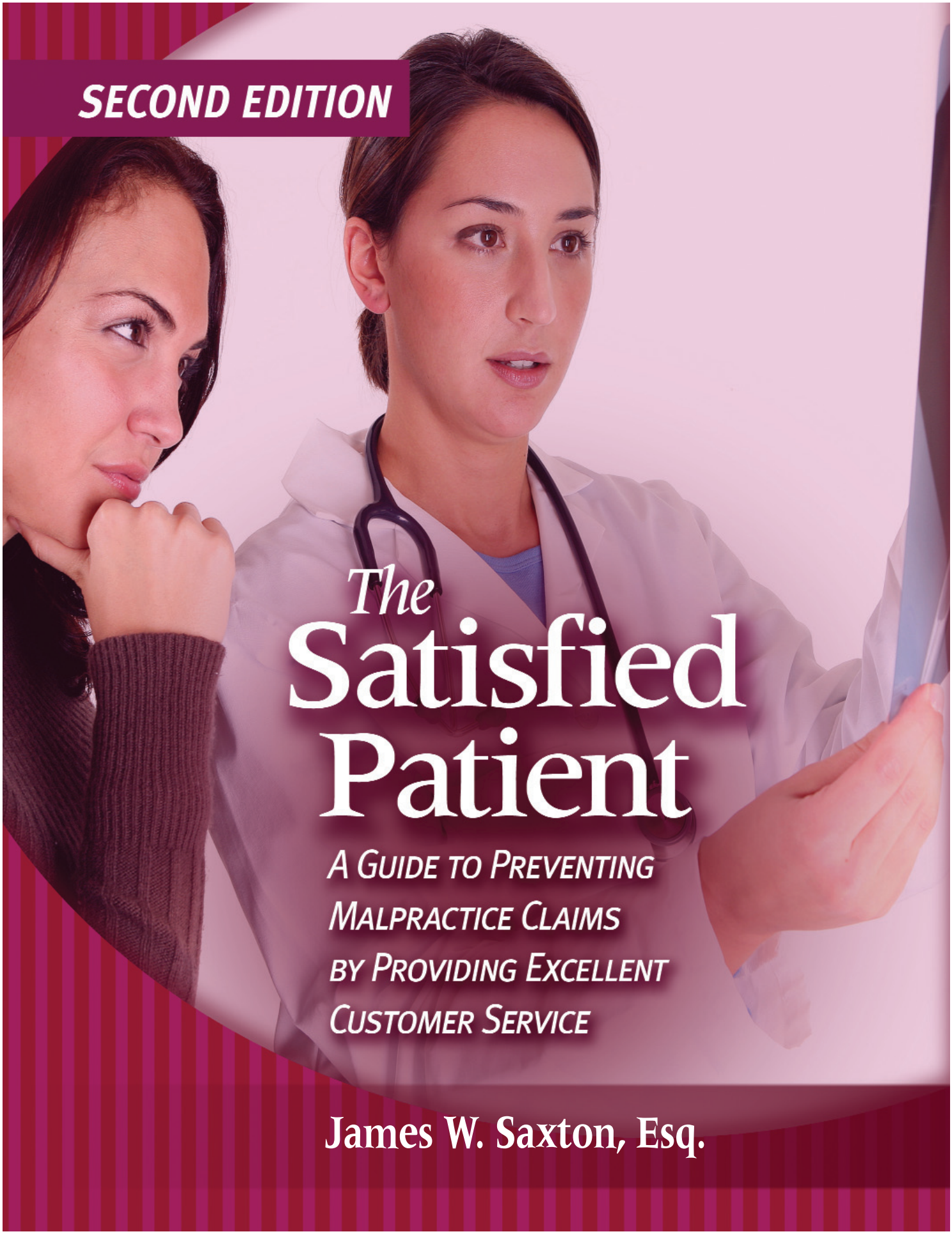
SECOND EDITION
The
Satisfied
Patient
A Guide to Preventing
Malpractice Claims
by Providing Excellent
Customer Service
James W. Saxton, Esq.

Contents

Chapter One

The Looming Cloud

The potential for a malpractice claim continues to loom over healthcare professionals. Plaintiffs are winning more cases that go to trial than they did in the early 2000s. Malpractice insurance premiums have also risen sharply in at least 35 states, hitting hospitals the hardest in the high-risk areas of obstetrics, emergency care, neurosurgery, trauma, and bariatric surgery. Although premiums have started to level off in 2007, it is at much too high of a rate, and premiums are too large of a piece of the overhead.

