AMCNO Co-Sponsors Medical Malpractice Seminar

Over 85 physicians attended a session on December 6, 2012, when Roetzel & Andress, the Academy of Medicine of Cleveland & Northern Ohio (AMCNO), and the Northeast Ohio Medical University co-sponsored, Medical Malpractice Claims — The Impact of Being Sued. This half-day seminar addressed risk management and medical-legal issues, including the lawsuit and trial process, the nuts and bolts of medical malpractice trial presentation, the False Claims Act (FCA), and the emotional and psychological impact of being sued on a healthcare provider.

Dr. James Sechler, M.D., AMCNO President kicked off the meeting with some opening comments and was followed by Anna Carulus of Roetzel & Andress, who outlined “The Anatomy of a Lawsuit,” in which she provided the most important clues that a lawsuit could be filed. These include a litigious patient, adverse event, a records request, and the 180-day letter with the records request. The 180-day letter is followed by a Summons & Complaint document, the official notification that a lawsuit is in the works. At this point, the first reaction might be to

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contact the plaintiff (patient), the plaintiff attorney, other named doctors, subsequent treating doctors, or even the judge. According to Ms. Carulus, none of these ideas are viable options. A defendant does not have attorney-client privilege in any of these conversations. Anything said can be repeated during the litigation process. She advised that physicians should notify and provide documents to the insurance carrier or hospital law department and make sure that the attorney-client privilege is maintained at all times.

Ms. Carulus also advised against amending medical records at any time noting that any changes to existing medical records can be construed as an intention to “cover up wrongdoing” and may result in a punitive damage claim as well.

The judge can also make a significant difference in how the case is dealt with in the court system by establishing a schedule, setting dates and deadlines for discoveries, expert reports, the final pre-trial, settlement conferences, and the trial date, if necessary. Ms. Carulus also noted that trial preparation is of key importance and it behooves the defendant(s) to know the facts of the case. Working closely with the attorney, and providing full disclosure of the facts, can help the defendant anticipate all areas of questioning before it begins. Expert witnesses will also be deposed to establish the common standard of care, causation, and damages.

R. Mark Jones, representing Roetzel & Andress, cautioned physicians to be flexible and patient, however difficult it may be during the pre-trial period. Trial preparation includes putting all of the pieces together, developing a strategy, and creating a persuasive argument that focuses on the facts, explains the practice of medicine, creates proper perception among jurors and overcomes sympathy. Before the trial, lawyers will try to limit the evidence, as well as facts and issues of fault. Jurors will be selected and a civil case requires eight jurors; and only six of the eight needs to agree with the case in order for penalties to occur. The civil case is simply plaintiff vs. defendant, with the objective being not to remove the defendant’s freedom but to provide financial “recovery” to the “victim." The burden of proof is the preponderance of evidence rather than the “beyond a reasonable doubt" required in a criminal case. Criminal cases move much faster but require a unanimous jury and the defendant is facing the state/prosecutors office rather than the “victim.”

**How to Deal with a Cross Examination**

Roger Dodd, of Dodd Law shared his expertise on cross examination. Mr. Dodd pointed out that logic and intuitive thinking don’t always work in the courtroom. He advises that defendants disassociate from what is familiar to them and to keep in mind that even lawyers are insecure in the courtroom. According to Mr. Dodd, the doctor factors into only 30 percent of the case but makes up the most important part. He noted that sixty-five percent of the case is comprised of the events occurring in the courtroom and five percent involves the defense attorney. Mr. Dodd noted that jurors tend to base their votes on moral belief, not mere facts. Facts that are begged down with detail are not often remembered, and he noted that convincing, not facts, leads to certainty so putting testimony into the form of a story will help teach the case to reluctant listeners.

He also noted that cross examination is often one of the most stressful components of a trial. In all cases, the facts trump all so always work with just the facts (no conjecture) and assume no one understands what you are about to say and explain everything in as simple terms as possible. In addition, rely on the attorney to determine which facts are best to share, stay focused on the theory, don’t volunteer information and finally, remember; the odds are most likely on the physician’s side.

Ms. Stacy Ragon Delgros, from Roetzel discussed the apology statute noting that this statute protects any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that relates to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care. She noted that under Ohio law a physician may speak with a patient and/or a patient’s family members and express his/her heartfelt sympathy for their pain following a negative outcome without risk of that expression of sympathy being used against him in court, but remember that this statute does not include making a statement that something was your “fault.”

**The Emotional and Physiological Impact of Being Sued**

Dr. Gregory Collins of the Cleveland Clinic Foundation; and Dr. Martha Hackett, participated on a panel discussion with Dr. Jason Kolb, Alliance Community Hospital; Stacy Ragon Delgros and Beverly Sanchacz, from Roetzel & Andress. The panel discussed the emotional and physiological impacts often suffered by physicians embroiled in long-term lawsuits. Dr. Collins noted that the most common emotional and physical impacts of a lawsuit on a person, include depression, anger, intense worry, and distraction. According to Dr. Collins, 16 percent of doctors experience some type of physical illness, seven percent abuse alcohol, and less than one percent abuse drugs as a result of the stress of a long-term lawsuit. In addition, fear and anxiety are frequently experienced along with longer workdays, avoidance, and an obsession over the incident, and/or the practice of defensive medicine. The panel did point out that it is unproductive to believe oneself to have failed or to accept too much blame for an unexpected outcome noting that it is advisable to manage emotions by working closely with one’s defense counsel and to be actively involved in the defense process.

The AMCNO would like to thank Roetzel & Andress and the Northeast Ohio Medical University for co-sponsoring this important seminar. (Editor’s Note: The session also included a presentation on “Strategies in False Claims Act (FCA) Cases and Compliance Techniques” — this topic was already covered in a previous issue of the Northern Ohio Physician in an article prepared by R. Mark Jones from Roetzel & Andress. To view the article go to our website at www.amcno.org and search on “False Claims.”)