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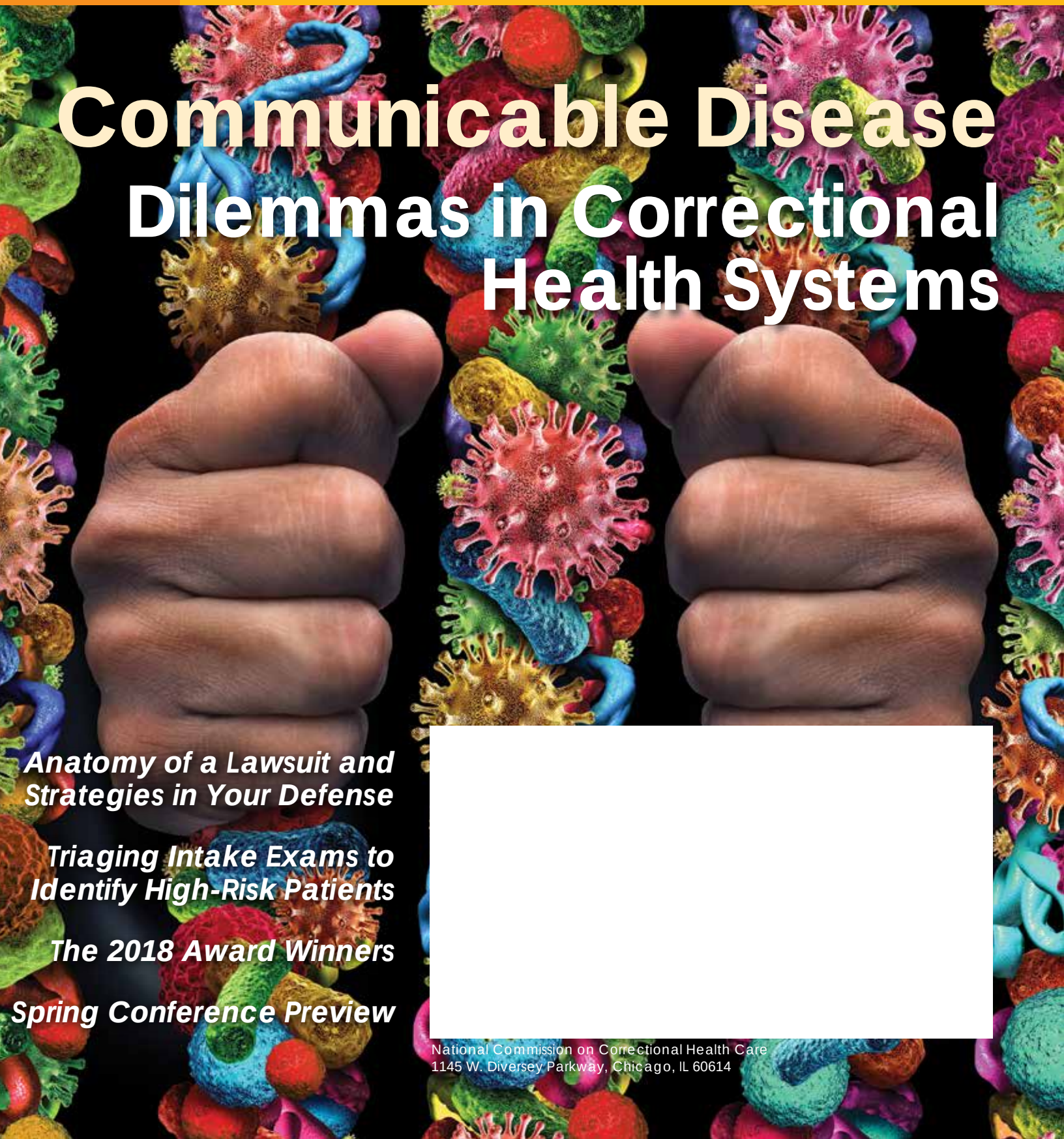

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National Commission on Correctional Health Care
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Anatomy of a Health Care Lawsuit: Issues and Strategies in Your Defense

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If you have never had the unique experience of being named in a lawsuit, you may wonder what happens when you are sued. My firm and I represent health care providers in many arenas, and some of these providers are exposed to greater risk of lawsuits by the nature of what they do. Unfortunately, correctional health care providers are not immune from litigation and are increasingly being named individually in lawsuits that historically were reserved for sheriffs, jails or correctional officers.