Further, the costs of settling a case and the dollar amounts awarded, frequently referred to as "severity," continue to increase. In 2004, the median verdict was $1,514,000 up from $1 million in 2000. Many healthcare organizations and physicians have seen fit to create their own insurance vehicles where they successfully self-fund their risk in risk retention groups, creating stability and, importantly, incorporating disciplined risk management protocols. According to the *Risk Retention Reporter* Web site, in 2007 there are approximately 240 such groups in the country.[1] Where the underwriting and risk management tasks are disciplined and comprehensive, these vehicles have been very successful.

Medical groups in many states still have difficulty both recruiting doctors to their practices and convincing physicians who train in their state to remain in state to practice. Consider, for example, Pennsylvania, where many physicians have reported the inability to recruit doctors to their practices. In an article for *Physicians News Digest*, one doctor admitted being aware of 18 physicians leaving Pennsylvania to practice in a state with a better liability climate.[2]

Additionally, the American Hospital Association released a survey in 2000 of physician membership in "crisis states" (18 at the time) about the effect of liability problems on physician recruitment.[3] More than half of the hospitals in these states said that professional liability expenses made it more difficult to recruit physicians, and 48% said they lost physicians or reduced coverage in their ED because of the crisis.

Meanwhile, verdict awards have continued to escalate. According to discussions with jurors, jury consultants, and national malpractice insurance experts, here are some reasons why:

1. **Healthcare promises a perfect delivery of care.** Healthcare marketing boasts of service, quality, and success, and the Internet allows patients to learn about the advances in medicine. So many patients expect to be diagnosed and cured quickly, painlessly, and inexpensively. The public has come to believe that if they can get to a physician, a hospital emergency department, or an ambulatory care center, they can be healed regardless of the stage of their illness. In hospitals especially, many patients believe they are absolutely "safe." Of course, this is what we all want to believe—but it is not reality.

When unfortunate results occur, patients sometimes look for someone to blame. Society has confused the concept of "maloccurrences" with true "malpractice"—the former being an unfortunate reality of the complexities of medicine, and the latter being far more rare than we are lead to believe. In fact, I have come to believe that many physicians are even too hard on themselves because they hold themselves to such high standards.

2. **As healthcare costs rise, patients will expect more for their money.** When patients do not receive the care they expect, they may feel cheated and become resentful. Consider the following example from a deposition:

> *I remember the visit with Dr. X quite well, and I'll tell you why. My wife and I need to watch our dollars month to month. Our health insurance benefits were cut back fairly significantly at my job about a year before. I hadn't reached my yearly deductible yet, so I brought a check because this was going to come right out of my pocket. I sat there in the waiting room, waiting, and it became clear to me that I wasn't going to get back to work on time. I asked the woman behind the desk about it, and she quickly sent me back to my seat. I remember finally being called in to see the doctor and got what I thought was a world's record for the quickest visit. He asked me what the problem was, and as I went through the litany of issues I had been dealing with, it became obvious that he was not listening. I understand now that my symptoms were pretty classic, but I'm not surprised the doc missed it. When I went out to pay my bill and write out the*

check, I could hardly believe I had gotten what I had paid for. Months later, when I found out from another physician that I had cancer, I knew I hadn't.

There's more going on in this situation described in the deposition than a misdiagnosis case. Healthcare costs are a struggle for many patients and families, and although it is something that physicians have little control over, they need to be cognizant of the fact that it pushes expectations higher.

In this example, the staff could have helped to diffuse the wait (as will be reviewed in the following chapters), and Dr. X needed to make sure the patient felt, even though the schedule was hectic, that his complaints were being heard and understood. Often, it is more about the tone than the time.

3. **Reimbursement is shrinking.** This is a very significant problem and one that has not received enough attention. Overhead continues to increase, insurance premiums remain high, and technology costs are rising—yet reimbursement is not keeping pace, and payers are demanding the same high level of quality that healthcare professionals have always provided. These factors place more stress on caregivers who already feel stretched thin.

