \$100,000 paid to the plaintiffs to go to the attorney. There is nothing for the child. Who won in this case?

According to Philip K. Howard, JD, more money now goes to the attorneys and administrative costs than to patients who have been harmed by medical malpractice (1). The proposal of health courts has been opposed by the American Bar Association. Healthcourts as proposed would resolve healthcare disputes and make rulings on proper standards of care and there would be no juries (1). This system would "no longer tolerate wildly inconsistent verdicts" according to Mr. Howard (1). It is estimated that 80% of claims are made against physicians that were not negligent (1). Put in another way, this

proposed system would take away large verdicts in which attorneys receive a large percentage of the money.

When all is said and done, one of two scenarios occur. The plaintiff wins, the defense loses and there is a large verdict for the plaintiff. A majority of this money goes to the plaintiff's attorney. If the defense wins, the defense attorneys get paid well because they work for an hourly rate. The plaintiff gets nothing (who actually may have suffered) and the plaintiff's attorney gets nothing usually but only took the case because he thought that he could win. Traditionally plaintiff's attorneys only take cases that they think they can win. If there is a low likelihood of winning, they pass on the case. If they lose, however, there are left with expenses for the case.

America's lawsuit culture is rampant in all areas of life, not just medicine and continues to undermine our freedom (2). ***There are no winners in medical malpractice suits except attorneys.*** Plaintiffs and defendants do not win.

#### **REFERENCES**

1. Howard PK: America Needs a New System of Medical Justice. American College of Surgeons Bulletin, Vol. 91, No. 5, May, 2006, pages 12-15.
2. Howard PK: The Collapse of the Common Good. How America's Lawsuit Culture Undermines Our Freedom. Ballantine Publishing Company, New York. 2001

## **HONESTY IN TESTIFYING IN COURT: TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH**

**Daniel M. Avery, MD and Kathy T. Avery, BA, RN, MT (AMT)**

**Abstract:** Tell the truth, the whole truth and nothing but the truth. If there is a bad outcome, present the case to a health court judge. Let the judge make a decision, resolve the issue in a timely fashion and compensate the patient if needed as soon as possible.

Tell the truth, the whole truth and nothing but the truth, so help you God. How many times have we heard that? What an incredible statement. What a foundation to base our legal system on. We unfortunately have gotten away from simply telling the truth. We go to great extents to have the best legal representation and the best expert witnesses tell the court system what the truth or what seems like the truth or what we would like the truth to be is.

If one is sued, the best advice is to get a good lawyer. The best preparation and the best representation in court goes a long way toward winning. Winning...after all is that not what it is all about? Winning? Having gone to law school early during my medical career, I learned that the two professions were vastly different. I can remember telling the Dean of the law school that I was in the wrong place.

Medicine seeks the truth, the answer, the diagnosis that will make a patient get well, be healed or be better. Making the diagnosis of a problem is the essence of medicine. Today, if a physician makes a diagnosis and tells the patient, that patient can look that diagnosis up on the internet and arrive at the most current up to date treatment by himself.

Law has nothing to do with truth. We say that it does but nothing could be farther from the truth. Law is about who can make the best argument, put on the best show and literally convince the jury in the courtroom. It all has to do with good, no, impeccable representation. Money is well spent on legal representation. Money is not well spent on an inexperienced attorney right out of law school who just passed the bar. That is what you hope the other side mistakenly does.

A certain university medical center teaching hospital for years used the inhouse legal counsel for the hospital to save money in malpractice cases. A gynecologic oncologist related the story of a malpractice suit directed toward he and the hospital. The inhouse counsel amid his other hospital responsibilities was assigned the case. He read through the case the day before court, made no preparation and to everyone's surprise lost a shoulder dystocia case in court with a large monetary award for the plaintiff. This was of course to save money. The jury awarded the plaintiff a seven digit verdict.

Risk management at the hospital and the trust fund insuring the physician saved \$100,000 in legal representation and paid out \$5,000,000 to the plaintiff. That hospital system now invests in the most prestigious, most experienced defense firms in the country to represent their hospital, with good results and probably financial savings.

America is replete with suggestions to make tort reform and the legal justice system better. Unfortunately, it is controlled by attorneys who have no interest in it being better. My word, it is wonderful to them because they are making large sums of money off of society, the patient, physicians, hospitals and insurance carriers. The only thing that they would be willing to change would be to increase the money that they currently make. Recommendations have included health courts (1), maloccurrence insurance (2), waiver of liability (3) and so on. None have any interest to trial attorneys and none will be passed. We as physicians fool ourselves into thinking that one or more of these recommendations will pass and become law but it will not happen.