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While you cannot prevent lawsuits from being filed, you can be aware of the overall process in the defense of litigation, including how to provide effective assistance in your defense, and learn of the strategies we pursue to successfully defend correctional health professionals.

State or Federal Court

Lawsuits are typically filed in state courts or federal courts, assuming there is not an administrative-type venue for such suits in your jurisdiction. Lawsuits filed in state courts generally "sound" in tort-based claims, such as professional negligence or medical malpractice, but could include federal causes of action. A federal-based lawsuit could include the tort claims and an allegation of federal civil rights violations.

These court systems are very different, with rules that are very specific. Where your case is pending may result in significantly different potential monetary awards, including limits or caps on damages and the potential for awards of attorney fees. You should be aware of these differences and ask your counsel about the significance attached to the court system in which litigation against you was filed.

The U.S. Constitution, the Eighth Amendment, prior federal case law and congressional acts such as the Prison Litigation Reform Act have served as the basis and evolution of many lawsuits. The cases that are decided are used as precedent in future litigation, so in addition to actual statutes, "case law" continues to be an expanding basis for future decisions. While this is a very simplistic explanation, the point is that claims and allegations against correctional health care providers have grown, changed and advanced as the law continually does the same.

Parties to Correctional Health Care Lawsuits

Most providers in a correctional setting are familiar with the pro se inmate claims, by jailhouse lawyers who represent themselves. Your patients could also be represented by attorneys with a background in constitutional law or criminal defense, possibly by the usual proximity to clients in their criminal representation. However, attorneys who focus on medical malpractice have shown an increased interest in some of the correctional health care cases that they deem "sexy"—cases usually involving what they deem egregious facts and/or inmate deaths.

Depending on your employer, you could be individually named, an employee of a private provider that is named or just involved peripherally as a fact witness due to the care and treatment that you provided. If the allegations in the case are centered or focused on the provision of medical care, you and/or your employer may be the only defendants. However, pro se plaintiffs often include many additional parties, and the different and varied claims will increase accordingly. In fact, health care providers in a correctional setting are often named as defendants in lawsuits even when the cause of action is in no way related to the provision of care and treatment.

Allegations

So, the burning question … why are we being sued? National studies and statistics regarding the most common types of claims made in medical malpractice are surprisingly similar (with a few marked exceptions) to those made in a correctional health care setting. These include failure to …

- Test/further assess
- Diagnose
- Send for a higher level of care (i.e., consult with a specialized provider, hospital or emergency department)
- Institute appropriate suicide prevention mechanisms
- Treat the patient, citing alleged malinging or frequent complaints

How is this fair, you ask? After all, the challenges of providing care to this population are many, as you generally have some of the most noncompliant patients who may be poor historians and often struggle with other issues, such as mental health and substance abuse. The level of care you provide may be constrained—you often are not involved until there are actual complaints, and although inmates are a captive audience, the traditional standard of care in a medical setting may be applied to your correctional setting. In other words, the unique circumstances of providing care during custody, and the balance of the two, may not necessarily be understood by a judge or jury.

The lack of understanding of your constraints by your patients, plaintiff attorneys and jurors alike is real. Custodial issues are primary in the provision of reasonable health care, but the allegations may make it appear that the nmate had checked into a hospital or treatment facility.

Experts

Before you become too concerned about the many challenges faced, know that your counsel will use experts in your industry, industry standards and professional organizations, and the accreditation process in your defense. This defense can include chart reviews by those with knowledge and experience in your discipline, as well as deposition or trial testimony.

These "expert witnesses" are providers just like you, with relevant experience in the correctional health care setting. Attorneys obtain names of individuals to serve as expert witnesses from professional organizations and industry contacts and involvement, networking, academia, social media and even attorney and expert databases or repositories. In other words, we want someone who works in the same setting as you to testify on your behalf—not the nurse working for a local primary health care provider. While the actual care and treatment may be similar, the setting is very different, and the differences are key in your defense.