4. **Healthcare professionals have been cast in a villainous light.** The public has been deluged with information about healthcare, and unfortunately much of it has been negative. I can recall a case in which a risk manager informed me that a patient had a lawyer

in her room at the hospital the day after a surgical complication. The lawyer was not a relative and was there proudly representing the patient and her family in a potential malpractice claim. Imagine the tension created in the environment under these circumstances.

This is a sad commentary and, in part, a reflection, not only on the individual patient, but on the fact that a true relationship had not been developed between patient and physician, reminding us of the importance of "the relationship bank," a trust built between you and your patients. Further, it underscores the importance of event management. (More on these two concepts will be discussed later in this book.)

5. **Plaintiffs' attorneys are aggressive.** Prosecuting medical malpractice cases continues to be big business. Billboards urge disgruntled patients to "assert their rights." Television ads run in the middle of the workday, seemingly targeted at people who may be out of work due to an injury. Personal injury attorneys pack phone books with ads. In 2006, plaintiffs' attorneys changed their association's name from "The Association of Trial Lawyers" to "American Association for Justice" and are launching a major ad campaign. Lawsuits are big business. Moreover, our information indicates that plaintiffs' attorneys will be pushing solid cases even further from a severity point of view.

   Of course, there are many fine plaintiffs' attorneys who appropriately steer their clients away from litigation if the case has no merit. And although about 70% of claims

nationally are closed without payment, we certainly have not solved the frivolous lawsuit problem in this country.

6. **"Expert" witnesses complicate matters.** Testimony from expert witnesses is required in all but the simplest cases, where the doctrine of *res ipsa loquitur*—a Latin term meaning, "the thing speaks for itself"—applies, for example, in a case of surgery performed on the wrong side of the body or on an incorrect body part. However, the requirement of "expert" testimony has not turned out to be a very significant screening goal. Defense counsels have heard experts testify on behalf of plaintiffs that any miss on a radiograph or any postoperative infection is malpractice.

   Sometimes experts do not receive all of the necessary information to provide a truly informed opinion. Although jurisdictions have passed legislation in an effort to establish some standards and more and more professional societies have their own standards in place, some self-funded physician programs are challenging these experts legally, which should be more prevalent. This includes making reports to professional societies and even initiating lawsuits where appropriate. Expert abuse is understated and should be the subject of greater attention. Both sides, plaintiffs and defendants, should be willing to submit reports and sworn testimony to peer review, with significant implications if there are abuses.

7. **The legal system's checks and balances seem to be askew.** Multimillion-dollar verdicts account for one out of every four jury verdicts, and the transactional costs associated with a trial

> (e.g., attorneys, experts, litigation costs, etc.) can eat up more than 50% of any verdict or settlement. Without caps on damages, as is still the case in many jurisdictions, there exists the potential of a highly emotional verdict by a jury that is swayed by a skilled plaintiffs' attorney's case. The system is broken. Many patients probably go undercompensated or without compensation while others get a windfall, and the system is full of cases that should never have been filed. The cost is enormous.

A close analysis of these issues helps us understand why putting proactive principles into place is imperative. Patient expectations will not change on their own, but we can influence them and can appropriately influence whether patients seek an attorney and, if they do, whether the attorney will take their case and how strong of a case it may be. We can appropriately do something about the evidence a jury may ultimately see and hear. Healthcare professionals create evidence every day. The question is whether it is positive or negative evidence. Understanding these issues will help lead us to solutions.

We need to put preventive measures in place in the first instance and then use the concept known as "event management" to help derail claims, or at least help appropriately create positive evidence after an adverse event. Once we develop strong evidence we can, and should, begin to fight cases far more aggressively, using more technology, science, and winning strategies. It is time to take the proverbial gloves off in defending these cases, but we need to concurrently build a better foundation. This combination is powerful.

Remember, risk management's foundation is actually about quality, safety, and great communication. This foundation is not only an important tool to

reduce the potential of a lawsuit, but it also positively affects patients. Perhaps that is why it works so well.

Reporting requirements

The following is one example of how important certain risk reduction strategies, such as patient satisfaction, has become: The Centers for Medicare & Medicaid Services (CMS) has worked with the Agency for Healthcare Research and Quality to develop the standard patient survey titled "CAHPS Hospital Survey." The survey is designed to collect information on patient satisfaction in a more standardized fashion since there is not currently a national standard for collecting and reporting this data for hospitals. It will also enable more effective comparisons among hospitals as patients (or customers) make their choices.