The only things that will make a difference or have attempted to make a difference in other states are physician strikes in which only emergency patients are seen (Mississippi), marches to state capitols (Georgia and Mississippi), not providing medical care to attorneys, their families, significant others, employees or remote relatives (Alabama) or suits on the part of physicians.

Consider a totally different system. The physician makes to the best of his ability a diagnosis, renders treatment, follows the patient, manages complications, timely and appropriately, but still has a bad outcome. The physician presents his case to a judge, not a jury, honestly and succinctly. The patient with assistance presents his or her case to the judge. The judge makes a decision on the care and renders an opinion. A variety of solutions have been proposed above (1,2,3).

We spend large sums of money on preparation for court and winning. Who really wins in a malpractice case (4)? Present the facts honestly to the judge and the patient. Do not spend fortunes trying to explain what was done, what probably was done, what may have

been done, good or bad. Be honest! Take what actually happened and not all the other rhetoric that completely confuses everyone. Let the judge decide..good or bad.

I was named in a lawsuit years ago in which an obstetrician/gynecologist was sued over a shoulder dystocia case. I had received nothing in the case. The primary physician defendant received \$1700 for global obstetrical care and the plaintiff's expert witness received \$20,000 for testifying against the defendant physicians. My small part of the case cost \$50,000 in legal fees. Multiple episodes of testifying to the contrary by the plaintiff expert witness was presented by the defense and the jury later remarked that they did not believe a word that he said. The cost of even winning is expensive.

Forget winning....concentrate on the truth. Leave attorneys out. After a bad outcome, approach a health court judge shortly, not in 10 years, present the case and get resolution for the sake of everyone, *especially the patient*. Consider one of many remedies as described above (1,2,3). Information is fresh on the mind of everyone concerned. There should be no expert witnesses to describe in detail what was done as if they were there when in reality, they were often thousands of miles away. Compensate the patient as soon as possible if so decided. If the patient needs compensating, compensate him. Use this as an opportunity to continue care and compensate the one who needs it the most...the patient.

#### **REFERENCES**

- 1.) Avery DM, Avery KT: Health Courts. Submitted. 2006
- 2.) Avery DM: No Fault Medical Maloccurrence Insurance. Medicolegal OB/GYN Newsletter, Vol. 11, # 2, July, 2005
- 3.) Avery DM: Waiver of Liability as an Adjunct to Cost Containment in Health Care, Medicolegal OB/GYN Newsletter, Vol. 12, # 2, May, 2006
- 4.) Avery DM, Avery KT: Who are the Real Winners in a Medical Malpractice Suit? Submitted. 2006

## **THE ROLE OF RELIGIOUS VALUES IN THE PRACTICE OF OBSTETRICS AND GYNECOLOGY**

Daniel M. Avery, MD and Kathy T. Avery, BA, RN, MT (AMT)

**Abstract:** Religious values can give strength to the stresses of the practice of Obstetrics and Gynecology. Just like alcoholics anonymous it is not as important what we call a higher power as much as believing that such exists.

Dealing with malpractice litigation has a pronounced effect on an Obstetrician/Gynecologist's life. Medicine today is inundated with legal issues, fear of being sued and patient demands. Physicians go great length to provide the best care, provide informed consent and give our all to our patients. Despite our effort we still end up being sued when patients do not do well and their families seek a legal remedy. Many of us feel hopeless and wish we could quit, retire or do something else. When I chose OB/GYN as a specialty, I can remember an older attending telling me at our graduation dinner that I would live to regret selecting OB/GYN as a career. I think about that often.

At two o'clock in the morning, worrying over an awful fetal heart tracing, I think about pathologist colleagues being at home in bed asleep without a care about what is going on in the labor and delivery suite at the hospital.

Is there any hope for us? Alcoholics Anonymous has helped many an alcoholic stay clean and sober for decades now. The essence of the program is a higher power that watches over us that many choose to call God. AA has escaped specifically identifying that Higher Power as God, Allah, Jesus, or Buddha, only asking those in the program to recognize that there is such a being that cares for us, keeps us clean and sober, without specific identification (1).

Ever think about that obstetric patient that is bleeding out at cesarean section and finally the right figure-of-eight suture in a field of blood where it is literally impossible to see, stops the bleeding? Did you do it, was it luck, was it great skill or a higher power? What about the patient that really should not have survived because she was so sick but miraculously did? We often fool ourselves into thinking “aren’t we good?” when we probably are not.

It is interesting that we call on God’s help in the operating or delivery room, when things are not going well, but do we have gratitude to him after all is said and done? We are more humble when blood is going everywhere than when things seem to be progressing nicely. Why is that? There is an old adage that there are no atheists that deliver babies (2).

Maybe should we have asked for that higher power’s help before we ever started the case. Maybe the bench in the physician’s locker room is made for kneeling and praying before surgery or a delivery, rather just for putting on our shoes.