Resolution

A defendant's next question usually is, "How does my lawsuit get resolved?" Strategies for resolution by your defense counsel usually first involve dispositive motions—we attack the very pleadings and allegations against you and challenge their sufficiency. This could include an attack on the credentials and qualifications of the plaintiff's expert, if an expert opinion is a requisite to filing the lawsuit. For example, in some states you cannot even file a complaint to initiate a lawsuit against a medical professional unless the plaintiff also attaches an affidavit from a "like" expert. It could also be an attack on the venue or jurisdiction, or on the timeliness or statute of limitations.

We often focus on the damages involved in the accusations and could potentially resolve very early for a "nuisance value." This options weighs the value of settling cheaply versus paying the cost of defense, and a low dollar amount may be offered to resolve early. Depending on your employer, you may have a degree of immunity. Importantly, there are a variety of ways to engage and defend, and, most importantly, resolve as quickly as possible.

If the case cannot be resolved early, how do you defend? Obviously, most health care providers understand that attorneys, insurance companies and risk managers all try to manage risk, including the documentation of care, training, policies and procedures, and forms. But can you prevent lawsuits? Or is it just the cost of doing business? While arguable, I often tell people that anyone can allege anything. In many jurisdictions, however, there are some basic statutory requirements that assist in your defense.

Of course you should assist your counsel in your defense. Be organized and prepared from the beginning. I have had many health care providers admit to me at our first meeting that they have not bothered to read "the legal stuff" they were served with by a process server. Thoroughly read the complaint several times—this is the allegation against you and you need to know the specifics.

As an attorney providing your defense, I look at the complaint in detail, while my clients immediately ask for the patient's chart. This is natural, as your charting and the chart entries are a documentation of your work, your care and treatment of your patient. The tendency of sued providers is to assure themselves the charting was adequate and then the case can suddenly be explained, and the attorney can make it go away.

Providing an explanation to your defense counsel does not "make the case go away" necessarily. We must educate the folks on the other side, as well, and ultimately the judge and/or jury. But sometimes a careful review of the allegations in the legal document—the complaint—along with your careful review of the chart provides valuable information that you need to share with your attorney.

For example, perhaps the allegation is that you, as an LPN providing care in a local county jail, failed to provide any care and treatment to a patient who suffered a sudden cardiac event that resulted in his death. You pull the chart and see that at 5 p.m. you documented an intake assessment in which the patient evidenced no complaints and provided a detailed history with no mention of cardiac problems, and that was the extent of the interaction. Your employer's contract with that county provides for 8 hours of health care per day, and the cardiac event occurred at 9:30 p.m., beyond the hours of in-person, on-site contracted care.

If you as the health care provider read that complaint in detail, you can agree that you failed to provide care and treatment during the cardiac event as you were not even in the jail. It was an impossibility. But the lawyer representing the inmate's family may or may not know the hours of contractual care and may be trying to name as many people or entities as possible in the litigation, as each additional party is a potential insurance policy. Additionally, most attorneys may not know the details of how that care is provided. Your attorney, representing you in the defense, may not yet have a copy of the contract to know the stated hours of services, and must file a timely answer on your behalf. Your input and attention to details in formulating a response assist greatly in establishing a defense.

Be honest and remain communicative throughout what sometimes can be a lengthy process. If you have concerns about the care provided, the documentation or interactions with coworkers or other named defendants in the custodial setting, let your attorney know. Surprises generally cost money, but even information that is detrimental to the defense of the case can be handled efficiently and effectively with advance knowledge. Give us the good, the bad and the ugly initially so that information will empower your counsel to make the best overall decisions.

Ultimately, an informed client who cares and communicates about their case makes the defense so much better. We want the best possible resolution for your lawsuit and rely on you to assist us in your own unique knowledge and skills sets. Help us help you!

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Tips for Managing Risk

Experts recommend engaging in routine, regular and scheduled risk assessment. Are your files audited? Is there an internal review process? How do your industry or professional accreditation organizations recommend that you manage risk? It's also valuable to use litigation as an educational tool.

Programs, educational materials and best practices are found in industry and accreditation standards and also may be supplied by your professional malpractice insurance carrier. Regardless, know the contents of your policy, the coverage provided and notification provisions. For example, does a record request by an inmate or an attorney trigger a reporting requirement to your insurance company?