Additionally, one of the survey's goals is increased transparency. On November 1, 2006, CMS promulgated the *Final Rule on Reporting Hospital Quality Data for the Fiscal Year 2008 Inpatient Prospective Payment System Annual Payment Update Program*. Beginning with Fiscal Year 2008, eligible hospitals will have incentives to participate. The survey is currently being implemented, and once implementation is complete, information and data will be released on CMS' Hospital Compare Web site at *www.hospitalcompare.hhs.gov,* or via *www.medicare.gov.*

Another reporting entity, The National Practitioner Data Bank (NPDB), created by the Health Care Quality Improvement Act of 1986, requires hospitals and entities to report any monetary payments a practitioner makes to resolve a malpractice claim. The information becomes part of a national computerized information clearinghouse that can be accessed by a medical staff services professional whenever a practitioner applies for staff privileges.

The general public does not have access to information in the NPDB, although national legislation to change this is occasionally proposed. Many states make their own malpractice-related information quasi-public, however. Pennsylvania, for example, requires physicians to report all filed lawsuits to the state board of medicine, which actively investigates certain cases. Consumer groups continue to push this trend, so assume an overall push toward transparency in this area will continue.

Physicians must carefully consider the implications of a report to the NPDB and, if applicable, to their state board of medicine, when deciding whether to settle a case. They should also consider how a settlement would affect their malpractice insurance and ability to be credentialed at area hospitals, health systems, health plans. These are difficult decisions and clearly lead one to conclusion: prevention is the key.

All of these factors are part of the "looming cloud." This is not meant to be just doom and gloom, but rather a realistic view of the problem so you can organize and react proactively. A malpractice claim could have adverse economic consequences, adverse publicity, licensure implications, and the emotional and sometimes physical pain and suffering are too high. This is why we need to move our efforts to the next level to reduce the likelihood that unfortunate events occur. In other words, it is worth preventing and is preventable.

[1] *Visit the Web site of the Risk Retention Reporter* (www.rrr.com) *to see the Common Questions section for more information on RRGs.*

[2] *Christopher Guadagnino, PhD, "Pennsylvania Physician Flight or Oversupply?"* Physicians News Digest, *November 2000* (www.physiciansnews.com).

[3] *Christopher Guadagnino, PhD, "Physician Shortage in Pennsylvania?"* Physicians News Digest, *August 2003* (www.physiciansnews.com).

HCPro

Order your copy today!

Please fill in the title, price, order code and quantity, and add applicable shipping and tax. For price and order code, please visit *www.hcmarketplace.com*. If you received a special offer or discount source code, please enter it below.

Title	Price	Order Code	Quantity	Total
				$

Your order is fully covered by a 30-day, money-back guarantee.

Shipping* (see information below)	$
Sales Tax** (see information below)	$
Grand Total	$

➲ **Enter your special Source Code here:**

Name

Title

Organization

Street Address

City State ZIP

Telephone Fax

E-mail Address

***Shipping Information**
Please include applicable shipping. For books under $100, add $10. For books over $100, add $18. For shipping to AK, HI, or PR, add $21.95.

****Tax Information**
Please include applicable sales tax. States that tax products and shipping and handling: CA, CO, CT, FL, GA, IL, IN, KY, LA, MA, MD, ME, MI, MN, MO, NC, NJ, NM, NY, OH, OK, PA, RI, SC, TN, TX, VA, VT, WA, WI, WV.

State that taxes products only: AZ.

BILLING OPTIONS:

☐ Bill me ☐ Check enclosed (payable to HCPro, Inc.) ☐ Bill my facility with PO # _____

☐ Bill my (✓ one): ☐ VISA ☐ MasterCard ☐ AmEx ☐ Discover

Signature Account No. Exp. Date

(Required for authorization) (Your credit card bill will reflect a charge from HCPro, Inc.)

Order online at *www.hcmarketplace.com*

Or if you prefer:

MAIL THE COMPLETED ORDER FORM TO: HCPro, Inc. P.O. Box 1168, Marblehead, MA 01945

CALL OUR CUSTOMER SERVICE DEPARTMENT AT: 800/650-6787

FAX THE COMPLETED ORDER FORM TO: 800/639-8511

E-MAIL: *customerservice@hcpro.com*

 Code: EBKPDF