Has does religion fit into malpractice litigation? Does it mean that good Baptists, devout Catholics, Jews and Moslems do not get sued? Of course not. Does it mean that there are only good outcomes for those who believe in a higher power or God? Certainly not. So how does all this fit together? What good is it? Are there times when a believer feels that God has let them down? How many times do we think “I am an experienced, board-certified/recertified OB/GYN and I do not understand why God did that?” Or is our faith limited to what we see as solutions to problems only?”

What about the case when the case goes bad after the surgeon spent time on his knees in prayer before surgery, his wife and family prayed for his cases as well as the patient’s family? How do we explain that?

I grew up in a strict Baptist home. There was no alcohol, profanity or dishonestly. My mother even discouraged dancing because “it led to other things,” even though we were in the 5<sup>th</sup> grade in elementary school and had no idea what she was talking about. As the years went by, my mother daily prayed for the patients I cared for and operated on. Every Sunday she asked me what number of cases I had on the schedule for the upcoming week, how difficult I perceived that they would be and how sick did I think that they would be postoperatively. Do I still get into the bowel and bladder when dissecting massive adhesions? Of course. Do I receive strength to endure the case knowing that she prayed for me? Certainly.

It will be a great personal and *professional* loss when my mother dies because her prayers give me strength to do my very best. It makes me feel like I am not alone especially in the labor room and operating room when things are at their very worst. I can feel like I have done my very best.

“God grant me the serenity to accept the things I cannot change, courage to change the things I can and the wisdom to know the difference,” comes from the “Big Book” of Alcoholics Anonymous (1). Strength does come to those of us that ask for it. It is not as important to clearly define for everyone who the higher power is as long as we recognize that such exists. Many of us to define that being as God, while for others it may be someone else.

## REFERENCES

- 1.) Alcoholics Anonymous. Alcoholics Anonymous World Services, Inc. 3<sup>rd</sup> Edition, 1976.
- 2.) Avery DM: Obstetric Emergencies. Emergency Medicine Series, University of Alabama School of Medicine, 2006

## MEDIOCRITY IN MEDICINE

**Daniel M. Avery, MD and Kathy T. Avery, BA, RN, MT (AMT)**

**Abstract:** There is no place for mediocrity in medicine. One physician looked at his own approach to medicine and related his seemingly mediocrity as he approaches medicine. There are many reasons for mediocrity including ambivalence, “burn out,” loss of skill from not doing procedures and fear of complications.

The following are comments an older obstetrician/gynecologist related to me:

“I was doing an endometrial biopsy and I thought if I used a 3 mm Pipelle I would not have to dilate the cervix, sound the uterus, grasp the cervix with a tenaculum or hurt the patient. I really did not want to perforate the uterus. The residents perforate a lot of uteruses. Often the tissue is insufficient and then I have to do a D&C.”

“If I think that the patient may be uncomfortable in the office, I perform her LEEP in the hospital. If I they complain about my biopsy in the office I do not do but the minimum number.”

“If a patient is real obese, I will often do a midline incision, when cosmetically it would be better to do a pfannenstiel incision. If the ovaries are hard to get out, abdominally or vaginally, I just leave them behind. If the cervix is hard to get to, I just do a supracervical hysterectomy. “

“If I cannot sufficiently visualize the ureters, I just leave the ovaries and the cervix to minimize my risk of damaging a ureter.”

“If I can cannot adequately ablate all the endometriosis at laparoscopy, I just tell the patient that they need Lupron postoperatively.”

“If there is an ectopic pregnancy, I do a minilaparotomy incision instead of a laparoscopic approach because it is easier.”

“If a patient wants a tubal ligation and they are very obese, I will occasionally do a minilaparotomy tubal to keep from having to struggle with a laparoscopic approach.”

“I hate vaginal surgery. I have quit doing vaginal hysterectomies. I do all hysterectomies “from above” or refer them to a pelvic surgery specialist if the patient needs vaginal repair work. I am no longer comfortable with vaginal surgery.”

“I hate uterine manipulators because of the risk of perforation. Our residents occasionally perforate the uterus so I do my best to do without a manipulator.”

So, why do these things happen?

Occasionally physicians lose their drive for competence and become ambivalent. Doing one’s best becomes less important. Concern not to hurt a patient is a good thing provided that there is a better way to care for their needs. Sometimes physicians do not keep up with newer ways to do procedures and even newer procedures themselves. This was the case with laparoscopic cholecystectomies which eventually became the standard of care, supplanting open cholecystectomies most of the time. The physicians that operated on gallbladders had to relearn newer procedures or not do the old ones under pressure from peers and insurance companies.

Many professionals including physicians experience “burn out” in which they tire of what they do and quit doing it. It is no longer fun and they want a change. I suppose this happens when obstetrics is no longer fun and one becomes strictly a gynecologist.

