

Closed Claim: When to Hold 'Em and When to Fold 'Em



By Erika Roberts, JD

Most likely you have heard the song, “The Gambler,” written by Don Schlitz and famously sung by Kenny Rogers. The song depicts an interaction between the narrator and a seasoned gambler on an evening train. The gambler notices the narrator’s dejected facial expression and surmises that the narrator is “out of aces.” In exchange for a long draw of whiskey and a light for his cigarette, the gambler dispenses some sage advice:

*You've got to know when to hold 'em
Know when to fold 'em
Know when to walk away
And know when to run*

Litigation, like cards, can at times feel like a bit of a gamble. There are many moments along the way where the lawyers and parties must decide how to proceed and which cards to play. There are facets to consider – the facts of the case, the standard of care, how the

plaintiff and the defendant will be perceived by the jury, the amount of the damages sought, and the policy limits, to name a few. When a case has solid defenses, the defendant physician supports their care, and defense counsel has procured strong expert support, it makes sense to take an educated risk and defend the case through trial. However, there are situations where the best move may be to resolve a case through settlement, sometimes even before suit has been filed.

The latter scenario occurred involving radiologist Dr. Blanton's care. (Names have been changed). Mack Allan, a 15-year-old male, presented to the ER complaining of right testicular pain. There was some swelling present. Mack reported that he might have hit it against something the night before. A urinalysis showed protein and mucous in his urine.

An ultrasound was ordered, and Dr. Blanton read the image. Dr. Blanton noted that the right testicle was larger than the left, and the right epididymis was enlarged. Her impression was that there was no testicular torsion, mildly enlarged right epididymis and a small right hydrocele that needed to be clinically correlated for epididymo-orchitis. Mack was discharged from the ED with two antibiotics, a topical cream for swelling, and Zofran for nausea. He was told to consult a physician if symptoms worsened and to follow-up in one to two weeks with his primary care physician.

Six days later, Mack presented to a children's hospital with worsening pain, swelling, and redness of the right testicle. He reported that he felt that he had been improving since his first visit to the ER and had been taking his medication as prescribed. Mack's clinical exam by the emergency physician was concerning for testicular torsion. An ultrasound confirmed, showing findings "consistent with acute right testicular torsion." Urology was consulted, and it was determined that there was no significant return of blood flow once the testicle was untwisted. The right testicle was removed.

Mack followed up a month later and appeared to be doing well. He had no other subsequent complications. Later, Mack's parents sought the counsel of an attorney who contacted Dr. Blanton, requesting pre-suit resolution. Dr. Blanton immediately contacted SVMIC.

An expert hired by the claimant opined that Dr. Blanton misread the scrotal ultrasound, noting that there was "clear asymmetry in the blood flow" between the left and right testicle, that there was a lack of attention to the side-by-side comparison study, and that the standard of care required a STAT consult with a urologist and a surgery for orchiopexy could have occurred, thus salvaging the right testicle.

At the time of ultrasound review, Dr. Blanton was focused on the enlarged right epididymis, as noted in the physical exam, which drew her to the conclusion of epididymitis. A quality assurance review of this matter did not conclude any adverse finding, though a preliminary independent expert review was not favorable as to Dr. Blanton's interpretation of the imaging. The sympathetic nature of the plaintiff's injuries was a significant consideration as well.

Prior to filing suit, the parties began discussing the possibility of resolving this matter through settlement. Dr. Blanton was anxious for a speedy resolution and consented to try to resolve the case. After several months of informal negotiations, the parties mediated, and the claim was reasonably settled pre-suit. Dr. Blanton was relieved to have this matter resolved quickly, and the patient's family was pleased to receive the settlement payment before Mack left for college.

What to do if a patient takes issue with a physician's care?

How physicians behave after learning that their care is being questioned by a patient can have a significant impact on the outcome of the claim. That's why it's important for physicians to know how to act upon learning of a potential issue with a patient's care.

Although every case is different, the following are some general guidelines to help physicians in this situation.

- 1. Notify your insurer as soon as you've received notice, even if a lawsuit has not been filed.**

Not only does that get your insurer working on your behalf as soon as possible, it also means you may have legal representation faster, depending on the situation. This provides a protective shield for some conversations. Employed physicians should notify their employers immediately as well.

- 2. Don't open or alter records.**

It is very tempting to review or even revise relevant medical records, but doing so can be a costly mistake. Plaintiff attorneys will seize upon EHR data and any alterations. Even looking back at the same record over and over may be an inadvertent flag which highlights potential issues for adverse counsel. Plus, plaintiff's counsel can use a doctor's attempt to conceal or destroy evidence to possibly obtain punitive damages, in addition to compensatory damages. Insurance coverage issues could arise as well.

- 3. Don't investigate.**

It is human nature to want to review the case, talk to other providers and staff about the patient and care, and look for errors. Unfortunately, if done improperly, this can look like an attempt to block the investigation or cover up wrongdoing. The best practice is to consult with an SVMIC Claims attorney who can provide guidance and retain outside counsel when appropriate.

- 4. Don't talk to the plaintiff's attorney, if the request seems unusual, before consulting with SVMIC and/or an outside attorney.**

A plaintiff's attorney may contact the office of the defendant doctor with a request for records or other information. Absent allowing staff to fulfill HIPAA-compliant medical

records requests, do not communicate with anyone on the plaintiff's side. The conversation can be used against you. Contact SVMIC and/or your attorney to address any concerns before taking action.

5. **Be kind to yourself.**

Many physicians feel the public and self-imposed pressures of appearing infallible. Yet, all doctors are humans, and all humans make mistakes. **Even the best doctors make mistakes; even the best care can result in an adverse outcome; sometimes nature wins despite your best efforts.** Even if the physician feels they provided the best possible care, the psychological effect of a claim or lawsuit is not to be ignored, and can include guilt, shame, self-doubt, depression, anger, and physical illnesses. The best methods of working through litigation stress include self-care (exercise, meditation, rest, nutrition, etc.), and seeking professional help (including psychologists, psychiatrists, priests, ministers, or rabbis).

In Dr. Blanton's case, she played her dealt hand appropriately – upon learning of the patient's allegations, she immediately notified SVMIC. During the entire process, she was involved in the investigation and was responsive to her attorney's inquiries and guidance. She did not conduct her own investigation, but rather worked with her counsel and SVMIC. She took care of herself mentally and physically as well. Finally, she had a realistic understanding of her care in this case. Rather than allowing her ego to cloud her judgment, she saw the potential merits of the patient's claim and wanted to resolve the issue expeditiously.

Although it could be said that in this case that Dr. Blanton had very few aces in her hand, she and her legal team made shrewd plays and folded early, avoiding what could have been a very long and costly gamble.

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