Many times as we do procedures less frequently, we lose our skill and confidence at doing them. Then we do not want to do them at all. An older staff obstetrician told me recently that he had taken call so infrequently that he was not comfortable with surgical obstetrics any longer and was unsure of his skills at a cesarean hysterectomy. The most important thing is that he realized this change in his ability.

Fear of complications overwhelms what we used to do well. Now we do not want to do that which we used to be very comfortable with. It is no longer fun and intriguing. Bad outcomes make us question do we still have adequate ability to do them.

Is mediocrity a sign that it is time for us to reevaluate ourselves for whatever reason? Is mediocrity a sign of aging. Is it an omen to back off from procedures that we used to do? Is it the step before our complications begin to increase or the credentials committee asks for an evaluation?

For whatever reason, there is no place in modern medicine for mediocrity.

## HEALTH COURTS

**Daniel M. Avery, MD and Kathy T. Avery, BA, RN, MT (AMT)**

**Abstract:** Health courts have been proposed as one solution to the malpractice crisis and soaring, seemingly uncontrollable verdicts in this country. Judges would decide malpractice cases not juries and hopefully control astronomical verdicts that juries often decide. This has been opposed by the American Bar Association. This proposal will never become law because attorneys will never give up the opportunity to make large sums of money from malpractice litigation.

My medical career has been plagued with the malpractice crisis, soaring costs of malpractice insurance and astronomical verdicts juries often award plaintiffs. My family members and friends that are attorneys tell me that the verdicts for plaintiffs are down, the awards are less and the cases are harder and harder to win...I do not see it. Obstetricians are in the highest risk group for malpractice litigation.

Obstetricians open their mail differently from the rest of society. We first go through the mail looking for letters from attorneys, subpoenas and request for records. Next we go through it like regular physicians looking for payments from insurance carriers, Medicare and Medicaid. It is really great that Medicare now sends their letters with checks in them in one color envelope and those without checks in another colored envelope. It really speeds things up because one does not even to open the particularly colored envelope that does not have an reimbursements.

Health courts were designed such that cases would be decided by judges not juries (1). This would hopefully reduce the runaway verdicts that juries award plaintiffs. Similar courts are already in place for tax disputes and workers' compensation cases in which there are no juries (1). These judges would determine the standard of care that both

physicians and patients could understand. Health care policy would develop from this. It would be a reliable system (1).

The American Bar Association has opposed this system which is not surprising since 60% or more of money in verdicts go to attorneys not to harmed patients (1). Attorneys are not going to give up a major source of money for themselves. It is like a physician deciding not to take Blue Cross/Blue Shield Insurance anymore in a state in which Blue Cross/Blue Shield is the predominant carrier. Unfortunately attorneys pretend that it is the correct thing to do for patients but then take that money from the patients. There are no real winners in a malpractice case except attorneys (2). It is the same situation with the right to legal abortion. It is a right to have a termination unless one does not have the money, then it is not a right.

Another proposal to the malpractice crisis is the development of no fault medical maloccurrence insurance (3). This would work like compensation insurance completely free of the legal system which of course will never happen because attorneys would be completely excluded altogether. A patient would file for compensation like damage to one's home after a hurricane. A decision would be determined and the compensation granted. Money in the system would go to patients not attorneys. Premiums that physicians pay for malpractice coverage would go to a compensation fund not to a malpractice carrier.

Malpractice carriers are at fault because they continue to escalate insurance premiums and pass the losses on to the physicians and keep their profits for themselves. Any money spent on a physician's case increases premiums. Any verdict against a physician may mean being dropped from the carrier.

Another innovative idea is complete waiver of liability as an adjunct to controlling healthcare costs (4). No liability is involved at all on the part of providers and there is no defensive medicine. Basic medical care is rendered. Only the most obvious cases of malpractice go through the legal system.

Health courts are a wonderful idea and have worked in other specialty ideas such as tax disputes and workers' compensation cases. The American Bar Association has opposed this. Attorneys will never the relinquish the opportunity to make a lot on money at the patient, physician and healthcare systems' expense.

## REFERENCES

- 1.) Howard PK: America Needs a New System of Medical Justice. American College of Surgeons Bulletin, Vol. 91, # 5, May, 2006, p 12-15.
- 2.) Avery DM, Avery KT: Who are the Real Winners in a Malpractice Suit? Submitted for publication.
- 3.) Avery DM: No Fault Medical Maloccurrence Insurance. Medicolegal OB/GYN Newsletter, Vol. 11, # 2, July, 2005

Avery DM: Waiver of Liability as an Adjunct to Cost Containment. Medicolegal OB/GYN Newsletter, Vol. 12, # 2, M